No. 06-___

In The Supreme Court of the United States

ANTHONY ASH and JOHN HITHON,

Petitioners,

v.

TYSON FOODS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In *Ash v. Tyson Foods, Inc.*, 126 Sup. Ct. 1195 (2006), this Court noted that the courts of appeals "have articulated various . . . standards" regarding when a plaintiff may support a claim of employment discrimination by adducing evidence that he or she was better qualified than the individual selected for a disputed position. The question presented is the issue expressly left unresolved by *Ash*: "what standard should govern pretext claims based on superior qualifications[?]" 126 Sup. Ct. at 1197.

(2) How and by whom should evidence of racist remarks be evaluated in a case alleging racial discrimination?

PARTIES

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STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Anthony Ash and John Hithon[1] respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 2, 2006.

OPINIONS BELOW

The August 2, 2006 opinion of the court of appeals, which is not officially reported, is unofficially reported at 2006 WL 2219749, and is set out at pp. 1a-8a of the Appendix. The October 2, 2006 order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 43a-44a.

The April 19, 2005 opinion of the court of appeals, which is reported at 129 Fed. Appx. 529, is set out at pp.

[1] Resolution of the questions presented in this case would affect petitioners in different ways.

The courts below, based on their views of the two questions presented, concluded that the jury's finding of racial discrimination against petitioner Ash should be set aside, and judgment entered in favor of Tyson. A decision by this Court in favor of Ash on either of those issues would require that that decision to award judgment as a matter of law be either reversed or vacated.

The court of appeals overturned the judgment as a matter of law against petitioner Hithon, but upheld the district court's decision to order a new trial. The district court's new trial order was based on its conclusion that the jury's finding of discrimination against Hithon was "against the great weight of the evidence." (42a). That new trial order itself contained no analysis of the evidence in this case; it necessarily was colored by the trial judge's conclusion, set forth only two months earlier, that much of the evidence offered by Hithon could not as a matter of law support a finding of discrimination. A decision by this Court in favor of Hithon regarding the issues presented in this petition would require that the trial judge reconsider his decision regarding whether the jury verdict was against the great weight of the evidence.

9a-21a. The March 26, 2004 memorandum decision of the district court, which is not officially reported, is set out at pp. 22a-41a. The May 18, 2004 order of the district court, which is not officially reported, is set out at p. 42a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 2, 2006. A timely petition for rehearing was denied on October 2, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

In February 2006 this Court granted certiorari in the instant case and overturned per curiam several aspects of the Eleventh Circuit's 2005 opinion. On remand, the Eleventh Circuit reinstated the holding that had been vacated by this Court. This petition seeks resolution of several inter-circuit conflicts that persist despite this Court's 2006 decision.

This litigation concerns two promotions that were made in the summer of 1995 to the position of shift manager at a Gadsden, Alabama plant of Tyson Foods. The plant processes chickens. At the time petitioners Ash and Hithon, both African-American men, were unit managers at the plant, the position immediately below shift manager. The shift manager vacancies at issue were both filled by whites with far less experience at Tyson, or with chicken processing, than Ash and Hithon.

A jury found that Tyson was guilty of racial discrimination against both Ash and Hithon, and awarded each plaintiff $250,000 in compensatory damages and $1.5 million in punitive damages. At trial the parties offered sharply conflicting evidence on a wide range of factual issues. The questions presented by this petition, concern the legal standards to be applied in resolving those disputed issues. Two aspects of the trial record are material here.

First, it was undisputed that on several occasions Thomas Hatley, the white plant manager who made the promotion decisions, addressed Ash and Hithon as "boy." (34a). On one of those occasions Ash's wife was present and objected to the remark, pointing out that her husband was an adult; in response, "Hatley laughed." (*Id.*). Tyson filed an in limine motion to bar admission of this evidence,

objecting in part that it there would be "undue prejudice" if the jury learned what Hatley had said.[2] Tyson also requested an instruction limiting jury consideration of these remarks. The district court denied the in limine motion and refused to give the requested instruction. Hatley's action in addressing Ash and Hithon as "boy" was a major issue at trial. In their closing arguments, counsel for plaintiffs[3] and defendant[4] discussed and disagreed about the significance of Hatley's actions in addressing Ash and Hithon as "boy."

Second, both parties offered substantial evidence regarding whether the white individuals who received the

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[2] Defendant's Motion in Limine Regarding "Stray Remarks" As To Plaintiffs Anthony Ash and John Hithon, p. 2.

[3] Tr. 571-72 ("[W]e all know that is a term meant to be deprecating or a put down to a black man. We all know that. We're southerners. . . . I suggest to you that that remark shows a reflection of [Hatley's] thinking and Tyson's thinking.")

[4] Tyson's attorney insisted that the word "boy" "wasn't delivered with that level of venom and hostility that [plaintiff's witnesses] delivered it on the witness stand." (Tr. 612). If the word "boy" had been used in that tone of voice, he urged, Ash and Hithon would surely have complained to the plant personnel section. (Tr. 613). Of course, since Hatley was the plant manager, the staff in the personnel section were his subordinates.

Defense counsel also acknowledged that the term "boy" could have a racist meaning when used as a form of address to a African-American man:

> I know they were said, and I have to deal with them, because I grew up in Anniston in the 1950's, and I know what that comment means. . . . [W]hen I was in high school, that . . . was fighting words . . . [I]f Hatley said it the way it was said on that witness stand by those witnessed, you know, back when I was growing up, there would probably he a little trouble. And that was a mean thing to say, and I would not defend that.

