No. 23-1039

# In the Supreme Court of the United States

MARLEAN A. AMES,

*Petitioner,*

*v.*

OHIO DEPARTMENT OF YOUTH SERVICES,

*Respondent.*

*On Writ of Certiorari*
*to the United States Court of Appeals*
*for the Sixth Circuit*

## BRIEF OF PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether, in addition to pleading and proving the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Pet. App. 5a.

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## INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation that defends the principles of liberty and limited government, including equality before the law. The right of individuals to be free from racial discrimination has always been at the core of PLF's civil rights efforts. PLF is currently litigating, or has recently litigated, cases that seek to vindicate the equal protection rights of children in New York, Virginia, Connecticut, and Maryland. *See, e.g.*, *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, No. 23-1137, 2024 WL 5036302, at *1 (U.S. Dec. 9, 2024) (Alito, J., dissenting) (dissenting from denial of certiorari in case challenging racial discrimination in K-12 admissions); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659, at *1 (U.S. Feb. 20, 2024) (Alito, J., dissenting) (same).

This year alone, PLF won an important appeal before the Second Circuit that clarified the standard for evaluating equal protection challenges to facially-neutral laws. *Chinese Am. Citizens All. of Greater New York v. Adams*, 116 F.4th 161, 178 (2d Cir. 2024) (holding that "evidence of the exclusion of Asian-American students at numerous New York City middle schools" after changes to the admission policy established that the changes had a discriminatory impact). And PLF won an equal protection challenge to a law mandating gender balance on state boards.

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

*Hurley v. Gast*, 711 F.Supp.3d 1069, 1074, 1083 (S.D. Iowa 2024) (striking down gender balance law).

This case falls within PLF's mission because the so-called "background circumstances" rule undermines equality before the law by interpreting Title VII in a manner that mandates differential treatment on the basis of race and sex.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII protects "any individual" against employment discrimination. 42 U.S.C. § 2000e-2(a)(1). It does not protect racial "groups" more than others. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). Accordingly, in *McDonald*, this Court held that Title VII prohibits discrimination against individuals from all racial groups "upon the *same* standards." *Id.* at 280 (emphasis added).

Nevertheless, several courts of appeal have undermined this Court's unambiguous holding by requiring majority group plaintiffs to carry the additional evidentiary burden of showing that their employer is the "unusual employer who discriminates against the majority." This so-called "background circumstances rule" applies in all Title VII cases where it's been adopted, including cases involving discrimination based on race.

As Petitioner argues, the rule is not consistent with Title VII's text. Amicus submits this brief because the rule is flawed for two additional reasons.

*First*, it violates the equal protection guarantee of the Fifth and Fourteenth Amendments. When courts apply the background circumstances rule to some Title VII plaintiffs (those in majority racial groups)

but not others (those in minority groups), they create a suspect classification for equal protection purposes. Given that the background circumstances rule treats individuals differently on the basis of race, it must be narrowly tailored to a compelling governmental interest.

*Second,* the rule's purpose is wildly outdated. Immediately after Title VII took effect in 1964—and before the background circumstances rule was adopted by appellate courts—private employers were already adopting race-based affirmative action and diversity initiatives. Today, these practices have become commonplace—if not ubiquitous—in the modern workplace. All too frequently, these policies involve the employer giving preferential treatment to employees on the basis of race. But as this Court explained in *Students for Fair Admissions v. President & Fellows of Harvard College* (SFFA), providing a benefit to one individual in a zero-sum environment inevitably means disadvantaging another. 600 U.S. 181, 218 (2023). So too with opportunities in the workplace—preferences for individuals from certain racial groups necessarily entails discrimination against individuals in other racial groups.

The rise of DEI ideology and racial preferences means that discrimination is all too common today. It is no longer the unusual employer that discriminates against majority groups. To the contrary, discrimination against individuals in "majority groups" is likely more common (and certainly more accepted) than discrimination against individuals in "minority groups." In today's world, the background circumstances rule makes no sense, if it ever did. The Court should reject it and rule that all individuals must meet the same evidentiary burdens.

## ARGUMENT

### I. The Background Circumstances Rule Violates The Fifth And Fourteenth Amendments

As the Petitioner aptly shows, the background circumstances rule violates both the letter and spirit of Title VII. But there is a more serious defect with the background circumstances rule: it renders Title VII unconstitutional. This is because the rule violates the Fifth and Fourteenth Amendments' guarantee of equal protection of the laws.

