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The Great "White" Way: Reconsidering Comprehensive Color-Conscious Casting Plans Through Affirmative Action, Commercial Speech, and Statutory Amendment

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THE GREAT "WHITE" WAY: RECONSIDERING COMPREHENSIVE COLOR-CONSCIOUS CASTING PLANS THROUGH AFFIRMATIVE ACTION, COMMERCIAL SPEECH, AND STATUTORY AMENDMENT

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INTRODUCTION

By the end of 1880, Brush arc lamps were beginning to illuminate the streets of Midtown Manhattan,[1] making Broadway one of the first electrically lighted streets in the United States.[2] After basking in the radiance of these glowing lamps one February evening in 1902, Sheppard Friedman, a writer for the New York Morning Telegraph, coined a new nickname and dubbed Broadway "The Great White Way."[3] As twinkling theater marquees supplemented the arc lamps along the streets of Midtown Manhattan, the nickname continued to prosper as all the lights of the theater and more "snapped on" every day at dusk.[4] For over a century, these lights have dazzled the night sky of New York's theater district.[5] Broadway's fabled bright lights have made "The Great White Way" an integral part of the American cultural landscape and, perhaps more importantly, the center of American theater.[6]

Though truly just a street, Broadway represents theater's intersection between art and commerce.[7] Its artistic prowess stems from vivid theatrical imaginations that experiment with what is possible on stage in varying attempts to push the art form forward.[8] Aside from artistry, Broadway also serves as a strong commercial industry that contributed about $12.6 billion to the New York economy in the 2018-2019 season.[9] Broadway also supports about 12,600 direct jobs and 74,500 indirect jobs in New York City.[10] Accordingly, the simple yet delicate balance for the world of Broadway theater remains developing "good art" while delivering

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1. *Who first called NYC's Broadway, "The Great White Way?"*, DAVID BRUCE SMITH'S GRATEFUL AM. FOUND., https://gratefulamericanfoundation.com/10130/ [https://perma.cc/7S3D-ENBG].

2. *Id.*

3. W. G. Byrne, *Facile Pen of Fort Worth Reporter Gave to Broadway Name of "Great White Way"*, FORT WORTH STAR-TELEGRAM, Jan. 2, 1927, at 2.

4. ALLEN CHURCHILL, THE GREAT WHITE WAY: A RECREATION OF BROADWAY'S GOLDEN ERA OF THEATRICAL ENTERTAINMENT 13 (E. P. Dutton & Co., Inc., 1st ed. 1962).

5. Lindsey Sullivan, *We Endorse! Whoopi Goldberg Has a New Nickname for Broadway: 'The Great Bright Way'*, BROADWAY.COM (June 25, 2020), https://www.broadway.com/buzz/199523/we-endorse-whoopi-goldberg-has-a-new-nick name-for-broadway-the-great-bright-way/ [https://perma.cc/G6G2-ZWGY].

6. STEVEN ADLER, ON BROADWAY: ART AND COMMERCE ON THE GREAT WHITE WAY 2–3 (S. Ill. Univ. Press, 2004).

7. *Id.* at 2.

8. *Id.* at 2–3.

9. THE N.Y. STATE DEP'T OF LAB., BROADWAY THEATERS: AN ECONOMIC ENGINE FOR NEW YORK (July 2019), https://dol.ny.gov/system/files/documents/2021/03/broadway-theaters-an-economic-engine-for-new-york.pdf [https://perma.cc/H4SH-9VKN]. Figures in recent years would undoubtedly be lower given the impact of the Covid-19 pandemic. *See, e.g.*, Michael Paulson, *Broadway Grosses Drop 26 Percent as Many Shows Cancel Performances*, N.Y. TIMES (Dec. 21, 2021), https://www.nytimes.com/2021/12/21/theater/broadway-covid-omicron.html [https://perma.cc/4Q7V-2R62] (discussing how even once shows reopened, Covid-19 forced cancellations, significantly decreasing revenue).

10. THE N.Y. STATE DEP'T OF LAB., *supra* note 9.

a strong economic impact.[11] Part of maintaining that balance requires understanding what American audiences want to see when they go to the theater.[12]

A great many plays and musicals in the theatrical canon focus on the illustrious imagery of the American Dream, a predictably appealing topic.[13] As a result, dramatic literature, musicals in particular, assume an "All-American" quality, and often, that quality can be more exclusive than inclusive.[14] While one theater historian claims that Broadway is a "cultural Ellis Island," another scholar, Warren Hoffman, contends that nonwhite groups "have not been granted full access to creating Broadway shows, let alone succeeded in putting fair representations of themselves on stage."[15] This lack of access presented by Hoffman is visible on stage and exemplified in the disparity between the amount of white actors versus nonwhite actors cast in the New York theater season.[16]

Bearing that in mind, the irony of Mr. Friedman's use of a color to fabricate Broadway's infamous nickname is not lost.[17] Because of Broadway's history of racial inequality and underrepresentation, some see Mr. Friedman's nickname as all too emblematic of the industry's standard of discrimination.[18] In addition to indicating discriminatory behavior, Mr. Friedman's nickname can also be seen as intimating current casting practices: use of color descriptors.[19] As discussed below, theatrical casting overtly focuses on race, raising serious questions about how current practices would fare against antidiscrimination laws.[20]

This Note discusses the theatrical casting process from publishing a breakdown through audition day type outs and how this process exposes productions, theater companies, and Actor's Equity Association ("AEA") to potential liability. Part I provides a background on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981, as these are

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11. *See* ADLER, *supra* note 6, at 11.

12. *Id.* at 12.

13. WARREN HOFFMAN, THE GREAT WHITE WAY: RACE AND THE BROADWAY MUSICAL 6 (Rutgers Univ. Press, 2014).

14. *Id.* at 4.

15. *Id.* at 4–5.

16. *See* Kristin Bria Hopkins, *There's No Business Like Show Business: Abandoning Color-Blind Casting and Embracing Color-Conscious Casting in American Theatre*, 9 HARV. J. SPORTS & ENT. LAW 131, 134 n.15 (2018) (discussing the racial composition of roles performed in New York City). *See generally* THE ASIAN AM. PERFORMERS ACTION COAL., THE VISIBILITY REPORT 8 (2019), http://www.aapacnyc.org/uploads/1/3/5/7/135720209/aapac_report_2018-2019_final.pdf [https://perma.cc/UJ65-54QR].

17. *See* Sullivan, *supra* note 5.

