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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for reasonable application of federal non-discrimination laws in a manner that preserves the rights of public employees while recognizing the special concerns and operational realties of public school systems.

NSBA submits this brief to emphasize the significant adverse impact that the Tenth Circuit's decision, if left intact, would have on the operation of our nation's schools.

SUMMARY OF ARGUMENT

This case presents the strong possibility of serious unintended consequences for the nation's school districts if this Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations.

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

Under many state statutes, school boards are the final decision-makers in many school employment decisions, including hirings, firings, and promotions, that are subject to Title VII and other non-discrimination statutes. At the same time, as a matter of sound governance, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the judgment and recommendations of their school administrators in rendering these personnel decisions. If anything, current trends are toward less board involvement in the operational minutiae of school districts, with boards focusing more of their attention and oversight on the broad academic and civic mission and sound overall operations of public schools. School districts also have put in place many other procedural safeguards to protect employees from discrimination.

In requiring an employer to investigate for possible racial bias in a subordinate's personnel decision, even in the absence of any evidence of such bias, the Tenth Circuit's approach to this case fails to account for these realities among school boards and similarly situated employers. The Tenth Circuit's holding is unsupported by Title VII itself or by this Court's holdings, and its apparent rationales—that employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder—are irrelevant in the school board context. Affirming the Tenth Circuit would ignore—and indeed undermine—the existing safeguards school boards utilize.

ARGUMENT

states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[4]

School boards do not directly manage and supervise employees—administrative functions delegated primarily to the superintendent.[5] In fact, most school boards have no role in evaluating employees, in investigating employee complaints, or in developing recommendations for hiring, discipline, or termination.[6] Instead, in most instances, the

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[4] *Id*. at 170. ("In most states, the school board is the ultimate employer

school district administration is responsible for the day-to-day operations of the school district, including managing employees.[7] Ultimately, school boards rely on the recommendations and input of administrators to inform their hiring and firing decisions. Typically the superintendent relies on associate superintendents, area directors, principals, and supervisors to evaluate, supervise, train, and discipline school district employees and recommend employees for hiring and termination.

Where employees have no property or liberty interest in their employment,[8] or no statute or collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendation of subordinates in making a decision to terminate. In that instance, a school board will consider the facts as presented by the superintendent or other administrator when reaching a decision. Unless an issue of discrimination is raised by the affected employee, a school board will only act based on the facts presented to it. As a matter of course, a school board at that point will not be in a position to identify *sua sponte* whether racial bias played any part in the recommendation.

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superintendent, however, or to other members of the administrative or supervisory team.").

[7] *Id*. at. 8. ("Unless otherwise specified in state statutes or board policy, a board exercises daily supervision and control primarily through its chief administrator and does not directly deal with staff members employed to assist the superintendent in implementing board directives.").

[8]School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (2002), http://www.ecs.org/clearinghouse/ 37/48/3748.pdf.

hearing to contest an adverse employment action, an employee can raise issues of discrimination or bias and have a full and fair opportunity to have those claims impartially

the appropriate distance of school boards from the day-to-day operations of the school district, which impedes boards from uncovering the racial animus of subordinates on whom

through the district's chain-of-command, ending with consideration by the board. If a person raising a complaint is not satisfied by working with administrators, he or she can ultimately raise the issue with the entire school board.

Even more to the point, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state constitutional and statutory equal protection and non-discrimination mandates, including Title VII.[13] In an effort to comply with these wide ranging laws, virtually all school districts adopt non-discrimination policies with respect to provision of services and employment practices,[14] develop complaint and administrative procedures specifically for employees,[15] and disseminate these policies and procedures through various means including district policy manuals, employee handbooks, and in service training. These policies typically include procedures for reporting and investigating discrimination complaints to ensure employees have an

[13] Among the federal non-discrimination laws that apply to school districts are: Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Title IX of the Educaivins-0.(71(t1044.2(et0 -1.14-r)Tj00ni)-2.2Tj00ni97(.)-2.7lit07(S.C.

opportunity to have their concerns addressed and resolved at the earliest point possible.