(Tr. 611).

disputed promotions were less qualified than Ash and Hithon. Plaintiffs offered evidence tending to show that under Tyson's own written standards the two whites were far less qualified than Ash and Hithon, and that one or both of the whites did not even meet the minimum requirements for the job.

Plaintiffs introduced a company "job summary" which stated that three to five years of experience with Tyson was among the "requirements" for the job of shift manager;[5] one of the whites promoted, Steve Dade, had worked for Tyson for less than two years. A separate Tyson "Personnel Policy" indicated that when filling vacancies, priority consideration should be given to Tyson workers in the complex or department in which that vacancy existed.[6] Although Ash and Hithon were in the same plant as the two shift manager positions, the other white promoted, Randy King, was not from the Gadsden plant or the complex of which it was a part. Third, another Tyson "Personnel Policy" offered into evidence stated that promotion was among the "benefits and rights for team members who establish seniority with the company."[7] Ash and Hithon had fifteen and thirteen years, respectively, of seniority with Tyson, compared to less than two years for Dade.

Tyson offered two types of evidence to respond to the contention that Ash and Hithon were more qualified under the company's own standards. First, the defendant offered testimony by Hatley, the plant manager who made the disputed promotion decisions, that he simply did not know

[5] Plaintiffs' Exhibit 2.

[6] Plaintiffs' Exhibit 10 p. 8.

[7] Plaintiffs' Exhibit 9.

about these written Tyson personnel and promotion standards.[8] Second, Tyson disputed the meaning of the written standards in question. For example, although the job summary stated that three to five years experience was a "requiremen[t]," a defense witness testified that that amount of experience was merely "suggested."[9]

In addition, Tyson offered evidence that a primary criterion that was used to determine the individual to receive each promotion was whether he or she did *not* work at the Gadsden plant, and thus could bring a fresh approach and prospective.[10] Application of that criterion would have favored the two whites actually selected. Hatley explained that he used that standard – rather than experience or seniority or work in the same department – because the Gadsden plant was assertedly losing money, and was at risk of being closed by Tyson.[11] Plaintiffs contended that this ad hoc standard had been fashioned simply to rationalize promoting two less qualified whites; plaintiffs offered evidence that the Gadsden plant was not actually losing money, and that one of the whites selected had come from a Tyson plant that had been closed because it was not profitable.[12]

Much of the closing argument at trial was devoted to these disputes regarding whether the whites who were promoted were, under Tyson's own standards, far less

[8] Tr. 355-56, 536, 539.

[9] Tr. 607.

[10] Tr. 436, 445, 446.

[11] Tr. 439-40.

[12] Tr. 449.

qualified than Ash and Hithon.[13] The jury was properly instructed that it could not find Tyson liable merely because the promotion decisions "were stupid decisions or bad decisions," but only if those decisions had been motivated by racial discrimination.[14]

Following the jury verdict for plaintiffs, Tyson moved for judgment as a matter of law. The district court concluded as a matter of law that much of the evidence offered by plaintiffs could not be relied on to support the jury's finding of intentional discrimination. First, applying Eleventh Circuit precedent, the trial judge held that plaintiffs could not rely on evidence that they were better qualified than the promoted whites, unless that evidence was so extraordinary it "jump[s] off the page and slap[s you] in the face." (31a) (*quoting Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)). Even if the plaintiffs were more qualified than the whites who received the disputed promotions, the court held, any disparity was not great enough to meet that demanding standard. (33a). Second, the judge concluded that Hatley's use of the term "boy" was not "racial in nature." (34a). The judge also ruled, in the alternative, that Tyson was entitled to a new trial, in part because "the jury's verdict of discrimination is against the great weight of the evidence." (42a).

In its 2005 decision, the Eleventh Circuit upheld the trial judge's conclusion that as a matter of law neither the evidence regarding qualifications and nor the evidence regarding Hatley's actions in calling Ash and Hithon "boy" could support the jury's finding of discrimination. The

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[13] Transcript, pp. 560, 573-74, 576-85, 589, 603-04, 605-07, 617, 622.

[14] Transcript, p. 636.

court of appeals held that evidence that Ash and Hithon were more qualified could not be relied on to show an employer's reasons were a pretext for discrimination, unless the disparities in qualifications were so great that they "virtually jump off the page and slap you in the face." 15a (*quoting Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)). The court of appeals also held that as a matter of law Hatley's use of the term "boy" when addressing Ash and Hithon was not evidence of discrimination; only use of the phrase "black boy," the court insisted, could support a finding of discrimination. (14a).

The court of appeals upheld the decision of the district court to award judgment as a matter of law dismissing Ash's claim. (15a). With regard to Hithon's claim, the panel concluded that there was sufficient evidence to support the jury verdict, because Hatley had interviewed Hithon for one of the vacancies only *after* Hatley had actually offered the job to King and after King had accepted it. (16a). The appellate court upheld the trial court's actions in granting Tyson a new trial with regard to Hithon's claim. (16a). Petitioners filed a timely petition for rehearing in the Eleventh Circuit. That petition was denied on June 23, 2005.

This Court granted a petition for writ of certiorari, and in a per curiam decision overturned the Eleventh Circuit. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, ___ U.S. ___ (2006). With regard to evidence that a discrimination plaintiff had superior qualifications, this Court rejected the Eleventh Circuit's "slap in the face" standard as "unhelpful and imprecise." 126 S. Ct. at 1197. The Court emphasized that "qualifications evidence may suffice, at least in some circumstances, to show pretext," 126 S. Ct. at 1197; the petition had demonstrated that the Eleventh

Circuit's "slap in the face" standard was so stringent that it had *never* been satisfied in any appellate or district court decision in that circuit.[15] This Court noted that the circuit courts had adopted conflicting standards for evaluating qualifications evidence, but expressly did not undertake to resolve that conflict. Rather, the Court remanded the case to the Eleventh Circuit with instructions to utilize instead a standard that would ensure "consistent results." 126 S. Ct. at 1198.