18. *Id.* Some of this standard is derived from institutionalized racial bias, not just legally implicated discrimination. Kiara Alfonseca, *As Broadway Reopens, Theater Confronts Racial Inequality Criticism*, GOOD MORNING AM. (Sep. 14, 2021), https://www.goodmorningamerica.com/culture/story/broadway-reopens-theater-industry-confronts-racial-inequality-criticism-79386742 [https://perma.cc/85YF-GNPY].

19. *See infra* Section II.A.

20. *See infra* Part III.

the federal antidiscrimination laws under which a lawsuit is most likely to arise. Part II explores the language of breakdowns, defines the concept of theatrical typing, and discusses the two predominant methods the theater industry frequently utilizes in casting shows. Likewise, Part II examines two frequent, often overlooked, issues facing the theater industry right now: publishing racially preferential casting breakdowns and typing as a form of segregation.

Part III discusses potential ways in which producers may try to shield productions from liability. Part III first analyzes the inefficacy of affirmative action policies and whether current casting methods fit squarely within the contours of affirmative action. This section then considers breakdowns and typing in the context of the First Amendment as commercial speech and artistic expressive conduct. Finally, Part III addresses Bona Fide Occupational Qualification arguments and the merits of statutory amendments that would codify current practices.

As possible solutions, Part IV explores two potential statutory modifications that would allow the theater industry to engage in race-conscious hiring. This proposed qualified exemption would create a burden-shifting test that would enable a challenger to recover against a production or theater company in instances of legitimately invidious racial discrimination in casting. Part V briefly concludes.

Ultimately, while color-conscious casting is the theater industry's preferred casting method, a comprehensive color-conscious casting program that encompasses casting from the moment a casting breakdown is published is not feasible under the law. The current form of breakdowns precludes color-conscious casting from being an affirmative action plan because it necessarily excludes people of other races, and the First Amendment does not protect breakdowns because they are an illegal form of commercial speech. However, the part of color-conscious casting focusing on typing has been accepted as a form of protected expressive conduct. The theater industry's best way forward is through a statutory exemption that codifies existing casting practices and allows the industry to advertise racially preferential breakdowns.

I. STATUTORY BACKGROUND

Aggrieved employees or applicants most commonly bring lawsuits challenging race discrimination under two federal statutes: Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.[21] One who challenges an employer's hiring or employment practices can sue the employer using either or both theories, provided that the proper criteria are satisfied.[22]

21. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460–61 (1975).
22. *Id.*

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits employers from failing or refusing to hire any individual on the basis of that individual's race, color, religion, sex, or national origin.[23] Title VII also precludes employers from segregating or classifying applicants for employment in a way that "would deprive or 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."[24] Additionally, Title VII bars employers from printing or publishing notices or advertisements about employment that indicates a "preference, limitation, specification, or discrimination on the basis of race, color, religion, sex, or national origin."[25] Congress created Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate *invidiously* to discriminate on the basis of racial or other impermissible classification."[26] To be sure, Title VII's purpose is not to ensure employment for minorities, but rather, its purpose is to protect employees from discriminatory practices.[27]

Regarding Title VII's applicability, the statute's definition section elucidates the law's limits.[28] Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[29] The statute also defines a labor organization as an entity that is:

> [E]ngaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.[30]

23. 42 U.S.C. § 2000e-2.
24. *Id.*
25. *Id.* § 2000e-3(b).
26. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).
27. *Id.* at 429–30.
28. 42 U.S.C. § 2000e.
29. *Id.*
30. *Id.*

Moreover, Title VII caps damages that a claimant may recover if successful.[31] The cap varies based on the number of employees an employer has "in each of 20 or more calendar weeks in the current or preceding calendar year."[32] Title VII claimants must also satisfy administrative preconditions by filing a charge within the applicable stringent statute of limitations with the Equal Employment Opportunity Commission ("EEOC") before filing a lawsuit.[33]

Applying the Title VII framework to the theater industry, some productions and theater companies, like summer stock theater companies, fail to qualify as employers because they do not satisfy the minimum employee threshold.[34] Likewise, some fail to operate for a sufficient amount of time for employees to work a minimum of twenty weeks in the current or preceding calendar years.[35] Further, because all facets of professional theater comprise largely of individuals bouncing from single production contract to contract, many artists employed in the theater do not work at one theater for extended periods, affecting the number of weeks worked by certain employees.[36] Likewise, the unpredictability of how long a show may run inhibits an employee's ability to satisfy the 20-week minimum.[37] A show can close overnight or run for thirty-plus years.[38]

Nevertheless, AEA would undoubtedly qualify as a labor organization because its sole purpose is to deal "with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment."[39] AEA surpassed twenty-five members by March 24, 1972.[40] AEA also operates as a hiring hall, thus satisfying the

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31. *Id.* § 1981a.

32. *Id.*

33. *Filing a Lawsuit in Federal Court*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/filing-lawsuit-federal-court [https://perma.cc/76L9-A4V8]; *Timing Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/8HNC-H3NN].

34. For example, summer stock companies may only operate for 10–12 weeks each year. Laurie Swigart, *Summer Stock*, THEATRE ON A SHOESTRING (Dec. 8, 2020), https://www.upstagereview.org/post/summer-stock [https://perma.cc/RV8Q-8ZWM].

35. *Id.*

36. Barbara Ruben, *What Do Theater Actors Make?*, CHRON (updated July 1, 2018), https://work.chron.com/theater-actors-make-5909.html [https://perma.cc/3VKA-ZFSJ] (stating only 13% of actors work for a particular theater company as opposed to being self-employed or employed by other entities).

37. Jeffery S. Simonoff & Lan Ma, *An Empirical Study of Factors Relating to the Success of Broadway Shows*, 76 N.Y.U J. BUS. 135, 135–36 (2003) (discussing the risk involved in mounting a Broadway show).

38. *Id.*; *see also* Carson Blackwelder, *'The Phantom of the Opera' Closing on Broadway After 35 Years*, ABC NEWS (Sept. 19, 2022, 9:03 AM), https://abcnews.go.com/GMA/Culture/phantom-opera-closing-broadway-35-years/story?id=90149661 [https://perma.cc/FF4E-UZND].

39. *Why Join Equity?*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/join/WhyJoin/ [https://perma.cc/2Z5R-PNNH].