Many school board policies oblige all employees, including supervisors, to report discriminatory behavior in order to ferret out unlawful discrimination from the outset of an impermissible act. For these processes to be most effective, employees must come forward and raise discrimination issues with the employer *before* filing a lawsuit. This Court recognized the importance of encouraging employees to bring forward evidence of discrimination immediately when it limited employer liability under Title VII to the extent the employer takes reasonable steps to prevent and address discrimination by encouraging employees to report discrimination. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

Allowing an employee to bring a Title VII claim where the employee never informed the actual decision-maker about possible racial animus of a subordinate, despite the availability of mechanisms to do so, would encourage employees to disregard the reporting mechanisms, denying their workplace colleagues and employers the benefit of having such policies in the first place. Furthermore, by providing the employee no incentive to bring forth a claim for the employer's immediate consideration and resolution, the employer is denied the opportunity to remediate the alleged discriminatory acts.

An employee who skips an opportunity to raise concerns about discrimination should not be rewarded with a

future if the Court embraces the Tenth Circuit's analysis in *BCI*. In *Mateu-Anderegg*, the plaintiff declined the opportunity for a statutory non-renewal hearing before the school board, yet the court of

> . . .[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. . . . [S]imply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.

BCI, 450 F.3d at 488.

There is no investigation requirement under Title VII, and one should not be judicially imposed on school boards. As more fully explained below, neither the plain language of the statute nor Supreme Court precedent supports imposing an investigation requirement on employers. Furthermore, other policy factors weigh against it. First, the scope of an employer's obligations in conducting "an independent investigation of the allegations against an employee" remains unclear under the Tenth Circuit's decision. Second, conducting either type of investigation is burdensome because every employee belongs to at least two protected classes (race and sex). This means under the Tenth Circuit's rationale, an investigation would be virtually mandatory for every adverse employment decision based on subordinate input.[16] Third, requiring an investigation discounts the

[16] When determining how to handle claims of subordinate bias, lower courts have applied the same legal principles to Title VII, ADEA, and ADA cases, meaning whatever holding this Court reaches in this case lower courts will likely apply to cases brought under other employment statutes.

other—likely more effective—measures school boards take to eradicate discrimination. Finally, practically speaking, an investigation requirement actually may be unproductive or counterproductive in uncovering subordinate bias.

A. Neither the plain language of Title VII nor prior Supreme Court precedent supports imposing an investigation requirement on employers.

Requiring employers to investigate all adverse employment actions to make sure they comply with Title VII is a dramatic change for employers. This requirement has no grounding in the plain language of Title VII. In fact, the failure to investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (finding the failure to investigate a

appeal process. Employers then should be held accountable if they fail to address on a case-by-case basis those allegations of discriminati

B. Requiring a school board to investigate before taking any adverse employment action is burdensome, duplicative of other steps school boards have taken to eliminate discrimination, and may not be productive.

In addition to being unsupported by Title VII, a mandatory investigation requirement before any adverse employment action would be particularly burdensome on school districts. School administrators and other managers will find themselves engaging in defensive employment practices that will increase employer costs, either through the hiring of additional human resources staff and independent investigators or through the adoption and implementation of even more rigorous grievance and appeal policies that consume countless hours of time searching for an inflammatory where there is neither "smoke nor fire."[18]

Under the law in many states, the school board is the actual decision-maker when determining whether to hire or fire employees. In the case of terminating at-will employees, the school board generally will rely entirely on information from subordinates because school boards do not manage or interact with most school employees, except high-level administrators.[19] Under the Tenth Circuit's ruling, the board

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[18] The nation's employers make thousands of decisions every week; presumably most do not involve discrimination. According to the EEOC, 27,238 charges of racial discrimination were filed nationally in 2006, and 17,324 of these were found to lack reasonable cause. *See* EEOC Enforcement Statistics, http://www.eeoc.gov/stats/race.html.

[19] School districts in collective bargaining states and school district in states where teachers are protected by teacher tenure laws are accustomed to holding hearings for teacher terminations, and of course in this instance investigating the reasons for a termination is easier. However, as *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, illustrate, such investigations do not necessarily produce evidence of alleged discriminatory animus.

would be compelled to make an affirmative inquiry in every instance.[20]

School systems also would be subjected to more unworkable burdens because Title VII protects employees against any adverse employment action, not just terminations—including failure to hire or promote. 42 U.S.C. § 2000e-2(a)(2). Even more onerous than a requirement that school boards investigate all recommendations to *terminate*, would be a requirement that boards investigate all recommendations to *hire* a particular individual over all the other applicants. In a typical school district, school administrators solicit applicants, select candidates to interview, conduct interviews, and recommend employment of particular candidates to the board. The board then may meet the recommended candidate and decide whether to hire him or her. If this Court adopts the Tenth Circuit's holding, would a school board have an obligation to investigate the facts surrounding a subordinate's recommendation to hire each employee? If so, what kind of specific inquiry would a board have to make to support a defense that there was no subordinate discrimination? Such an inquiry would, in any case, amount to proving a negative and ultimately would not serve the interests of Title VII in deterring discrimination any more effectively than proactive anti-discrimination policies.