#### A. The Constitution forbids government discrimination on the basis of race

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The "central mandate" of the Equal Protection Clause is "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). "[T]he Constitution's guarantee of equal protection" means that "the Government must treat citizens as individuals, not as simply components of a racial . . . class." *SFFA*, 600 U.S. at 223 (quoting *Miller*, 515 U.S. at 911).

The constitutional requirement that the government must treat each citizen as an individual, without regards to race, binds the federal and state governments alike. To be sure, the Equal Protection Clause of the Fourteenth Amendment only applies to the states. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). But this Court has long held that racial discrimination by the federal government violates the

Fifth Amendment's guarantee of due process of law. *Id.* at 499. And the Court has further clarified that equal protection analysis "in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

Consequently, in the words of Justice Harlan, "the constitution of the United States, in its present form, forbids . . . discrimination by the general government, or by the states, against any citizen because of his race. All citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565, 910 (1896).

### B. Equal protection applies to judicial enforcement of statutes too

The principle of equal protection does not only apply to legislatures—it also applies to court proceedings. Thus, in *Shelley v. Kraemer*, this Court held that it violated equal protection for judges to enforce racially restrictive covenants. 334 U.S. 1, 16 (1948). This Court has also held that the racially discriminatory use of peremptory challenges in a civil trial violates the Constitution. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630 (1991). In such a situation, the court has "not only made itself a party" to racial discrimination, but "has elected to place its power, property, and prestige" behind the act. *Id.* at 624 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 862 (1961)). And as this Court has recognized, "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Id.* at 628.

But interpreting Title VII as imposing the background circumstances rule places the judiciary in

the untenable position of enforcing racial discrimination. As Judge Kethledge explained below, the background circumstances rule imposes "different burdens on different plaintiffs *based on their membership in different demographic groups*." *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 827 (6th Cir. 2023) (Kethledge, J., concurring). The rule "treats some 'individuals' worse than others—in other words, it discriminates." *Id.* (Kethledge, J., concurring). Accordingly, when courts apply the background circumstances rule to a Title VII race discrimination case by imposing higher evidentiary requirements on a "majority group" plaintiff, courts are enforcing a requirement that discriminates on the basis of race. As Judge Kethledge noted, "If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases where plaintiffs are treated less favorably because of their race)." *Id.* at 828.

If the background circumstances rule is the correct interpretation of Title VII, then Title VII enlists the judiciary to enforce racial discrimination. Accordingly, Title VII would effectively be placing the judiciary in the same position as the racially restrictive covenant at issue in *Shelly*. 334 U.S. at 16.

In that scenario, the background circumstances rule implicates equal protection for a suspect class—namely race, and thus, it must satisfy strict scrutiny in order to be found constitutional. It cannot pass this test.[2]

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[2] While the background circumstances rule applies to other classifications as well (where other levels of scrutiny might apply), the fact that it applies in race discrimination cases where

### C. The background circumstances rule fails strict scrutiny

To the extent courts read Title VII to require a background circumstances rule, this causes Title VII to fail strict scrutiny. This is because the background circumstances rule neither furthers a compelling governmental interest, nor is narrowly tailored to such an interest.

Race-conscious government action may be constitutional where it "remediat[es] specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. But this governmental interest cuts strongly *against* the background circumstances rule. A Title VII lawsuit is one of the chief means for adjudicating allegations of race-based discrimination. Raising the evidentiary bar for only plaintiffs in certain racial groups contradicts the compelling governmental interest in remediating past unlawful discrimination—especially since Title VII protects all individuals from racial discrimination under the "same standards." *McDonald*, 427 U.S. at 280.

It is unclear what governmental interest—if any—could justify the racially discriminatory background circumstances rule. The absence of a clearly articulated interest suggests that any such interest "cannot be subjected to meaningful judicial review[]" and therefore is "not sufficiently coherent for purposes of strict scrutiny." *SFFA*, 600 U.S. at 214.

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strict scrutiny applies is enough of a reason to completely jettison the judge-made rule.

The background circumstances rule also fails strict scrutiny because it sweeps too broadly. Imposing a higher evidentiary burden on *every single plaintiff belonging to a particular race—and only on plaintiffs of that race*—is not narrowly tailored by any workable standard.

