No. _____

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

CATASTROPHE MANAGEMENT SOLUTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Chastity Jones, an African-American woman, was hired for a position at a call center by Catastrophe Management Solutions, Inc. ("CMS"). CMS then rescinded her job offer solely because Ms. Jones's hair was in natural locs (or "dreadlocks"), which CMS's Human Resources Manager contended "tend to get messy" and therefore violated CMS's grooming policy. The United States Court of Appeals for the Eleventh Circuit upheld the dismissal of the Complaint, on the ground that Title VII does not prohibit discrimination based on "mutable" characteristics. This decision contravenes controlling precedent in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where this Court ruled that Title VII prohibits discrimination on the basis of stereotypes—in that case, concerning the "mutable" traits of a female employee's demeanor, dress, and hairstyle.

The question presented is:

Whether an employer's reliance on a false racial stereotype to deny a job to an African-American woman is exempt from Title VII's prohibition on racial discrimination in employment solely because the racial stereotype concerns a characteristic that is not immutable.

PARTIES TO THE PROCEEDING

Petitioner Chastity Jones is an individual and citizen of Alabama who was the real party in interest in the proceedings below. The Equal Employment Opportunity Commission ("EEOC") was the plaintiff and appellant in the proceedings below and brought this action based on its investigation of Ms. Jones's charge of discrimination. Respondent Catastrophe Management Solutions, Inc. was the defendant and appellee in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Counsel for Ms. Jones, the NAACP Legal Defense and Educational Fund, Inc., is a non-profit organization that has not issued shares of stock or debt securities to the public and has no parent corporation, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eleventh Circuit, affirming the judgment of the district court, is reported at 852 F.3d 1018 (11th Cir. 2016), and is reproduced at App. 1a-33a. The opinion of the United States Court of Appeals for the Eleventh Circuit, denying a petition for rehearing en banc, with accompanying concurring and dissenting opinions, is reported at 876 F.3d 1273 (11th Cir. 2017), and is reproduced at App. 48a-86a. The opinion of the United States District Court for the Southern District of Alabama, dismissing the EEOC's Title VII claim, is reported at 11 F. Supp. 3d 1139 (S.D. Ala. 2014), and is reproduced at App. 34a-45a. The opinion of the United States District Court for the Southern District of Alabama, denying leave to file the Amended Complaint, is unreported and is reproduced at App. 46a-47a.

JURISDICTION

The court of appeals entered its judgment on December 13, 2016. The EEOC filed a timely petition for rehearing en banc on December 23, 2016, which the court of appeals denied on December 5, 2017. On February 28, 2018, this Court extended the time for Ms. Jones to file a petition for writ of certiorari by 30 days. Order on Application No. 17A902. With this petition, Petitioner also files a motion for leave to intervene in this case. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 703(m) of Title VII of the Civil Rights Act of 1964 provides:

> (m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

STATEMENT OF THE CASE

In enacting Title VII, Congress intended "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In an age where employment discrimination rarely presents itself in policies that explicitly exclude employees based on skin color, the vitality of Title VII depends on its ability to root out more subtle practices—facially neutral policies, racial proxies, stereotyped thinking—that still operate to disfavor applicants based on their race. The economic security and dignity of working people depend on the application of Title VII to remove discriminatory obstacles from the path of equal employment opportunity.

The decision below diverges from this Court's precedents by categorically insulating a form of discrimination from Title VII's reach: employment decisions motivated by racial stereotypes but expressed as restrictions on "mutable" characteristics. This Court should grant certiorari because reading an immutability requirement into Title VII is inconsistent with this Court's decisions and an outlier position among the courts of appeal. Policies unrelated to merit or job function but based on racial stereotypes have no place in a fair and equal workplace.

I. CMS Rescinds Ms. Jones's Job Offer Because of Her Locs.

Chastity Jones, an African-American woman, applied online for a position as a Customer Service Representative with Catastrophe Management Solutions, Inc. that entailed handling claims processing at a call center. Am. Compl. ¶ 10, ECF No. 21-1. The position did not require in-person contact with customers or the public. *Id.* CMS invited Ms. Jones to an in-person interview, to which she wore a blue business suit with dark pumps. *Id.* ¶ 12. At the time, Ms. Jones had short, well-kept locs (or "dreadlocks").[1] Shortly after the interview, CMS's Human Resource Manager, Jeannie Wilson, informed Ms. Jones and other selected applicants that they were hired. *Id.* ¶ 14.

After telling Ms. Jones that she was hired, Ms. Wilson and Ms. Jones had a private meeting about scheduling. *Id.* ¶ 15. In that meeting, Ms. Wilson asked Ms. Jones whether her hair was in "dreadlocks." *Id.* ¶ 16. When Ms. Jones answered affirmatively, Ms. Wilson informed her that CMS could not hire her with her locs. *Id.* Ms. Jones asked why her hair was a problem, and Ms. Wilson stated

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[1] Except where quoting the record below, this petition uses the term "locs" to describe Ms. Jones's hair and similar styles worn by innumerable Black persons across professions. Some prefer the term "locs" or "locks," as the term "dreadlocks" originated from the historical disparagement of Black slaves. *See* Am. Compl. ¶ 20; Brown White, *Releasing the Pursuit of Bouncin' and Behavin' Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 Int'l J. Media & Cultural Pol. 295, 296 n.3 (2005) ("[T]he term *dreadful* was used by English slave traders to refer to Africans' hair, which had probably loc'd naturally on its own during the Middle Passage.") (emphasis added).

that locs "tend to get messy, although I'm not saying yours are, but you know what I'm talking about." *Id.* Ms. Jones refused to cut off her hair, and Ms. Wilson told her that CMS would not hire her and asked her to return the paperwork for new hires.