40. Robert Simonson, *When Actor's Equity Staged Its First Strike*, AM. THEATRE (Mar. 1, 2013), https://www.americantheatre.org/2013/03/01/when-actors-equity-staged-its-

required criteria in the statutory definition of "labor organization" under Title VII.[41]

Turning back to the statute, claims that arise under Title VII can be categorized as either disparate treatment or disparate impact.[42] In disparate treatment cases, claimants must establish that the employer intentionally treated an employee or applicant less favorably than others because of a protected trait listed in the statute.[43] Claimants must prove intent either directly or circumstantially.[44] In disparate impact cases, claimants must prove that facially neutral employment practices fall more harshly on a particular group than others and cannot be justified by a business necessity defense.[45] Claimants need not prove discriminatory intent under a disparate impact theory.[46]

Claimants may prove an employer's discriminatory intent either circumstantially or directly.[47] In *McDonnell Douglas Corp. v. Green*, the Supreme Court established a three-part, burden-shifting test that claimants may use to establish by circumstantial evidence that an employer discriminated against them.[48] Claimants initially bear the burden of proving that the claimant belongs to a racial minority, applied and was qualified for the job in question, that despite being qualified, the employer rejected them, and that after the rejection, the employer continued seeking applicants with the complainant's qualifications.[49]

If a claimant successfully establishes a prima facie case, there is a rebuttable presumption of discrimination.[50] With this rebuttable

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first-strike/ [https://perma.cc/5U54-SDUV]. An interesting quick fun fact, George M. Cohan, often referred to as The Father of American Musical Comedy, was notoriously anti-union and very likely is the only actor, since AEA's conception, to ever perform in a Broadway show without being a member of the union. *See* Bob Mondello, *George M. Cohan, 'The Man Who Created Broadway,' Was An Anthem Machine*, NPR (Dec. 20, 2018, 4:16 P.M. EST), https://www.npr.org/2018/12/20/677552863/george-m-cohan-the-man-who-created-broadway-american-anthem [https://perma.cc/XAB2-VN9B]. Prolific Broadway star Patti Lupone just terminated her AEA membership, so it will be interesting to see if she will be the next actor to exploit the AEA loophole allowing non-union actors to perform in a Broadway show. *See* Emily Kirkpatrick, *Patti Lupone Explains Why She Decided to Leave the "Worst Union" Actor's Equity*, VANITY FAIR (Oct. 18, 2022), https://www.vanityfair.com/style/2022/10/why-patti-lupone-left-actors-equity-association-worst-union [https://perma.cc/8HG3-XE8V].

41. Mark D. Meredith, Note, *From Dancing Halls to Hiring Halls: Actors' Equity and The Closed Shop Dilemma*, 96 COLUM. L. REV. 178, 179 (1996) (discussing how Actors' Equity Association qualifies as a labor organization); *see* 42 U.S.C. § 2000e.

42. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971)).

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

48. *Id.* at 802–04.

49. *Id.* at 802.

50. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

presumption, the burden switches to the employer to "articulate some legitimate, nondiscriminatory reason" as to why the employer rejected the employee.[51] If employers can articulate such a reason, claimants must show that the reason is merely pretext.[52] By contrast, claimants can show direct discrimination by proving that policies permit discriminatory practices prohibited by the statute based on a protected feature.[53]

With the current state of theatrical casting practices, aggrieved actors are more likely to raise a disparate treatment claim than a disparate impact claim for two reasons. First, as this note will soon examine, some hiring practices in the professional theater are facially discriminatory, and those that are questionably facially neutral still exude clear racial preferences.[54] Second, claimants typically bring disparate impact claims as part of class action suits against an employer.[55] There is some doubt as to whether actors could successfully bring a class action because "actors may not have the numerosity, resources or time to bring such an action."[56] As a result, disparate treatment claims with intentional discrimination are more suitable for the theater.[57]

B. 42 U.S.C. § 1981

In addition to Title VII, claimants may raise race discrimination complaints under 42 U.S.C. § 1981.[58] Congress enacted § 1981 as part of the 1866 Civil Rights Act,[59] an act promulgated after the adoption of the Thirteenth Amendment as an attempt to "shap[e] a multicultural society in a postwar South."[60] Substantively, § 1981 establishes that all persons shall have the same rights as white citizens to "make and enforce contracts."[61] When Congress enacted the Civil Rights Act of 1991, it amended § 1981(b)

51. *McDonnell Douglas Corp.*, 411 U.S. at 802.

52. *Id.* at 804.

53. ANN C. JULIANO, A SHORT & HAPPY GUIDE TO EMPLOYMENT DISCRIMINATION 32 (1st ed. 2021).

54. *See infra* Section II.A.

55. Heekyung Esther Kim, *Race as a Hiring/Casting Criterion: If Laurence Olivier was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim*, 20 HASTINGS COMMC'NS. & ENT. L.J. 397, 408 (1998) (discussing practical issues with actors trying to bring a disparate impact class action claim).

56. *Id.*

57. *See infra* Section II.A.

58. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460–61 (1975).

59. *Section 1981*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/section_1981 [https://perma.cc/JY5E-E496].

60. *The Civil Rights Bill of 1866*, U.S.: HIST., ART, & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/ [https://perma.cc/JK2A-XFWV].

61. 42 U.S.C. § 1981.

to ensure that the section applied to racial discrimination regarding all aspects of employment, like Title VII.[62]

Section 1981 differs from Title VII in key respects.[63] First, § 1981 does not cap damages.[64] Second, the statute does not require a minimum number of employees for an employer to be liable.[65] Rather, § 1981 applies to any contractual relationship, not subject to defined employer-employee relationships.[66] Unlike with Title VII, claimants utilizing § 1981 need not go through administrative proceedings through the EEOC.[67] The Supreme Court has recognized that while Title VII and § 1981 are related, the two are "separate, distinct, and independent."[68] Third, Courts apply the four-year statute of limitations from 28 U.S.C. § 1658 to § 1981 claims, giving claimants a much longer window to initiate a cause of action as compared with Title VII.[69] However, § 1981 is slightly more restrictive because claimants must prove intentional discrimination and may not rely on a theory of disparate impact like one might under Title VII.[70] Likewise, under § 1981, the plaintiff maintains the constant burden of showing that race was the "but-for" cause of the alleged injury.[71]

II. THE ILLEGALITY OF CURRENT THEATRICAL HIRING PRACTICES

Previous scholarship on racially discriminatory theatrical hiring practices has typically focused on the actual hiring of an actor to play a certain role.[72] However, the casting process involves two other potential violations of Title VII or § 1981 that arise even before an actor is hired: advertisements for employment based on race (breakdowns) and segregation of applicants (typing). Both potential violations may be far more pressing for productions and theater companies to grapple with, given

62. JOEL W. FRIEDMAN, EXAMPLES & EXPLANATIONS EMPLOYMENT DISCRIMINATION 233 (Aspen Publ'g, 4th ed. 2021).

63. *Id.*

64. *Id.* at 234.

