

No. 26-310

In the
Supreme Court of the United States

JOSHUA F. YOUNG,
Petitioner,

v.

COLORADO DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF FOR THE BUCKEYE INSTITUTE
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether employer-mandated training that communicates derogatory racial stereotypes and directs race-conscious workplace conduct may be sufficiently severe to create a racially hostile work environment absent repetition or additional race-based misconduct.

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INTEREST OF AMICUS CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT

The Court should grant certiorari in this case to clarify the pleading standards required for hostile workplace claims challenging racially charged training like that experienced by Petitioner, Mr. Young. In affirming the district court’s dismissal, the Tenth Circuit relied heavily on the fact that the training to which Mr. Young objected had occurred only once. The hostility complained of here, however, is different in kind from that presented in the typical hostile workplace claim. The number of occurrences should weigh heavily in those cases where racial

¹ As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

hostility is evinced by showing a mosaic of offensive statements or actions that, taken together, compose a racially hostile work environment. Here, however, the racial animus—ascribing negative attributes to the entirety of a racial group—is official policy. The Court should thus look deeper than how many times the offensive training was presented and focus on how this is a government policy that aims to draw lines of distinction between racial groups and assign to some badges of inferiority.

In his lone dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice John Marshall Harlan articulated his view of a color-blind Constitution. Harlan's argument was that the Fourteenth Amendment prohibited designations based on race, and that the majority's view that "separate but equal" facilities passed constitutional muster was, at best, window dressing for racial prejudice, and at worst, a disingenuous attempt to justify a racial caste system. To Harlan, the damage to civil rights lay not in the separation of races inherent in Louisiana's train car statute, but in the government's recognition of any distinction between citizens of the United States based on race.

Thankfully, much has changed since Harlan wrote his dissent. *Brown v. Board of Education*, 347 U.S. 483 (1954), overturned *Plessy*. Congress passed the Civil Rights Act of 1964. Many Americans alive today cannot remember—or even conceive of—the de jure segregation that was commonplace in education, the workplace, and public spaces that existed only three generations ago. Yet Harlan's views are just as relevant now. Although certain government

interventions—from the affirmative action given judicial sanction in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to the government sponsored EDI training of which Mr. Young complains—may spring from a good faith desire to bring about a better and more equitable society, they ironically suffer from the same fault as Louisiana’s noxious segregation statute: They sort American citizens by race.

Whether the distinction between races is being drawn in order to provide a benefit to ameliorate past wrongs or current lack of opportunity is irrelevant. The sin, as Justice Harlan saw it, is in the government taking any notice of the race of a U.S. citizen.

The Tenth Circuit’s apparent focus on the number of occurrences also threatens to resurrect the “background circumstances” doctrine that this Court recently rejected in *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025). This Court’s unanimous decision last Term in *Ames* affirmed a key principle regarding Title VII antidiscrimination law: “Congress left no room for courts to impose special requirements on majority-group plaintiffs” who plead a Title VII case. *Id.* at 310. Although the *Ames* Court applied this principle to Title VII disparate treatment cases, it should apply with equal force to hostile work environment claims like the kind Mr. Young presents here.

More specifically, in *Ames*, this Court rejected the Sixth Circuit’s “background circumstances” rule, which required majority-group plaintiffs to meet a higher evidentiary burden than minority-group plaintiffs in order to establish a *prima facie* case of

Title VII disparate treatment. In doing so, *Ames* affirmed Title VII's original promise—to protect minorities and majorities alike in this country from discrimination in the workplace.

But by focusing on the fact that Mr. Young provided evidence of only one training session—implying that additional evidence of further sessions would have been dispositive—the Tenth Circuit's decision below overlooks the bedrock Title VII principle that this Court fortified in *Ames*. In the context of government sanctioned EDI training materials that teach that white individuals “implicitly” perpetuate “white supremacy” simply by being white, define “race” as a term invented by white people “to justify social and economic oppression of people of color,” and urge employees to treat colleagues differently in the workplace based on race are presented as government policy, requiring evidence beyond the policy itself places a higher burden on non-minority claimants in violation of *Ames*. See Pet. App. 59a, 60a, 66a (citations omitted).

