No. _____

In The
Supreme Court of the United States

SHAWNA CANNON LEMON,

Petitioner,

v.

MYERS BIGEL, P.A., LYNNE A. BORCHERS, and UNNAMED OTHERS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the six factors set forth in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), addressing whether director-shareholder physicians of a professional corporation were "employees" for purposes of determining whether the corporation had the statutory minimum number of employees for coverage under the Americans with Disabilities Act, apply to whether a shareholder in a law firm may assert claims of race and sex discrimination and retaliation against the law firm as an "individual" under Title VII of the Civil Rights Act of 1964.

2. Whether the United States Court of Appeals for the Fourth Circuit erred in dismissing Petitioner's claim under 42 U.S.C. § 1981 for failure to plead "but-for" causation where Petitioner pleaded that her race was a cause for Respondents' adverse employment actions, consistent with the Court's determination in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) that the protected trait need only be one but-for cause of the challenged employment action.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Shawna Cannon Lemon, Plaintiff and Petitioner;
2. Myers Bigel, P.A., Lynne A. Borchers, and Unnamed Others, Defendants and Respondents.

RELATED CASES

- *Lemon v. Myers Bigel, P.A., et al.*, No. 5:18-cv-00200, U.S. District Court for the Eastern District of North Carolina. Judgment entered March 11, 2019.
- *Lemon v. Myers Bigel, P.A., et al.*, No. 19-1380, U.S. Court of Appeals for the Fourth Circuit. Judgment entered January 19, 2021.
- *Lemon v. Myers Bigel, P.A., et al.*, No. 19-1380, U.S. Court of Appeals for the Fourth Circuit. Judgment entered February 17, 2021.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on January 19, 2021. App. 1. The Fourth Circuit affirmed the decision of the United States District Court for the Eastern District of North Carolina on March 11, 2019, document number 36 in the District Court's docketed matter number 5:18-cv-00200-FL (E.D.N.C.). App. 18.

STATEMENT OF JURISDICTION

The United States Court of Appeals issued its opinion affirming the decision of the United States District Court for the Eastern District of North Carolina on January 19, 2021, App. 1, and subsequently denied Petitioner's Petition for Rehearing and Petition for Rehearing En Banc on February 17, 2021, *id.* at 76. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the anti-discrimination and antiretaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2 and 2000e-3.

42 U.S.C. § 2000e-2(a) EMPLOYER PRACTICES It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a) DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has

> opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

This case also involves the anti-discrimination provisions of 42 U.S.C. § 1981.

> 42 U.S.C. § 1981(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, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The Fourth Circuit erroneously affirmed dismissal of Petitioner Shawna Lemon's case after it improperly applied this Court's decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), which addressed the narrow question of whether director-shareholder physicians of a professional corporation were "employees" for purposes of determining whether the professional corporation was an employer under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.*, to the entirely

separate and legally distinct question of whether Petitioner could assert claims of race and sex discrimination against a law firm as an "individual" under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. This Court must grant the writ of certiorari to correct the Fourth Circuit's error, correct this ongoing misapplication of *Clackamas* by the lower courts which continues to result in individuals being improperly denied protection under Title VII, and confirm that *Clackamas* has no bearing on whether a person is an "individual" protected under Title VII against discrimination and retaliation in the workplace. Despite Title VII's plainly worded prohibition on discrimination against "individuals," lower courts, including the Fourth Circuit in this case, have continued to improperly constrain Title VII's sweeping protections by erroneously applying *Clackamas* and its progeny to determine whether or not an individual complaining of discrimination under Title VII is an "employee." In sum, the Fourth Circuit and other circuits have asked the wrong question, used the wrong test, and unsurprisingly, consistently reached the wrong result.

The result is that equity holders of professional businesses like law firms have been left unprotected from discrimination in the workplace. This is completely contrary to both the plain language and broad remedial purpose of Title VII. The time has come for this Court to correct this ongoing error which is contrary to the plain meaning of Title VII's text and Congress's purpose in adopting it: to "eliminat[e] the

effects of discrimination in the workplace[.]" *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 630 (1987). The erroneous distinction which courts nationwide have applied to deny shareholders of professional corporations the protections of Title VII—a direct result of the continued misapplication of *Clackamas*—contravenes this Court's admonition "that Title VII should not be read to thwart such efforts." *Id.* The Court must grant certiorari to put an end to the harm these erroneous decisions continue to inflict on victims of discrimination.

The Fourth Circuit also erroneously determined that Lemon failed to state a claim for race discrimination under 42 U.S.C. § 1981. This Court's recent decisions in *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020) and *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) have made clear that a plaintiff need only initially plead facts that plausibly suggest that she can establish her race was one "but-for" cause of the challenged action. But the Fourth Circuit instead imposed an improperly heightened pleading standard by holding that Lemon must allege that her race was *the* but-for cause of the challenged employment action. Moreover, other lower courts, citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), also continue to impose an erroneous heightened pleading standard. This Court should grant certiorari to clarify that the pleading standard under § 1981 requires only that the plaintiff allege that her

race was one but-for cause of the challenged employment action, regardless of whether other factors may have contributed.