65. *Id.*

66. Rivers v. Roadway Express, 511 U.S. 298, 303–04 (1994).

67. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 461 (1975).

68. *Id.* at 460.

69. Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 382 (2004).

70. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982); *cf.* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.").

71. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020). "Under this standard a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred." *Id.* at 1014.

72. *See* Hopkins, *supra* note 16; *see also* Kim, *supra* note 55, at 415. *See generally* Bonnie Chen, Note, *Mixing Law and Art: The Role of Anti-Discrimination Law and Colorblind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515 (1999) (discussing the merits of color-blind casting).

the overt way that productions solicit auditioners and segregate explicitly by race.[73]

Beyond productions and theater companies, AEA is also relevant for liability purposes because it represents professional stage actors.[74] AEA plays a role in facilitating and regulating audition days for union workers.[75] Because AEA participates in auditions, AEA constantly communicates with and works alongside theater companies and productions.[76] Given Title VII's inclusion of labor organizations[77] and § 1981's inclusion of labor organizations,[78] aggrieved actors seeking redress may very likely name AEA as a defendant in a potential lawsuit.

A. Language in Breakdowns

A breakdown is a written notice published by casting directors, producers, or theater companies that solicits submissions for an upcoming or ongoing production.[79] Breakdowns contain production details like location and rate of pay, and breakdowns also include a description of characters for which submissions are sought.[80] These character descriptions state personality traits of the character, special skills the character may possess like juggling, and the physical identity traits of the character like gender and race.[81] For instance, the breakdown that seeks an actress to play Asaka in a production of *Once on This Island* describes the character as:

> She/her. Black, 30s – 50s. Mother Earth. A mentor to Ti Moune. She is generous and good-humored on the surface, but like all the gods, feared by the islanders; her motherly facade is not to be trusted. She is powerful, funny, and ironic. Mezzo/Soprano with strong high belt, vocal range A3-E5.[82]

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73. Nicole Ligon, *Who Tells Your Story: The Legality of and Shifting Racial Preferences Within Casting Practices*, 26 WM. & MARY J. WOMEN & L. 135, 146 (2019).

74. *See Why Join Equity?*, *supra* note 39.

75. *See generally Auditions and Job Interviews*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/resources/Producers/casting-call-how-to/ [https://perma.cc/TM3Q-LRK7].

76. *Id.*

77. 42 U.S.C. § 2000e.

78. *See generally* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, *458 U.S. 375 (1982)*. AEA also helps set the terms of production contracts, and § 1981 pertains to any contractual agreement. *See* 42 U.S.C. § 1981(a).

79. *What is a Breakdown?*, ACTING MAG., https://actingmagazine.com/2018/08/what-is-a-breakdown/ [https://perma.cc/H8JP-9S8E].

80. *Id.*

81. *Id.*

82. *Once on this Island; Oregon Shakespeare Festival*, ACTORS ACCESS (July 26, 2022, 12:57 PM), https://actorsaccess.com/projects/?view=breakdowns&breakdown=756847&region=32 [https://perma.cc/JW36-KMAA].

Similarly, a breakdown seeking an actor to play Wilbur in a production of *Hairspray* is looking for an actor to portray someone who is "40 – 55, Male, White, working class inventor. Tracy's Father. Sweet, goofy, childlike personality. Funny, good character singer. Also plays various roles including a flamboyant fashion boutique owner and a condescending high school principal. Must be an inventive character actor. Simple dance/movement required."[83] Notably, both breakdowns explicitly mention race, and this preference appears to violate 42 U.S.C.S. § 2000e-3(b).[84] Some may argue that these breakdowns only advertise the race of the character, not the applicant sought.[85] However, the difference is semantical.[86] These breakdowns evince a clear intent to focus on just black women for Asaka or white men for Wilbur.[87]

Language specifying race in breakdowns has certainly come under scrutiny before.[88] For example, take the controversy that arose over the breakdown released by the musical *Hamilton*, seeking "nonwhite men and women."[89] AEA publicly repudiated this notice by stating that all actors, regardless of race, should be allowed to audition.[90] As a result, *Hamilton* producers recanted the notice, amended it, and clarified that while everyone was allowed to audition, the production was still committed to casting nonwhite actors because it was "essential" to telling the story.[91] *Hamilton's* swift change in approach likely saved them from legal repercussions.[92] Through unclever verbal gymnastics and semantics, the production shifted its discriminatory hiring practices from a glaringly illegal, public racial preference to a non-discrete, private decision that some believe may be protected by the First Amendment.[93]

The advertised casting language that prompted the *Hamilton* controversy is distinguishable from what is exhibited in the *Hairspray* or

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83. *Hairspray; NETworks Presentations*, ACTORS ACCESS (Aug. 4, 2022, 10:01 AM), https://actorsaccess.com/projects/?view=breakdowns&breakdown=757922&region=32 [https://perma.cc/7VDE-BD5H].

84. *Id.*; *see also Once on this Island*, *supra* note 82; 42 U.S.C. § 2000e-3(b).

85. Spencer Kornhaber, *Hamilton: Casting After Colorblindness*, THE ATL. (Mar. 31, 2016), https://www.theatlantic.com/entertainment/archive/2016/03/hamilton-casting/476247/ [https://perma.cc/23TD-MWMD].

86. *See* Stefanie M. Renaud, *Are Casting Calls for Actors of Certain Races or National Origins Illegal?*, SKOLLER-ABBOTT: THE LAW @ WORK (Sep. 28, 2016), https://www.skoler-abbott.com/2016/09/28/are-casting-calls-for-actors-of-certain-races-or-national-origins-illegal/ [https://perma.cc/4KMK-BYXY].

87. *See Hairspray*, *supra* note 83; *Once on This Island*, *supra* note 82.

88. Michael Paulson, *'Hamilton' Producers Will Change Job Posting, but Not Commitment to Diverse Casting*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/arts/union-criticizes-hamilton-casting-call-seeking-nonwhite-actors.html [https://perma.cc/MA7Q-JAGT].

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Renaud, *supra* note 86.

93. *Id.*

Once on This Island breakdowns.[94] *Hamilton* cared about the actor's race,[95] while *Hairspray* and *Once on This Island* cared about the character's race.[96] Nevertheless, both methods end up in the same place: with a racial preference for the actor playing a certain role.[97] Removing racial preference to the character, and not the actor, can hardly be said to cure a breakdown of its facial discrimination.[98]

After reading the breakdown and familiarizing themselves with the material, actors often refuse to even apply for certain roles for which they may not be right.[99] Such a refusal to apply would be problematic under a hypothetical situation in which an actor tried to prove employment discrimination circumstantially through the *McDonnell-Douglas* test.[100] However, the circumstantial evidence framework need not apply because the breakdowns' use of color descriptors is evidence of direct discrimination.[101] As the Supreme Court stated:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs…When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.[102]

Although a breakdown's call for specific races is not as flagrant as some of the job advertisements of the mid-twentieth century, these breakdowns are nonetheless facially discriminatory, even in their more nuanced approach.[103]

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94. *Compare Once on This Island*, *supra* note 82, *with Hairspray*, *supra* note 83.