If the school board, as the actual decision-maker, is required to reach behind the facts presented to determine on its own whether or not there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by

[20] In the private sector this may pose less of a problem where a direct supervisor generally has the authority to terminate, hire, or promote an employee based on the supervisor's first hand knowledge of an employee and situation rather than relying on subordinates when making adverse employment decisions.

time-consuming and ultimately unnecessary hearings. The board's ability efficiently to handle even the most routine employment decisions, let alone its other governance functions, would be severely hampered. As part of their governance function, school boards take affirmative steps to ensure that the subordinates recommending the adverse employment action do not act based on racial animus and that supervisors have taken steps necessary to be satisfied that the recommended adverse employment action is justified pursuant to state and federal law and school board policy. These steps include careful screening of administrator candidates, non-discrimination employment policies, employee training, internal complaint procedures, and the accessibility of the school board to receive complaints at school board meetings. If school boards must disregard the recommendations of their administrators and conduct their own investigation, particularly when hiring employees, the untenable result will be to shift the administrative personnel role to the school board itself. [21]

The Tenth Circuit's theory that "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory," *BCI*, 450 F.3d at 488, is unrealistic in practice. Indeed, it was completely unavailing in *Kramer*, where the teacher was given a chance to give her version of events during a five-hour school board hearing. Similarly, other types of investigations might reveal disparities between a supervisor's and an employee's version of the events leading up to a termination, but they would not necessarily uncover the supervisor's racial bias, thus leaving the actual decision-maker to assess credibility, but no more able to identify and short circuit any improper motives the supervisor might harbor. If investigating an employee's side of the story

[21] In jurisdictions where state law pointedly delineates school board and administrator roles, a ruling to this end would have a deleterious effect on statutorily established roles.

generally fails to reveal racial animus, there is no practical justification for deeming this a requirement under Title VII.

C. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action discourages employees from fulfilling their duty to minimize the harm of discrimination.

Where the employer has already established preventive and corrective measures, such as complaint, grievance, and training procedures aimed at exposing and deterring improper discrimination, the Tenth Circuit's investigation requirement negates any responsibility on the part of employees to avail themselves of the employer's "preventive and remedial apparatus." This Court has held that employers who "have provided a proven, effective mechanism for reporting and resolving complaints of [discrimination], available to the employee without undue risk or expense. . ." should not be held liable where the plaintiff unreasonably fails to use the preventive

require innumerable hearings with inquiries of all informing subordinates about their biases before making any decision. Even where state law, collective bargaining agreements, or constitutional provisions already require a hearing before an employee is terminated, the focus of the hearings would shift from determining whether just cause for the termination exists and whether the employee received any remedial opportunities to which he or she may be entitled

of discrimination, a requirement that employers conduct such an inquiry in the absence of any report of bias would be unproductive or even counterproductive. An actual decision-maker would in most cases be engaging in time consuming and labor intensive inquests to determine a negative, and would remain uncertain that the investigation was thorough enough to satisfy a court. In the absence of any indication at the outset of discriminatory animus, it is difficult to imagine how Title VII's deterrent purposes are served by requiring the school board to engage in such a far flung inquiry before making every employment decision.

Investigating for discriminatory bias in every employment decision may even be counter-productive, because it may discourage employees from becoming whistleblowers, knowing that reporting another employee's behavior will result in an inquiry into their own potential discriminatory motives for disclosing information that may play a factor in an employment decision. Such reticence can have disastrous consequences in a school setting where school administrators may discover employee misconduct, such as inappropriate sexual relationships between employees and students, through other employees reporting their suspicions. *See, e.g., P.H. v. School Dist. of Kansas City*, 265 F.3d 653 (8th Cir. 2001) (other teachers complained to administration that teacher was spending too much time with student, student was frequently tardy and absent from 1ca.625 aTD 0 Tc 0.24 Tw (eirig);d

reason to believe it exists, may only serve to encourage employees on the brink of termination to manufacture claims

reasonable steps to meet their Title VII obligations by adopting, disseminating, and implementing non-discrimination policies that include effective mechanisms for reporting and redressing discrimination complaints, liable for relying on information from subordinates who harbor discriminatory animus unknown to the actual decision-maker.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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