No. 20-2179

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER SWINDELL

Plaintiff-Appellant,

-v-

CACI NSS, INC., f/k/a L-3 National Security Solutions, Inc.; Quick Services, LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina at Raleigh

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

SHERRILYN A. IFILL
President and Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
P: (212) 965-2200

DANIEL S. HARAWA*
Of Counsel
MAHOGANE D. REED
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

**Counsel of Record*

Counsel for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

February 3, 2021

Pursuant to Federal Rule of Appellate Procedure 29 and Fourth Circuit Rule 29(a)(3), amicus curiae the NAACP Legal Defense & Educational Fund, Inc., ("LDF) respectfully moves for leave to file the attached brief in support Plaintiff-Appellant Christopher Swindell. Counsel for Appellant consent to LDF's filing; counsel for Defendants-Appellees CACI NSS, Inc., and Quick Services, LLC do not consent.

INTEREST OF AMICUS CURIAE

LDF is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Since the enactment of the Civil Rights Act of 1964, LDF has helped Americans vindicate their rights under Title VII to be free from discrimination on the basis of race and ethnicity. LDF has represented plaintiffs in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has a strong interest in the proper application of Title VII to combat workplace discrimination.

RELEVANCE OF LDF'S BRIEF

In response to Appellees' summary judgment motion to dismiss his hostile work environment claim under Title VII, Mr. Swindell, one of two Black employees working on a small team for defense contractors to the federal government, offered compelling evidence that during his employment, he was forced to endure near-

constant racial harassment from co-workers and alleged supervisors. The comments Mr. Swindell heard and received from his white peers invoked the most odious anti-Black racist stereotypes, including comments deeming Black people genetically inferior, using sexualized and animalistic imagery to describe Black men, and suggesting that all Black people are on government assistance. The district court nevertheless granted the Appellees summary judgment on Mr. Swindell's hostile work environment claim, holding that no reasonable juror could conclude that the harassment Mr. Swindell faced was sufficiently severe or pervasive to establish liability under Title VII. LDF's brief highlights two glaring errors in the district court's reasoning.

First, LDF argues that the district court adopted and applied a narrow view of Title VII's protection. Both the Supreme Court and this Circuit have held that Title VII does not tolerate a work environment where Black employees are ridiculed and harassed because of their race. *See, e.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (holding that a workplace "permeated with discriminatory intimidation, ridicule, and insult" can be "sufficiently severe or pervasive to alter the conditions of the victim's employment"); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280-81 (4th Cir. 2015) (en banc). Nor does Title VII tolerate a workplace where crude and offensive remarks about Black people are openly bandied about. *See, e.g.*, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) ("One of the critical inquiries in a hostile environment claim must be the environment. Evidence of a general work atmosphere therefore—as well as evidence of specific hostility directed toward the

plaintiff—is an important factor in evaluating the claim.") (citation omitted). Indeed, "Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). The district court's reduction of Mr. Swindell's complaints and dismissal his colleagues' comments as merely "offensive" but not actionable under Title VII undercuts the utility of Title VII as a means to rid the workplace of race-based discrimination.

Second, LDF argues that district court failed to analyze whether Mr. Swindell's work environment was abusive and hostile from the perspective of a reasonable person *in the plaintiff's position*. *Oncale v. Sundower Offshore Svcs., Inc.*, 523 U.S. at 81 (1998); *see also Boyer-Liberto*, 786 F.3d at 277. This standard necessarily observes the hostility of the workplace from the perspective of a person with the same relevant protected characteristic(s) as the plaintiff. *See Oncale*, 523 U.S. at 81–82; *see also Aman v. Cort Furniture Rental Co.*, 85 F.3d 1074, 1081 (3d Cir. 1996) (explaining that to make out a hostile work environment claim, a plaintiff must show "the discrimination would detrimentally affect a reasonable person *of the same race* in that position . . .") (emphasis added). Here, viewing Mr. Swindell's allegations from the perspective of a Black person in his position compels the conclusion that Mr. Swindell's workplace was objectively abusive. Many of the racially discriminatory "jokes" and comments doled out at Appellees' workplace expressly invoked offensive racial tropes, many of which have played a historical role in justifying and perpetuating racial violence and discrimination, both inside and outside the workplace. A reasonable Black person in Mr. Swindell's position could certainly

perceive comments deeming Black people genetically inferior, using sexualized and animalistic imagery to describe Black men, and suggesting that all Black people are on government assistance as objectively abusive, and the district court erred in holding otherwise.