A. Factual Background.

Petitioner Shawna Cannon Lemon is a North Carolina intellectual property lawyer and an African-American woman. App. 3, 19. Upon entering the practice of law in September 2001, she was employed by Respondent Myers Bigel, P.A. ("MB"). *Id.* at 20. Lemon and MB entered into an Employment Agreement on September 4, 2001, which contained the terms and conditions of her employment, including:

- Allowing Lemon's employment to be terminated "without cause and at any time, by giving at least thirty (30) days' written notice";
- Requiring Lemon "to devote all necessary time and [her] best efforts to the performance of [her] duties as a lawyer for [defendant MB] in accordance with the highest ethical standards of the legal profession and the rules, regulations, and policies of [defendant MB] as adopted from time-to-time";
- "Limiting her ability to work and earn income outside of defendant MB, including income from professional services, teaching fees, director fees, and honorariums";

- "Requiring her to maintain 'professional competence' "; and
- "Requiring her 'to observe and comply with the personnel policies, the operating policies and procedures, and all other rules and regulations of [defendant MB]' and 'to carry out and perform orders, directions, and policies stated by [defendant MB] to [her.]"

Id. at 20–21 (alterations in original). She was also subject to a strict quality control policy. *Id.* at 21–22. She received a W-2 to report her income to the United States Internal Revenue Service. *Id.* at 22.

None of this changed when Lemon became a shareholder of MB in 2007. *Id.* at 21–22. Her Employment Agreement remained in full force and effect; she remained subject to the strict quality control policy; and she continued receiving a W-2 reflecting employer withholdings, rather than a K-1 reflecting partnership or similar distributions, to report her income on her taxes. *Id.*

MB is a professional association, owned by its shareholders, governed by a board of directors, but ultimately managed by a Management Committee and Managing Shareholder, Respondent Lynne Borchers. *Id.* at 23–25. While MB's shareholders each held equal shares and held a seat on the Board of Directors, some shareholders were more equal than others. Borchers and members of the Management Committee of MB controlled the Board of Directors by scheduling

meetings, setting agendas, and making recommendations to the Board that were followed as a matter of course. *Id.* at 25. Importantly, a subgroup of shareholders (that did not include Lemon) effectively controlled MB's revenues and major client relationships (the "Controlling Shareholders"), and thereby effectively controlled the Management Committee, the Board of Directors, and MB generally. *Id.* at 25–26. Thus, there was a clear divide between the nominal equality of the shareholders and the true power within the firm.

MB's workplace had been hostile to minorities and women since at least 2011. *Id.* at 26. MB hired outside counsel to advise it concerning numerous claims of gender discrimination, including a hostile work environment, raised by several of MB's attorneys. *Id.* at 27. As part of this investigation, Lemon met for an interview with MB's outside counsel on June 2, 2016. *Id.* at 27–28. She candidly reported her personal knowledge of gender discrimination at MB which supported the other employees' claims of gender discrimination. *Id.* at 28.

MB's outside counsel ultimately prepared a confidential memorandum to MB's Board of Directors regarding the outcome of the investigation, which the Board discussed at a June 15, 2016 meeting. *Id.* at 28–29. This memorandum revealed Lemon's protected speech to MB's outside counsel confirming MB's hostile work environment towards women. *Id.* at 28. Upon reviewing this memorandum at the meeting, members of MB's Board then openly excoriated Lemon, calling her statements "idiotic," and screaming at her to "grow up"

and "stop complaining." *Id.* at 29. Board members also chastised her for hiring an attorney to advise her after her interview with MB's outside counsel. *Id.* Following this meeting, another MB shareholder, in order to spread an inaccurate and ugly stereotype of African-Americans, claimed that Lemon "played the black card too much." *Id.* at 30. Another shareholder referred to Lemon as a "bad a**hole" for expressing her sincerely held concerns of gender discrimination to MB's outside counsel. *Id.*

These comments constituted and precipitated further retaliation against Lemon for her honest and good-faith participation in MB's investigation into gender discrimination, a protected activity under Title VII. In addition to removing another shareholder who had voiced concerns of gender discrimination at MB from the Management Committee, MB further intentionally discriminated and retaliated against Lemon by denying her election under MB's short term leave ("STL") policy, which reduced a shareholder's expected hours due to "personal illness, family leave, or serious family illness or other hardship." *Id.* at 30–35. Throughout 2016, Lemon had experienced numerous qualifying events under the STL policy and had notified Borchers of this. *Id.* at 33. Prior to Lemon's request, MB had ministerially confirmed the leave requests of white shareholders for reasons such as cataract surgery, undisclosed illnesses, and even when the alleged basis for leave did not qualify at all under the terms of the STL policy. *Id.* at 33–36. However, when it came to Lemon, the Management Committee subjected her to

"insensitive questioning" that white shareholders did not experience; required her to provide medical documentation that it did not require white shareholders to provide; and required her to present her request to the Board directly, which, again, white shareholders were not required to do. *Id.* at 35–36.

At the meeting to discuss Lemon's STL request, the Board required Lemon and another female shareholder to leave the room due to their hiring of an attorney to represent them following MB's investigation into gender discrimination so that the remaining members of the Board—and the Controlling Shareholders in particular—could openly discuss their negative opinions of Lemon. *Id.* at 34–35. When Lemon returned to the meeting, the Board voted 17-3 to deny her STL request, and promptly moved to discuss "punishment" for her alleged "bad behavior," specifically including Lemon's hiring of personal legal counsel related to the discrimination investigation. *Id.* at 36. Punishment options discussed included public censure, monetary penalties, and termination at the direction of Borchers, the Managing Shareholder. *Id.* Ultimately, the Board passed a retaliatory amendment to MB's compensation plan to specifically punish Lemon if she was unable to meet her billable requirements—which was now a strong possibility, and one created by MB's discriminatory denial of her STL request. *Id.* at 36–37.

