Nos. 17-1618, 17-1623, 18-107

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, PETITIONER
v.
CLAYTON COUNTY, GEORGIA, RESPONDENT

ALTITUDE EXPRESS, INC., PETITIONER
v.
MELISSA ZARDA, ET AL., RESPONDENTS

R.G. & G.R. HARRIS FUNERAL HOMES, PETITIONER
v.
EEOC, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE EMPLOYERS

PHILIP HAMBURGER
MARK CHENOWETH
ADITYA DYNAR
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

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INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a non-profit civil-rights organization devoted to defending

constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current legal development denies more rights to more Americans. Although we still enjoy the shell of our Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is especially concerned about the conduct of the Equal Employment Opportunity Commission (EEOC), which recently adopted a novel and dubious interpretation of Title VII that the federal courts had long rejected and that Congress has repeatedly declined to enact. *See Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015); *Macy v. Holder*, EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012). Yet rulings from this Court—and from numerous lower courts—command the judiciary to extend "great deference" to the EEOC's interpretations of Title

VII, even though Congress refused to confer substantive rulemaking authority on the EEOC when it established the agency in 1964. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971). NCLA urges the Court to explicitly repudiate the "great deference" standard that it established in *Griggs* and make clear that the EEOC's interpretations of Title VII may be followed only if a court, in the exercise of its independent judgment, finds the agency's views persuasive.[1]

SUMMARY OF THE ARGUMENT

However this Court decides to interpret the meaning of "sex" discrimination, it is crucial that the Court clarify how much deference—if any—is owed to the EEOC's substantive interpretations of Title VII. None of the principal briefs are arguing for deference to the EEOC,[2] and none of the appellate-court decisions said anything about whether the EEOC's pronouncements in *Baldwin* or *Macy* should receive "deference" from the federal judiciary. All parties appear content to have this Court decide the issue without placing *any* thumb on the scale in favor of the EEOC's interpretation of Title VII.

But the Court must not blithely disregard the underlying issue of agency deference lurking here, even if it

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1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

2. Mr. Bostock's district-court filings argued that the EEOC's interpretation of Title VII should receive *Skidmore* deference. J.A. 89–92; *see also* J.A. 125. But Mr. Bostock has not advanced this argument in his briefing before this Court.

decides (properly) to interpret Title VII without giving any weight to the EEOC's views. This Court has previously declared—on no fewer than four separate occasions—that the EEOC's interpretations of Title VII are entitled to "great deference" from the courts. *See Griggs*, 401 U.S. at 433–34; *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94–95 (1973); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430–31 (1975); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279–80 (1976). The Court should explicitly repudiate these previous commands of "great deference" to the EEOC because Congress never gave the EEOC rulemaking authority over Title VII's substantive provisions. *See Gilbert*, 429 U.S. at 140–41 ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title.").

The EEOC, however, has managed to obtain the functional equivalent of substantive rulemaking powers on account of the "great deference" it has received from this and other courts. Although the EEOC remains unable to impose its preferred interpretations of Title VII through notice-and-comment rulemaking, it accomplishes the same result by issuing "regulatory guidance" and then demanding that employers kowtow to its "guidance" or else risk EEOC enforcement action. These EEOC "guidance" documents create *in terrorem* effects because employers remain aware of the judicial precedents that require "deference" to the EEOC's interpretations of Title VII, and an employer must gamble on whether a lower court will invoke those precedents and defer to the EEOC.

Only an unequivocal pronouncement from this Court recognizing that the EEOC gets *no* deference from the judiciary when it interprets Title VII's substantive provisions will remove the *in terrorem* effects created by the agency's past (and no doubt future) regulatory guidance. Deference to—and, indeed, judicial facilitation of—this shadow rulemaking has no basis in the Constitution, in part because mere regulatory guidance cannot lawfully bind third parties, as this Court recognized just last term.