This Court also overturned the Eleventh Circuit's holding that "boy," as a form of address to an adult African-American man, could never as a matter of law be evidence of discriminatory animus. The Court held that this form of address could be "probative of bias," and identified several factors which should be considered in determining "[t]he speaker's meaning." 126 S. Ct. 1197.

On remand the Eleventh Circuit insisted, despite this Court's decision, that the evidence in this case still was insufficient as a matter of law to support the jury's finding of discrimination. The court of appeals held that proof that a plaintiff was better qualified than the person promoted to a disputed position could not support a finding of discrimination unless the differences in ability were so enormous "that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." (6a). The court of appeals held that this stringent standard was not satisfied. With regard to the repeated instances in which

[15] The petition noted that that standard had been applied in 10 Eleventh Circuit decisions and in 34 decisions by district courts within that circuit. In every case the court concluded that the standard had not been satisfied. Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 05-379, 11-12.

the African-American plaintiffs were addressed as "boy," the Eleventh Circuit again insisted that this classic racial slur could not support a finding of racial discrimination. (5a).

The court of appeals denied a timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHEN, OR INDEED WHETHER, EVIDENCE OF COMPARATIVE QUALIFICATIONS CAN BE UTILIZED TO PROVE INVIDIOUS DISCRIMINATION IN EMPLOYMENT

This case presents the inter-circuit conflict that was recognized, but that expressly was not resolved, by this Court's February 2006 decision in the instant case. There remains a widespread inter-circuit conflict regarding when, and indeed whether, a plaintiff alleging discrimination in promotion or hiring can prove invidious discrimination by showing that he or she was more qualified than the person selected for the position in question. This Court's February 2006 decision observed that in addition to the "slap in the face" standard disapproved in that opinion, "[f]ederal courts . . . have articulated various other standards" for evaluating such qualifications evidence. 126 S. Ct. at 1197.

The Court's decision did not resolve that conflict; rather, it explained "[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications." 126 S. Ct. at 1198. In light of the Eleventh Circuit's intransigent response to this Court's February 2006 decision, the instant

case provides an exceptionally appropriate "occasion to define more precisely" the standard governing this manner of proof.

The inter-circuit conflict recognized by this Court in *Ash* is well-established and clearly defined. The Eleventh and Fifth Circuits apply a "no reasonable person" standard. In both circuits a substantial body of caselaw makes clear that this standard can virtually never be met. No appellate or district court decision in the Eleventh Circuit has ever found that a plaintiff's evidence satisfied the "no reasonable person" standard. The Seventh Circuit applies the "no reasonable person" standard more narrowly, limiting it to cases in which the plaintiff has no other evidence of unlawful intent; even in the Seventh Circuit, however, when the "no reasonable person" standard does apply, evidence of superior qualifications is always rejected. Conversely, the Ninth Circuit does not limit the use of qualifications evidence, and has repeatedly permitted a plaintiff to rely on such evidence to defeat summary judgment or to sustain a jury verdict. The Third, Fourth and District of Columbia Circuits apply intermediate standards, permitting reliance on evidence of comparative qualifications in some but not all cases.

The Eleventh Circuit first articulated the "no reasonable person" standard in 2000, and has now applied it in a dozen decisions involving a variety of federal employment discrimination cases, including claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 1981, the Age Discrimination in Employment Act, and the Fourteenth Amendment.[16] Under that standard, evidence that a

[16] *Taylor v. Roche*, 2006 WL 2613659, at *1 (11th Cir. Sept. 12, 2006) (Title VII); *Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2

(Continued on following page)

plaintiff was better qualified cannot be relied on to prove intentional discrimination unless the differences in qualifications were so vast "that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." (6a). The Eleventh Circuit does not claim that this "no reasonable person" standard is substantively different than the "slap in the face" standard rejected by this Court in *Ash*. To the contrary, the Eleventh Circuit has repeatedly held that the "no reasonable person" standard is identical to the rejected "slap in the face" standard.[17] The

(11th Cir. Aug. 28, 2006) (Title VII and the Age Discrimination in Employment Act); *Milledge v. Rayonier, Inc.*, 2006 WL 2257949, at *2 (11th Cir. Aug. 8, 2006) (Title VII); *Ash v. Tyson Foods, Inc.*, 2006 WL 2219749, at *3 (11th Cir. Aug. 2, 2006) (Title VII and section 1981); *Hubbard v. M & H Valve Co.*, 2006 WL 1410147, at *1 (11th Cir. May 22, 2006) (Title VII and section 1981); *Tippier v. Spacelabs Medical, Inc.*, 2006 WL 1130809, at *3 (11th Cir. April 27, 2006) (Title VII and section 1981); *Brooks v. County Commission of Jefferson County, Ala.*, 446 F.3d 1160, 1163-64 (11th Cir. 2006) (Title VII); *Watkins v. Huntsville, Ala.*, 176 Fed. Appx. 955, 956 (11th Cir. 2006) (Title VII); *Hithon v. Tyson Foods, Inc.*, 144 Fed. Appx. 795, 800 (11th Cir. 2005) (Title VII and section 1981); *Cooper v. Southern Co.*, 390 F.3d 695, 732-33 (11th Cir. 2004) (Title VII and section 1981); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254-55 (11th Cir. 2000) (Title VII) (overturning jury verdict); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1340-41 (11th Cir. 2000) (Section 1981 and the Fourteenth Amendment).