95. *See* Paulson, *supra* note 88.

96. *See Once on This Island*, *supra* note 82; *see also Hairspray*, *supra* note 83.

97. No show is going to hire a white actor to play a role intended for a black actor or Asian actor given the gross and offensive nature of "blackface" and "yellowface" performances. Kendall Trammell, *Brownface. Blackface. They're All Offensive. And Here's Why*, CNN (Sept. 20, 2019, 8:13 AM), https://www.cnn.com/2019/09/19/world/brownface-blackface-yellowface-trnd [https://perma.cc/BL8N-7WVQ].

98. *But cf.* Renaud, *supra* note 86.

99. Tiffany Byrd Harrison, *Why I Stopped Auditioning for Acting Roles*, YOUTUBE (June 26, 2020), https://www.youtube.com/watch?v=1r1_W-9o40A [https://perma.cc/BS65-MSM4].

100. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The second step requires an aggrieved person suing under Title VII to have actually applied to the job. *Id.*

101. *See Once on This Island*, *supra* note 82; *see also Hairspray*, *supra* note 83.

102. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365–66 (1977).

103. *Compare id.*, *with* Paulson, *supra* note 88 (discussing *Hamilton*'s racial preference for characters, not actors).

The ultimate question is: do the verbal gymnastics overcome the express discrimination exhibited by many different theaters and productions? Altering a breakdown from "seeking actors of a specified race" to "seeking all actors to play a character of a specified race" hardly seems appropriate.[104] The semantics are nothing short of pretext.[105] So why did *Hamilton's* modified verbiage mollify the masses? What can producers do to publicize a legitimate preference without exposing their productions to liability under Title VII or § 1981? The questions only compound in difficulty when considering that the process of casting shows is ongoing and multifaceted, not a one-time affair.[106]

B. Typing

Typing is a process wherein the casting team assesses auditioners based on appearance, typically by seeing both an auditioner's headshot and their body in person.[107] Whoever runs the auditions either releases those who do not fit the casting team's desired type or separates the auditioners into smaller groups to be auditioned with others with the same or similar physical characteristics.[108] An actor's type is a composite of that actor's external and internal characteristics that, when taken together, firmly and believably suggest certain kinds of characters.[109] These external and internal characteristics include physical traits, emotional traits, and socioeconomic statuses.[110] A few examples of actor types are the girl next door, dumb jock, geek, and blue-collar worker.[111] Casting directors frequently type people out as a way of expediting the audition process and focusing on candidates that interest them.[112]

Through its means of separating actors, the typing process constitutes segregation of applicants.[113] However, typing does not always amount to unlawful discrimination. There are instances where race is not

104. *See* Renaud, *supra* note 86.

105. *See* Paulson, *supra* note 88.

106. Suzanne Daley, *The Art of Keeping Long-Running Broadway Shows Fresh*, N.Y. TIMES (Feb. 21, 1982), https://www.nytimes.com/1982/02/21/theater/the-art-of-keeping-long-running-broadway-shows-fresh.html [https://perma.cc/F8UP-GGNA].

107. Andrew Byrne, *23 Must-Know Musical Theater Audition Terms*, BACKSTAGE (last updated Apr. 15, 2021), https://www.backstage.com/magazine/article/must-know-musical-theater-audition-terms-5719/ [https://perma.cc/S2MR-989R].

108. *Id.*

109. Benjamin Lindsay, *How to Find Your Type as an Actor*, BACKSTAGE (last updated Apr. 12, 2021), https://www.backstage.com/magazine/article/find-type-actor-3730/ [https://perma.cc/S7ME-2STG].

110. *Id.*

111. *Id.*

112. *See* Byrne, *supra* note 107.

113. *See id.*

integral to the decision.[114] For example, a casting director does not violate Title VII by dismissing a scrawny auditioner for the role of Superman, a character typically portrayed by a buff and chiseled man. Typing does amount to discrimination when at an open call, a diverse group of actors arrives to audition, but the casting team splits the groups by gender or race or dismisses them on those grounds.[115] This is because typing based on a protected characteristic is either, or both, the but-for cause or a motivating factor in the decision.[116] A decision becomes purely or largely about the actor's race and how the actor's race affects their ability to play the role. Yet, given the breadth of casting, typing is an effective and efficient means by which to organize the casting process.[117] Despite the advantages of typing, when race becomes the motivator by which typing is done, it violates Title VII by its language and § 1981 because it puts actors of different races in different positions to create contracts.[118]

Here are AEA's current guidelines on acceptable uses of typing at chorus call auditions:

> "Typing" may be used by casting personnel to audition only those members the casting personnel determine to be physically right for the production. The following rules shall govern typing:
>
> a) Typing is entirely at the discretion of the casting personnel for each individual call. If typing is used at one call (e.g., the female singers' call), it may or may not be used at any of the other calls for that production or season.
>
> b) Typing may only occur at the start of each call and typing must be completed *before the first member enters the room to audition.*
>
> c) Typing must be done in person and in the audition room. Typing of members may not be conducted using only headshots and/or resumes.
>
> d) Once typing is announced, no non-Equity or opposite gender actors may be seen at that call. Once typing of

114. *See* Hopkins, *supra* note 16, at 151 (discussing how race is not always germane to casting).

115. *Cf. Equity Chorus Call Audition Procedures: New York, Chicago, and Los Angeles*, ACTOR'S EQUITY ASS'N, https://www.actorsequity.org/resources/Producers/casting-call-how-to/ecc-procedures.pdf [https://perma.cc/P3KN-MV4K].

116. *See* Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1015 (2020).

117. *See* Byrne, *supra* note 107.

118. *See supra* Section I.A; *see also supra* Section I.B.

> members has been completed, the call is considered closed.[119]

Most notably, the guidelines explicitly mention that this process centers around physical appearance, including protected characteristics listed in Title VII.[120] Moreover, typing is final and necessarily excludes those cut from the audition based on a physical characteristic.[121] So, the critical question becomes: Is typing a part of the protected artistic expression of producing a show? If not, how can those responsible for casting a show strike a balance of using typing in a legal yet efficient manner?