In the weeks following MB's denial of Lemon's STL request and in a show of invidious gender and racial discrimination and retaliation, MB continued to display hostility towards Lemon. *Id.* at 37–39. In

particular, Lemon's practice group questioned her about her "intentions," what would happen "if somebody pushed her off the cliff," and whether she would sue MB. *Id.* She was further chastised for having hired an attorney. *Id.* Due to this ongoing hostile work environment, Lemon's health suffered, and she ultimately resigned on December 23, 2016. *Id.* at 39.

B. The District Court's Erroneous Dismissal of Lemon's Claims.

On April 4, 2018, Lemon filed suit against MB, Borchers, and unnamed others, alleging that they retaliated against her for her participation in the investigation into gender discrimination in violation of Title VII, and alleging disparate treatment and retaliation based on her race in violation of Section 1981 and Title VII. *Id.* at 18. On November 19, 2018, MB and Borchers moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Lemon was not an "employee" for purposes of Title VII and therefore ineligible to receive relief thereunder, and that she failed to allege that race was a sufficiently important motivation in MB's and Borchers's actions towards her. *Id.* at 18, 55–57. In response, Lemon argued that she was an "individual" and "person aggrieved" under Title VII. *Id.* at 88–93. She further argued that even under the *Clackamas* standard, she alleged sufficient facts to support her status as an "employee" of MB. *Id.* at 93–101. Lemon also argued that she had alleged sufficient facts to state a plausible claim under § 1981. *Id.* at 101–109.

On November 19, 2018, while the motion to dismiss was pending, Lemon filed a motion to amend under Fed. R. Civ. P. 15(a)(2), in which she sought to add additional context for her status as an "employee" of MB and to raise claims for Breach of Fiduciary Duty and Breach of the Implied Covenant of Good Faith and Fair Dealing, which have since been abandoned. *Id.* at 6, 19.

On March 11, 2019, the District Court granted MB's and Borchers's motion to dismiss and denied Lemon's motion to amend as futile. *Id.* at 42. The District Court held that only an "employee" may bring a claim under Title VII, and applied the *Clackamas* factors to determine that Lemon was not an "employee" of MB and therefore failed to state a claim. *Id.* at 42–55. The District Court further held that Lemon's complaint did not sufficiently allege that MB's and Borchers's actions were "motivated by" racial bias. *Id.* at 59–61.

C. The Fourth Circuit's Erroneous Application of *Clackamas* to Lemon's Title VII Claims and Misapprehension of *Bostock*.

On appeal, Lemon argued that the District Court erred in is application of *Clackamas*. App. 143–69. Lemon further argued that the District Court erred by applying a heightened pleading standard to Lemon's Section 1981 claim. App. 169–81. Following the close of briefing but prior to oral argument before the Fourth Circuit, this Court issued its opinion in *Comcast Corp.*

v. National Ass'n of African American-Owned Media, 140 S. Ct. 1009 (2020), holding that § 1981 requires pleading and proving that the plaintiff would not have lost a protected right "but for race." *Id.* at 1019. Both Respondents and Lemon raised this holding with the Fourth Circuit in a supplemental filing. App. 111–12. Also following the close of briefing but prior to oral argument before the Fourth Circuit, this Court issued its opinion in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), holding that the term "because of" in Title VII "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 1739. Lemon raised this holding to the Fourth Circuit in a supplemental filing. App. 113–14.

The Fourth Circuit affirmed the District Court. *Id.* at 2. In the Fourth Circuit's opinion, "the protections of Title VII's anti-discrimination and anti-retaliation provisions extend only to employees." *Id.* at 7. The Fourth Circuit further held that the "*Clackamas* factors are manifestly well-suited" to the determination of whether an individual is an "employee" and entitled to Title VII protection. *Id.* at 9. In applying *Clackamas*, the Fourth Circuit held that Lemon was not an employee, which was a "result . . . to be expected" since she was an "equity partner in a conventionally-structured law firm." *Id.* at 13. The Fourth Circuit also held that Lemon "failed to appropriately allege . . . that her race was the but-for cause of the Board's denial of her leave application." *Id.* at 14–17 (citing *Comcast*, 140 S. Ct. at 1014–15). On February 2, 2021, Lemon filed a Petition for Rehearing and Petition for Rehearing En

Banc, which the Fourth Circuit denied on February 17, 2021. *Id.* at 76.

The Fourth Circuit's holdings that only an "employee" may receive protection under Title VII and its decision to apply *Clackamas* to this determination were clear error based on the text and purpose of Title VII. And the Fourth Circuit's imposition of a heightened standard for Lemon's Section 1981 claim contradicts this Court's recent holding in *Bostock*. While the Fourth Circuit's errors affected Lemon personally, they also are but one example of the same persistent and ongoing errors throughout the lower courts that must be corrected. This Court must grant certiorari to ensure all persons aggrieved under Title VII can receive its protection and to clarify the pleading standard under § 1981 consistent with the Court's recent rulings on but-for causation.

