No. 08-16135-BB

In the
United States Court of Appeals for the Eleventh Circuit

JOHN HITHON, Plaintiff-Appellant-Cross-Appellee
v.
TYSON FOODS, INC., Defendant-Appellee-Cross-Appellant,

On Appeal from the United States District Court
for the Northern District of Alabama
No. CV96-RRA-03257-M

Amici Curiae Brief in Support of Plaintiff-Appellant's Petition for Rehearing En Banc of Civil Rights Leaders Hon. U.W. Clemon; Ms. Dorothy Cotton; Rev. Robert S. Graetz, Jr.; Dr. Bernard LaFayette, Jr.; Rev. Joseph E. Lowery; Mrs. Amelia Boynton Robinson; Hon. Solomon Seay, Jr.; Rev. Fred L. Shuttlesworth; Rev. C.T. Vivian; Dr. Wyatt Tee Walker; Hon. Andrew Young

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1 AND 11TH CIR. R. 26.1-1

I hereby certify the following is a complete list of trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations (including subsidiaries, conglomerates, affiliates, parent corporations, and any publicly held corporation owns 10% or more of the party's stock), and other identifiable legal entities related to a party that have an interest in this case:

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2. Archer, Deborah (Attorney for *Amici Curiae*)
3. Armstrong, Robert P., Jr. (United States Magistrate Judge for the Northern District of Alabama, Middle Division)
4. Boddie, Elise (Attorney for *Amici Curiae*)
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31. Tyson Foods, Inc. (NYSE symbol: TSN) (Defendant/Appellee), and its subsidiaries: Cobb-Vantress, Inc.; Cobb Breeding Company Limited; Hudson Foods, Inc.; The Pork Group, Inc.; Tyson Breeders, Inc.; Tyson Farms, Inc.; Tyson Farms of Texas, Inc.; Tyson Foreign Sales, Inc.; Tyson International Company, Ltd.; Tyson International Holding Company; Tyson Mexican Original, Inc.; Tyson Poultry, Inc.; Tyson Shared Services, Inc.; World Resource, Inc.; AAFC International, Inc.; Benton Sales, Ltd.; Cobb-Denmark A/S; Cobb-Espanola, S.A.; Cobb France E.U.R.L.; Cobb-Poland B.V.; Cobb (Straffon) Ireland, Ltd.; Global Employment Services, Inc.; Gorges Foodservice, Inc.; Hudson Development Company; Hudson Foods Foreign Sales, Inc.; Hudson Midwest Foods, Inc.; IBP, Inc.; Meat Products Exports, Inc.; National Comp Care, Inc.; Oaklawn Capital Corporation; Oaklawn Capital-Mississippi, LLC; Oaklawn Sales, Ltd.; TPM Holding Company; TyNet Corporation; Tyson Export Sales, Inc.; Tyson Foreign

Sales, Inc.; Tyson Marketing, Ltd.; Tyson Seafood Group-Japan, Inc.; and Universal Plan Investments, Ltd.

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STATEMENT OF COUNSEL PURSUANT TO 11TH CIR. R. 35-5(c)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether the panel decision, by minimizing the probative value of a significant racial slur, subverts the purpose and core function of § 1981 and other civil rights laws that ban racial discrimination.

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STATEMENT OF ADOPTION

Amici adopt Plaintiff-Appellant's "Course of Proceeding and Disposition of the Case" and "Statement of Facts Necessary to Argument of the Issues and Arguments and Citations of Authority," which are set forth in Plaintiff-Appellant's Petition for Rehearing En Banc.

STATEMENT OF *AMICI*

Amici are pioneers and pillars of the civil rights community who personally participated in the Civil Rights Movement. All *Amici* knew and worked with Dr. Martin Luther King, Jr. As outlined in their accompanying Motion, *Amici* have a profound interest in the outcome of this case and in the preservation of the legal protections for which they have committed their lives.[1] Moreover, the *Amici* are intimately familiar with the language of racial discrimination and its demeaning and harmful effects. They share the view that use of the term "boy" to describe an African-American man is deeply offensive and that its use reflects discriminatory intent. The *Amici* are: Hon. U.W. Clemon, Alabama's first African-American federal judge; Ms. Dorothy Cotton, the Education Director for the Southern Christian Leadership Conference (SCLC) (1960-68); Rev. Robert S. Graetz, Jr., a