At the time, CMS had a written grooming policy, which stated: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . hairstyle[s] should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable . . . ." *Id.* ¶ 17. The policy did not expressly refer to locs or dreadlocks. *Id.* ¶ 18. Ms. Jones had short locs, and CMS did not suggest her hairstyle was "excessive." Instead, CMS interpreted its policy to prohibit locs based on the stereotype that they tend to "get messy" and withdrew Ms. Jones's offer of employment on that basis, despite assuring her that her own hair did not fit that description. *Id.* ¶ 16.

Locs are a style commonly worn by people of African descent, in which natural Black hair forms into larger coils. *Id.* ¶¶ 8, 19. In our society, locs are generally associated with Black people. *Id.* ¶ 26. The texture of Black hair makes it conducive to the development of locs, which can be formed with manipulation ("cultivated locs") or without ("freeform locs"). *See id.* ¶ 19. Numerous prominent Black Americans—especially in the arts and the academy—wear locs, including Toni Morrison, Alice Walker, Ava DuVernay (film director), Heather Williams (former Assistant Attorney General for the State of New York), Angela Smith Jones (Deputy Mayor of Indianapolis and a former leader of the Indianapolis

Chamber of Commerce), Vincent Brown (Harvard professor), and many less well-known individuals.[2]

Yet, locs are often the target of scorn and derision based on long-held stereotypes that natural Black hair is dirty, unprofessional, or unkempt. Am. Compl. ¶¶ 27, 30. Indeed, the term "dreadlocks" originated from slave traders' descriptions of Africans' hair that had naturally formed into locs during the Middle Passage as "dreadful." *Id.* ¶ 20.

The stereotype that Black natural hairstyles are dirty or unkempt and therefore not appropriate for more formal settings remains unfortunately widespread. For example, until 2014, the U.S. military banned a number of common Black hairstyles, including cornrows and braids.[3] School administrators and dress codes also often restrict Black natural hairstyles, and in one dramatic recent episode, a school principal reportedly took scissors to a Black student's locs.[4]

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[2] Nikki Brown, *Why the #ProfessionalLocs Hashtag Still Matters*, ESSENCE (Oct. 25, 2016), https://www.essence.com/beauty/professionallocs-hashtag (compiling photos and statements of Black professionals with locs).

[3] David S. Joachim, *Military to Ease Hairstyle Rules After Outcry from Black Recruits*, N.Y. TIMES (Aug. 14, 2014), https://www.nytimes.com/2014/08/15/us/military-hairstyle-rules-dreadlocks-cornrows.html.

[4] David Moye, *Mom Accuses Principal of Cutting Her Son's Hair Without Permission*, HUFF. POST (Mar. 28, 2018), https://www.huffingtonpost.com/entry/mississippi-boy-hair-locs-cut-principal_us_5abbfa33e4b03e2a5c78e34d; *see also* Kayla Lattimore, *When Black Hair Violates the Dress Code*, NPR (July 17, 2017), https://www.npr.org/sections/ed/2017/07/17/534448313/when-black-hair-violates-the-dress-code (describing two Black

The belief that natural hairstyles for Black women are inappropriate in the workplace has particular and longstanding currency. A recent study found that White women, on average, show explicit bias against "black women's textured hair," rating it "less professional than smooth hair."[5] And that stereotype is communicated to Black women in a variety of ways. For example, at a 2007 event hosted by a prominent law firm, a Glamour editor told a roomful of female attorneys that "afro-styled hairdos and dreadlocks are Glamour don't's."[6]

Given these attitudes about their hair, it is no surprise that a recent study found many Black women feel pressure to straighten their hair for work.[7] In

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students punished for wearing braids); Crystal Tate, *16-Year-Old Black Student with Natural Hair Asked by School to "Get Her Hair Done,"* ESSENCE (May 16, 2017), https://www.essence.com/hair/natural/black-student-natural-hair-asked-to-get-hair-done.

[5] *See* ALEXIS M. JOHNSON, ET AL., THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 6, PERCEPTION INSTITUTE (Feb. 2017), https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf.

[6] Tania Padgett, *Ethnic Hairstyles Can Cause Uneasiness in the Workplace*, CHICAGO TRIBUNE (Dec. 12, 2007), http://articles.chicagotribune.com/2007-12-12/features/0712100189_1_hair-glamour-dreadlocks; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 367, 368 n.7 (Apr. 1991) (describing Hyatt's firing of an African-American woman for wearing her hair in braids; in justifying the firing, Hyatt's personnel manager stated: "What would our guests think if we allowed you to wear your hair like that?").

[7] *See* JOHNSON, "GOOD HAIR" STUDY, *supra* note 5 at 12; Carla D. Pratt, *Sisters in Law: Black Women Lawyers' Struggle for Advancement*, 2012 Mich. St. L. Rev. 1777, 1784 (2012).

other words, many Black women who wish to succeed in the workplace feel compelled to undertake costly, time-consuming, and harsh measures to conform their natural hair to a stereotyped look of professionalism that mimics the appearance of White women's hair. Professor Paulette Caldwell described this fraught choice:

> For blacks, and particularly for black women, [hairstyle] choices . . . reflect the search for a survival mechanism in a culture where [their] social, political, and economic choices . . . are conditioned by the extent to which their physical characteristics, both mutable and immutable, approximate those of the dominant racial group.[8]

In this case, there was nothing subtle or indirect about the pressure on Ms. Jones to change her natural hairstyle if she wanted to succeed at work. Based on stereotyped assumptions about Ms. Jones's natural hair, CMS's human resources manager told Ms. Jones she would have to either cut off her locs or lose her offer of employment.