[17] In *Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2 (11th Cir. Aug. 28, 2006), the Eleventh Circuit approved a district court decision that had "equated the language" of the "slap in the face" standard with the "no reasonable person" standard.

The Eleventh Circuit's seminal decision in *Cooper v. Southern Co.* 390 F.3d 695 (11th Cir. 2004), explained that the requirement of evidence

> "so apparent as virtually to jump off the page and slap you in the face" . . . "*should be understood to mean* that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial

(Continued on following page)

Eleventh Circuit nonetheless insists that its adherence to the "no reasonable person" standard was "approved" by this very Court in *Ash* itself.[18]

The "no reasonable person" standard, avowedly stringent in theory, is fatal in practice. In the 12 Eleventh Circuit decisions applying this standard, no plaintiff ever succeeded in making the requisite showing. The court of appeals has applied that standard both to direct summary judgment for defendants and, as here, to overturn jury verdicts. Equally striking is the pattern of decisions

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judgment, could have chosen the candidate selected over the plaintiff for the job in question."

207 F.3d at 1340 (*quoting Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) and *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)) (emphasis added). The Eleventh Circuit reiterated that the two standards were identical in *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000) and *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000).

In addition, in the period prior to this Court's decision in *Ash*, eight district court decisions in the Eleventh Circuit had expressed their understanding that the "slap in the face" and "no reasonable person" standards were identical. *Twilley v. Burlington Northern, etc. Rwy. Co.*, 351 F. Supp. 2d 1299, 1307 (N.D.Ala. 2004); *Harrington v. The Children's Psychiatric Center*, 2003 WL 23356396, at *10 (S.D.Fla. Dec. 9, 2006); *Dorrego v. Public Health Trust of Miami Dade County*, 293 F. Supp. 2d 1274, 1283 (S.D.Fla. 2003); *Green v. Miami-Dade County*, 2003 WL 22331877, at *8 (S.D.Fla. Sept. 9, 2003); *Rogers-Libert v. Miami-Dade County*, 184 F. Supp. 2d 1273, 1280 (S.D.Fla. 2001); *Dancy-Pratt v. The School Board of Miami-Dade County*, 2001 WL 1922063, at *7 (S.D.Fla. Dec. 13, 2001); *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1363 (S.D.Fla. 2001); *Taylor v. Williams*, 2000 WL 1844698, at *3 (S.D.Ala Oct. 30, 2000).

[18] *Taylor v. Roche*, 2006 WL 2613659, at *1 (11th Cir. Sept. 12, 2006) (describing the "no reasonable person" standard "as approved by *Ash v. Tyson Foods, Inc.*"); *Brooks v. County Commission of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (describing *Ash* as "approving of this language" stating the "no reasonable person" standard).

among district court decisions in the Eleventh Circuit. Since that circuit fashioned the "no reasonable person" standard in 2000, it has been applied in 28 district court decisions reproduced in Westlaw. In every one of those cases, the district judge held that the plaintiff had failed to show that the disparities in qualifications were so great that no reasonable person could have chosen the candidate selected over the plaintiff.[19] This Court has repeatedly held that discrimination plaintiffs should be permitted to rely on evidence of greater qualifications to prove discrimination. *Ash*, 126 S. Ct. at 1197; *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). The Eleventh Circuit's utilization of a standard which invariably precludes reliance on such evidence is inconsistent with this Court's decisions in *Ash*, *Patterson*, and *Burdine*.

In the Eleventh Circuit it is for judges, not juries, to decide whether evidence of qualification disparities satisfies the "no reasonable person" standard. Thus in the instant case, the dispositive finding made by the Eleventh Circuit panel was that "*we conclude* that the plaintiffs did not meet their burden . . . to show" that the "no reasonable person" standard had been met. (7a) (emphasis added).[20]

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[19] We set forth a list of those district court decisions in an Appendix to the petition.

[20] *See Higgins v. Tyson Foods, Inc.*, 2006 WL 2466178, at *2 ("the district court concluded that the plaintiff has simply failed to meet that test. We agree"); *Milledge v. Rayonier, Inc.*, 2006 WL 2257949, at *2 ("[the plaintiff's] account . . . may show that he was qualified for the position, but not that [the no reasonable person standard was met]"); *Hithon v. Tyson Foods, Inc.*, 144 Fed. Appx. 795, 800 (plaintiff "failed to establish" that the no reasonable person standard was met).

The "no reasonable person" standard is also well established in the Fifth Circuit. From the outset the Fifth Circuit (like the Eleventh Circuit) has held that the "no reasonable person" standard "should be understood to mean" the same thing as the "slap in the face" standard, the very standard rejected by this Court in *Ash v. Tyson's Food*.[21] In the Fifth Circuit it also is for the courts, not the trier of fact, to decide whether the differences in qualification were so great that no reasonable person could have rejected the plaintiff in favor of the candidate chosen.[22] That circuit recognizes that the "no reasonable person" requirement is an "extremely high" standard. *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004). In practice the standard is almost

[21] *Deines v. Texas Department of Protective and Regulatory Services*, 164 F.3d 277, 280-81 (5th Cir. 1999):

> The phrase "jump off the page and slap [you] in the face" is simply a colloquial expression that we have utilized to bring some degree of understanding to the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

The "no reasonable person" formulation originated in *Deines*.