For the foregoing reasons, LDF respectfully requests that this Court grant leave to file the accompanying amicus brief.

Dated: February 3, 2021

Respectfully submitted,

/s/ Daniel S. Harawa

Daniel S. Harawa*
Of Counsel
Mahogane D. Reed
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

Sherrilyn A. Ifill
President and Director-Counsel
Janai S. Nelson
Samuel Spital
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
P: (212) 965-2200

Counsel for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2021, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 3, 2021

/s/Daniel S. Harawa

Daniel S. Harawa*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

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SHERRILYN A. IFILL
President and Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
P: (212) 965-2200

DANIEL S. HARAWA*
Of Counsel
MAHOGANE D. REED
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

**Counsel of Record*

Counsel for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all Americans. Since the enactment of the Civil Rights Act of 1964, LDF has helped Americans vindicate their rights under Title VII to be free from discrimination on the basis of race and ethnicity. LDF has represented plaintiffs in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has a strong interest in the proper application of Title VII to combat workplace discrimination.

SUMMARY OF THE ARGUMENT

During the first two months of his employment with defendants CACI NSS, Inc., and Quick Services, LLC, Christopher Swindell, a distinguished Black military veteran, endured near-constant racial harassment. Over that short period, Mr. Swindell witnessed his coworkers hypothesizing that Black people can't swim because of their genetic makeup. J.A. 1802. He listened as a coworker said it is

[1] Amicus curiae states that no party's counsel authored this brief either in whole or in part, and that no party or party's counsel, or person or entity other than amicus curiae, amicus curiae's members, and their counsel, contributed money intended to fund preparing or submitting this brief.

acceptable for older white people to refer to Black people as "coloreds." J.A. 1800. One coworker called him a "bigger black guy" as compared to "skinny" "Africans." J.A. 1830. Yet another coworker with supervisory responsibility said Mr. Swindell's mere presence reminded him of food stamps. J.A. 1819. And Mr. Swindell withstood this same coworker telling a white female coworker that she could not "take a black man's banana," and if she tried, she would "slip and fall in [her] va-jay-jay juice." J.A. 1823. Mr. Swindell, who was the only Black civilian member of his team, J.A. 647, 649, and one of only two Black employees on the entire project, J.A. 716, pointed to at least ten racially harassing remarks made over his first few months of his employment. *See* J.A. 270–79. As Mr. Swindell testified: "it seemed like a lot of conversations for some odd reason would just get to race. I don't know why, but . . . that's where everything ended." J.A. 1801.

The district court nevertheless granted the defendants summary judgment on Mr. Swindell's hostile work environment claim, holding that no reasonable juror could conclude that the harassment Mr. Swindell faced was sufficiently severe or pervasive to establish liability under Title VII.[2]

This Court should reverse. Title VII does not tolerate a work environment where Black employees are ridiculed and harassed because of their race. *See, e.g.*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280-81 (4th Cir. 2015) (en banc). Nor does it tolerate a workplace where crude and offensive remarks about Black

[2] The district court also dismissed Mr. Swindell's § 1981 and Title VII retaliation claims, as well as his wrongful discharge claim. J.A. 2039. This brief focuses on the district court's errors with respect to Mr. Swindell's hostile work environment claim.

people are openly bandied about. *See, e.g.*, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) ("One of the critical inquiries in a hostile environment claim must be the environment. Evidence of a general work atmosphere therefore—as well as evidence of specific hostility directed toward the plaintiff—is an important factor in evaluating the claim.") (citation omitted). Indeed, "Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

The district court adopted and applied a narrow view of Title VII's protections that is inconsistent with the Supreme Court's precedents, which look at the "[the] real social impact of workplace behavior," and which "often depends on a constellation of surrounding circumstances, expectations, and relationships, which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 81–82 (1998). The district court's cramped review of Mr. Swindell's allegations discounted and decontextualized the racial abuse and harassment that permeated defendants' workplace and minimized the impact that defendants' work environment would have on a reasonable person in Mr. Swindell's position. *See id.* at 82 (requiring courts to assess whether, under the totality of the circumstances, a work environment is abusive from the perspective of a reasonable person in the plaintiff's position). The district court's error undermines Title VII's workplace protections and should be reversed.