C. Color-blind versus Color-conscious Casting

Two methods of casting permeate the theatrical landscape: color-blind and color-conscious. Both are examined below.

Color-blind casting is a method of casting in which directors, producers, and casting directors cast shows based off an actor's talent, ignoring the actor's race.[122] This casting method was devised with the intention of curbing overtly racist casting processes.[123] The main goal of color-blind casting is to promote equality by employing more minority actors.[124] The theater industry attempts to meet this goal by hiring actors to play roles that are specifically written for or traditionally played by actors of a different race, sex, etc.[125]

In theory, this casting method gives minority actors more opportunities.[126] However, in practice, color-blind casting has stifled opportunities for minority actors and may have perpetuated the hiring disparities between white and nonwhite actors.[127] "With respect to color-blind casting, white actors regard color-blind casting as a vehicle to only benefit minorities, while minorities feel as if color-blind casting is not helping them at all."[128] Proponents of color-blind casting appear to believe that by treating white and nonwhite actors similarly, discrimination will no longer be an issue.[129]

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119. *See Equity Chorus Call Audition Procedures: New York, Chicago, and Los Angeles*, *supra* note 115.

120. *Id.*

121. *Id.*

122. *See* Hopkins, *supra* note 16, at 135–36.

123. Brandon Johnson, Note, *Whitewashing Expression: Using Copyright Law to Protect Racial Identity in Casting*, 112 NW. UNIV. L. REV. 1137, 1144 (2018) (discussing current uses of color-conscious casting methods).

124. *See* Hopkins, *supra* note 16, at 141.

125. *Id.* at 136–37

126. *See* Chen, *supra* note 72, at 521.

127. *See* Hopkins, *supra* note 16, at 134.

128. *Id.* at 139.

129. *See id.* at 141.

One favorable argument of color-blind casting is that it is legal under Title VII, as directors, producers, and casting personnel intentionally do not consider race or other identity traits.[130] While the promise of eliminating race as a factor is appealing, "claims that the law must be 'colorblind' … must be seen as an aspiration rather than as a description of reality."[131] Although Justice Brennan shared this sentiment in the context of an Equal Protection Clause challenge to affirmative action, it also applies to the idea that color-blind casting is an ineffective method for casting a show.[132]

Color-blind casting also gives rise to the mentality that the best person for the role should be cast.[133] However, people who possess such a mentality seemingly view the role in isolation, detached from the realities of mounting a production with multiple other characters.[134] The theater industry is not conducive to being a meritocracy.[135] Actors must not only fit the role they were hired to play, but they must also be compatible with an ensemble of other actors in terms of chemistry and aesthetic.[136] All of these considerations are inherently subjective.[137] Disregarding race as part of this calculation may result in questionable casting choices that can undermine the quality of a production, regardless of an actor's talent.[138]

By contrast, color-conscious casting explicitly takes race into consideration when casting a show.[139] Some theatrical entities confine color-conscious casting to situations where the casting team intentionally casts a nonwhite actor in a traditionally white role to explore how race impacts the story.[140] However, some construe this casting method more

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130. *Id.* at 135.

131. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, J. dissenting in part and concurring in part).

132. *See generally* Hopkins, *supra* note 16, at 154.

133. *See generally* Ligon, *supra* note 73, at 152–53 (*quoting* Brian Eugenio Herrera, *The Best Actor for the Role, or the Mythos of Casting in American Popular Performance*, 27 THE J. OF AM. DRAMA AND THEATRE (2015) (discussing meritocracy in casting actors)).

134. Liz Chirico, *When Onstage Chemistry is Technically Perfect but Something's Missing*, ONSTAGE BLOG (Oct. 5, 2017), https://www.onstageblog.com/columns/2017/10/5/when-onstage-chemistry-is-technically-perfect-but-somethings-missing [https://perma.cc/5F7B-VE9A].

135. *See* Ligon, *supra* note 73, at 152.

136. *See* Chirico, *supra* note 134.

137. *See generally* Christopher Caggiano, *Spark of Creation: What Makes Good Musicals Good*, DRAMATICS (Feb. 2018), https://dramatics.org/spark-of-creation/ [https://perma.cc/4Z3Q-PWQH].

138. *Id.*

139. Gail Obenreder & Christian Wills, *Two Perspectives on "Color-Blind vs. Color-Conscious Casting in Shakespeare*," DEL. SHAKESPEARE (Oct. 29, 2020), https://delshakes.org/2020/11/two-perspectives-on-color-blind-vs-color-conscious-casting-in-shakespeare/ [https://perma.cc/BG6Y-ZGZU].

140. Samantha Williams, *Coloring Outside the Lines: A Look Into Color-Conscious, Colorblind, and For Us By Us Casting Practices*, UNIV. OF MICH. SCH. OF MUSIC, THEATER, & DANCE EXCEL LOG (Jan. 25, 2021), https://umexcelsmtd.com/2021/01/25/race-in-casting-part-1/ [https://perma.cc/87MN-67U6].

generally as a way to promote "stronger productions, and contribute to a more equitable world."[141] In either sense, the crux of color-conscious casting is deliberately focused on race as part of the casting process.[142] Color-conscious casting raises Title VII concerns because it makes race a motivating factor when advertising racially preferential breakdowns[143] and typing auditioners based on race.[144] Similarly, color-conscious casting violates § 1981 because, but for the production's preference for race, actors of a different race would have the opportunity to submit for a role or pass the initial type out based on race.[145]

III. DEFENDING AGAINST DISCRIMINATION CLAIMS

How the theater industry decides to defend against potential liability may take many forms. First, the industry may choose to depict color-conscious casting methods as a voluntary, affirmative action plan.[146] Second, the theater industry may invoke the First Amendment as a defense,[147] though questions of what is protected as expressive conduct and what is commercial speech complicate the matter. Third, as several scholars have suggested, the theater industry could lobby Congress to include race as a Bona Fide Occupational Qualification ("BFOQ"), despite specific Congressional avoidance of using race as a BFOQ.[148]

A. Affirmative Action

In overcoming past discrimination, Justice Blackmun noted that "to treat some persons equally, we must treat them differently."[149] One scholar who has written about affirmative action plans for theatrical casting processes echoed Justice Blackmun's sentiment and argued that "[i]ncreasing minority employment must be a priority and including an

141. Teresa Eyring, *Standing Up for Playwrights and Against 'Colorblind' Casting*, AM. THEATRE (Jan. 7, 2016), https://www.americantheatre.org/2016/01/07/standing-up-for-playwrights-and-against-colorblind-casting/ [https://perma.cc/YPU8-YZ9U].