The Court should also clarify that the "great deference" standard from *Griggs* is no longer good law because the Court's subsequent Title VII cases decline to extend "great deference" to the EEOC's views, and instead state that the EEOC's interpretations of Title VII should receive nothing more than respectful consideration under *Skidmore*. *See, e.g.*, *General Electric Co. v. Gilbert*, 429 U.S. 125, 140–41 (1976); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257–58 (1991). Yet this Court has never explicitly repudiated the "great deference" standard from its earlier decisions, so the lower courts continue to invoke *Griggs* intermittently and insist that "great deference" should be afforded to the EEOC's interpretations of Title VII. *See, e.g.*, *Reyes v. Waples Mobile Home Park Limited Partnership*, 903 F.3d 415, 432 n.10 (4th Cir. 2018) ("[T]he EEOC's interpretations of Title VII, as the enforcing agency of Title VII, [are] 'entitled to great deference'" (quoting *Griggs*, 401 U.S. at 434)); *Scott v. Rochester Gas & Electric*, 333 F. Supp. 3d 273, 278 (W.D.N.Y. 2018) ("The EEOC's interpretation of Title VII and its terms is afforded great deference." (citations omitted)).

The Court should make clear that its previous statements requiring "great deference" to the EEOC are no longer good law, rather than continuing to allow these prior statements to mislead lower courts that feel compelled to rule in a manner consistent with the EEOC's interpretations of Title VII.

Finally, the Court should repudiate the "great deference" standard from *Griggs* because it raises grave constitutional concerns under Article III and the Due Process Clause, especially in cases where the EEOC appears before this Court as a litigant.

ARGUMENT

It is imperative that this Court repudiate its command from *Griggs* that requires courts to extend "great deference" to the EEOC's interpretations of Title VII. This is so for three reasons. First, a posture of judicial "deference" enables the EEOC to make an end run around Congress's decision to deny it substantive rulemaking authority over Title VII—and thus around bicameralism and presentment. Second, many lower courts continue to invoke and apply the "great deference" standard in Title VII litigation, even though this standard is irreconcilable with the Court's recent pronouncements on Title VII and agency deference. Finally, a regime of "deference" to the EEOC is incompatible with the judiciary's constitutional duties to exercise independent judgment and avoid bias when resolving the cases and controversies that come before it.

I. *GRIGGS*'S DEFERENCE REGIME IS INCOMPATIBLE WITH CONGRESS'S DECISION TO WITHHOLD SUBSTANTIVE RULEMAKING AUTHORITY FROM EEOC

The most urgent reason for this Court to repudiate *Griggs*'s decision to extend "great deference" to the EEOC's interpretations of Title VII is that it is flatly incompatible with Congress's decision to deny the EEOC rulemaking authority over Title VII's substantive provisions.

A. Courts May Not Defer to Agencies Absent Gap-Filling Authority

When Congress enacted Title VII and created the EEOC, it allowed the agency to issue only *procedural* regulations. *See* 42 U.S.C. § 2000e-12 ("The Commission shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this subchapter." (emphasis added)). Because Congress withheld substantive rulemaking authority from the EEOC, it has not vested the EEOC with *any* interpretive authority over the meaning of Title VII. *See United States v. Mead Corp.,* 533 U.S. 218, 226–27 (2001) (requiring evidence of "congressional intent" to give an agency interpretive authority over a disputed statutory provision). The judiciary should not subvert this congressional allocation of authority by extending "great deference" to the EEOC's announced interpretations of Title VII—and treating agency pronouncements as if they were the product of congressionally authorized gap-filling authority.

An agency of course has the prerogative to opine on what it thinks a statute means, regardless of whether Congress has given the agency rulemaking authority. But even proponents of agency deference recognize that an agency's views cannot receive judicial *deference* unless there is evidence of congressional intent to give the agency interpretive authority over the disputed statutory provision. *See Mead*, 533 U.S. at 226–27. No such evidence of congressional intent can be found when the Title VII statute empowers the EEOC to issue only procedural and not substantive regulations.