The decision below is thus inconsistent with *Ames* and a departure from Justice Harlan's observation that under our Constitution “[t]here is no caste Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). The Court should grant certiorari to clarify the pleading standard required when non-minority claimants challenge the official policies embedded in EDI training programs under Title VII.

ARGUMENT

I. **The Court should look to Justice Harlan’s *Plessy* dissent in evaluating the pleading requirement for a hostile work environment claim based on government-mandated race-based training.**

“But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). The first Justice John Marshall Harlan wrote those words in 1896 in what constitutional scholars and Supreme Court Justices have identified as one of the most important dissenting opinions in American jurisprudence. See Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 245 n.14 (1998) (citing Justice William Brennan, and scholars Bruce Ackerman and Alan Barth on the canonical nature of Harlan’s dissent in *Plessy*); see also Anita Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 Rutgers L. Rev. 781, 800 (2000).

Yet while present-day scholars, judges, and politicians often pay lip service to Harlan’s dissent, they often fail to recognize the radical nature of his words. Many of our Nation’s current struggles over how to cement racial equality into our society flow from our Nation’s failure to adopt Harlan’s race-neutral Constitution a century ago. Indeed, in an address to a group of Second Circuit judges, Thurgood Marshall stated that “[a]ffirmative action is an issue today because it was not color blind in the 60 years

which intervened between *Plessy* and *Brown*.” Peter S. Canellos, *Why the Court’s Civil Rights Hero Might Have Opposed Affirmative Action*, Politico (Dec. 11, 2022), <https://www.politico.com/news/magazine/2022/12/11/john-marshall-harlan-opposed-affirmative-action-00073295>. As one commentator put it, “as the nation came to recognize and reject the moral iniquity of the separate but equal doctrine, Harlan and his dissenting voice became the noble and judicious symbol of how the law should have been.” Krishnakumar, *supra*, at 802.

Harlan’s dissent in *Plessy* is unusual not just for its content at the time, but for its scope and breadth. The majority treated the case as having little constitutional import. In the majority’s view— informed by the recently decided *Civil Rights Case*, 109 U.S. 3 (1883), in which Harlan was also the lone dissenter—the Louisiana statute did not conflict with the Fourteenth Amendment because it was a “reasonable regulation” that did not interfere with the “political equality of the negro.” *Plessy*, 163 U.S. at 550. The *Plessy* majority held that “[i]n determining the question of reasonableness, [the state legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.” *Id.* The majority further engaged in circular reasoning, holding that

we cannot say a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the

fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Id. In other words, the decision was simply business as usual, affirming a reasonable regulation for the comfort and safety of citizens. Indeed, newspapers reporting on the *Plessy* decision saw it so lacking in news value that one listed *Plessy* second in a story reporting the decisions of the day. *Three Louisiana Cases Decided*, The Times-Picayune, May 19, 1896, at 8.

The majority went on to engage in what we would today call gaslighting—insisting that a readily observable problem simply is not real. To the *Plessy* majority, any badge of inferiority associated with government-sanctioned classification and separation was imaginary:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy, 163 U.S. at 551.

The majority concluded by giving a nod to the legal equality required by the Fourteenth Amendment, while with a wink holding that it should not really be taken literally:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544.

But Justice Harlan took the Fourteenth Amendment's words seriously and literally. His genius was to read the Fourteenth Amendment as in fact prohibiting the government from making any "distinctions based on color." It—along with the Thirteenth and Fifteenth Amendments—had "removed the race line from our governmental systems." *Id.* at 555 (Harlan, J., dissenting). This was the apotheosis of the sort of equality begun in the Declaration of Independence. The logical conclusion of this view of the Fourteenth Amendment was ludicrous to his contemporaries and still shocks today. Harlan wrote that "[i]n respect of civil rights, common to all citizens, *the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected* in the enjoyment of such rights." *Id.* at 554 (Harlan, J., dissenting) (emphasis added). Plainly, the EDI training

experiences that Mr. Young alleges evince a contrary vision, where drawing racial distinctions is state policy. Regardless of whether the drawing of those distinctions is well-intended, it falls far short of Harlan's vision.