[22] See, e.g., *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 383 (5th Cir. 2006) (plaintiffs "have failed to show" that they were so much better qualified as to meet the "no reasonable person" standard); *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004) (the plaintiff's evidence "does not satisfy" the "no reasonable person" standard); *Reynolds v. City of Dallas*, 2004 WL 893425, at *8 (N.D.Tex. April 23, 2004) ("the Court does not find that Plaintiff's qualifications were so disparately superior to [the successful candidates'] that no reasonable person, in the exercise of impartial judgment, could have chosen them.").

impossibly high. No appellate decision in the Fifth Circuit has ever found that a plaintiff had met that standard.[23] Among the 31 district court decisions in the Fifth Circuit applying the "no reasonable person" standard,[24] there are only two highly unusual cases in which a district judge has ever found that that standard had been satisfied.

The Ninth Circuit, at the other end of the spectrum, imposes no such limitations on the use of evidence of comparative qualifications. "In *Odima* [*v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995)], we held that the plaintiff's superior qualifications *standing alone* were enough to prove pretext." *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185, 1194 (9th Cir. 2003) (emphasis in original). Indeed, in the Ninth Circuit even evidence that the plaintiff was *equally* qualified as the successful candidate is sufficient to support a finding of discrimination. *Margolis v. Tektronix, Inc.*, 44 Fed. Appx. 138, 141-42 (9th Cir. 2002)

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[23] *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 383 (5th Cir. 2006) (section 1981); *Roy v. United States Department of Agriculture*, 115 Fed. Appx. 198, 201 (5th Cir. 2004) (Title VII); *Cook v. Mississippi Dept. of Human Services*, 108 Fed. Appx. 852, 860 (5th Cir. 2004) (Title VII and section 1981); *Barnes v. United States Department of the Navy*, 95 Fed. Appx. 46, 50 (5th Cir. 2004) (Title VII and the ADEA); *Wright v. Columbia Women & Children's Hospital*, 2002 WL 495325, text at n.11 (5th Cir. May 18, 2002) (ADEA); *Celestine v. Petroleos de Venezuela*, 266 F.3d 343, 357 (5th Cir. 2001) (Title VII).

[24] A list of those cases is set out in an Appendix to this petition.

In *Chustz v. City of New Orleans*, 2002 WL 31556353, at *10 (E.D.La. Nov. 15, 2002), the successful candidate for a high level administrative post (as the employer well knew) was addicted to crack cocaine, had been fired from his previous position for drug abuse, and did not meet the minimum requirements for the new post. In *Lall v. Perot Systems Corp.*, 2004 WL 884438, at *7 (W.D.Tex. April 23, 2004), all four of the original founders of the business unit in question executed affidavits stating that plaintiff was the best qualified candidate.

("Margolis' principal argument is that . . . she is more qualified than one or more male managers. . . . Margolis' evidence on this point, if believed, is adequate . . . to survive summary judgment. A jury could find that Tektronix['s explanation] is a pretext for discrimination if it believes that Margolis was, in fact, more (or at least as) qualified."); *Tucevich v. State of Nevada*, 1999 WL 62735, at *1 (9th Cir. Jan. 22, 1999) (reversing award of summary judgment in part because "the evidence indicates that Tucevich was equally qualified, if not more qualified, than the individuals that defendant hired.") Unlike the Eleventh Circuit, which asserts that this Court's decision in *Ash* approved the "no reasonable person" bar to such evidence, the Ninth Circuit cites *Ash* for the contrary proposition that qualifications evidence "may suffice . . . to show pretext." *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006).

This sharp difference in the standards applied to evidence of comparative qualifications is clearly outcome determinative. The Ninth Circuit has repeatedly done something that the Eleventh and Fifth Circuits have invariably refused to do under the "no reasonable person" standard – upheld a discrimination claim because the plaintiff had offered evidence of his or her greater qualifications. In seven cases the Ninth Circuit has relied on such evidence to deny summary judgment to a defendant employer. *Cornwell v. Electra Central Credit Union*, 439 F.3d at 1033-34 (9th Cir. 2006) (Title VII) ("a reasonable jury might . . . view the disparity between [the plaintiff's] management experience and [that of the person treated more favorably] as proof that the Defendant's explanation . . . was a pretext for race discrimination."); *Margolis v. Tektronix, Inc.*, *supra*; *Haas v. Betz Laboratories, Inc.*, 1999 WL 451206, at *2 (9th Cir. June 23, 1999) ("Haas

also has established pretext indirectly by offering evidence that the chosen applicant . . . was not the most qualified applicant for the job."); *Tucevich v. State of Nevada*, *supra*; *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) ("Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they 'suggest that [the defendant's explanation] may not have been the real reason for choosing [the applicant selected] over the [plaintiff].' ") (*quoting Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991)); *Thomas v. California State Department of Corrections*, 1992 WL 197414, at *3 (9th Cir. Aug. 18, 1992) ("we find that . . . a rational trier of fact could conclude that Thomas was more qualified [than the person hired] and that the Department's articulated reasons for rejecting him were pretextual."); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) ("All of these facts tend to show that [the person promoted] may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reasons for choosing [him] over Lindahl.").