There are additional problems with the background circumstances rule. This Court has held that race-based government policies "may never use race as a stereotype or a negative" and must eventually end. *Id.* at 213. But the background circumstances rule fails to comply with these requirements as well. It is based on a stereotype—the idea that "majority group" individuals are rarely discriminated against. It also uses race as a negative—imposing higher burdens in court on "majority" plaintiffs. And as binding precedent in multiple circuits, the background circumstances rule has no end date in sight.

Therefore, the background circumstances rule fails strict scrutiny and renders Title VII unconstitutional if it's the correct interpretation of Title VII. But given the strength of Petitioner's interpretation of Title VII, the Court should reject the background circumstances rule as a matter of statutory construction.

Even if the background circumstances rule was a plausible interpretation of Title VII (it's not), the Court should reject it under the constitutional avoidance canon so that it doesn't have to strike down Title VII on equal protection grounds. *See Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) ("When 'a serious doubt' is raised about the constitutionality of an Act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is

fairly possible by which the question may be avoided.'") (quotation omitted)).

## II. The Background Circumstances Rule Does Not Reflect Contemporary Reality

In addition to being patently unconstitutional, the premise that it's less typical for an employer to discriminate against "majority groups" is baseless today. As shown below, the rise of governments and private businesses embracing diversity, inclusion, and equity initiatives (DEI) means that discrimination pervades the modern workplace.

### A. Race-based employment policies are nothing new

The first court of appeals to adopt the background circumstances rule was in 1981. *See Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). But by that time, discrimination against "majority group" individuals was prevalent.

Starting in the late 1960s, legal reforms and public pressure caused many private companies to embrace race-based measures as "a way of life." Louis Menand, *The Changing Meaning of Affirmative Action*, The New Yorker (Jan. 13, 2020).[3] President Nixon's administration required companies contracting with the federal government to set racial benchmarks. *Id.* "Thousands of firms adopted [race-based] affirmative-action programs" in response. *Id.*

By the 1980s, racial preferences were so prevalent in private companies' practice that they successfully pressured the Reagan Administration to abandon its plans to end such requirements for government

[3] https://tinyurl.com/b8pt65ws

contractors. *Id.*; Atinuke O. Adediran, *Racial Targets*, 118 Nw. U.L. Rev. 1455, 1477 (2024). Many companies at that time stated publicly that they would continue their race-based "'goals and timetables no matter what the government does.'" *Id.* at 1477 (quotation omitted). "During the Reagan Administration, the Business Roundtable stated that "[s]etting goals and using numerical measures 'are a basic fact of how business operates.'" *Id.* (quotation omitted).

Relatedly, private companies started adopting race-based initiatives "[f]ollowing the Civil Rights Act of 1964" taking effect. William C. Dix, *Corporate DEI Reexamined*, 49 J. Corp. L. 653, 654 (2024); Todd J. Clark, *Reversing DEI: The consequence – "IED" – indoctrination and elimination of diversity*, 55 U. Tol. L. Rev. 169, 175 (2024) ("DEI initiatives find their historical beginnings in the mid-1960s, following the passage of the Civil Rights Act of 1964."). Those initiatives quickly evolved into present-day DEI initiatives.

### B. DEI initiatives are the background circumstances of the modern workplace

DEI initiatives have only expanded race-first actions in recent years. Ostensibly, these initiatives promote "diversity" through the unique ways in which individuals can contribute to company success. Dix, *supra*, at 655. But making this assessment is "difficult," so "companies and researchers often use demographics—including race, ethnicity, and gender—as proxies for these skills, backgrounds, and perspectives." *Id.* The "equity" part of DEI preaches that companies have a duty to rectify the "historical circumstances [that] have caused certain

inequalities." *Id.* at 656. Thus, proponents advocate that "organizations should not merely treat all individuals 'equally,' but should 'take[] into consideration a person's unique circumstances, adjusting treatment accordingly so that the end result is equal." *Id.* (quotation omitted). DEI teaches that race, ethnicity, and gender should also be used to identify those suffering unequal outcomes and who "deserve assistance." *Id.*

Critical race and gender theory infect DEI initiatives. *C.f. Rollerson v. Brazos River Harbor Nav. Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 648 (5th Cir. 2021) (Ho, J., concurring) (noting that focusing on "equality of outcome" is a form of "critical race theory"). The growth of DEI intensified "in the wake of the Black Lives Matter Movements and it has since grown tremendously in the business landscape." Mariana Larson, *Diversity on Trial: Navigating Employer Diversity Programs Amidst Shifting Legal Landscapes*, 8 Bus. Entrepreneurship & Tax L. Rev. 239, 249-50 (2024). "After the nation's summer of 2020 post-George Floyd racial reckoning, institutions across the country began to consider, and implement or amplify, their existing DEI measures." Tanya Katerí Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. Rev. Discourse 282, 285 (2024). As a result, DEI is "standard" company practice "for many different firms, businesses, and corporations within the United States." Rana L. Freeman, *Admissions denied: The effects on corporate America jobs if race is excluded as a factor in university admissions*, 50 S.U.L. Rev. 111, 119 (2023).