In large part, Harlan's view has prevailed, if not always in the judiciary but in the hearts and minds of the American people. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (decided the same day as *Brown* and noting equal protection stems from "our American ideal of fairness"). Harlan wrote that "the destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under sanction of law." *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). The idea of two races "indissolubly linked together" was hardly a foregone conclusion in 1896. And there are still voices urging racial separation—albeit for different reasons—today. See, *e.g.*, Dion J. Pierre, *Harvard Prepares to Host All Black Graduation*, Nat'l Ass'n of Scholars (May 12, 2017), https://www.nas.org/blogs/article/harvard_prepares_to_host_all_black_graduation; *Columbia's Multicultural and Affinity Celebrations*, Columbia Univ., <https://commencement.columbia.edu/content/multicultural-grad-celebration> (last visited Oct. 9, 2026).

Although Mr. Young's claims are statutory rather than constitutional, Title VII flows from and follows the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (recognizing that Congress enacted Title VII pursuant to the enforcement power

created by Section 5 of the Fourteenth Amendment). Justice Harlan's thoughts on what that Amendment commands are thus worthy of consideration.

The EDI initiatives that Mr. Young complains of have both champions and detractors. Many of those detractors, like Mr. Young himself, argue that the EDI regimes in place in government institutions are not innocuous programs designed to promote equal opportunity and racial understanding, but rather are a pretext for political indoctrination and a racial spoils system. That question is beyond the scope of this brief. But the question of when those efforts create a hostile work environment is worthy of the same clear-eyed realism that Justice Harlan brought to the Louisiana statute. This case presents the Court the opportunity to give new life to Justice Harlan's powerful dissent and to avoid the resurrection of the background circumstances rule that the Court rejected in *Ames*.

II. *Ames* affirmed that Title VII protects individuals, not groups.

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on an individual's race:

It shall be an unlawful employment practice for an employer 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.

42 U.S.C. § 2000e-2(a)(1). The statute protects “any individual”—not just minorities or just majorities within the protected categories. Nothing in the statute’s text suggests it ought to be viewed through a majority-minority lens.

Some courts, however, have erred by looking outside of the text to impose additional requirements for non-minority litigants. The *Ames* Court rejected the Sixth Circuit’s “background circumstances” rule on this basis. The Sixth Circuit appended its “background circumstances” test to the disparate-treatment framework articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To satisfy that initial prong of a *McDonnell Douglas* inquiry, the Sixth Circuit required majority-group plaintiffs to “demonstrate ‘background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority.’” *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 255 (6th Cir. 2002) (citation omitted). This imposed an additional burden on non-minority claimants.

Although this requirement did not appear in Title VII’s text, the “background circumstances” rule, for a time, governed huge swaths of the country. Before *Ames*, five circuit courts had adopted the “background circumstances” test (or tests equivalent to it), while only *two* circuits had explicitly rejected such a test. April Anderson, Cong. Rsch. Serv., LSB11386, *Ames v. Ohio Department of Youth Services: Reverse Discrimination and the McDonnell Douglas*

Evidentiary Framework 2 (2026). Some scholars have speculated that “it is likely that some reverse discrimination plaintiffs in [circuits applying the background circumstances rule] whose cases were resolved on summary judgment would survive now.” See, e.g., William R. Corbett, *Stripping Title VII Down to Its Bare Essentials: Uncovering an Employee-Friendly Employment Discrimination Law*, 94 Geo. Wash. L. Rev. Arguendo 35, 45–46 (2025) (explaining that recent rulings regarding affirmative action may have contributed to an increase in so-called “reverse discrimination” suits).