II. Proceedings in the District Court

After CMS rescinded its job offer, Ms. Jones timely filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Am. Compl. ¶ 6. In September 2013, the EEOC filed this action against CMS on Ms. Jones's behalf, alleging that CMS engaged in intentional race-based discrimination in violation of Title VII, seeking monetary relief for Ms. Jones and an injunction. App.

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[8] Caldwell, *A Hair Piece*, *supra* note 6 at 383.

2a. The Complaint alleged that CMS discriminated against Ms. Jones based on her race by interpreting its grooming policy to require her to cut off her locs as a condition of her employment. Compl. ¶¶ 9-13, ECF No. 1. Jurisdiction was proper under 28 U.S.C. §§ 1331, 1337, 1343, and 1345. *Id.* ¶ 1.

CMS moved to dismiss the Complaint. Asserting that employees "can control their dress, makeup, and hair styling," CMS contended its policy against locs was outside the scope of Title VII because it did not apply to immutable characteristics. Def.'s Mot. to Dismiss 2, ECF No. 7.

In January 2015, the district court granted CMS's motion, relying on *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), which predates this Court's decision in *Price Waterhouse*. App. 39a-41a, 44a. The district court concluded that Title VII's protections are limited to discrimination on the basis of immutable characteristics, which excludes "a hairstyle, even one more closely associated with a particular ethnic group." App. 42a. In rejecting arguments that locs are a racial identifier and that CMS's decision not to hire Ms. Jones was based on a racial stereotype, the district court reasoned that locs are not "exclusive[ly]" worn by Blacks and are "not inevitable and immutable" despite being "a reasonable result of [Black] hair texture, which is an immutable characteristic." App. 44a. The district court also denied the EEOC's motion for leave to amend, finding that the Amended Complaint "offers nothing new" and would be futile in light of the court's interpretation of Title VII. App. 46a-47a. The EEOC timely filed an appeal. App. 7a.

III. Proceedings in the Eleventh Circuit Court of Appeals

In its appeal, the EEOC argued that the district court erred in holding that the EEOC had not pleaded a prima facie case of disparate treatment. The EEOC contended that the district court wrongly characterized its claim as merely concerning a grooming requirement divorced from its racial context. Appellant's Br. at 18. The EEOC pointed out that its Amended Complaint contained detailed allegations about the nexus between locs and race, which supported a claim that the adverse employment action against Ms. Jones was intentional race-based discrimination. *Id.* Among other allegations, the Amended Complaint pleaded that CMS's stated reason for prohibiting locs (they "tend to get messy") was based on stereotypes about Black natural hair and a preference for White hair conventions. *Id.* at 12, 31-32. The EEOC argued that in light of these allegations, the district court erred in dismissing the Complaint and denying leave to amend. *Id.* at 13.

In December 2016, the Eleventh Circuit affirmed the district court's decision.[9] The court held that the EEOC's Amended Complaint[10] did not state a claim of

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[9] The Eleventh Circuit issued a prior opinion in September 2016, but subsequently withdrew and replaced that opinion in December. 837 F.3d 1156 (11th Cir. 2016), *withdrawn and superseded*, 852 F.3d 1018 (11th Cir. 2016). This petition discusses only the latter opinion.

[10] As the Eleventh Circuit recognized, the operative allegations here are those in the Amended Complaint. App. 6a. ("Like the district court, we accept as true the well-pleaded factual allegations in the proposed amended complaint."). Unless

intentional discrimination because Title VII prohibits discrimination on the basis of "immutable characteristics," and the EEOC did not allege that locs are an immutable trait of Black persons. App. 2a. Noting that Title VII did not define the word "race," the panel surveyed dictionaries contemporaneous with the passage of the Civil Rights Act of 1964, concluding that "'race' as a matter of language and usage, referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time." App. 14a-17a. The panel determined that "immutable" was an apt term to describe such characteristics, while conceding that the word did not appear in any of the definitions of "race" in the dictionaries it consulted. *Id.*

Viewing itself bound by *Willingham* (holding employer's policy about hair length for male employees was not sex discrimination), and *Garcia v. Gloor*, 618 F. 2d 264 (5th Cir. 1980) (holding employer's English-only rule was not discrimination on the basis of national origin), the panel further concluded that circuit precedent dictated that Title VII applies to protected classes "with respect to their immutable characteristics, but not their cultural practices." App. 22a. The panel did not cite *Price Waterhouse* or discuss its effect on *Willingham* or *Garcia*. The panel recognized that one of the EEOC's arguments for reversal was that CMS's application of its grooming policy to deny Ms. Jones's employment constituted racial stereotyping in violation of Title VII, App. 9a, but it did not address that argument.

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otherwise noted, the Petition therefore refers to the "Amended Complaint" as the "Complaint."

While acknowledging the difficulty in administering an immutable/mutable distinction, the panel nevertheless concluded that it was required by Title VII. App. 22a-23a. In the panel's view, that distinction allowed it to reconcile its decision in this case with *Jenkins v. Blue Cross Mut. Hosp. Ins.,* 538 F. 2d 164 (7th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 986 (1976), which recognized that discrimination against a Black employee for wearing her hair in an afro violated Title VII. *Id.* The panel did not, however, explain why afros should be considered immutable but locs mutable: both are natural Black hairstyles but neither is unchangeable.