The prevalence of DEI in the modern workplace can be seen in the amicus briefs filed by private

businesses in *SFFA*. In one such brief, several major corporations emphasized that "American businesses are making historic and long-term investments in diversity, equity, and inclusion programs." Brief for Major Am. Bus. Enters. as Amici Curiae Supporting Respondents, *Students for Fair Admission, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3130774, at *18. They noted that "DE&I programs are now 'a given' among leading businesses, with 97% of top global enterprises reporting formal DE&I strategies at their companies." *Id.* (quotation omitted).

Before the First Circuit in *SFFA*, over "60 major corporations" filed an amicus brief defending the use of race in college admissions. Freeman, *supra*, at 134. They argued that "'prohibiting universities nationwide from considering race among other factors in composing student bodies would undermine businesses['] efforts to build diverse workforces.'" *Id.* (quoting Brief for Major American Business Enterprises as Amici Curiae Supporting Respondents at 21-22, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, (1st Cir. 2020) (No. 20-119)). Clearly, efforts by employers to increase the number of minority employees through race-conscious programs are widespread.

Large companies boast about their "racial hiring and promotion goals with specific numerical targets." Adediran, *supra*, at 1456. For example, "[i]n 2020, Starbucks stated its goal is to have 40% of its retail roles and 30% of its enterprise roles filled by people of

color by 2025." *Id.* Additionally, thirteen states' attorneys general issued an open letter warning that "[r]acial discrimination is commonplace among Fortune 100 companies." Letter from Kansas Attorney General Kris W. Kobach et. al. to Fortune 100 Companies, at 2 (July 13, 2023).[4] Their letter then noted that several major companies had set racial hiring quotas in recent years. *Id.*

Cases currently being litigated by Amicus Pacific Legal Foundation illustrate how deeply entrenched DEI programs have become. In *Diemert v. City of Seattle*, one of Seattle's public employees sued the City for a racially hostile work environment under Title VII (with pro bono legal aid from Amicus). He alleges that the City required him to take trainings about "white privilege" and "collective guilt that white employees . . . purportedly bear for societal inequality." First Amended Complaint for Declaratory Relief & Damages at ¶ 62, *Diemert v. City of Seattle*, No. 2:22-cv-01640-LK (W.D. Wash.). He alleges that in one training, the facilitators of the training said that "'white people are like the devil,'" that "'racism is in white people's DNA,'" and that "'white people are cannibals.'" *Id.* at ¶ 65 (quotations omitted). The district court denied the City's motion to dismiss, allowing the racially hostile work environment claim to proceed. *Diemert v. City of Seattle*, 689 F.Supp.3d 956, 967 (W.D. Wash. 2023).

In *Haltigan v. Drake*, PLF represents a job applicant who alleges that the University of California Santa Cruz required him to submit a statement about his contributions to DEI. *Haltigan v. Drake*, No. 5:23-

[4]https://tinyurl.com/muyzcb9n

CV-02437-EJD, 2024 WL 150729, at *2 (N.D. Cal. Jan. 12, 2024). He alleges that the DEI statement was part of the University of California's "Advancing Faculty Diversity (AFD) program to support projects that increase racial and gender balance on the University campuses." *Id.* at *1. And he alleged that UC Santa Cruz used a specific scoring system for DEI statements that express support for DEI ideology and for treating individuals differently based on race. Second Amended Complaint at ¶¶ 46-47, *Haltigan v. Drake*, No. 5:23-cv-2437-NC (N.D. Cal.).