In the Ninth Circuit, the degree to which the qualifications of the plaintiff exceed those of the successful applicant are matters for consideration by the trier of fact, not a possible basis for summary judgment or judgment as a matter of law. *Thomas v. California State Department of Corrections*, *supra*. "The closer the qualifications of the candidates, the less *weight* the [trier of fact] should give to perceived differences in deciding whether the proffered explanations were pretextual." *Odima v. Westin Tucson*

Hotel Co., 991 F.2d 585, 602 (9th Cir. 1993) (emphasis added).[25]

The Sixth Circuit in *Jenkins v. Nashville Public Radio*, 106 Fed. Appx. 991 (6th Cir. 2004), explained that

> This circuit has never adopted the [Fifth Circuit] requirement that in order to raise a genuine issue as to whether the plaintiff was rejected because of an improper motive rather than because of the exercise of discretionary business judgment, the plaintiff must demonstrate qualifications that are "vastly – or even clearly" greater than those of the successful applicant. And we cannot readily reconcile [such a requirement] with the well-established principle of *Burdine* that "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

106 Fed. Appx. at 994. Relying on evidence that an employment discrimination plaintiff was better qualified, the Sixth Circuit overturned district court decisions awarding summary judgment to the defendant employers in *Jenkins*, in *Zambetti v. Cuyahoga Community College*, 314 F.3d 249, 259 (6th Cir. 2002), and in *King v. Healthrider, Inc.*, 1999 WL 825122 (6th Cir. Oct. 8, 1999). In *Carberry v. Monarch Marking Systems, Inc.*, 30 Fed. Appx. 389, 392 (6th Cir. 2002), the Sixth Circuit upheld a jury's finding of discrimination largely because of evidence that the plaintiff was

[25] Because the claims in *Odima* had been determined at a bench trial, the Ninth Circuit referred in this instance to evaluation of the weight of the evidence by the trial court.

the better qualified applicant. And in *Glenn's Trucking Co. v. NLRB*, 298 F.3d 502, 506 (6th Cir. 2002), the Sixth Circuit upheld an NLRB finding of discrimination against union members in light of evidence that "the discriminatees appear to be more qualified than those individuals who were hired."

The District of Columbia Circuit has adopted an intermediate standard. In a sharply divided en banc decision, that court of appeals held that

> [i]f a factfinder can conclude that a reasonable employer could have found the plaintiff to be *significantly better qualified* for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Aka v. Washington Hosp. Center, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (emphasis added). This standard is more demanding than that in the Ninth Circuit (which does not require that the difference in qualification be *significant*) but less demanding than that in the Eleventh and Fifth Circuits (which require differences in qualifications to be overwhelming, and which insist that the court, not the factfinder, should determine if that standard is met.) In both *Aka* and *Lathram v. Snow*, 336 F.3d 1085, 1092-93 (D.C.Cir. 2003), the District of Columbia Circuit relied on evidence regarding comparative qualifications to overturn decisions awarding summary judgment to defendants. On the other hand, that circuit has upheld summary judgment for employers where it concluded that a reasonable jury could not find that the plaintiff was "significantly better qualified." *Carter v. George Washington University*, 387 F.3d

872, 881-82 (D.C.Cir. 2004); *Stewart v. Ashcroft*, 352 F.3d 422, 429-30 (D.C.Cir. 2003).

The Fourth Circuit also applies an intermediate standard, requiring that the qualifications evidence be sufficient to permit a finding that the plaintiff was "discernibly better qualified" *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 261 (4th Cir. 2006), or "plainly superior." *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 649 n.4 (4th Cir. 2002). The Fourth Circuit relied on such qualifications evidence to uphold a jury's finding of discrimination in *Dennis*, and to overturn the award of summary judgment in *Heiko*.

In *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), the Third Circuit relied on evidence of comparative qualifications to deny summary judgment to an employer; the court divided sharply, however, regarding what standard should be applied. The majority held that the plaintiff could rely on evidence that she was better qualified than the successful applicant (110 F.3d at 995-97), while the dissenting judge would have insisted on evidence that "the qualifications were extremely disproportionate." 110 F.3d at 1000 (Alito, J., dissenting). The majority objected that the standard proposed in the dissent would "immunize an employer from the reach of Title VII," 110 F.3d at 993, but then Judge Alito objected that the majority's holding would bring about "an unwarranted extension of the anti-discrimination laws." 110 F.3d at 1002.

The Seventh Circuit has adopted a hybrid approach. Where a plaintiff relies *solely* on evidence of comparative qualifications, the Seventh Circuit utilizes the Eleventh Circuit "no reasonable person" standard.[26] On the other

[26] See cases cited at n.28.

hand, where the plaintiff has other evidence (albeit evidence not by itself sufficient to support a finding of discrimination), the Seventh Circuit uses the Ninth Circuit standard, permitting reliance without limitation on evidence of comparative qualifications.[27]

In the Seventh Circuit, as elsewhere, the standard utilized is of conclusive importance. In the Seventh Circuit there are 9 appellate[28] and 24 district court decisions[29] applying the "no reasonable person" standard. In every one of these 33 cases the court held that the plaintiff's evidence could not satisfy that standard. On the other hand, in all of the cases in the Seventh Circuit applied the less demanding Ninth Circuit standard, the court concluded that the plaintiff's evidence was sufficient to withstand summary judgment.[30]

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[27] *Harvey v. Office of Banks and Real Estate*, 377 F.3d 698, 712-13 (7th Cir. 2004) (Title VII and section 1981); *David v. Caterpillar, Inc.*, 324 F.3d 851, 861-63 (7th Cir. 2003) (Title VII).