The EEOC petitioned the Eleventh Circuit to rehear the case en banc. The EEOC maintained that it had stated a plausible claim of race discrimination, specifically, that CMS's "interpretat[ion of] its appearance policy to impose a per se ban on dreadlocks" evinced a preference for "Caucasian hair and style standards" and placed on Black applicants the burden of meeting those conventions. Appellant's Pet. for Reh'g at 6-7. The EEOC criticized the panel's immutability standard as inconsistent with *Price Waterhouse* and leading to absurd distinctions between afros and locs. *Id.* at 10-12.

The Eleventh Circuit denied the petition for rehearing en banc. Judge Martin, joined by Judges Rosenbaum and Jill Pryor, dissented. Judge Martin argued that *Willingham*'s immutability standard is no longer good law in light of *Price Waterhouse*, in which this Court recognized a Title VII claim where an employer's decision was based on sex stereotypes concerning mutable characteristics, including dress, demeanor, and hairstyle. App. 67a-69a (Martin, J., dissenting). The dissent also criticized the

immutability standard as unadministrable and tangential to the key question of whether an employer who refuses to hire a Black applicant based on a racial stereotype has been motivated by race. App. 73a-76a, 85a. The dissent explained that the Amended Complaint stated a plausible claim of disparate treatment because it alleged that CMS refused to hire Ms. Jones based on "the false racial stereotype" that Black natural hair is "unprofessional, extreme, and not neat," expressed by the assumption that locs "tend to get messy" even while acknowledging that description did not in fact apply to Ms. Jones's hair.[11] App. 60a, 76a-81a.

Judge Jordan concurred in the denial of rehearing. Judge Jordan acknowledged that under *Price Waterhouse*, when an employer targets a mutable trait that is linked by stereotype to a protected class, then discrimination on the basis of that protected class has occurred; nonetheless, he concluded that *Willingham*'s immutability standard survived *Price Waterhouse*. App. 51a.

REASONS FOR GRANTING THE WRIT

In departing from this Court's precedent, the Eleventh Circuit constricted one of the nation's most important civil rights statutes, which is designed to protect the dignity of workers and ensure that an individual's race does not limit her employment opportunities.

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[11] The dissent also concluded that the panel's analysis was flawed even when applying the immutability standard because the Amended Complaint contained allegations that locs are immutable. App. 81a-83a.

Based on the well-pleaded allegations in the EEOC's Amended Complaint, CMS refused to hire Chastity Jones, an African-American woman, because CMS's representative believed that Mr. Jones's natural hairstyle violated the company's grooming policy, specifically because of the assumption that it would "tend to get messy." In other words, "the complaint indicated that CMS's only reason for refusing to hire Ms. Jones was [a] false racial stereotype." App. 60a (Martin, J., dissenting). The Complaint stated a straightforward claim for relief under Title VII's disparate-treatment standard.

The Eleventh Circuit, however, affirmed the district court's dismissal of the case on the ground that Ms. Jones's hairstyle was not an "immutable characteristic," and that CMS's discrimination against her was therefore beyond the purview of Title VII. That reasoning is squarely foreclosed by this Court's precedent. This Court has ruled that Title VII reaches the full spectrum of employment discrimination related to race, color, religion, sex, or national origin. Consistent with this principle, the Court has specifically held that Title VII prohibits discrimination based on stereotypes relating to one of these protected categories, even when those stereotypes do not concern "immutable characteristics." Stereotypes about appropriate grooming in the workplace that disqualify natural African-American hairstyles violate Title VII just as employers who favor narrow and stereotypical standards of appropriate hairstyles and dress for women violate Title VII's prohibition against gender discrimination. Because the Eleventh Circuit has decided an important issue of federal law in a manner

that departs from this Court's precedent, certiorari is warranted. Sup. Ct. R. 10(c).

Certiorari is also warranted because the Eleventh Circuit's decision conflicts with the decisions of other federal courts of appeals on this important issue. *See* Sup. Ct. R. 10(a). Applying this Court's precedent, courts in the First, Second, Third, Fifth, Sixth, Seventh, and Eighth Circuits have held that Title VII reaches discrimination based on stereotypes, without any "immutable characteristic" limitation. Further, the Seventh Circuit Court of Appeals has held that Title VII prohibits an employer from taking adverse action against a Black woman because, just like Ms. Jones here, she wore a natural hairstyle to work. Contrary to the Eleventh Circuit's decision below, nothing in the statute or this Court's precedent authorizes federal courts to distinguish among different Black natural hairstyles in deciding whether an employer's stereotyped-based racial discrimination is prohibited by Title VII.

I. The Decision Below Contradicts this Court's Title VII Precedent Forbidding Stereotype-Based Discrimination.

This Court has held that Title VII "'prohibit[s] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.'" *Washington County v. Gunther*, 452 U.S. 161, 180 (1981) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)). The statute requires "fair and racially neutral employment and personnel decisions," and it "tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Title VII's strict prohibition on "discrimination, subtle or otherwise" includes discrimination based on stereotypes. As this Court has stated with respect to sex: "'In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.'" *Washington County*, 452 U.S. at 180 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis in *Washington County*). In other words, "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Manhart*, 435 U.S. at 707. Indeed, "[t]he statute's focus on the individual" means that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708. Thus, "[i]f height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short." *Id.*

These principles likewise forbid "employment decisions . . . predicated on mere 'stereotyped' impressions about the characteristics" of any racial group. *Id.* Race, like sex, is an expressly protected category under Title VII, and eradicating racial discrimination in employment was Congress's principal goal in enacting the statute. "'[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'" *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) (quoting 110 Cong. Rec. 7247). Indeed, while an employer's bona fide occupational qualification is a lawful defense to a claim of sex discrimination, there is no comparable defense to a claim of race

discrimination. 42 U.S.C. § 2000e-2(e). As this Court explained in *Manhart*, Title VII was "designed to make race irrelevant in the employment market." 435 U.S. at 709.