This Court's recent decisions have held that courts may defer to agencies *only* when there is congressional intent (or presumed congressional intent) to bestow gap-filling authority upon the agency. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) ("*Auer* deference (as we now call it) is rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."); *see also id.* at 2417 (withholding *Auer* deference "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity," because "Congress presumably would not grant it that [interpretive] authority."). There is no *conceivable* congressional intent to give the EEOC interpretive authority over Title VII's substantive provisions when the statute authorizes the agency to issue only *procedural* regulations. *See* 42 U.S.C. § 2000e-12. And by specifically limiting the EEOC's rulemaking authority to procedural regulations, the statute rebuts any possible "presumption" of

congressional intent to vest the EEOC with substantive gap-filling authority over the meaning of "sex" discrimination.

B. Judicial Deference Wrongfully Empowers EEOC to Create Binding Substantive Rules

Worse, a regime that extends "great deference" to the EEOC's interpretations of Title VII will effectively empower the EEOC to create binding rules—even though Congress specifically denied the EEOC rulemaking authority over Title VII's substantive provisions. The EEOC can circumvent this restriction on its powers by announcing its interpretations of Title VII in "guidance documents" and then demand that the courts "defer" to those guidance documents under *Griggs*. A regime of this sort enables agencies to issue pronouncements that carry "the force and effect of law" on account of the judicial deference that they receive, without going through the notice-and-comment procedures that the APA requires for the "legislative" or "substantive" agency rules that bind private parties. *See Kisor*, 139 S. Ct. at 2420 (acknowledging that agency rules should not be given "the force and effect of law" without going through the notice-and-comment procedures prescribed by 5 U.S.C. § 553).

This is no mere hypothetical problem. Consider the *Harris Funeral Homes* case, where the EEOC chose to press enforcement of its novel interpretation of "sex" discrimination in one of the very circuits—the U.S. Court of Appeals for the Sixth Circuit—where the agency fully expected to receive "great deference" to its statutory interpretation from the federal judiciary at the time that it brought the lawsuit. *See Johnson v. Univ. of Cincinnati*,

215 F.3d 561, 580 (6th Cir. 2000) ("Pursuant to the Supreme Court's directive, the EEOC's interpretation of Title VII is to be given 'great deference' by the courts." (quoting *Griggs*, 401 U.S. at 434)).

C. Judicial Deference Evades Bicameralism and Presentment

A final problem with the *Griggs* "great deference" regime is that it weakens political accountability by allowing an evasion of bicameralism and presentment. The bicameralism-and-presentment requirement ensures that laws are made by the two houses of Congress and are subject to the possibility of a veto. Responsibility thus lies in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people. The EEOC, by contrast, is designed as an "independent" federal agency whose commissioners cannot readily be controlled by the President. When the judiciary bypasses Congress and allows an entity of this sort to claim interpretive authority over the laws that it administers, then "the people lose control over the laws that govern them. . . . The public loses the right to have both its elected representatives *and* its elected president take personal responsibility for the law." D. Schoenbrod, *Power Without Responsibility* 99–105 (Yale U. Press 1993).

II. The "Great Deference" Standard from *Griggs* Continues to Cause Confusion in Lower Courts

It did not seem to matter to the *Griggs* Court that the agency-announced interpretations of Title VII had never gone through notice-and-comment rulemaking, nor did it

matter that Congress had denied the EEOC rulemaking authority over Title VII's substantive provisions. The brute fact that the guidance reflected the EEOC's views was sufficient to command "great deference" from the judiciary, without regard to whether Congress actually vested the EEOC with interpretive authority over Title VII's substantive provisions. Yet this "great deference" standard has never been explicitly overruled—even though this Court's later cases have moved away from it—and it continues to rear its head in the lower courts despite its incompatibility with this Court's subsequent pronouncements.

A. The *Griggs* Era Supreme Court Commanded "Great Deference" to EEOC

In the 1970s, this Court declared on four separate occasions that the EEOC's interpretations of Title VII are entitled to "great deference" from the judiciary. In *Griggs*, for example, the Court considered whether Title VII prohibits employment practices that have a disparate racial impact. This inquiry required the Court to interpret § 703(h) of the Civil Rights Act of 1964, which provided that:

> [I]t shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Id. at 426 n.1 (quoting 78 Stat. 255). Although Congress had denied the EEOC authority to issue regulations interpreting this statutory language, the EEOC nonetheless issued "guidelines" declaring that § 703(h)'s safe harbor should apply only to *job-related* tests:

> The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

Id. at 434 n.9 (quoting EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966). The EEOC had also issued additional guidance in 1970 forbidding the use of any test unless the employer has "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.* (quoting 29 C.F.R. § 1607.4(c), 35 Fed. Reg. 12,333 (Aug. 1, 1970)).