[28] *Sublett v. John Wiley & Sons, Inc.*, 2006 WL 2613509, at *7 (7th Cir. Sept. 13, 2006) (Title VII); *Mlynczak v. Bodman*, 442 F.3d 1050, 1060 (7th Cir. 2006) (Title VII); *Farrell v. Butler University*, 421 F.3d 609, 615-16 (7th Cir. 2005) (Title VII); *Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 813 (7th Cir. 2005) (Fair Labor Standards Act); *Jordan v. City of Gary, Indiana*, 396 F.3d 825, 834 (7th Cir. 2005) (Title VII and ADEA); *Reed v. Lawrence Chevrolet, Inc.*, 108 F.3d 393, 395-96 (7th Cir. 2004) (Title VII); *Reed v. Manteno School Dist. No. 5*, 59 Fed. Appx. 868, 871-72 (7th Cir. 2003) (Title VII and ADEA); *Bernales v. Cook*, 37 Fed. Appx. 792, 795 (7th Cir. 2002) (Title VII); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1182 (7th Cir. 2002) (Title VII).

[29] A list of those decisions is set forth in an appendix to this petition.

[30] *Harvey v. Office of Banks and Real Estate*, *supra*; *David v. Caterpillar, Inc.*, *supra*; *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 988 (W.D.Wis. 2003) (Title VII); *Kozlowski v. Fry*, 238 F. Supp. 2d 966, 1012 (N.D.Ill. 2002) (Title VII).

The question presented is of manifest importance. In the Eleventh, Fifth and Seventh Circuits there are 110 decisions applying the "no reasonable person" standard. The total number of discrimination cases in those three circuits involving qualifications evidence is substantially higher; in the Eleventh and Fifth Circuits, for example, there have also been numerous other decisions applying the semantically distinct but substantively identical "slap in the face" standard.[31] Cases involving this type of evidence also arise with considerable frequency in the other circuits. In the absence of a decision by this Court resolving the question left open in its February 2006 decision in the instant case, the large number of claims resting on such evidence will continue to be decided differently depending on the circuit in which an action is filed. Certiorari should be granted to resolve that conflict.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OF NUMEROUS COURTS OF APPEALS REGARDING THE EVALUATION OF BIASED REMARKS IN DISCRIMINATION CASES

In its 2005 decision, the Eleventh Circuit held that addressing an adult African-American man as "boy" (unlike "black boy") could never as a matter of law be evidence of racial animus. (14a). This Court overturned that per se rule. In *Ash* this Court held that the significance of such a remark would depend on "[t]he speaker's meaning," and listed a number of factors to be considered

[31] Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), No. 05-379, pp. 10-14 (listing 90 "slap in the face" cases in the Fifth and Eleventh Circuits).

in determining the speaker's intent. 126 S. Ct. at 1197. On remand, however, the Eleventh Circuit responded with a flurry of new objections to the evidence of these potentially damning statements. In its determination to find some reason to again overturn the jury's finding of discrimination, the court of appeals flatly disregarded several controlling decisions of this Court, including this Court's February 2006 decision in the instant case.

First, the Eleventh Circuit held that the repeated use of the term "boy" was not probative because the remarks were "ambiguous." (5a). But in *Ash* this Court itself had already noted that very ambiguity, expressly recognizing that this form of address does not invariably have the same meaning. "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign." *Ash*, 126 S. Ct. at 1197. On remand the court of appeals has now held that that very ambiguity precludes a trier of fact from relying on evidence that the term "boy" was used to address African-American men. That is emphatically contrary to this Court's holding in *Ash* that the trier of fact is to resolve that ambiguity and by so doing is to ascertain "[t]he speaker's meaning." *Id*. By holding that the ambiguity in "boy" (unlike "black boy") precludes reliance on this evidence, the Eleventh Circuit has resuscitated the very rule rejected by this Court in *Ash*.

Second, in making its determination that the plant manager had no racial intent in using the term "boy," the Eleventh Circuit objected that the factors set forth in this Court's decision in *Ash* for interpreting that usage were not "in the record." (5a). But two of the factors identified by this Court, "inflection" and "tone of voice," by their very nature would never be reflected in a cold transcript. 126

S. Ct. at 1197. Only the trier of fact, unlike an appellate court, would "be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). At the trial in the instant case, a witness reproduced for the jury the tone and inflection with which the term "boy" had been used.[32] The Eleventh Circuit, by insisting that the interpretation of allegedly discriminatory remarks be made by an appellate court based solely on the content of the transcript, effectively refused to comply with this Court's decision in *Ash* that inflection and tone of voice *should* be considered in determining a speaker's meaning.[33]

Third, the Eleventh Circuit objected that the "boy" remarks, even if they did indicate "general racial bias" on the part of the plant manager, were nonetheless legally irrelevant because the remarks were not made at the time of the promotion decisions and, in the court's view, were for that reason "totally unrelated to the promotions at issue." (5a). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court emphatically rejected that very basis for disregarding biased remarks. In *Reeves*, as here, the court of appeals held that evidence of biased remarks could not support a jury verdict of discrimination because "these comments were not made in the direct context of Reeves's termination." 197 F.3d 688, 693 (5th Cir. 1999). This Court held, to the contrary, that such

[32] See n.4, *supra*.

[33] *Cf. Anderson v. City of Bessemer City*, 470 U.S. at 579 ("it is easy to imagine that the tone of voice with which the witness related her comment . . . might have conclusively established that the remark was a facetious one.")

remarks were probative even if not made in connection with the disputed employment decision.

> In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. . . . The court . . . failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of [a decisionmaker's] age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination."