I. The District Court's Decision is Contrary to Binding Precedent.

Before the district court, Mr. Swindell identified at least ten racially charged remarks that were made either about him or in his presence within his first two months of employment with defendants. And many of these comments focused on the most pernicious anti-Black stereotypes. When a coworker asked Mr. Swindell why Black people can't swim, and then suggested it was because of genetics, the coworker invoked the stereotype that Black people are inherently inferior—a stereotype which has been used for over four centuries to justify the most horrific abuses of African Americans. J.A. 1802.[3] When a coworker with supervisory responsibilities[4] told Mr. Swindell that he reminded him of "EBT," that harkened to the toxic (and demonstrably false) notion that Black people disproportionately rely on government assistance. J.A. 1819.[5] When this same supervisor "joked" with a white female coworker that she could not "take" a Black man's "banana" (referring to his penis) because she would "slip and fall in her va-jay-jay juice," J.A. 1823, that comment equated Black men to monkeys, and "monkey imagery has been significant in racial

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[3] *See, e.g.*, Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624, 629–30 (1985) (discussing how the belief "that Afro-Americans were permanently and inherently inferior" was used to justify legal segregation).

[4] Mr. Swindell argues that the coworker who made these comments, Rob Harrison, was a supervisor for Title VII purposes. *See* Appellant's Br. at 39–41. The district court held otherwise. *See* J.A. 2065–66. LDF submits that given the frequency and severity of the racially charged comments, this distinction is immaterial to the question whether Mr. Harrison's comments contributed to an abusive work atmosphere. *See Equal Emp't Opportunity Comm'n v. Cent. Wholesalers*, Inc., 573 F.3d 167, 176–77 (4th Cir. 2009) (concluding discriminatory acts and comments by non-supervisory co-workers could be perceived by a reasonable person to have created a hostile work environment).

[5] Andrea Freeman, *You Better Work: Unconstitutional Work Requirements and Food Oppression*, 53 U.C. Davis L. Rev. 1531, 1549 (2020) (discussing "the racist trope of the 'Welfare Queen'").

harassment [cases]." *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (cited with approval in *Boyer-Liberto*). Not only that, but this demeaning comment played on the racist trope of Black men having "bestial sexual predilection[s]," which as this Court made plain, is "acutely insulting to members of the African-American community." *Boyer-Liberto,* 786 F.3d at 283 (quotation marks omitted) (reversing grant of summary judgment where supervisor called plaintiff a "porch monkey"). These comments were not just "mere offensive utterance[s] . . . ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). They were "degrading and humiliating in the extreme." *Spriggs*, 242 F.3d at 185 (citation omitted).

Below, the defendants did not contest that Mr. Swindell subjectively believed that the workplace was hostile because of these extremely offensive comments. J.A. 2057–58. Nor could they. As Mr. Swindell testified: there were just "so many comments." J.A. 1778. He did not "want to have to come to a work environment where [they were] supposed to be supporting troops and supporting the government and have to sit [there] and hear these comments because [he is] black or overhear comments that demean black people." J.A. 1810–11. He did not "think [he] could have taken any more harassment and discrimination just for being black." J.A. 1777.

Rather, the district court held that Mr. Swindell's hostile work environment claim failed because no reasonable juror could find that the harassment that Mr. Swindell suffered was objectively severe or pervasive enough to create a hostile work environment under Title VII. *See* J.A. 2058. The district reached this conclusion by first noting that "only four of the ten comments were directed at Swindell." *Id.* The

district court then reasoned that although the comments were "insensitive, offensive utterances," because they did "not include physical threats directed at Swindell," "did not concern a disciplinary action or termination decision directed at Swindell," and "were unrelated to [any] negative performance feedback," "no rational jury could find the offensive utterances sufficiently severe or pervasive to create a racially hostile work environment under Title VII." *Id.* (citations omitted).