Far from being "irrelevant," race was central to CMS's decision to refuse to hire Ms. Jones. Specifically, CMS's representative relied on a racial stereotype that Ms. Jones's natural hairstyle could, in the future, make her appearance unprofessional. CMS's representative told Ms. Jones that CMS could not hire her "with the dreadlocks," because "'they tend to get messy, although I'm not saying yours are, but you know what I'm talking about.'" Am. Compl. ¶ 16. In other words, the Complaint alleged that CMS's stated concern about locs "did not apply to Ms. Jones, as the human resources manager acknowledged Ms. Jones's hair was not messy," thereby indicating "that CMS's only reason for refusing to hire Ms. Jones was the false racial stereotype." App. 60a (Martin, J., dissenting). The Amended Complaint further alleged that locs are "physiologically and culturally associated with people of African descent," Am. Compl. ¶ 28, and it explained the racialized nature of the stereotype that locs are unprofessional or will inevitably get messy, a belief "premised on a normative standard and preference for White hair," *id.* ¶ 30. This belief dates back to slavery itself, during which slave traders referred to slaves' hair as "dreadful" because, during the forced transport of Africans across the Atlantic, their hair would become matted with blood, feces, urine, sweat, tears, and dirt. *Id.* ¶ 20. The Amended Complaint explained how this stereotype has persisted over time to shape assumptions about Black employees who wear

natural hairstyles in professional settings. *Id.* ¶¶ 27, 30.

Yet, despite CMS's express reliance on a common racial stereotype that Black natural hair is "messy" to deny Ms. Jones employment, the district court granted CMS's motion to dismiss, and the Eleventh Circuit affirmed. For both courts, the dispositive fact requiring dismissal of the disparate-treatment claim was that the EEOC had not alleged that locs are "immutable traits" or "immutable characteristics" of Black people. In the Eleventh Circuit's words, "our precedent holds that Title VII prohibits discrimination based on immutable traits, and the proposed amended complaint does not assert that dreadlocks—though culturally associated with race—are an immutable characteristic of black persons." App. 2a; *see also* App. 22a-23a (similar); App. 42a (district court opinion) (holding that the complaint failed to state a claim because Ms. Jones's "hairstyle . . . is a mutable characteristic").

The lower courts' reasoning finds no support in Title VII, and it is contrary to this Court's precedent that Title VII reaches the full spectrum of employment discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is directly on point. In that case, Ann Hopkins presented evidence that she was denied a promotion because of her employer's sex-based stereotypes, but "[n]one of the traits the employer identified as its reasons for not promoting Ms. Hopkins were immutable." App. 66a (Martin, J., dissenting). Instead, the stereotypes were that Ms. Hopkins's personality and appearance—including her hairstyle—were too masculine. In the words of one of the Price Waterhouse partners who advised Ms. Hopkins about why she was denied a promotion, she

should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, *have her hair styled*, and wear jewelry.'" *Price Waterhouse,* 490 U.S. at 235 (emphasis added).

Yet, far from rejecting Ms. Hopkins's claims on the basis that her employer's sex-based stereotypes involved mutable characteristics, this Court "held that discrimination on the basis of these traits, which Ms. Hopkins *could* but did not change, constituted sex discrimination. The Court explained that discrimination on the basis of these mutable characteristics—how a woman talks, dresses, or styles her hair—showed discrimination on the basis of sex." App. 66a (Martin, J. dissenting) (discussing *Price Waterhouse*).

Indeed, although members of this Court disagreed about other issues in *Price Waterhouse*, the Court was united on this point. The four-justice plurality explained that when an employer acts on "stereotypical notions about women's proper deportment," 490 U.S. at 256, it has "acted on the basis of gender" in violation of Title VII, *id*. at 250; *see also id*. at 251, 255. Similarly, in her opinion concurring in the judgment, Justice O'Connor recognized that Ms. Hopkins had provided "direct evidence of discriminatory animus," by proving that Price Waterhouse "'permitted stereotypical attitudes towards women'" to play a significant role in denying her a promotion. *Id*. at 271-72 (quoting Court of Appeals' decision). Because Ms. Hopkins had proven that sex-based stereotypes were a substantial factor in the denial of her promotion, the burden was on Price Waterhouse to show that it would have made the same decision even absent those stereotypes. *See id*. at 261, 272-73. Justice White, in a separate

opinion concurring in the judgment, agreed that Ms. Hopkins's evidence supported the district court's finding that an "unlawful motive was a substantial factor" in the denial of a promotion, such that the burden shifted to Price Waterhouse to show "'that it would have reached the same decision in the absence of' the unlawful motive."[12] *Id.* at 259-60 (citation, emphasis, and alteration omitted).