[1] *Amici's* interest in this case is focused on the panel's misinterpretation of the "boy" testimony in *Ash v. Tyson Foods, Inc.*, 190 F. App'x 924 (11th Cir. 2006) [hereinafter *Ash III*] and in the panel's August 17, 2010 opinion, *Ash v. Tyson Foods, Inc.*, 2010 WL 3244920 (11th Cir. Aug. 17, 2010) [hereinafter *Ash IV*].

leader of the Montgomery Bus Boycott; Dr. Bernard LaFayette, Jr., a leader in the Civil Rights Movement; Rev. Joseph E. Lowery, a founder and former president of the SCLC; Mrs. Amelia Boynton Robinson, Selma civil rights activist; Hon. Solomon Seay, Jr., eminent Alabama civil rights attorney; Rev. Fred L. Shuttlesworth, civil rights pioneer and a founder of SCLC; Rev. C.T. Vivian, Executive Staff for the SCLC; Dr. Wyatt Tee Walker, former Chief of Staff to Dr. King; the Hon. Andrew Young, former Executive Director of the SCLC, Mayor of Atlanta, Congressman, and Ambassador to the United Nations.

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

I. Is evidence of a supervisor's use of the term "boy" to address an African-American man probative of racial discrimination, given the historical and contemporary understanding of the term?

II. Are issues of racial discrimination "exceptionally important," warranting en banc review?

STATEMENT OF FACTS NECESSARY FOR *AMICI* ARGUMENT

On remand from the Supreme Court, the panel in *Ash III* concluded that testimony adduced at the first trial concerning Defendant's use of "'boy'… was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson's stated reasons for not promoting the plaintiff[ ] was racial discrimination." *Ash III*, 190 F. App'x at 926. The panel further determined

that these usages were "conversational" and "non-racial." *Id*.[2] At the second trial, following *Ash III*, counsel elicited testimony that Hithon and Ash were having lunch in the cafeteria in July 1995 (before the promotion decision at issue) when Hatley "walk[ed] up to the table without saying anything, [and then] said 'Boy, you better get going.'" *See Ash IV*, 2010 WL 3244920, at *14. Ash testified that he was "shocked" by Hatley's language and that he thought Hatley's tone was "mean" and "derogatory." *Id*. As Ash explained to the jury, "'everyone know[s] being in the South [that when] a white man says boy to a black man, that's an offensive word.'" *Id*. Ash further testified that his wife responded to Hatley "'He's not a boy. He's a man.'" *Id*. Hithon also testified that Hatley addressed him as "boy" a second time "sometime after May but before July 1995," calling after him '"hey, boy,"' as Hithon was leaving a conference room. *Id*.

A divided panel reversed the district court judge's decision to deny the Defendant judgment as a matter of law on Hithon's promotion claim and remanded for entry of judgment in favor of Defendant. *See id*. at *1. The court concluded

[2] The court continued that the "the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions." *Ash III*, 190 F. App'x at 926. Referring to the Supreme Court's directive to revisit its previous decision in *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529 (11th Cir. 2005) [hereinafter *Ash II*], the panel then concluded that "[t]he lack of a modifier in the context of the use of the word 'boy' in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if 'boy' is considered to have general racial implications." *Id*.

that this additional testimony was not probative of Defendant's racially discriminatory intent because it addressed only Ash and Hithon's understanding of "why the use of the term 'boy' is offensive" and did not present new evidence of "what was in Hatley's mind when he used it." *Id.* at *14.

Amici contend that the panel's opinion in *Ash IV* (and in *Ash III*, to the extent it relies on that opinion) is not only inconsistent with this Court's standard for deciding a judgment as a matter of law because it fails to draw all reasonable inferences in favor of the nonmovant,[3] but that in drawing the wrong inferences, the panel also ignores the relevant historical and social context. Indeed, it is difficult to fathom what use of "boy" would satisfy the panel's standard if Hatley's outright reference to Hithon is not probative of racially discriminatory intent. The jury undoubtedly understood this context, as did the first jury to award a verdict (and substantial damages) to Mr. Hithon. In a very real sense, the contemporary use of the term "boy" in the workplace, directed at an African American adult male by a white supervisor, is a powerful indication of why our civil rights laws continue to serve a vital function even long after we all hoped that the indignities *Amici* faced would have vanished. The panel's unwarranted decision to reject this verdict merits consideration by the en banc court.

[3] *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (holding that the court must draw all reasonable inferences in favor of the nonmoving party in deciding a motion for judgment as a matter of law).