The district court's "overly cramped view" of Title VII is inconsistent with binding precedent. *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 224 (4th Cir. 2016). First, the district court's ruling is contrary to Supreme Court precedent. The Court has unequivocally stated Title VII "is not limited to 'economic' or 'tangible' discrimination." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). As the Court explained, Title VII is comprehensive in scope, and looks at the "[t]he real social impact of workplace behavior," which "often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 81–82. Indeed, the Court has held that a workplace "permeated with discriminatory intimidation, ridicule, and insult" can be "sufficiently severe or pervasive to alter the conditions of the victim's employment[.]" *Harris,* 510 U.S. at 21 (quotation marks and internal citations omitted). Such an environment, said the Court, is actionable under Title VII because it is likely to "detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 23.

Second, the district court's ruling, by focusing on how many of the comments were directed at Mr. Swindell, is also contrary to this Court's precedent. This Court has made clear that racist comments need not be directed at a plaintiff to give rise to an objectively hostile work environment. Indeed, this Court has held that the idea that racial comments must be targeted at the plaintiff "finds no support in the law." *Spriggs*, 242 F.3d at 184 (reversing grant of summary judgment where plaintiff's supervisor incessantly used "racial slurs" in front of him, none of which were directed at plaintiff). In any event, the fact that four racially-charged comments *were* expressly directed at Mr. Swindell during his first seven weeks on the job is less indicative of "offhand comments," *Boyer-Liberto*, 786 F.3d at 272 (citation omitted), and instead signifies a workplace "permeated with discriminatory intimidation, ridicule, and insult[.]" *Harris*, 510 U.S. at 21 (citation omitted). Contrary to the district court's reasoning, the existence of four separate racially harassing comments directed at Mr. Swindell cuts in favor of Mr. Swindell's hostile work environment claim, not against it. *See, e.g.*, *Spriggs*, 242 F.3d at 185 (concluding that the existence of racially charged comments, although not directed at the plaintiff, created a hostile work environment).

Third, this Court has emphasized that "whether harassment was sufficiently severe or pervasive is quintessentially a question of fact" better left for the jury. *Guessous*, 828 F.3d at 227 (quoting *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 208 (4th Cir. 2014)). Here, a jury should decide the "quintessentially" factual question of whether Mr. Swindell's workplace was sufficiently severe or pervasive given the "frequency of the discriminatory conduct." *Id.* at 227 (citation omitted). The comments

Mr. Swindell faced reflected a range of the most odious anti-Black stereotypes. And as Mr. Swindell testified, from the moment he walked on the job, it seemed that every conversation was reduced to race. J.A. 1801. In light of the circumstances that Mr. Swindell endured, a "jury would certainly be entitled to reach [the] conclusion" that the comments made "the work environment [ ] abusive." *Guessous*, 828 F.3d at 227–28 (quoting *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995)).

Mr. Swindell faced precisely the type of work environment Congress intended to counteract by passing Title VII. *See Harris*, 510 U.S. at 21. Given the "frequent and highly repugnant insults" that were constant in his workplace, *Spriggs*, 242 F.3d at 185–86, a jury should decide whether the conduct Mr. Swindell complains of "sufficiently affect[ed] [his] conditions of employment . . ." *Harris*, 510 U.S. at 21. At a minimum, "reasonable minds could differ" as to whether the harassment was sufficiently severe or pervasive to render the work environment hostile, making summary judgment inappropriate. *See Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 208 (4th Cir. 2014) (citation omitted). This Court should reverse.