Writing for the Court in *Ames*, Justice Jackson stated the obvious: Making “plaintiffs who are members of a majority group bear an additional burden . . . cannot be squared with the text of Title VII.” *Ames*, 605 U.S. at 309.

This Court has rightly affirmed in cases going back decades that minority or majority favoritism runs counter to Title VII’s text. Such decisions include *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”), *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976) (“We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes.”), and *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 658 (2020) (“[Title VII] tells us three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals, not groups.”).

Also instructive are the enforcement actions of the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for investigating and prosecuting violations of Title VII and other antidiscrimination laws. This Court has looked to EEOC decisions for helpful guidance in Title VII cases, including *Griggs*, 401 U.S. at 433–34, and *McDonald*, 427 U.S. at 279.

In EEOC Decision No. 74-31, which was decided less than a decade after the passage of Title VII and was later cited in this Court’s ruling in *McDonald*, the EEOC affirmed that it would be a “derogation of the Commission’s Congressional mandate” to hold that racially discriminatory hiring methods only violated Title VII in situations where a white majority was discriminating against some minority. EEOC Dec. No. 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326 (1973). In addition, the EEOC’s Compliance Manual specifically eschews imposing any kind of heightened evidentiary standard on majority-group claimants:

Title VII prohibits race discrimination against all persons, including Caucasians. . . . Some courts, however, take the position that if a White person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. *The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim’s race*

U.S. Equal Emp. Opportunity Comm’n, *EEOC Compliance Manual* § 15-II (2006),

<https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> (emphasis added).

Even more germane to the facts of Mr. Young’s case, the EEOC has clarified in a “What You Should Know” guide on “Diversity, Equity, and Inclusion” training that discrimination against a majority group will still be addressed under the same standard as discrimination against minorities. *What You Should Know About DEI-Related Discrimination at Work*, U.S. Equal Emp. Opportunity Comm’n, <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work> (last visited Sep. 21, 2026).

Title VII’s plain text opens the judiciary’s doors wide for plaintiffs of all races, colors, religions, sexes, and national origins to challenge workplace discrimination on equal footing. A large body of case law and the EEOC’s posture strongly support this conclusion. In affirming a textualist approach to interpreting Title VII, the *Ames* Court continued an encouraging trend of “stripping away judicial gloss and making employment discrimination law more favorable to employee-plaintiffs.” Corbett, *supra*, at 46.

Even if one wishes to take a more retributive-justice view of Title VII,² he must contend with the fact

² Some look to the legislative history of Title VII to justify this view. But the legislative history of Title VII is more complex than many give it credit for. While the law was primarily intended to help minorities, Senators Joseph S. Clark and Clifford P. Case, who were the floor managers of Title VII, clarified in an extensive memo distributed prior to debate that the law would protect anyone in the United States, regardless of group membership,

that modern American workplaces and society are far more integrated and multiethnic than they were circa 1964. As Justice Thomas observes in his *Ames* concurrence:

Defining the “majority” is even more difficult in the context of race, as racial categories tend to be “overbroad” and “imprecise in many ways.” “American families have become increasingly multicultural,” and “attempts to divide us all up into a handful of groups have become only more incoherent with time.” And, even if courts could identify all the relevant racial groups and their boundaries, courts would still struggle to determine which racial groups make up a majority. Black employees in Detroit, for example, make up a majority in their city, but not in Michigan or the United States at large.

Ames, 605 U.S. at 316 (Thomas, J., concurring) (citation omitted).

In short, American society is moving closer to the one that Justice Harlan envisioned in his *Plessy* dissent—if not in law, then in fact. That is one in which “race lines” are “obliterated.” *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting). Title VII is devoid of “race

from employment discrimination, and particularly stressed that there would be an obligation not to discriminate against whites as much as minorities. David P. McGinley, *Ames v. Ohio Department of Youth Services: Reaffirming Title VII's Neutrality in an Era of Shifting Discrimination*, 20 Liberty U.L. Rev. 417, 427–29 (2025).

lines.” Yet until *Ames* was decided, some courts continued to draw them into the statute, despite such lines having rapidly diminishing meaning.