REASONS FOR GRANTING THE PETITION

I. The *Clackamas* Factors Are Inapplicable to Whether an Individual May Assert a Claim under Title VII.

The Court must grant certiorari in this case because the question presented is important and compelling, as it affects minority shareholders in companies nationwide. In determining who is entitled to the protections of Title VII, the Fourth Circuit and other circuits have asked the wrong question, used the wrong test, and unsurprisingly, consistently reached the

wrong result. The threat of discrimination does not end when an individual obtains a minority share of equity in a company; nevertheless, lower courts applying *Clackamas* to determine who may bring a claim under Title VII ignore this fact and prevent relatively powerless minority shareholders—"individuals" whom Congress intended to protect in enacting Title VII with such a broad remedial purpose—from obtaining justice for discrimination and retaliation by the companies for which they work. This unjust result will be repeated until this Court takes up this issue and corrects the erroneous use of *Clackamas* in this context. In this case, the Fourth Circuit has improperly decided an important question of federal law that has not been, but should be, settled by this Court.

Clackamas is simply inapplicable to the question of whether an individual may hold an employer liable for discrimination or retaliation under Title VII. Lower courts have erroneously extended *Clackamas* far beyond the logical scope of its holding and in doing so have undermined Title VII's broad remedial scope. *Clackamas* only addressed the ADA's definition of "employee" *not* to determine if an *individual* was a "person aggrieved" or "individual" entitled to raise a claim under Title VII, but rather to determine whether a *professional corporation* was an "employer," i.e., "a person engaged in an industry affecting commerce who has fifteen or more employees" that could be liable under Title VII. *Clackamas*, 538 U.S. at 444 (2003). Applying *Clackamas* to the issue of who is protected under Title VII—as the Fourth Circuit did in this case and other

courts have done—stands *Clackamas* on its head and is wholly inconsistent with Title VII's purpose and scope. This continued misapplication of *Clackamas* suppresses meritorious discrimination claims and ignores the reality that even a minority equity shareholder in a firm may face discrimination from her peers, as Lemon experienced here.

The Fourth Circuit erred in its conclusion that Title VII applies only to "employees" as defined by the statute, because the plain text of Title VII prohibits discrimination and retaliation against "individuals." Compounding its error, the Fourth Circuit erroneously applied *Clackamas* to determine whether Lemon was an "employee" under Title VII, despite the fact that the *Clackamas* factors seek to identify who is an employee under the ADA which has an entirely different definition of "employee." It is imperative that this Court clarify for lower courts that the broad remedial purpose and text of Title VII empowers "individuals," not just "employees," to sue for discrimination and retaliation in the workplace.

a. *Clackamas* is inapplicable to Title VII because Title VII focuses on the "individual" to effect its remedial purpose, not on the "employee."

Clackamas is inapplicable to the question of whether a professional can assert a Title VII claim against a firm because Title VII's implementing provisions empower an "individual"—a much broader term

than "employee"—to bring claims for discrimination and retaliation. The text of Title VII plainly states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added).

Similarly, as for retaliation, Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any *individual*, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. § 2000e-3(a) (emphasis added).

Moreover, Title VII provides a private right of action not to an "employee," but to a "person aggrieved."

42 U.S.C. § 2000e-5(f)(1). Under Title VII, consistent with its broad remedial purpose, the term "person" includes "one or more *individuals*" in addition to corporate entities and governmental agencies. *Id.* § 2000e(a) (emphasis added); *see also Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) ("The Act defines 'employee' as 'an individual employed by an employer,' but nowhere are there words of limitation that restrict references in the Act to 'any individual' to include only former employees or applicants for employment, in addition to present employees."). As with the definition of "employee" (discussed *infra*), Congress could have excluded "shareholders," "partners," "owners," or "members" in its definition of the term "person," but did not do so. Instead, Congress used a broadly-defined term—"individual"—to ensure that Title VII's goal of rooting out invidious discrimination in the workplace against individuals with protected traits is accomplished.

As its text plainly states, Title VII prohibits discrimination and retaliation against *individuals*, not just employees. In *Bostock* this Court noted that Title VII "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups." 140 S. Ct. at 1740. Likewise, this Court previously noted that "[t]he antiretaliation provision seeks to prevent harm to *individuals* based on what they do, *i.e.*, their conduct." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (emphasis added).

While the term "individual" is not defined in Title VII, the term's ordinary, common meaning applies where that word is not otherwise defined in a statute. *See* 42 U.S.C. § 2000e; *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) ("[T]he ordinary meaning of [the statutory] language accurately expresses the legislative purpose." (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010))). The term "individual" is used in Title VII as a noun. In this usage, an "individual" ordinarily includes any singular person. *See, e.g.*, *Bostock*, 140 S. Ct. at 1740 (restating definition of "individual" in 1964 as "[a] particular being as distinguished from a class, species, or collection" (citing Webster's New International Dictionary, at 1267)); *Individual*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "individual" in adjectival form as "[e]xisting as an indivisible entity" or "[o]f, relating to, or involving a single person or thing, as opposed to a group"). Under a plain reading of the statute, therefore, the question of who may bring a claim under Section 2000e-2(a)(1) does not hinge on whether that individual is an "employee" as defined by Section 2000e(f). Because the statute plainly states that an employer may not discriminate against an "individual," this should be the end of the analysis. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear [in a statute], that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.").