II. The District Court's Decision Minimized the Severity of the Racial Harassment Mr. Swindell Endured.

By being forced to endure ten statements evincing pernicious anti-Black stereotypes, including four that were specifically directed at him, Mr. Swindell experienced pervasive racial harassment. At a minimum, a reasonable jury could find the breadth of the harassment to be pervasive, and the district court erred by holding otherwise. The district court compounded its error by discounting the severity of the

harassment Mr. Swindell endured. The district court dismissed the significance of those comments as "insensitive[,] offensive utterances," emphasizing that they did "not include physical threats directed at Swindell," and "were unrelated to [any] negative performance feedback[.]" J.A. 2058–59. But the comments Mr. Swindell was forced to listen to in fact reflect the worst and most odious racial stereotypes, and most Black employees in Mr. Swindell's position would have found them offensive and unreasonable.

Title VII looks to whether a work environment was objectively abusive from the perspective a reasonable person *in the plaintiff's position*. *See Oncale*, 523 U.S. at 81 (requiring courts to judge the totality of the circumstances in a hostile work environment claim "from the perspective of a reasonable person in the plaintiff's position"); *see also Boyer-Liberto*, 786 F.3d at 277 (explaining that whether a workplace was objectively abusive under Title VII is assessed "from the perspective of a reasonable person in the plaintiff's position" (citing *Oncale*, 523 U.S. at 81)). This standard necessarily observes and analyzes the hostility of the workplace from the perspective of a person with the same relevant protected characteristic(s) as the plaintiff and after considering the relevant social context. *See Oncale*, 523 U.S. at 81–82. Some circuits have explicitly required that courts assess allegations of a hostile workplace from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff. *See Aman v. Cort Furniture Rental Co.*, 85 F.3d 1074, 1081 (3d Cir. 1996) (explaining that to make out a hostile work environment claim, a plaintiff must show "the discrimination would detrimentally affect a reasonable

person *of the same race* in that position . . .") (emphasis added). The Ninth Circuit explained the prudence of viewing the objective hostility of the workplace from the perspective of a reasonable person bearing the plaintiff's protected status:

> By considering both the existence and the severity of discrimination from the perspective or a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.

McGinest v. GTE Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004).[6] Incorporating the plaintiff's race or ethnicity into the objective reasonableness inquiry serves the important purpose of contextualizing complained-of comments and behavior within the lived experience of the average person from the same racial or ethnic background.[7] The Third and Ninth Circuits have recognized that perception remains a central problem to the recognition of racially discriminatory "jokes" and comments in the workplace as discrimination, and thus encourage lower courts to employ an "appropriate sensitivity" by viewing the complained-of discrimination as a reasonable person like the plaintiff would. *See Oncale*, 523 U.S. at 82.

By contrast, using a "reasonable person" standard that ignores the perspective of a person of the same racial or ethnic group as the plaintiff risks allowing the

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[6] *See also* Melissa K. Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. Cal. L. Rev. 1437, 1454 (2003) ("Without an understanding of the historical development and social function of racial jokes, those who never experienced pervasive racial oppression cannot comprehend the devastating impact of hostile racial humor on targeted minorities.").

[7] *See* Brief of Civil Rights Leaders as Amici Curiae in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, *Hithon v. Tyson Foods, Inc.*, No. 08-16135-BB (11th Cir. Oct. 16, 2010) (examining the pernicious social and historical context of white people's use of the word "boy" to a Black employee).

perceptions of white people to define the "reasonable" understanding of racially charged comments targeting people of color.[8] "This possibility is particularly ominous in light of the fact that many white[people] may not be aware that certain remarks or behavior are offensive to most . . . minorities."[9] The Second Circuit in *Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 321 (2d Cir. 1999), made the similar observation that the majority of white people "might well not be aware that certain remarks or displays are offensive to most" Black people. The court warned that this truth created the risk that a "reasonable person" standard that failed to consider the race of the plaintiff "might turn out to [perpetuate] the very stereotypical views that Title VII is designed to outlaw in the workplace." *Id.*

The proper "reasonable person" focus requires courts to take into account not only the historical context of the complained-of comment from the perspective of a Black employee, but also to see and credit the detrimental impact these comments have on Black employees. Black people's work conditions are often adversely impacted, not by *direct* threats of physical harm and disciplinary action or termination, but by the presence of humiliating and persistent racist banter and the use of anti-Black racist tropes and comments in the workplace.[10] These jokes often build "on the historical and cultural contexts of slavery, minstrel shows, and biological theories that defined [Black people] as . . . inferior to [white people].[11] They