PLF's ongoing litigation against race and sex preferences for positions on public boards and commissions further illustrates the prevalence of race-based diversity initiatives. Amicus has filed several lawsuits across the country challenging laws that direct officials responsible for filling positions on public boards and commissions to give preferences to racial minorities and to individuals based on sex. In *Hurley v. Gast*, the court granted summary judgment to an individual who was excluded from running to serve on the State Judicial Nominating Commission because of his sex. 711 F.Supp.3d 1069, 1074, 1083 (S.D. Iowa 2024). PLF has also challenged a Montana statute that requires appointments to state boards to be gender balanced. First Amended Complaint, *Do No Harm v. Gianforte*, No. 6:24-cv-00024-BMM-KLD (D. Mont.) (challenging Mont. Code § 2-15-108(1)). And PLF has recently filed cases challenging race preferences for appointing officials to public boards in Alabama, Louisiana and Minnesota. Complaint for Declaratory & Injunctive Relief at ¶ 2, *Am. All. for Equal Rights v. Ivey*, No. 2:24-CV-104-RAH, 2024 WL

1181451 (M.D. Ala. Mar. 19, 2024) (citing Ala. Code § 34-27A-4); Complaint at ¶ 15, *Do No Harm v. Edwards*, 5:24-cv-00016 (W.D. La.) (citing La. Stat. § 37:1263(B)); Complaint for Declaratory & Injunctive Relief at ¶ 2, *Am. Alliance for Equal Rights v. Walz*, 0:24-cv-01748 (D. Minn).

Government contracting is also ripe with DEI and a race-first mindset. In Texas, PLF is challenging Houston's requirement that private contractors subcontract to racial minorities. Complaint for Declaratory & Injunctive Relief at ¶ 23-24, *Landscape Consultants of Tex. v. City of Houston*, No. 4:23-cv-03516 (S.D. Tex.). In *Hierholzer v. Guzman*, PLF is challenging the federal government's practice of preferring businesses that are owned by racial minorities when awarding government contracts to small businesses. No. 2:23-cv-0024, 2024 WL 894896, at *1-3 (E.D. Va. Feb. 15, 2024) (appeal pending).

Many other discrimination cases have been filed recently by other law firms against private companies. *See* Jason C. Schwartz et. al., *DEI Task Force Update* (Nov. 2, 2023), Gibson Dunn.[5] There are many more examples. In short, DEI and discriminatory policies against individuals in so-called "majority groups" are the background circumstances of the modern workplace.

### C. DEI efforts frequently mandate intentional discrimination against individuals in "majority groups"

The widespread prevalence of DEI initiatives is especially troublesome when those polices lead to

[5] https://tinyurl.com/yu6bjz4x

intentional discrimination. This Court recognized in *SFFA* that making race a factor in college admissions amounts to discrimination, in part, because "[c]ollege admissions are zero-sum." 600 U.S. at 218.

There's a "growing concern that diversity has increasingly become a code word for discrimination" at private companies. *Price v. Valvoline, L.L.C.*, 88 F.4th 1062, 1067-68 (5th Cir. 2023) (Ho, J., concurring). Businesses only have so many positions to offer, so many slots for promotion, and only so much money for raises. Thus, businesses' focus on boosting numbers in the name of DEI often results in discrimination in the zero-sum world of career advancement. "[D]ivisive workplace policies that allocate professional opportunities to employees based on their sex or skin color, under the guise of furthering diversity, equity, and inclusion" can violate Title VII. *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 509 (5th Cir. 2023) (en banc) (Ho, J., concurring).

EEOC Commissioner Andrea Lucas recognizes this problem and has argued that "increasingly popular" DEI initiatives may rise to the level of actionable Title VII discrimination. Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity program*s, Reuters (June 29, 2023).[6] She noted that examples include restricting "access to mentoring, sponsorship, or training programs" to racial minorities. *Id.* And "selecting interviewees partially due to diverse candidate slate policies." *Id.*

[6] https://tinyurl.com/mr3za3r2

Therefore, the background circumstances rule is fatally flawed. The rise of DEI shows that—at the very least—it's just as likely for an employer to discriminate against an individual from a majority group as it is for an employer to discriminate against an individual from a minority group. Even if the background circumstances rule could have been justified fifty years ago, it has far outlived that purpose. In *Shelby County v. Holder*, the Court ended the Voting Rights Act's preclearance requirement because "current conditions" no longer justified the requirement. 570 U.S. 529, 557 (2013). The same is true here. To the extent that past conditions once justified treating discrimination plaintiffs differently on the basis of race (they never did), current conditions clearly do not.

## CONCLUSION

The judgment of the lower courts should be reversed.

Respectfully submitted,

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