ARGUMENT

It is no accident that *Amici* are iconic figures of the civil rights movement. Many of them worked with or were contemporaries of Rev. Dr. Martin Luther King, Jr. Most are also native sons of the South who experienced firsthand the racial indignity of being called "boy" by whites or having their loved ones and friends demeaned by use of the term. All *Amici* bring a distinctive historical, social, and cultural understanding to this case and to the panel's extraordinary decision to overturn the jury's verdict, the second racially mixed Alabama jury to find for Mr. Hithon. Signficantly, although *Amici* have a particular historical and social vantage point, their perspective is not unique. Indeed, the use of "boy" to refer to African-American men is widely understood to be racially discriminatory. *See infra* Part I. If not a proxy for "nigger," it is at the very least a close cousin.[4]

[4] In a number of racial discrimination cases, courts have been asked to consider the use of "boy" along with "nigger" and other racial epithets to describe African-American men. These cases indicate that such epithets are often used interchangeably. *See, e.g.*, *Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App'x 546, 549 (2d Cir. 2007) (declining to differentiate between "nigger" and "boy"); *McKenzie v. Citation Corp.*, 2007 WL 1424555, at *12 (S.D. Ala. May 11, 2007); *see also* Michele Norris, *The Grace of Silence* 52 (2010) (observing "[t]hey called my grandfather 'boy' and 'nigrah,' which was supposed to be slightly less offensive and confrontational than *nigger*. Slightly.") (emphasis in original); Betram Wilbur Doyle, *The Etiquette of Race Relations in the South: A Study in Social Control* 143 (1937) ("Even 'nigger' is occasionally used, though Moton remarks that the term is rarely heard in public on the lips of white people. This term does not strictly conform to what is accepted, for Negroes resent it occasionally. Where these terms are not used, the ubiquitous 'Jack' and—as on Pullman cars—'George' and 'boy' are in good form.").

The panel's opinion, therefore, is remarkable not only for its failure to defer to the jury's assessment of the factual context in which Mr. Hithon's promotion claim arises, but also for its ahistorical and socially acontextual rendering of the facts.

Amici specifically contend that the panel's strained interpretation of the Defendant's use of "boy" to address Hithon is inconsistent with the United States Supreme Court's directive to this Court to consider "context, inflection, tone of voice, local custom, and historical usage." *See Ash v. Tyson Foods*, 546 U.S. 454, 456 (2006). Like its opinion in *Ash II* — in which the court erred by unduly focusing on the lack of a racial modifier (*i.e.* "black boy") — the panel in *Ash III* did not fully appreciate the significance of Defendant's presumptively racially coded reference to Hithon. The Court of Appeals panel now compounds the error in *Ash III* by concluding that no reasonable jury could have weighed the considerable body of evidence presented by Plaintiff-Appellant to find for Mr. Hithon on his promotion claim, a decision that defies the considered judgment of not just one, but two jury verdicts in his favor.[5] Insofar as it suggests that only the

[5] *See Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465 (D.C. Cir. 1987) (affirming district court's decision to deny defendant judgment notwithstanding the verdict on the grounds that jurors were better situated to discern their racial meaning). The subtle social cues of language – voice, inflection, and tone — are precisely the sort of insights that are difficult to "glean[] from a cold record" on appeal. *Id*. at 472. This may be one reason why courts have concluded that racial discrimination cases are "'quintessentially'" fact-dependent and that juries are uniquely positioned to assess their merits. *See, e.g., Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 468 (6th Cir. 2009) (*quoting Jordan v. City of Cleveland*, 464

most egregious use of racially discriminatory language should qualify as evidence of pretext for racial discrimination, the panel's *Ash IV* decision (as well as *Ash III* on which it appears to rely) subverts the core purpose and mandate of 42 U.S.C. § 1981. *See infra* Part II. This case also merits en banc review because it involves unduly restrictive evidentiary rules that weaken the continued viability of claims of racial discrimination. This is not only an issue of exceptional and longstanding importance in the law, but threatens to undermine *Amici*'s hard fought struggle to ensure equality in the workplace.