142. Jessica Gelt, *Authenticity in casting: From 'colorblind' to 'color conscious,' new rules are anything but black and white*, L.A. TIMES (July 13, 2017, 6:00 AM), https://www.latimes.com/entertainment/arts/la-ca-cm-authenticity-in-casting-20170713-htmlstory.html [https://perma.cc/6RYV-6J93].

143. *See, e.g.*, Paulson, *supra* note 88.

144. *See, e.g.*, Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 990–91 (M.D. Tenn. 2012). This case is discussed at length later in this note.

145. *See* Comcast Corp. v. Nat'l Ass'n of Afr. American-Owned Media, 140 S. Ct. 1009, 1015 (2020).

146. *See, e.g.*, Hopkins, *supra* note 16, at 152–55.

147. *See* Ligon, *supra* note 73, at 144.

148. *See* Lois L. Krieger, Note, *"Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater*, 43 SYRACUSE L. REV. 839, 865 (1992).

149. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J. concurring).

actor's race as a factor during the audition process is the only way of doing so."[150] While this argument holds significant merit, affirmative action may not necessarily be the appropriate approach to accomplish this goal.

Projecting an employment practice as an affirmative action plan can shield an employer from liability.[151] In *United Steelworkers of America v. Weber*, the Supreme Court held that employers may adopt and implement race-conscious affirmative action plans.[152] Such affirmative action plans do not violate Title VII because they align with the "spirit" and "purpose" of the statute.[153] At its core, affirmative action is a program through which the government or an employer attempts to rectify the history of past discrimination, eradicate present discrimination, and impede future instances of discrimination.[154] Affirmative action plans are either legally mandated or voluntarily created.[155] Likewise, affirmative action plans can apply to both private and public entities.[156]

When a private company voluntarily implements an affirmative action program, challenges will arise under statutory law.[157] Notably, Title VII does not prohibit private employers and unions from making affirmative action plans designed to "eliminate manifest racial imbalances in traditionally segregated job categories."[158] In *Weber*, the Court upheld an affirmative action plan that reserved 50% of training opportunities for black employees to enhance these employees' skillsets and experiences.[159] The program was set to continue until the number of black specialized craftsmen approximated the number of black workers in the local labor force.[160] The Supreme Court declined to precisely draw the line between affirmative action plans that violate Title VII and those that do not.[161] However, the Court indicated that affirmative action plans that do not trammel the interests of white employees, do not terminate white employees to replace them with black employees, do not bar advancement of white employees, and are temporary in duration are permissible.[162]

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150. *See* Hopkins, *supra* note 16, at 154.

151. *See Section 607 Affirmative Action*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action [https://perma.cc/XJQ8-TKKV].

152. United Steelworkers v. Weber, 443 U.S. 193, 197 (1979).

153. *Id.*

154. *Affirmative Action*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_action [https://perma.cc/9VEE-NZMM].

155. Joel Wm. Friedman, EXAMPLES AND EXPLANATIONS FOR EMPLOYMENT DISCRIMINATION 219 (Aspen Publ'g 4th ed., 2021).

156. *Id.*

157. *See id.* at 222.

158. United Steelworkers v. Weber, 443 U.S. 193, 197 (1979).

159. *Id.*

160. *Id.*

161. *Id.* at 208.

162. *Id.*

From there, the Supreme Court's decision in *Johnson v. Transportation Agency of Santa Clara County* elucidated that the burden of proving the invalidity of an affirmative action program rests with the challenger.[163] Nonetheless, the Court utilized the *McDonnell-Douglas* burden-shifting analytical framework.[164] Once a challenger establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a nondiscriminatory reason for its actions, and the Court recognized that an affirmative action plan can serve as a valid reason.[165] The burden then shifts back to the challenger to show that the affirmative action plan is mere pretext.[166] The Court clarified that while employers may want to provide evidence of the plan to show that it is not mere pretext, the burden of proving pretext remains with the challenger.[167] *Johnson* also reaffirmed *Weber's* holding that employers can implement affirmative action plans to remedy manifest imbalances in the workforce as long as the plan does not trammel the rights of other employees.[168]

In the context of professional theater, any present affirmative action plan would need to be voluntarily adopted by a private employer.[169] These affirmative action programs would be voluntary because no court has previously imposed an affirmative action program on a theater-related business.[170] Affirmative action is a tool that could address what the theater industry identifies as inequality and a lack of diversity.[171]

AEA conducted national studies to determine what, if any, hiring biases exist within professional theater.[172] The study covering the years between 2013 and 2015, the first study of its kind, found that 71% of principal role contracts went to white actors, while only 7.5% went to black actors and 2% went to both Asian and Hispanic/Latinx actors.[173] Compare these figures with the statistics of the work force in the country where 79% of the work force was white, 12% of the work force was black, and 6% was Asian.[174] However, AEA acknowledges that 16% of its members declined

163. Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 627.
168. *Id.* at 631.
169. *See* Krieger, *supra* note 148, at 864.
170. *Cf. id.*
171. *See* Alfonseca, *supra* note 18.
172. Russell Lehrer & Nick DeSantis, *Looking at Hiring Biases by the Numbers*, ACTOR'S EQUITY ASS'N, https://actorsequity.org/news/PR/DiversityStudy/ [https://perma.cc/TP6J-HWHD].
173. *Id.*
174. *Composition of the Labor Force*, U.S. BUREAU OF LAB. STAT. (Sept. 2016), https://www.bls.gov/opub/reports/race-and-ethnicity/2015/home.htm [https://perma.cc/QZ2A-Y5AX] (The "composition of the labor force" statistics do not break down Hispanic/Latinx participation in a way that makes for a readily useful comparison to the AEA statistics.).

to self-identify by race, which likely impacts the accuracy of these figures.[175] When AEA released its second study in 2020, covering 2016 through 2019, the data revealed that approximately 64% of all equity contracts went to white actors, while about 10.4% went to black actors, 2% went to Asian actors, and 3.6% went to Hispanic/Latinx actors.[176] These statistics can be compared to the workforce in 2019 where 77% of the workforce was white, 13% of the workforce was black, and 6% of the workforce was Asian.[177]

AEA's statistics, though not conclusive, only slightly point to a manifest imbalance in the workforce representation of white, black, Asian, and Hispanic/Latinx actors compared to national standards.[178] None of the comparisons between AEA and the national workforce quite indicate the egregious disparity exemplified in *Weber,* where only 1.83% black workers had the skilled craftsman job despite representing 39% of the local labor market.[179] However, these numbers are more akin to *Johnson,* where women constituted 36.4% of the local labor market but only represented 22.4% of agency employees.[180] Thus, the statistics, absent more specific data,[181] somewhat indicate that AEA employment opportunities with

175. *See* Lehrer & DeSantis, *supra* note 172.