The dissent in *Price Waterhouse* also recognized that employment decisions based on sex-based stereotypes are forbidden by Title VII. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, explained that Ms. Hopkins had "presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process," such that the "decision was for the finder of fact," as to whether or not "sex discrimination caused the adverse decision." *Id.* at 295. In the dissent's view, however, the district court's findings showed that Ms. Hopkins was ultimately denied promotion

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[12] In the Civil Rights Act of 1991, Congress abrogated the aspect of *Price Waterhouse*'s holding related to the burden of proof in mixed motive cases. The 1991 Act added Section 703(m) to Title VII, clarifying that if discrimination on the basis of a protected category is "a motivating factor" for an employment decision, then a violation of Title VII has occurred, regardless of whether "other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 2000e-2(m)). The EEOC grounded its claims in the instant case in this section as well as Section 703(a). Compl. ¶7. While there is nothing in the record to suggest CMS's refusal to hire Ms. Jones was based on anything other than racial stereotypes about her hair, even if there were other considerations, the EEOC's claim remains valid because it has plausibly alleged that a false racial stereotype was "a motivating factor" in CMS's decision. 42 U.S.C. § 2000e-2(m).

for reasons other than Price Waterhouse's sex-stereotyped discrimination. *See id*. In other words, the dissent recognized that Title VII forbids stereotyped-based discrimination related to mutable characteristics. It simply concluded that Ms. Hopkins was not entitled to relief under Title VII because the district court (after a trial) had found that she was denied a promotion for reasons other than stereotyped-based discrimination. *See id*.

In sum, as Judge Martin explained in dissenting from the denial of rehearing below, "[t]he lesson of *Price Waterhouse* is clear. An employment decision based on a stereotype associated with the employee's protected class may be disparate treatment under Title VII even when the stereotyped trait is not an 'immutable' biological characteristic of the employee." App. 67a. Here, the well-pleaded allegations in the EEOC's Amended Complaint show that CMS made an "employment decision based on a stereotype associated with [Ms. Jones's] protected class," and therefore the Amended Complaint states a claim for disparate treatment even though "the stereotyped trait is not an 'immutable'" characteristic. *Id*.

In reaching a contrary conclusion, the Eleventh Circuit panel did not cite *Price Waterhouse*, nor did it attempt to explain how its reasoning was consistent with this Court's precedent holding that Title VII prohibits stereotyped-based discrimination. Indeed, although the panel acknowledged that the EEOC had argued that "targeting dreadlocks as a basis for employment can be a form of racial stereotyping," App. 8a-9a, it did not address that argument.

Judge Jordan did address *Price Waterhouse* in his opinion concurring in the denial of en banc rehearing,

which no other judge joined. However, his analysis only underscores the inconsistency between the panel's opinion and this Court's precedent. In his concurring opinion, Judge Jordan stated that *Price Waterhouse* "did not hold that Title VII protects mutable characteristics." App. 51a (Jordan, J., concurring). But the issue is not whether Title VII protects mutable characteristics, it is whether Title VII's prohibition on stereotyped-based discrimination includes stereotypes related to mutable characteristics. And, as Judge Jordan recognized, *Price Waterhouse* makes clear that Title VII does prohibit such discrimination because the stereotype connects the mutable trait to the protected category:

> [W]hen an employer makes a decision based on a mutable characteristic (demeanor) that is linked by stereotype (how women should behave) to one of Title VII's protected categories (a person's sex), the decision may be impermissibly based on a protected category, so the attack on the mutable characteristic is legally relevant to the disparate-treatment claim.

App. 52a.

That is as true here as it was in *Price Waterhouse*. CMS made a "decision based on a mutable characteristic" (natural hair locs) "that is linked by stereotype" (that Black natural hairstyles are unprofessional or tend to get messy) "to one of Title VII's protected categories" (race). *Id.*

The issue here is not whether locs are immutable, just as the issue in *Price Waterhouse* was not whether Ms. Hopkins hairstyle, dress, or comportment were

immutable. As Judge Martin explained, "*Price Waterhouse* teaches that, for purposes of Title VII, it does not matter whether the trait the employer disfavors is mutable or immutable. What matters is whether that trait is linked, by stereotype, to a protected category." App. 77a. (Martin, J., dissenting). Regardless of their mutability, locs are "linked, by stereotype, to [the] protected category" of race, *id.*, which means that the Amended Complaint states a plausible claim for race discrimination.

The Eleventh Circuit's contrary focus led it astray from the proper role of a federal court in applying Title VII. The panel sought to distinguish between discrimination targeting Black employees with afro hairstyles (protected under Title VII) and those with locs (supposedly unprotected under Title VII). App. 22a-23a. In defending that distinction, Judge Jordan asserted that an afro style is protected because—although not immutable in the sense that it cannot be altered—it is a Black person's hair in its "natural state." App. 55a. By contrast, he concluded that locs are unprotected because they are not "a black individual's hair in its natural, unmediated state." *Id*. But, Judge Jordan's distinction fails on its own terms. The EEOC's complaint specifically alleges that, just like an afro, locs are a "natural style," as they "are formed in a Black person's hair naturally, without any manipulation, or by the manual manipulation of hair into larger coils of hair." Am. Compl. ¶ 19. Furthermore, an afro is not a purely unmediated hairstyle but requires care and attention to develop and maintain the style, including routine detangling, moisturizing, and at times, the use of

braids during a growing-out phase.[13] The distinction between such "mediation" and that required for locs is arbitrary.

More important, Title VII does not authorize federal courts to inquire into how "natural" a Black person's hairstyle is, how much "mediation" is required as part of that style, or the degree to which a trait can be "masked" versus "alter[ed]" in determining whether a complaint should proceed. App. 55a. As Judge Martin explained, "[s]urely, the viability of Title VII cannot rest on judges drawing distinctions between Afros and dreadlocks." App. 85a. Both are presentations of Black natural hair. The panel's contrary "opinion requires courts and litigants to engage in a pseudo-scientific analysis of which racial traits occur naturally and which do not. This is not how we should be deciding claims of race discrimination." *Id*.