Griggs held that these EEOC "interpretations" of Title VII were "entitled to great deference," simply because they reflect "[t]he administrative interpretation of the Act by the enforcing agency." *Griggs*, 401 U.S. at 434–35. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), reaffirmed that the EEOC's interpretive guidance is to

receive "great deference" from the courts. *See id.* at 94 ("The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference" (citing *Griggs*, 401 U.S. at 434)). So did *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), each of which proclaimed that "great deference" must be accorded to the EEOC's interpretations of Title VII.[3]

B. The Subsequent Decisions of This Court Have Quietly Abandoned the *Griggs* Approach

But in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court tacitly abandoned this approach. *Gilbert* held that Title VII's prohibition on "sex" discrimination does not encompass discrimination on account of pregnancy, and it rejected the EEOC guidance that had reached the opposite conclusion. *See id.* at 140–43. But the Court also appeared to reject the dissenting opinion's plea

3. *See Albemarle Paper*, 422 U.S. at 431 ("The EEOC Guidelines are not administrative regulations[] promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.' *Griggs v. Duke Power Co.*, 401 U.S. at 433–434. *See also Espinoza*, 414 U.S. at 94 (1973)."); *McDonald*, 427 U.S. at 279 ("[T]he EEOC, whose interpretations are entitled to great deference, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites").

to extend "great deference" to that EEOC guidance. *See id.* at 156 (Brennan, J., dissenting).

Instead, the Court observed that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title," and as a result "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law." *Id.* at 141. Rather than applying the "great deference" standard from *Griggs*, the *Gilbert* Court held that the EEOC's regulatory guidance was entitled to nothing more than *Skidmore* deference, and it rejected the EEOC's pregnancy-discrimination guidelines after applying the *Skidmore* framework. *See id.* at 141–43.

The post-*Gilbert* decisions of this Court have likewise eschewed the "great deference" standard from *Griggs*, and they apply nothing more than *Skidmore* deference to the EEOC's announced interpretations of Title VII. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257–58 (1991).

C. Some Lower Courts Nevertheless Continue to Rely on *Griggs*

Yet the "great deference" standard refuses to die. Because it has never been *explicitly* repudiated by this Court, it remains available for litigants and lower courts to use — and the lower courts continue to invoke and apply the "great deference" standard. In many circuits ample appellate-court precedent extends "great deference" to the EEOC's interpretations of Title VII, in reliance on *Griggs* and other pre-*Gilbert* decisions from this Court.

See, e.g., *Reyes v. Waples Mobile Home Park Limited Partnership*, 903 F.3d 415, 432 n.10 (4th Cir. 2018) ("[T]he EEOC's interpretations of Title VII, as the enforcing agency of Title VII, [are] 'entitled to great deference' " (quoting *Griggs*, 401 U.S. at 434)).[4] And there is no

4. *See also Gulino v. New York State Education Dep't*, 460 F.3d 361, 383 (2d Cir. 2006) ("[T]he [EEOC] Guidelines represent 'the administrative interpretation of the Act by the enforcing agency' and are thus 'entitled to great deference.' " (quoting *Griggs,* 401 U.S. at 433–34)); *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 585 n.8 (9th Cir. 2000) ("Although the [EEOC] Guidelines are not legally binding, they are 'entitled to great deference.' " (quoting *Albemarle Paper,* 422 U.S. at 431)); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) ("Pursuant to the Supreme Court's directive, the EEOC's interpretation of Title VII is to be given 'great deference' by the courts." (quoting *Griggs*, 401 U.S. at 434)); *Allen v. Entergy Corp.*, 181 F.3d 902, 905 (8th Cir. 1999) ("While these [EEOC] guidelines have not been promulgated pursuant to formal procedures established by Congress . . . they are nevertheless 'entitled to great deference' as '[t]he administrative interpretation of the Act by the enforcing agency' " (quoting *Griggs,* 401 U.S. at 433–34)); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 993 n.1 (9th Cir. 1998) ("The EEOC Guidelines constitute [t]he administrative interpretation of [Title VII] by the enforcing agency, and consequently they are entitled to great deference." (citations and internal quotation marks omitted)); *see also EEOC v. Total System Services, Inc.*, 240 F.3d 899, 903–04 (11th Cir. 2001) (Barkett, J., dissenting from denial of rehearing en banc) ("[M]indful of the Supreme Court's directive that the EEOC's interpretation of Title VII is entitled to 'great deference' by the courts, see *Griggs v. Duke Power Co.,* 401 U.S. 424, 434 (1971), it seems that Title VII's participation clause must cover internal investigations, even in