[8] *See* Hughes, *supra* note 6, at 1472–73.
[9] *Id.*
[10] Penny Nathan Kahan & Lori L. Deem, *Current Developments in Employment Law: Sex and Race Harassment Update*, in *30th Annual Institute on Employment Law*, at 1268 (PLI Litig. & Admin. Practice Course, Handbook Series No. 664, 2001).
[11] Hughes, *supra* note 6, at 1454.

invoke anti-Black racial attitudes that not only harken back to a violent racial past, but import this violence and racism into the workplace. The constant barrage of jokes invoking these stereotypes in the workplace can cause stigmatization that results in feelings of self-doubt, humiliation, and self-humiliation among Black employees.[12] *See also Harris*, 510 U.S. at 370–71 (observing that "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers[,]" and can "destroy completely the emotional and psychological stability of minority group workers") (citation omitted).

"[A]n appropriate sensitivity to social context" compels the conclusion that, from the perspective of a reasonable person in Mr. Swindell's position, Mr. Swindell suffered severe and pervasive harassment that resulted in a hostile work environment under Title VII. *Oncale*, 523 U.S. at 82. Over the course of just a couple of months, during his already-short tenure working for the defendants, Mr. Swindell was directly subjected to or came within earshot of racist or racially insensitive jokes and comments that expressly invoked some of the most offensive racial tropes there are. Many of them have played a historical role in justifying and perpetuating racial

[12] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 89, 91 (Robert W. Gordon & Margaret Jane Radin eds., 1993). Psychologist Kenneth Clark explains "[h]uman beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth." *Id.* (alterations in original).

violence and discrimination, both inside and outside the workplace. A reasonable Black person in Mr. Swindell's position could certainly perceive comments deeming Black people genetically inferior, using sexualized and animalistic imagery to describe Black men, and suggesting that all Black people are on government assistance as objectively abusive. *Id*. at 81–82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances . . . which are not fully captured by a simple recitation of the words used or the physical acts performed."). The district court's treatment of Mr. Swindell's allegations of harassment as being merely "offensive" and otherwise not impacting Mr. Swindell's work performance was wrong. This Court should reverse and make clear that Title VII's objective inquiry must take into account whether a reasonable Black person would find the racially discriminatory comments to constitute harassment.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Dated February 3, 2021

Respectfully Submitted,

/s/ Daniel S. Harawa

Daniel S. Harawa*
Of Counsel
Mahogane D. Reed
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

Sherrilyn A. Ifill
President and Director-Counsel
Janai S. Nelson
Samuel Spital
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
P: (212) 965-2200

Counsel for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(g)(1) and Circuit Rules of the United States Court of Appeals for the Fourth Circuit 29 and 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Century Schoolbook 12-point font, with footnotes in Century Schoolbook 11-point font. This brief consists of 3,630 words, excluding those items noted in Federal Rule of Appellate Procedure 32(f). This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

Dated: February 3, 2021

/s/ Daniel S. Harawa

Daniel S. Harawa*
Of Counsel
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2021, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 3, 2021

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Of Counsel
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Washington, DC 20005
P: (202) 682-1300
dharawa@naacpldf.org

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 20-2179 as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

_____
(signature)

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Daniel S. Harawa (Of counsel) Name (printed or typed)	(202) 682-1300 Voice Phone
NAACP Legal Defense & Educational Fund Firm Name (if applicable)	_____ Fax Number
700 14th Street NW, Suite 600 Washington, DC 20005 Address	dharawa@naacpldf.org E-mail address (print or type)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-2179 Caption: Swindell v. CACI NSS, INC., f/k/a L-3 National Security Solutions, Inc.; Quick Services, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

NAACP Legal Defense & Educational Fund, Inc.
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 2/3/2021

Counsel for: NAACP Legal Defense & Educational Fund, Inc.

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