Finally, Judge Jordan stated that "[t]here is even disagreement over whether dreadlocks are exclusively (or even primarily) of African descent," citing a source for the proposition that the first written evidence of dreadlocks is in the Vedic scriptures, which are of Indian origin. App. 59a. (Jordan, J., concurring). But, for the reasons explained above, the issue in this case is not whether locs are exclusively or originally traits of Black people. The issue is whether, in denying Ms. Jones

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[13] *See generally* Funmi Fetto, *How to Guide: Tips for Caring for Afro Hair*, GLAMOUR (June 15, 2016), http://www.glamourmagazine.co.uk/article/how-to-care-for-afro-hair; John-John Williams IV, *Afros, Dreads, Natural Styles More Popular, Still Controversial*, BALT. SUN (Mar. 4, 2015), http://www.baltimoresun.com/features/fashion-style/bs-lt-natural-hair-20150304-story.html.

employment, CMS relied on a stereotype associated with Ms. Jones's race. This Court "need not leave . . . common sense at the doorstep" in applying Title VII. *Price Waterhouse*, 490 U.S. at 241 (plurality opinion). In this country and most others, locs are principally associated with people of African descent, as is the false stereotype that locs are or tend to get messy. As the Amended Complaint "clearly alleged, . . . dreadlocks are a stereotyped trait of African Americans," and the "perception that dreadlocks are 'unprofessional' and 'not neat' is grounded in a deep-seated white cultural association between black hair and dirtiness," which "has origins in slavery." App. 78a (Martin, J., dissenting) (citing amended complaint). At the motion to dismiss stage, those allegations raised a reasonable inference that the stereotype CMS relied on was related to Ms. Jones's race as an African-American woman. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (recognizing that a motion to dismiss should be denied when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

As such, the EEOC stated a claim for relief under Title VII.

For all the foregoing reasons, the Eleventh Circuit's decision in this case conflicts with the relevant decisions of this Court on a question of federal law. Sup. Ct. R. 10(c). And that question is an important one. It goes to the heart of the ability of Black women to compete in the workplace, free from stereotypes about whether their natural hair conflicts with a presentation of professionalism. As this Court has stressed in a Title VII case, "'[t]he prohibitions against discrimination contained in the Civil Rights

Act of 1964 reflect an important national policy.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)). "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239 (plurality opinion). By prohibiting racial discrimination in employment, the statute is designed to ensure that individuals have equal opportunities to obtain economic security and mobility regardless of race.

Here, the Eleventh Circuit misinterpreted Title VII as having no application to stereotype-based discrimination if the stereotyped trait is not immutable. "And it does so in very broad terms." App. 70a (Martin, J., dissenting). This case involves a hairstyle, but there is no basis for limiting the panel's holding that stereotype-based discrimination is not actionable unless the stereotype relates to an immutable characteristic. As a result, the "panel opinion forces courts in Alabama, Florida, and Georgia to close their eyes to compelling evidence of discriminatory intent." App. 76a. This is also not the first time the Eleventh Circuit has denied relief in a Title VII case by imposing a categorial rule that has no basis in this Court's precedent. *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (summarily vacating Eleventh Circuit decision that a manager's calling Black employees "boy" was categorically not probative of racial discrimination under Title VII).

Petitioner respectfully urges this Court to grant certiorari to address the direct inconsistency between the decision below and this Court's precedent.

II. The Decision Below Conflicts with Decisions of Other Federal Circuits Concerning Title VII's Prohibition on Stereotype-Based Discrimination.

As set forth *supra*, this Court's precedent is clear that Title VII reaches stereotype-based discrimination. Thus, it is unsurprising that the Eleventh Circuit is alone in holding that Title VII categorically does not apply to discrimination related to traits that are "mutable," even when the discrimination is rooted in stereotypes related to a protected category. Appellate courts in the First, Second, Third, Fifth, Sixth, Seventh, and Eighth Circuits, have each followed this Court's precedent and recognized that Title VII prohibits employment practices that are based on stereotypes related to mutable characteristics. Additionally, the First Circuit has explicitly recognized that this Court's holding in *Price Waterhouse* regarding gender-based stereotypes necessarily extends to racial stereotypes and, directly on point here, the Seventh Circuit has held Title VII prohibits an employer from taking adverse action against a Black woman because, like Ms. Jones, she had a natural hairstyle. The Eleventh Circuit's holding that Title VII cannot apply to discrimination related to a "mutable" characteristic, even if an adverse employment decision is based on a racial stereotype related to that characteristic, conflicts with the decisions of multiple other appellate courts and creates a circuit split on this important issue. Sup. Ct. R. 10(a).

A. The Majority of Circuits Follow *Price Waterhouse* Without Applying an Immutability Test.

Multiple circuits have followed this Court's reasoning in *Price Waterhouse* and held that discrimination based on stereotype is fully within Title VII's purview. In *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir. 2009), for example, the court of appeals held that the non-promotion of a woman with children was actionable because it was based on the gender-based stereotype that mothers, particularly those with young children, neglect their work duties due to childcare obligations. *Id.* at 42, 45-48. "Given what we know about societal stereotypes regarding working women with children," the First Circuit rejected the district court's conclusion that there was no evidence this stereotype was based on sex rather than a gender-neutral assumption about parents with children. *Id.* at 46-47.

In *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), the Second Circuit reversed the district court's entry of summary judgment to an employer under Title VII, holding that "stereotyped remarks can certainly be evidence that gender played a part in an adverse employment decision." *Id.* at 119 (quotation marks and citation omitted). More recently, the Second Circuit again relied on settled law that Title VII reaches employment discrimination based on stereotypes when it held in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), that discrimination on the basis of sexual orientation is actionable in part because it is discrimination based on non-conformity with gender norms. *See id.* at 121 ("The gender stereotype at work here is that 'real' men should date

women, and not other men.") (citation and quotation marks omitted).