I. HISTORY, CUSTOM, SOCIAL CONTEXT, AND RECENT CASE LAW REVEAL A COMMON UNDERSTANDING THAT "BOY" IS PRESUMPTIVELY RACIALLY DEROGATORY WHEN USED BY A WHITE PERSON TO ADDRESS AN AFRICAN-AMERICAN MAN

The *Ash III* and *Ash IV* panels found that Mr. Hatley's calling Mr. Hithon "boy," was "conversational" and "non-racial" and, in any event, was a "stray remark" that did not bear on the Defendant's decision not to promote Hithon. *Ash III*, 190 F. App'x at 926; *see also Ash IV*, 2010 WL 3244920, at *4. This reading of the facts does not stand the test of history, experience, reality, or the common social understanding of race relations in this country, particularly in the South. As evidence of the Defendant's racially discriminatory attitude toward African Americans, the term "boy" is necessarily probative of Mr. Hatley's intent and

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F.3d 584, 597 (6th Cir. 2006) (affirming district court's decision to deny judgment as a matter of law on claim for racially hostile work environment)).

whether his proffered reason for not promoting Mr. Hithon was in fact pretext for racial discrimination.

A. History Is Filled with Examples of White People Addressing African-American Men as "Boy" Purposely to Insult or to Demean Them

The denigrating use of the word "boy" by white people to address African-American men is deeply embedded in our country's regrettable racial history. During slavery and segregation, whites customarily referred to African-American adult males as "boy" to reinforce their racially subordinate status.[6] Whites also called African-American men "boy" to intimidate them and to put them "in their place" when they threatened the racial order. For instance, a white man accosted a civil rights worker who visited Amite County, Mississippi in 1961 to register African-American voters with "Boy, what's your business?" He then proceeded to lead a group of whites in beating him. *See* Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2005) (No. 05-379), 2005 WL 2341981, at *22. Hamilton Holmes, the first African-American male to attend the University of Georgia, recalled an incident in which white fraternity members harassed him by blocking his car with theirs to prevent him from leaving a parking lot. Seeing that

[6] For example, in his autobiography, Frederick Douglass recounted the story of a slaveholder who came across an African-American man walking along a road. Douglass observed that the slaveholder "addressed him in the usual manner of speaking to colored people on the public highways of the south: 'Well, boy, whom do you belong to?'" See Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* 61 (1845).

their cars were unlocked, Holmes opened their doors and began moving them. He described the ensuing response:

> I guess that was a little too much for the guys inside, so by the time that I was rolling down the second car, these fellows came out. Gosh musta been about fifteen or twenty of 'em …and the [ringleader] walked up, backed up by the other guys, and he said, "Say, boy, is that your car?" …And I said, "Man, it was obvious that you were tryin' to block me…I don't want any trouble. I just wanna leave." And he said, "Well, I think you got trouble boy, 'cause you were in my car and you didn't have any business bein' there."

Howell Raines, *My Soul Is Rested: The Story of the Civil Rights Movement in the Deep South* 335 (1983).

History is filled with examples just like these — of African-American men being ridiculed and taunted by whites who call them "boy."[7] Colonel Spann Watson, who had been a member of the famed Tuskegee Airmen, described his experience in 1941 with a white lieutenant colonel who tried to bait him in an interview to determine his "acceptability" to join the Army Air Corps. The colonel asked Watson, "'Boy, what do you think of niggers marrying white women?'" Lynn M. Homan & Thomas Reilly, *Black Knights: The Story of the Tuskegee*

[7] Ms. Hattie Kendrick, the named plaintiff in *Negro City Teachers Ass'n v. Schultz* case, Civ. No. 946 (E.D. Ill. 1946), told of how defense counsel and the judge repeatedly referred to famed attorney Thurgood Marshall (later a Justice of the Supreme Court) as "boy" throughout the hearing for an equal pay case. After the defense counsel explained to the court how an attorney responsible for a similar case in Tennessee was more competent and distinguished than the "boy," Marshall thanked him for the compliment and identified himself as the attorney who had handled the Tennessee case. Michael Seng, *Cairo Experience: Civil Rights Litigation in a Racial Powder Keg*, 61 Or. L. Rev. 285, 288 n. 15 (1982).

Airmen 26 (2001). Perhaps most famously, Dr. Martin Luther King, Jr. in his *Letter from Birmingham Jail* movingly wrote of the use of "boy" as both a signifier of and vehicle for the racial discrimination, degradation, and oppression endured by African-American men, including in so-called "conversations" with whites. Martin Luther King, Jr., *Why We Can't Wait* 69 (1964). Addressing the call for African Americans to be "patient" in their quest for civil rights, King wrote "…when your first name becomes 'nigger,' your middle name becomes 'boy' (however old you are) and your last name becomes 'John'…then you will understand why we find it difficult to wait." *Id.* Dr. King also related an incident from his childhood that illustrates this racial humiliation:

> [M]y father.... accidentally drove past a stop sign. A policeman pulled up to the car and said: "All right, boy, pull over and let me see your license." My father replied indignantly, "I'm no boy." Then, pointing to me, "This is a boy. I am a man, and until you call me one, I will not listen to you."