(continued…)

shortage of district-court rulings that espouse the "great deference" standard either. *See, e.g.*, *Scott v. Rochester Gas & Electric*, 333 F. Supp. 3d 273, 278 (W.D.N.Y. 2018) ("The EEOC's interpretation of Title VII and its terms is afforded great deference." (citations omitted)).[5]

At the same time, other courts insist that EEOC interpretations of Title VII should receive little or no deference on account of the fact that Congress has withheld substantive rulemaking authority from the agency. *See, e.g.*, *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 200 (5th Cir. 1994) ("[T]he usual deference afforded to agency interpretations is attenuated when applied to the EEOC, because Congress did not confer on the EEOC authority to promulgate rules or regulations under title VII. Thus, the EEOC's interpretations are not controlling on the courts." (citations omitted)).

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the absence of an EEOC notice of charge of discrimination." (footnote omitted)).

5. *See also Bazile v. City of Houston*, 858 F. Supp. 2d 718, 725–26 (S.D. Tex. 2012) ("The [EEOC] Guidelines . . . are 'entitled to great deference.' " (quoting *Albemarle Paper*, 422 U.S. at 431)); *Johnson v. University of Iowa*, 408 F. Supp. 2d 728, 741 (S.D. Iowa 2004) ("This Court must give great deference, however, to EEOC regulations issued in furtherance of Title VII." (citations omitted)); *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999) ("EEOC guidelines 'constitute the administrative interpretation of [Title VII] by the enforcing agency and consequently are entitled to great deference.' " (quoting *Griggs*, 401 U.S. at 433–34)); *Baron v. Port Authority of New York & New Jersey*, 968 F. Supp. 924, 930 (S.D.N.Y. 1997) ("The Supreme Court has made clear that EEOC's interpretation of Title VII and its terms is afforded great deference.").

And some courts of appeals wobble back and forth. In *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3d Cir. 2007), for example, the Third Circuit recognized that this Court had moved away from the "great deference" standard of *Griggs* and held that only *Skidmore* deference should apply to EEOC interpretations of Title VII. *See id.* at 244 ("[I]t does not appear that the EEOC's Guidelines are entitled to great deference. While some early cases so held in interpreting Title VII, *Griggs,* 401 U.S. at 434, more recent cases have held that the EEOC is entitled only to *Skidmore* deference."). But the very next year the Third Circuit was back to the *Griggs* standard, proclaiming that the EEOC's guidance interpreting Title VII should receive "a high degree of deference under *Griggs v. Duke Power*." *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008).

The Second Circuit has also seesawed between the "great deference" standard of *Griggs* and the *Skidmore* deference that appears in this Court's more recent cases. In *McMenemy v. City of Rochester*, 241 F.3d 279 (2d Cir. 2001), the Second Circuit purported to repudiate its earlier decisions that had required "great deference" to the EEOC's interpretations of Title VII. *See id.* at 284 ("Although we have held that '[t]he EEOC's interpretation of Title VII and its terms [should be] afforded great deference,' *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 309 (2d Cir. 1996), our deference here must be tempered in light of the Supreme Court's recent decision[s] . . . . [T]he EEOC's interpretation is 'entitled to respect' to the extent it has the 'power to persuade,' pursuant to . . . *Skidmore*"). But five years after that pronouncement, the

Second Circuit was back to applying the "great deference" standard from *Griggs*. *See Gulino*, 460 F.3d at 383 ("[T]he [EEOC] Guidelines represent 'the administrative interpretation of the Act by the enforcing agency' and are thus 'entitled to great deference.' *Griggs,* 401 U.S. at 433–34, 91 S. Ct. 849.").