530 U.S. at 162.

In the wake of *Reeves*, other circuits have correctly insisted that it is for the trier of fact to evaluate the type of evidence which the Eleventh Circuit insists can never be probative. In *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), the Fifth Circuit explained:

> In light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called "stray remarks" must be viewed cautiously. . . . Age-related remarks are appropriately taken into account when analyzing the evidence supporting a jury verdict (even if not in the direct context of the decision . . .)

235 F.3d at 229.[34] In *Plotke v. White*, 405 F.3d 1092 (10th Cir. 2005), the Tenth Circuit held:

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[34] See *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003) ("Post-*Reeves*, this court has taken a more 'cautious' view of the stray remark doctrine. . . . Age-related remarks 'are appropriately taken into account when analyzing the evidence supporting the jury's verdict,' even when the comment is not in the direct context of the termination. . . .") (*quoting Russell*); *Hooker v. Victoria's Secret Stores, Inc.*, 2001 WL 1692436 (5th Cir. Nov. 21, 2001) ("[I]n light of the Supreme Court's

(Continued on following page)

> The Supreme Court has emphasized that courts should not reject a plaintiff's evidence of additional circumstantial gender-based comments . . . because they 'were not made in the direct context of [the plaintiff's termination.' *Reeves*, 350 U.S. at 151-53. . . . Accordingly, we have held that gender-based comments by a plaintiff's supervisor can be relevant evidence of pretext . . . even when such comments were not directly limited to the termination decision.

405 F.3d at 1107. Both before and after *Reeves* that Ninth Circuit has recognized that biased remarks are probative of pretext even though the remarks were not made in connection with the disputed employment decision, or even about the plaintiff. *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (the supervisor's "remark establishes discriminatory intent even though it was uttered during consideration of *different* Asian-American's potential employment") (emphasis added) (citing *Reeves*); *Cardova v. State Farm Ins. Companies*, 124 F.3d 1145, 1149 (9th Cir. 1997) ("if such remarks were indeed made, they could be proof of discrimination against [the plaintiff] despite their reference to *another* agent and their utterance *after*" the employment decision in dispute) (emphasis added).

Fourth, the Eleventh Circuit on remand made its own finding of fact that the white plant manager who made the

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holding in *Reeves*. . . . 'the potentially damning nature of . . . age-related comments' cannot be discounted 'on the ground that they were not made in the direct context' of an adverse employment decision.") (*quoting Russell*); *Evans v. City of Bishop*, 238 F.3d 586, 591-92 (5th Cir. 2000) ("*Reeves* emphatically states that requiring evidence of discriminatory animus to be 'in the direct context' of the employment decision is incorrect.").

remarks did not intend to use the term "boy" with a racial meaning.

> The usages were conversational and *as found* by the district court *were non-racial* in context. . . . The 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. . . . The statements . . . *showed* no indication of general racial bias . . . by [the plant manager].

(5a) (Emphasis added).

This Court has made clear, however, that discerning the intent behind such extra-judicial statements is a question of fact for the trier of fact, not a question of law for the courts. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Whether a speaker intended to use the term "boy" or some other language in a racial manner is as much a question of fact as whether an employer intended to promote or fire a worker because of his or her race. Thus whether in this case the manager intended the term "boy" in a racial manner was, like the question of racial motive in promotions, a matter to be resolved by the jury.

In *Anderson* a finding of discrimination in hiring turned in part on whether a particular statement that had been made during a critical job interview was intended by the speaker to be serious or facetious. Following a bench trial, the district judge concluded that the remark was facetious, and relied on that finding in concluding that intentional discrimination had occurred. The Fourth Circuit reinterpreted the intent behind that remark, concluded that the remark was not facetious, and therefore reversed the find of discrimination. This Court unanimously reinstated the discrimination finding, explaining that the appellate court had erred in substituting its own finding regarding the meaning of the remark in

question for the conclusions of the trier of fact. "[T]he error of the Court of Appeals was its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony." 470 U.S. at 577.

In the wake of *Anderson*, numerous courts of appeals – unlike the Eleventh Circuit in this case – have recognized that the interpretation of extra-judicial statements that could indicate possible bias is a matter for the trier of fact. *Phelan v. Cook County*, 463 F.3d 773, 782 (7th Cir. 2006) ("To the extent that the discriminatory nature of . . . these remarks is ambiguous, we note that 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.'") (*citing Shager v. Upjohn Co.*, 913 F.3d 398, 402 (7th Cir. 1990)); *EEOC v. Heartway Corp.*, 2006 WL 3030562, at *8 (10th Cir. Oct. 26, 2006) ("Although this is arguably an ambiguous statement, a jury could reasonably find that [the employee] was being fired because [of her disability]"); *Thanonsingh v. Board of Educ.*, 462 F.3d 762, 781-82 (7th Cir. 2006) ("the statement could be interpreted reasonably by a juror as probative evidence that [the speaker] harbored animus against persons for whom English is a second language."); *Green v. City of New York*, 2006 WL 2846473, at *10 (2d Cir. Oct. 5, 2006) ("the district court, on summary judgment, should have resolved the ambiguity against [the defendant]"); *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990) (the district judge who improperly awarded summary judgment "considered the comments on age attributed to [the supervisor] to be ambiguous. That they were. But the task of disambiguating ambiguous utterances is for trial, not for summary judgment."); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 55 (3d Cir. 1990) ("a jury could find that . . . that phrase . . . indicated bias against older employees. Of course, a jury could also decide [otherwise] . . . but that is

precisely the sort of question that should be left to the jury.").

Certiorari should be granted to bring the Eleventh Circuit into compliance with this Court's decisions in *Ash*, *Anderson*, and *Reeves*, and to resolve these inter-circuit conflicts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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