Martin Luther King, Jr., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 420-21 (James Washington ed., 1986).[8]

Respectful treatment and acknowledgement of human dignity have long

[8] American literary classics are filled with just these sort of racially coded references to "boy." *See* Harper Lee, *To Kill A Mockingbird* 196–98 (1960); Richard Wright, *Native Son* 154, 213, 268–69 (1998) (originally published in 1940); Richard Wright, *Black Boy* 180–82 (2006) (originally published in 1944); Carson McCullers, *The Heart Is A Lonely Hunter* 72 (1967) (originally published in 1947); John Howard Griffin, *Black Like Me* 61, 62, 70 (1989) (originally published 1960); Harriet Beecher Stowe, *Uncle Tom's Cabin* 478 (Harvard Univ. Press 1962).

been at the core of the struggle for equal rights under the law. Resisting the habitual, discriminatory use of "boy" has been central to this effort. On March 28, 1968, thousands of civil rights activists assembled in Memphis, Tennessee with African-American sanitation workers who were on strike. The workers carried signs that proclaimed "I Am a Man" in order to demand respect and recognition of their dignity as racial equals.[9] Dr. King supported the Memphis strike because he believed it marked an important step towards equality for all African Americans.[10] It was his final march.

B. Recent Case Law Illustrates that "Boy" Is Commonly Understood to be Racially Discriminatory

The racially discriminatory use of "boy" is not simply a timebound artifact of slavery and segregation. Even among whites, "[t]he use of 'boy to a black American adult now would be considered offensive…and a positive insult." Leslie Dunkling, *A Dictionary of Epithets and Terms of Address* 57 (1990). Indeed, even counsel for the Defendant acknowledged that "boy" can be racially disparaging. *Ash v. Tyson Foods, Inc.,* No. 96-3257 (N.D. Al.) (Dkt. 413) at 833-834.

Recent case law reflects this accepted social understanding. Indeed, this Court has repeatedly acknowledged that the word "boy" is racially offensive when

[9] Michael Lollar, *"I Am A Man" poster from Memphis strike draws $34K at auction*, The Commercial Appeal, Feb. 25, 2010.
[10] Taylor Branch, *At Canaan's Edge: America in the King Years* 1965–68 719 (2006).

directed to an adult black male. *See Alexander v. Opelika City Schools*, 352 F. App'x 390, 393 (11th Cir. 2009); *McCann v. Tillman*, 526 F.3d 1370, 1379 (11th Cir. 2008); *Washington v. Kroger Co.*, 218 F. App'x 822, 825 (11th Cir. 2007). Other circuits have similarly recognized the use of "boy" as a racial epithet, creating triable jury questions on racial discrimination claims. *See Armstrong v. Whirlpool Corp.*, 363 F. App'x 317, 322 (6th Cir. 2010) (supervisor's reference to African-American men as "boys" supports hostile environment claim); *Betts*, 558 F.3d at 470 (concluding that white supervisor's reference to African-American plaintiff as "Phil's Boy," was "racially loaded" and evidence of racial hostility); *Williams*, 255 F. App'x at 549 (describing "boy" as "racially offensive" and indicative of racial animus); *Baltimore v. City of Franklin*, 2007 U.S. Dist. Lexis 53115, at *42 (M.D. Tenn. July 20, 2007) (use of "boy" supports hostile environment claim); *McKenzie v. Citation Corp*., 2007 WL 1424555, at *12 (S.D. Ala. May 11, 2007) (observing that "using words like 'boy' or 'nigger' to refer to African-American employees, is clearly race-related"); *Twymon v. Wells Fargo*, 462 F.3d 925, 934 n.5 (8th Cir. 2006) (observing that certain facially neutral phrases are "materially different from the historically racially disparaging but facially-neutral term 'boy' recently deemed potentially probative of racial animus…"); *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 297 (4th Cir. 2004) (reversing summary judgment on hostile environment claim based on defendant's

use of "boy," among other racially offensive language); *cf. Peal v. Cuomo*, 2000 WL 1902182, at *7 (S.D. Ind. Nov. 20, 2000) (indicating that racially neutral words should be considered in its context and not simply judged on face value). Indeed, one district court in Tennessee took "judicial notice" that "boy" historically has been used "from the time of slavery" to refer to African-American men in a "demeaning, insulting manner." *Bailey v. USF Holland*, 2007 WL 470439, at *10 (M.D. Tenn. Feb. 8, 2007). Concluding that it was "not credible" that those who had been "born and raised here in the south" would not understand this meaning, the court rejected the testimony of witnesses who professed not to comprehend the word's racially derogatory context. *Id.*