Of course, the plain reading of the statute may not always be wholly dispositive (although it is here), as "[t]he plainness or ambiguity of statutory language is determined" not only "by reference to the language itself," but also by reference to "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, analyzing the specific and broader context of the statute leads to the same conclusion as a straightforward reading of the statute.

For the specific context, the statute precedes the term "individual" with four types of prohibited conduct: (1) failure to hire; (2) refusal to hire; (3) discharge; and (4) otherwise discriminating. 42 U.S.C. § 2000e-2(a). Out of these preceding clauses, only discharge and otherwise discriminating could apply to an employee, yet all of the terms are applicable to an "individual". In other words, if Title VII applied only to protect an "employee," then "individuals" who an employer failed to hire or refused to hire would have no protection. The term "individual" must therefore encompass more than just an "employee" to avoid rendering the preceding clauses meaningless. Further, while one may counter that "individual" should only encompass employees and applicants for employment, Congress chose not to do so, despite having specified in the immediately following section that protects "employees or applicants for employment" from discriminatory classification. *Compare* 42 U.S.C. § 2000e-2(a)(1) *with id.* § 2000e-2(a)(2). Certainly, then, if Congress meant only to protect "employees or applicants for employment" in

§ 2000e-2(a)(1), it knew how to do it and could have so specified.

Looking to the broader context of the statute, Title VII uses the term "individual" in defining the term "employee." 42 U.S.C. § 2000e(f) ("The term 'employee' means an *individual* employed by an employer. . . ." (emphasis added)). If Congress meant for the term "individual" to only include "employees," it would have said so. But Congress clearly did not do so, and it is obvious why—defining "individual" to only mean "employee" would render the definition of "employee" even more circular than it already is. *See Clackamas*, 538 U.S. at 444 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)).

Congress could have narrowed the scope of Title VII by simply limiting its application and providing standing only to "employees." Instead, Congress chose to use the intentionally broad term "individual" in outlawing discrimination and retaliation based on a protected trait, and it provided standing to any "person aggrieved" under the statute. This broad language is essential to fulfilling Title VII's purpose.

Regardless of whether Lemon qualified as an "employee" under Title VII, she is certainly an "individual" and "person aggrieved" under the statute, as are countless others across the nation who suffer from illegal discrimination and retaliation based on their protected traits. By erroneously inserting *Clackamas* where it has no application, courts are continuing to deny individuals such as Lemon the protections explicitly

granted to them under Title VII. This Court must grant certiorari to correct this injustice.

b. *Clackamas* is inapplicable to Title VII because Title VII's definition of "employee" is not the same as the ADA's.

Even if Title VII only extends protection to "employees" rather than "individuals," (which it does not) *Clackamas* is still the wrong standard to judge Title VII's coverage. *Clackamas* interpreted the term "employee" as defined in the ADA; however, the definitions of "employee" under the ADA and Title VII are notably different.

The ADA defines "employee" as: "an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C. § 12111(4).

Title VII's definition is more specific. Title VII defines an "employee" as:

> an individual employed by an employer, ***except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal***

> ***powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision***. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e(f) (emphasis added). The key distinction between Title VII's definition of "employee" and the ADA's is that Title VII specifies who is ***not*** an employee. It is a well-established canon of statutory construction that *expressio unius est exclusio alterius*—the inclusion of one item in a group is to the exclusion of all others not mentioned. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). This Court has elaborated that this canon "does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it,' and that the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" *Marx*, 568 U.S. at 381 (internal citations omitted). Here, the canon clearly applies.

Unlike in the ADA, Title VII's definition of "employee" specifies that certain individuals are not deemed to be an "employee" when they are elected to public office, serving on a public officer's staff, or a policy-making appointee of a public officer. 42 U.S.C. § 2000e(f). If Congress intended shareholders of professional entities such as law firm equity holders to not

be employees under Title VII in any circumstance, it could have listed them in the exceptions provided. In fact, it would have been quite simple for Congress to specify that partners, shareholders, or other owners of a professional entity are not employees. It did not. Instead, Congress provided the broad statement of "individual employed by an employer" with specific exclusions from that definition and did not exclude law firm equity holders or others. Thus, Congress did not intend to exclude law firm equity holders from this definition, and instead intentionally kept the definition of "employee" broad to effectuate the purpose of Title VII.

This interpretation is wholly consistent with Title VII's aim to "strike at the entire spectrum of disparate treatment of men and women in employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Any arbitrary or limiting reading of Title VII that would impede this well-documented broad remedial intent contravenes Congress's purpose in enacting the statute to begin with.

c. Applying *Clackamas* to determine who may bring a Title VII claim against an employer is improper because *Clackamas* removes Title VII's focus from the individual by overemphasizing economic control and ignoring the reality of partner-to-partner discrimination in the workplace.