The *Ames* opinion espouses a view of the statute that comports with both its plain text and the increasingly diverse nature of modern American society. *Ames* also heeds the simple constitutional principle that “[i]n respect of civil rights, all citizens are equal before the law.” *Id.* at 559 (Harlan, J., dissenting).

III. The Court should apply the Title VII principle clarified in *Ames* to the hostile work environment claim at issue here.

The deliberately broad language of Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (cleaned up) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); see also *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). So, while disparate treatment and hostile work environment claims may have different evidentiary standards, the same fundamental Title VII principles must be upheld in both types of actions: namely, that the harm at issue was inflicted based on a protected characteristic. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

In affirming the dismissal of Young’s claim, the Tenth Circuit ignored Title VII’s core command to treat majority and minority races (so far as they can

be defined) equally in the workplace—a principle that should apply just as forcefully in a hostile work environment context as it does in a disparate treatment context. The Tenth Circuit’s decision below applies an inappropriately strict standard to Mr. Young’s case and effectively condones an ugly example of institutionalized discrimination—EDI trainings denigrating one race—which are on the rise. See Pet. 23–25. Neither Title VII nor the U.S. Constitution suggests such trainings should be considered less offensive because they target majorities as opposed to minorities.

IV. In the context of hostile work environment cases related to government-required, race-based EDI training, the Tenth Circuit’s decision effectively imposes a heightened standard on non-minority claimants.

To establish a hostile work environment under Title VII, a plaintiff must show that unwelcome conduct occurred in the workplace and that he was subjected to it because of a protected characteristic, such as race. The conduct need not be “economic” or “tangible,” as workplace discrimination can take many forms, nor does the conduct need to cause serious psychological distress. *Harris*, 510 U.S. at 20–21 (citations omitted).

In Young’s case, it appears that the challenged racial discrimination inherent in the training program was a feature of his workplace, not a bug: The challenged training materials explicitly stated that employees would be *held* to the concepts and instructions outlined in the training. Pet. 10, 13. This differs from the more typical hostile workplace claim,

where—contrary to official policy—supervisors engage in a pattern of racially charged comments or actions. The training materials are, in essence, statements of state policy.

Yet the Tenth Circuit treats the fact that Young only experienced one training as nearly dispositive on the issue of whether the workplace hostility was “severe or pervasive.” The Tenth Circuit, referencing its own ruling in a past case that Young filed challenging just the training (not after-effects), explains that Young “needed to combine his allegation of a [discriminatory] policy with a ‘pattern of race-based intimidation, ridicule, or insult that accompanied his employer’s official acts.’” Pet. App. 11a (quoting *Young v. Colo. Dep’t of Corr.*, 94 F.4th 1242, 1252 (10th Cir. 2024)). Specifically, the Tenth Circuit looks to *Lounds v. Lincare, Inc.*, 812 F.3d 1208 (10th Cir. 2015), as a ruler to measure the “severe or pervasive” threshold. *Lounds* involved a workplace in which co-workers and/or supervisors subjected a black employee to repeated, harsh, and demeaning racial epithets and other harassment.

To be sure, the *Lounds* rubric requiring a plaintiff “to show more than a few isolated incidents of racial enmity” makes sense in cases where that racial enmity arises to some extent—organically, through the racist statements and actions of employees and supervisors and management’s continued failure to address them. See *id.* at 1223 (citations omitted). But *Lounds* did not address whether that rubric ought to apply to government workplaces in which training materials displaying a racial animus are an intentional policy decision. This Court should take the opportunity to

answer that question, informed by Justice Harlan's colorblind view of the Constitution and consistent with its decision in *Ames*.

CONCLUSION

For the above reasons, the petition should be granted.

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