II. THE PANEL OPINION RAISES AN ISSUE OF "EXCEPTIONAL IMPORTANCE" WARRANTING EN BANC REVIEW

Federal Rule of Appellate Procedure 35(a) provides that an en banc rehearing may be ordered when "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. As members of the Eleventh Circuit have repeatedly recognized, cases involving issues of racial discrimination readily meet this standard. *See, e.g., Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (race-based challenge to felon disenfranchisement law); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (vote dilution claim); *United States v. Rodriguez*, 935 F.2d 194 (11th Cir. 1991) (racial discrimination in jury selection); *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985) (race-based challenge to imposition of death

penalty); *Spencer v. Zant*, 715 F.2d 1562 (11th Cir. 1983) (racial discrimination in jury selection); *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir. 1983) (race-based challenge to imposition of death penalty). *See also Jones v. Diamond*, 636 F.2d 1364 (5th Cir. Jan. 1981) (racial segregation in prison); *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir. Jan. 1981) (employment discrimination based on race and sex), *rev'd on other grounds*, 457 U.S. 496 (1982)*; Williams v. Consol. City of Jacksonville*, 381 F.3d 1298, 1307 (11th Cir. 2004) (Tjoflat, J., dissenting) ("Racial controversies have plagued our country, and the South in particular, since the Founding Era; the objective importance of adjudicating a potential racial injustice cannot be gainsaid. Careful consideration of racial discrimination charges are always of 'exceptional importance' not only to the parties involved, but to society at large."); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1267 (11th Cir. 2008) ("[T]his appeal from the Northern District of Alabama offers, amid a host of technical issues, an important reminder: despite considerable racial progress, racism persists as an evil to be remedied in our Nation.").

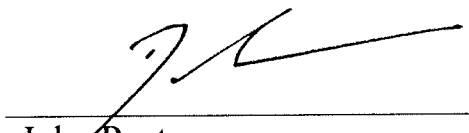
This case merits en banc consideration because, if left to stand, the panel decision will impede racial discrimination claims that rest at least in part on the use of racially coded slurs in the workplace. As one of the nation's oldest civil rights statutes, § 1981 was enacted to give effect to the core values of the Fourteenth Amendment, to promote positive race relations in the public sphere and to

eliminate the humiliation associated with racial discrimination. *See* H.R. Rep. No. 102-40 (II), at 1–2, *reprinted in* 1991 U.S.C.C.A.N. 694 (1991) (Section 1981 intended to "provide more effective deterrence and adequate compensation for victims of discrimination"); *West v. Gibson*, 527 U.S. 212, 219–20 (1999) (citing to Congress's motive for amending sections 2 and 3 of U.S.C. § 1981 to deter and provide appropriate remedies for intentional discrimination in the workplace under Federal law). Insofar as the panel opinion concluded that Hatley's calling Hithon a "boy" was a "stray remark" and not probative of discriminatory intent, it threatens the purpose and core function of § 1981 and other civil right laws that ban racial discrimination. *Cf. Feacher v. Intercontinental Hotels Grp.*, 563 F. Supp. 2d 389 (N.D.N.Y. 2008) (discussing the use of racial slurs as a classic example of the discrimination § 1981 was enacted to combat).

CONCLUSION

For these reasons, together with the substantial reasons set forth in Plaintiff-Appellant's petition, the panel's opinion in *Ash IV* warrants en banc consideration.

Respectfully submitted,



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October 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 29(e), the foregoing brief was timely filed and that, in accordance with 11th Cir. R. 35-1, fifteen (15) paper copies were sent to the Office of the Clerk.

I further certify that on October 16, 2010, two (2) true and correct paper copies of the same were served via Federal Express overnight delivery on the following individuals:

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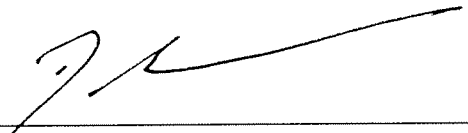

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