Congress enacted Title VII "to prohibit *all practices in whatever form which create inequality in employment opportunity* due to discrimination on the basis of race, religion, sex, or national origin[.]" *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)). Congress "ordained that its policy of outlawing such discrimination should have the 'highest priority.'" *Id.* (citing *Alexander*, 415 U.S. at 47; *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)). Moreover, this Court has noted that the antiretaliation provision sweeps at least as broadly as the antidiscrimination provisions. *See Burlington N. & Santa Fe Ry. Co v. White*, 548 U.S. at 63 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 456 (2008) ("Congress might have wanted its explicit Title VII antiretaliation provision to sweep more broadly (i.e., to include conduct *outside* the workplace) than its substantive Title VII

(status-based) antidiscrimination provision."). Congress's broad and strong remedial intent is clearly evident, as courts across the nation have recognized. *See, e.g.*, *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 110 (2d Cir. 2019) (declining to incorporate the Equal Pay Act's equal-work standard into Title VII due to Title VII's broad remedial purpose); *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 409–10 (4th Cir. 2015) ("Title VII should be liberally construed in light of its remedial purpose."); *Missirlian v. Huntington Mem'l Hosp.*, 662 F.2d 546, 549 (9th Cir. 1981) ("In our view, it is more compatible with the broad remedial purposes of Title VII and prior decisions of this circuit to require that a Title VII plaintiff receive a clear indication of when the ninety-day clock starts to run for filing a civil action."); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (noting Congress's intent that Title VII proscribe employment discrimination "in the broadest possible terms" and therefore it "should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of ethnic discrimination").

Importantly, one purpose of Title VII was to eliminate discrimination and retaliation in professional workplaces including law and medicine. *See Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123, 126 & n.3 (S.D.N.Y. Jan. 12, 1977) (describing legislative history of Title VII, including the Senate's rejection of a proposed amendment "designed to exclude physicians and surgeons employed by public or private hospitals"). In

fact, this Court rejected an argument that law firm partnership decisions should be categorically excluded from Title VII. *See Hishon v. King & Spalding*, 467 U.S. 69, 77–78 (1984). Applying *Clackamas* to determine who is entitled to bring a claim under Title VII, however, directly contravenes this purpose.

In this context, *Clackamas* creates a procedural hurdle that is at odds with the plain text of Title VII: law firm equity holders and other owners of professional entities must first prove in the pleadings stage that they are "employees" (not "individuals" as the statute states) triggering costly motions to dismiss claims before such individuals have the chance to elicit evidence of discrimination based on their protected traits or retaliation based on protected speech. This undue burden often results in law firm equity holders having no protection against discrimination. *See, e.g.*, *Mariotti v. Mariotti Bldg. Prod., Inc.*, 714 F.3d 761 (3d Cir. 2013) (affirming a motion to dismiss the Title VII claim of a terminated employee who was also a shareholder, officer, and director); *von Kaenel v. Armstrong Teasdale, LLP*, 943 F.3d 1139 (8th Cir. 2019) (affirming judgment on pleadings for age discrimination claim of firm partner whose employment was terminated by mandatory retirement policy).

In reality, while law firm shareholders may own a fraction of a firm, they still work for the firm and are subject to the firm's control. Such was the case with Lemon here: she held 1/20th of the firm's shares and one of twenty seats on the board of directors; however, she remained terminable at will, subject to firm

controls, and reported her earnings from the firm through a W-2 provided by the firm rather than a K-1. *See supra* Statement of the Case § A. Moreover, the continuing misapplication of *Clackamas* strips law firm equity holders from protection against retaliation when they engage in protected activity such as opposing discriminatory firm practices or actions, as Lemon did here. As discussed herein, this reasoning perversely perpetuates "top down" discrimination in a manner wholly at odds with Title VII's remedial purpose.

Moreover, this is a perverse result because law firm equity holders' economic stake in the firm does not itself offer any true protection against discrimination. An individual's ability to share in the profits and losses of the firm does nothing to prevent a controlling faction of the firm from voting against the equity holder's receipt of discretionary shares of profits. Indeed, one of the discriminatory actions taken by MB after its discriminatory and retaliatory refusal to grant Lemon's STL request was to amend the compensation plan to single out and specifically punish Lemon, which, as a minority shareholder, she was powerless to prevent. App. 36–37. In sum, while the *Clackamas* factors may help determine what companies are within Title VII's ambit, they utterly fail to answer the question of whether law firm equity holders need protection from discrimination. The answer to the latter question is undoubtedly yes.

Further, "there is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg v. Whitaker House*

Cooperative, Inc., 366 U.S. 28, 32 (1961). Indeed, as this Court noted in *Clackamas*, "[t]he mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee." *Clackamas*, 538 U.S. at 450. Justice Ginsberg's dissent in *Clackamas* provides helpful context on this point: owners of professional entities "invite the designation 'employee' for various purposes under federal and state law." *Id.* at 453 (Ginsburg, J., dissenting). Justice Ginsburg pointed out that the physician-shareholders in *Clackamas* claim to be employees under the Employee Retirement Income Security Act of 1974 (ERISA), under their state's workers' compensation law, and for purposes of limited liability based on their use of the corporate form. *Id.* The categories cited by Justice Ginsberg are not exhaustive. For example, it is common that owners of companies will also have employment agreements which enable them to be terminated at will (which is often accompanied by provisions governing buy-out of their shares). *See, e.g.*, *Virk v. MapleGate Anesthesiologists, P.C.*, 657 Fed. Appx. 19 (2d Cir. 2016) (holding that arbitration clause of employment agreement did not "terminate automatically upon Virk attaining shareholder-employee status"); *Lampman v. DeWolff Boberg & Assocs., Inc.*, 319 Fed. Appx. 293 (4th Cir. 2009) ("Lampman was an at-will employee, a status not altered by the Shareholders' Agreement, therefore his employment could be terminated at any time."); *Davis v. Yageo Corp.*, 481 F.3d 661, 676 (9th Cir. 2007) (discussing case in which employee/minority shareholder in a closely held corporation was subject