Moreover, other circuits have applied this principle when (as in *Price Waterhouse* itself), the stereotype at issue concerned mutable aspects of a person's appearance. In *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), the Third Circuit recognized a Title VII claim where the male plaintiff had been a target of harassment from his co-workers based on the stereotype that his wearing an earring was "not sufficiently masculine." *Id.* at 264. Similarly, in *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1042 (8th Cir. 2010), the Eighth Circuit ruled that a terminated female employee who dressed in a "tomboyish" manner with short hair and no makeup had an actionable claim for discrimination based on gender stereotypes in light of her supervisor's stated preference for "pretty" staff members with the "Midwestern girl look." *Id.* at 1041.

Indeed, other than the decision below, the courts of appeals have consistently recognized that stereotyped-based discrimination violates Title VII. In *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc), the Fifth Circuit relied on *Price Waterhouse* to hold that sexual harassment based on gender stereotyping violates Title VII. The Court of Appeals also cited numerous other cases expressly recognizing stereotype-based claims under Title VII in the gender discrimination context. *Id.* at 454 & n.4 (citing *Glenn v. Brumby,* 663 F.3d 1312, 1316 (11th Cir. 2011); *Lewis,* 591 F.3d at 1038; *Chadwick,* 561 F.3d at 44; *Smith v. City of Salem,* 378 F.3d 566, 573 (6th Cir. 2004); *Back,* 365 F.3d at 120; *Nichols v. Azteca Rest. Enters.,* 256 F.3d 864, 874-75 (9th Cir.

2001); *Bibby,* 260 F.3d at 263-64 (3d Cir. 2001); and *Doe v. City of Belleville,* 119 F.3d 563, 580 (7th Cir. 1997), *vacated on other grounds,* 523 U.S. 1001 (1998)).

None of these cases undertook an analysis of whether the characteristics to which the stereotype relates were mutable or immutable. Pregnancy and parenthood, for example, cannot be said to be immutable, nor can conformance with gender norms regarding dress, makeup, or deportment. The claims endorsed by multiple circuits would not have withstood the immutability test created by the court below.

B. Other Circuits Have Specifically Held that Title VII Prohibits Adverse Employment Actions Based on Racial Stereotypes.

Although the majority of the jurisprudence related to stereotype-based discrimination under Title VII has been in the context of sex discrimination, those principles are fully applicable in the context of racial discrimination. In *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999), the First Circuit reversed a grant of summary judgment to the employer and recognized a Title VII claim on the basis of racial stereotypes. In direct contradiction to the Eleventh Circuit's decision in the instant case, the First Circuit explained that "Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias." *Id.* at 42. The court held that "[t]he ultimate question is whether the employee has been treated

disparately 'because of race.' This is so regardless of whether the employer consciously intended to base [employment practices] on race, or simply did so because of unthinking stereotypes or bias." *Id.* at 58.

The Seventh Circuit's decision in *Jenkins v. Blue Cross Mut. Hosp. Ins.,* 538 F.2d 164 (7th Cir. 1976) (en banc), is particularly instructive. In *Jenkins*, as here, the alleged discrimination was based on a stereotype that a natural Black hairstyle was inappropriate. *Id.* at 165. Although *Jenkins* predated *Price Waterhouse*, the Seventh Circuit's analysis was fully consistent with this Court's subsequent decision in that case. The Seventh Circuit did not attempt to classify the plaintiff's hairstyle as either a mutable or immutable characteristic, but reasoned:

> [The plaintiff] said that her supervisor denied her a promotion because she "could never represent Blue Cross with [her] Afro." A lay person's description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination.

Id. at 168.

The Eleventh Circuit sought to reconcile the decision below with *Jenkins* by attempting to distinguish between afros and locs, but that distinction is untenable. Afros and locs are both Black natural hairstyles, but neither is immutable in the sense that it cannot be changed. *See supra* at 23-24. In *Jenkins*, the court held that discrimination on the basis of racialized stereotypes concerning Black

natural hairstyles violates Title VII. By contrast, the court below held the opposite, thereby dismissing Ms. Jones's allegations that the discrimination she suffered was actionable because it was rooted in racial stereotyping.

Two other circuit decisions have similarly recognized the significance of discrimination based on racial stereotypes under Title VII. In *Smith v. Wilson*, 705 F.3d 674 (7th Cir. 2013), the Seventh Circuit upheld a jury verdict against a plaintiff in a Title VII racial discrimination case on other grounds; however, citing *Price Waterhouse*, the Court of Appeals emphasized that "[w]e are mindful that certain ostensibly neutral bases for a hiring decision may be predicated on impermissible stereotypes and biases." *Id.* at 678. In *Satz v. ITT Fin. Corp.*, 619 F.2d 738 (8th Cir. 1980), the Eighth Circuit—prior to *Price Waterhouse*—observed that courts analyzing Title VII disparate treatment claims often consider the "potential for stereotyping of employees on the basis of their sex or race." *Id.* at 746.

In the instant case, the Eleventh Circuit failed to recognize the significance of such stereotypes. Instead, it relied on a rigid dichotomy—which finds no support in the text of Title VII, this Court's precedent, or the decisions of other courts of appeal—that purports to distinguish between characteristics that are "mutable" and "immutable." Such a distinction ignores both common sense and the clear precedent of this Court—followed by every other appellate court that has considered the question—that discrimination based on stereotype is actionable under Title VII regardless of whether it is connected to a purportedly immutable characteristic.

CONCLUSION

For the foregoing reasons, Chastity Jones respectfully requests that this petition for writ of certiorari be granted.

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