The Second Circuit's most recent pronouncement on the matter, however, appears to have reverted back to the *Skidmore* deference that the court had previously embraced in *McMenemy. See Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) ("[T]he EEOC's interpretation is entitled at most to so-called *Skidmore* deference—*i.e.,* 'deference to the extent it has the power to persuade.'" (emphasis added)).

All of this confusion is the inevitable byproduct of a Court that quietly moves away from an earlier line of precedent without explicitly repudiating the doctrines that had been established in those cases. Rather than overruling the passage in *Griggs* that requires "great deference" to the EEOC's interpretations of Title VII, this Court has chosen merely to disregard that language while charting a new course on agency deference. This reluctance to be explicit has produced a regime in which litigants and lower courts can pick and choose between the inconsistent pronouncements from this Court—and then insist that their hand-selected passages be regarded as "law" because only the Supreme Court can overrule one of its own decisions. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Steele v. Industrial Development Board Of Metropolitan Government Nashville*, 301

F.3d 401, 408–09 (6th Cir. 2002) ("[T]he Supreme Court has specifically stated that the lower courts are to treat its prior cases as controlling until the Supreme Court itself specifically overrules them.").

It is long past time for this Court to issue a clear and unmistakable pronouncement that its decisions extending "great deference" to the EEOC's interpretations of Title VII are incompatible with the Court's current approach and do not reflect the current state of the law.

III. The "Great Deference" Regime of *Griggs* Violates Article III and the Due Process Clause

The Court should also repudiate *Griggs* and its "great deference" requirements for constitutional reasons, because a requirement to "defer" to the EEOC's substantive interpretations of Title VII raises serious constitutional questions under Article III and the Due Process Clause.

A. The Court Should Not Abandon Its Article III Duty of Independent Judgment

A court that "defers" to the EEOC simply because the agency has weighed in on the interpretive question before the Court is abandoning its duty of independent judgment. The federal judiciary was established as a separate and independent branch of the federal government, and its judges were given life tenure and salary protection to shield their decisionmaking from the influence of the political branches. *See* U.S. Const. art. III. Yet a regime of "deference" to the EEOC causes Article III judges to abandon the pretense of judicial independence by giving

automatic weight to an agency's opinion of what a statute means.

B. Favoring EEOC as a Litigant Before the Court Violates Due Process

Worse, a command that courts "defer" to the EEOC requires the judiciary to display systematic bias toward the EEOC whenever it appears as a litigant. It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court violates the due process rights of other litigants before the court. This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by . . . bias").

Yet *Griggs* institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to the EEOC even when it appears as a litigant before the court (as in the *Harris Funeral Homes* case). Rather than exercise their own judgment about what the law is, judges under the *Griggs* regime extend "great deference" to the judgment of one of the actual litigants before them. *See*

generally Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

For all these reasons, the Court should expressly repudiate the "great deference" standard from *Griggs*—and these cases present an ideal opportunity to bury that superseded deference standard for good.

* * *

One of the most remarkable features of these cases is that none of the employee litigants are asking this Court to extend any type of deference to the EEOC's interpretation of "sex" discrimination. And none of the principal briefs even discuss the issue of agency deference—even though the EEOC conspicuously weighed in on the meaning of "sex" discrimination in its *Baldwin* and *Macy* proceedings.

But the Court should not be content to allow *Griggs* and its "great deference" standard to persist and thereby continue to confound lower courts. The Court should instead state unequivocally that the EEOC's interpretations of Title VII do not receive "great deference" from the judiciary—regardless of the past decisions of this Court that say otherwise. No deference appears to be the tacit premise of the litigants' arguments, but the Court should make that premise explicit in its ruling.

CONCLUSION

The EEOC interpretations at issue here should receive no deference.

Respectfully submitted.

PHILIP HAMBURGER
MARK CHENOWETH
ADITYA DYNAR
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

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