to mandatory repurchase of shares in event of termination of employment (citing *Stephenson v. Drever*, 16 Cal. 4th 1167, 69 Cal. Rptr. 2d 764, 947 P.2d 1301 (1997)); *Orr v. BHR, Inc.*, 4 Fed. Appx. 647 (10th Cir. 2001) (holding that minority shareholder physician's employment was lawfully terminated); *Brown v. Fin. Serv. Corp. Intern.*, 489 F.2d 144 (5th Cir. 1974) (interpreting buyout provision triggered by termination of shareholder's employment). Further, the tax code recognizes that owners often are employees of a corporation; for example, when a company is organized as a corporation, as is the case with MB,[1] shareholders may work for the company (rather than merely owning shares) and are taxed as employees, as was Lemon here. *See* IRS, *S Corporation Employees, Shareholders and Corporate Officers* (last modified Mar. 16, 2021), https://www.irs.gov/businesses/small-businesses-self-employed/s-corporation-employees-shareholders-and-corporate-officers (explaining that corporate officers and shareholders who perform work for a company are employees under the tax laws).

Realistically, law firm equity owners break into factions, some of which wield decision-making authority through which they can discriminate against other owners who are effectively powerless to stop it (as was the case within Myers Bigel). *See* App. 13. The Fourth

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[1] While MB is a "professional association," it is governed by both the North Carolina Professional Corporation Act as well as the North Carolina Business Corporation Act. *See* N.C. Gen. Stat. § 55B-3(a). MB had shareholders, directors, and officers, as in a corporation. *See supra* Statement of the Case § A.

Circuit stated that "inevitable differences in personal influence do not negate a partner's basic standing in the firm. Nor would sifting through such differences provide any remotely workable standard for determining employer/employee status." *Id.* The Fourth Circuit's message to law firm equity holders who fear discrimination or retaliation is that their only recourse to remedy discrimination is to rely upon the very same processes being abused by the controlling faction. This would require law firm equity holders to ingratiate themselves with the ruling faction, which is hopefully not racist, sexist, or otherwise bigoted. But when it is, as in Lemon's case, shareholders must either accept the illegal discrimination or risk reprisals they cannot remedy. This untenable situation starkly illustrates the ongoing harm caused by courts' continuing misapplication of *Clackamas*.

The absurdity of this reasoning is apparent. Of course no law firm equity holder who suffered from a firm's discriminatory or retaliatory conduct would suffer or permit it if she had the ability to end it. Permitting firms to sidestep Title VII as to its equity holders who, in addition to owning a percentage of the firm, however small, also do the work of the firm, is unjust, and this Court should empower law firm equity holders with protected traits to address discrimination and retaliation head-on under Title VII.

Discrimination against women and minorities in the workplace does not end when they obtain a minority share of equity in a firm. These individuals are entitled to Title VII's protection, and this Court should

grant certiorari to correct the ongoing misinterpretation of Title VII and to effectuate both the text as written and Congress's clearly expressed intent.

II. Lemon Clearly Stated a Claim for Race Discrimination under 42 U.S.C. § 1981 by Pleading that Race Was a Cause for Respondents' Adverse Employment Action, Consistent with This Court's Determination in *Bostock* that the Protected Trait Need Only Be One But-For Cause of the Challenged Employment Action.

The Fourth Circuit's opinion imposes an unreasonable heightened pleading standard to Lemon and others similarly situated, flying in the face of this Court's recent opinions interpreting § 1981 and Title VII. This Court should grant certiorari to clarify the pleading standard for § 1981 claims particularly in light of its recent decisions in *Comcast* and *Bostock*.

In *Comcast*, this Court addressed the question of whether § 1981 requires a protected trait to be a "but-for" cause of the challenged employment action or a "more forgiving" causation standard. 140 S. Ct. at 1013–14. In resolving this question, the Court held that a plaintiff's burden under § 1981 is to show that the protected trait "was a but-for cause of its injury." *Id.* at 1014. More concisely, the Court stated that for a § 1981 claim "[t]o prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Id.* at 1019.

Months later, this Court's landmark opinion in *Bostock* clarified once and for all that the term "because of" in Title VII encompasses the "'traditional' standard of but-for causation." *Bostock*, 140 S. Ct. at 1739 (citation omitted). Perhaps recognizing the lower courts' tendency to erroneously limit but-for causation's reach, the *Bostock* court noted that but-for causation "can be a sweeping standard. Often, events have multiple but-for causes." *Id.* The but-for causation standard does not allow a defendant to "avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.* (emphasis in original). Instead, the protected trait need only be "one but-for cause" of the challenged employment decision. *Id.* (citations omitted).

Read together, *Comcast* and *Bostock* provide a full picture of what a plaintiff must plead under § 1981: "To prevail, a plaintiff must initially plead and ultimately prove that, but for [a protected trait], it would not have suffered the loss of a legally protected right." *Comcast*, 140 S. Ct. at 1019. To prove that the protected trait was a but-for cause of the challenged action, the protected trait "need not be the sole or primary cause of the employer's adverse action." *Bostock*, 140 S. Ct. at 1744. Under the reigning *Twombly/Iqbal* pleading standard, at the motion to dismiss stage, a plaintiff need only initially plead facts that plausibly suggest that she can establish a protected trait was only one "but-for" cause of the challenged outcome. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544

(2007); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Lemon has done so here.

But lower courts have not followed the Court's straightforward command. Instead, they hold plaintiffs to a higher pleading standard, dismissing plaintiffs' claims before they have an opportunity to engage in discovery to uncover facts previously hidden from them. *See, e.g.*, *Olivarez v. T-Mobile USA, Inc.*, No. 20-20463, 2021 U.S. App. LEXIS 14585, at *6–11 (5th Cir. May 14, 2021) (holding that *Bostock* has no impact on pleading a prima facie case under the reigning regime of *Swierkiewicz*). But if a plaintiff has alleged facts suggesting that a protected trait played a role in the challenged action, it is often impossible to determine exactly what role the protected trait played in the challenged decision, both at the motion to dismiss and the summary judgment stages. That is the province of the jury, not the judge.

The Fourth Circuit, paying mere lip-service to *Comcast*, claimed that Lemon "failed to appropriately allege . . . that her race was *the* but-for cause of the Board's denial of her leave application." App. 16 (citing *Comcast*, 140 S. Ct. at 1014–15) (emphasis added). The Fourth Circuit found that Lemon's allegations that she was subject to a different STL request process than white shareholders proved only that "she was treated differently, not that she was treated differently *because of* her race." *Id.* (emphasis in original). The Fourth Circuit also found that the allegations of another shareholder's racist comment only four months before the Board's denial of her STL request in a process no white

shareholder had been required to undergo did not make Lemon's claim that she was treated differently "because of" her race plausible. *Id.* This analysis is not only a misapprehension of the facts alleged in the complaint, but also erroneously imposes a heightened pleading standard that required Lemon to prove—*at the motion to dismiss stage*—that race was not *a* but-for cause, but *the sole* cause—which is not but-for causation at all, but rather more akin to proximate causation. This approach is wholly inconsistent with *Bostock*, *Twombly*, and *Iqbal*.

It is essential that this Court clarify the scope of *Bostock* and its impact on the *Twombly/Iqbal* standard to lower courts. The dissent of Judge Wynn in *McCleary Evans v. Md. Dep't of Transp. State Highway Admin.*, 780 F.3d 582, 588–92 (4th Cir. 2015) (Wynn, J., dissenting) eloquently presents the problem presented by requiring plaintiffs to meet a greater standard at the outset of litigation:

> [W]e must take care not to ignore the costs borne by plaintiffs and society as a whole when meritorious discrimination lawsuits are prematurely dismissed. We ought not forget that asymmetric discovery burdens are often the byproduct of asymmetric information. . . . When we impose unrealistic expectations on plaintiffs at the pleading stage of a lawsuit, we fail to apply our "judicial experience and common sense" to the highly "context-specific task" of deciding whether to permit a lawsuit to proceed to discovery. *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937. At the early stages of Title VII

> litigation, borderline conclusory allegations may be all that is available to even the most diligent of plaintiffs. The requisite proof of the defendant's discriminatory intent is often in the exclusive control of the defendant, behind doors slammed shut by an unlawful termination.

Id. at 591–92 (citations omitted) (Wynn, J., dissenting). In short, requiring plaintiffs to allege anything more than facts suggesting a protected trait may have played a role in a challenged action subjects them to a heightened pleading standard that is unjust given the imbalance of knowledge and power between plaintiff individuals and defendant employers in these cases. *Bostock* tackles this imbalance head-on in broadening the concept of but-for causation in the pleading context. Therefore, the Court must grant certiorari to ensure that lower courts do not erode *Bostock*'s impact through rulings prematurely dismissing discrimination complaints for failing to sufficiently allege causation where only the "sweeping" standard of "but-for" causation is required. *Bostock*, 140 S. Ct. at 1739.

CONCLUSION

Lemon is not the only law firm partner to have experienced discrimination based on her gender and race, and she certainly will not be the last. Fortunately, Title VII provides a remedy allowing any individual to bring suit against an employer for unlawful discrimination or retaliation. While lower courts have misapplied *Clackamas* to determine whether an individual

has standing to bring a claim under Title VII, this test is inapposite to the narrow ruling in *Clackamas* and more importantly to Title VII's just purpose—to eliminate discrimination in the workplace. This misapplication is insidiously undermining the stated purpose of Title VII altogether and is instead *perpetuating* discrimination in the workplace by causing premature dismissal of meritorious Title VII cases. This Court must grant certiorari to clarify that Title VII plainly applies to "individuals" and empowers "persons aggrieved" to sue under it.

Likewise, this Court must grant certiorari to clarify that the standard of pleading a § 1981 claim under its recent opinions in *Comcast* and *Bostock* is not a heightened standard, but instead permits a case to proceed by pleading facts that plausibly suggest that a person's gender, race, or other protected trait was a but-for cause of a challenged action. Without this Court's review, countless meritorious § 1981 claims will be dismissed prematurely, and justice denied.

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