176. *Diversity Report 2018-2019 in Review*, ACTOR'S EQUITY ASS'N, https://actorsequity.org/news/PR/DandIReport2020/diversity-and-inclusion-report-2020 [https://perma.cc/QBG4-VKH4].

177. *Composition of the Labor Force*, U.S. BUREAU OF LAB. STAT. (Dec. 2019), https://www.bls.gov/opub/reports/race-and-ethnicity/2019/home.htm [https://perma.cc/D33J-243Z] (Again, the "composition of the labor force" statistics do not break down Hispanic/Latinx participation in a way that makes for a readily useful comparison to the AEA statistics.).

178. *See* Lehrer & DeSantis, *supra* note 172; *see also Diversity Report 2018-2019 in Review*, *supra* note 176.

179. United Steelworkers v. Weber, 443 U.S. 193, 198–99 (1979).

180. Johnson v. Transp. Agency, 480 U.S. 616, 621 (1987). This is approximately a 3:2 ratio of national workforce to the agency. This is similar to the 3:1 ratio of national workforce to Asian AEA actors. *See* Lehrer & Desantis, *supra* note 172. Most in the theater industry may likely focus on the fact that white actors outnumber black actors 6 to 1 and Asian actors 32 to 1. *See id.*

181. Defining the proper labor market for the theater is extremely difficult, as it is for any other profession. New York is largely the center of American theater in that it is home to Broadway and off-Broadway shows. *All New York's A Stage: New York City Small Theater Industry Cultural and Economic Impact Study*, N.Y.C. MAYOR'S OFF. OF MEDIA AND ENT. (2019), https://www1.nyc.gov/assets/mome/pdf/mome-small-theater-study-2019.pdf [https://perma.cc/2YRY-U53F]. Most theater professionals are based out of New York City. *See* Jeff Blumenkrantz, *Why NYC is the Best Place to Live to Pursue Theater*, BACKSTAGE (last updated Sept. 24, 2019), https://www.backstage.com/magazine/article/nyc-best-place-live-pursue-theater-15352/ [https://perma.cc/U46Q-BYVJ]. And, many theaters come to New York City to hire actors to come work for them across the country. *Id.* While there is plenty of local hiring of actors that occurs each day, the majority of the labor market is derived from New York City. *Id.* New York has more diversity in its labor market than other states and is different than the national average. *See* Tim O'Neill, *Minnesota's Diversifying Workforce*, MINN. DEP'T EMP. AND ECON. DEV. (March 2022), https://mn.gov/deed/newscenter/publications/trends/march-2022/workforce.jsp [https://perma.cc/B3V6-CER2]

productions and theater companies are unbalanced compared to the labor market. This suggests the possibility of addressing any imbalance by focusing on race in the casting process as a means to remedy the situation.

However, assuming such an imbalance exists, theatrical casting creates a complex and losing analysis under the factor that assesses whether an affirmative action plan trammels the rights of other employees.[182] Under *Weber*, an affirmative action plan does not trammel the rights of employees if it neither requires discharge of other employees nor serves as an "absolute bar" to other employees' advancements.[183]

In *Johnson*, the Court further clarified the trammeling requirement.[184] The Court validated the affirmative action plan in question because it utilized the immutable characteristic, gender in this case, as a singular "plus factor" to be weighed with other pertinent criteria.[185] Critically, the Court noted that affirmative action plans that neither automatically exclude a person lacking the immutable characteristic from obtaining the job nor absolutely entitle a person with the immutable characteristic to obtaining the job is permissible.[186] Applicants with the immutable characteristic must still compete against other qualified applicants.[187]

When it comes to publishing breakdowns or typing out of actors, the process arises at a preliminary stage and does not require discharge of other employees.[188] Both facets of casting being analyzed in this occur well

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(Table 3 provides a state-by-state comparison of diversity in the workforce). Thus, it is very difficult to decide between whether to use a local labor market or a national labor market to make a comparison, but because AEA is a national union and their data encompasses the entire country, using national data felt more appropriate. *See Diversity Report 2016-2019 in Review*, *supra* note 176. To complicate matters even further, there is no required degree, certification, or any other concrete requirements for actors to get jobs. Rebecca Strassberg, *13 Industry Experts on Whether Actors Need College Degrees*, BACKSTAGE (last updated Feb. 17, 2020), https://www.backstage.com/magazine/article/backstage-experts-answer-actors-need-college-degrees-9373/ [https://perma.cc/45CG-VSN9]. While having formalized training through a collegiate or professional program is useful, it is not necessary. *Id.* An actor trying to bring an employment discrimination claim could, and likely would, rely on statistical data. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) ("Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances."). However, a trial court will surely have its work cut out for it if and when an actor brings an employment discrimination action because trial courts are in the optimal position to make "the appropriate determination" about the proper "comparative figures" for any statistical analysis. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 313 (1977).

182. *Weber*, 443 U.S. at 208.

183. *Id.*

184. *Johnson*, 480 U.S. at 637–38.

185. *Id.* at 638.

186. *Id.*

187. *Id.*

188. *See generally* Frank Dilella, *Understanding Broadway: The Replacement*, PLAYBILL (June 15, 2010), https://playbill.com/article/understanding-broadway-the-replace

before an actor is hired.[189] No actor would have to be fired simply because a casting notice goes out or because there is a type out at auditions.[190] Moreover, there is no bar to the advancement of other applicants because the color-conscious casting method, exhibited through racially preferential breakdowns, does not exclusively apply to one race.[191] Typing can be used to exclude actors of any race given the needs of a project.[192] As such, breakdowns and typing will often make race an absolute bar to employees of another race, and this would be enough to violate *Weber*.[193]

Applying *Johnson* to theatrical casting almost certainly destroys any promise of painting current methods as affirmative action plans.[194] When it comes to hiring, one's race is certainly only one factor in getting cast; an actor still must be able to fit the role and production.[195] However, race becomes more than a mere plus factor because race is used to group applicants with other people of that race when it is germane to the role.[196] Moreover, when race is germane to the role, the color-conscious casting model automatically excludes individuals who do not belong to that particular race from consideration.[197] Turning back to the *Once on this Island* example, casting Osaka, a black woman, necessarily eliminates all white people from consideration, so black women are vying against other black women for the role.[198] This violates the core essence of what the court deemed a valid affirmative action plan in *Johnson*.[199] Although color-conscious casting does not guarantee any individual actor a certain role, it guarantees a certain race of actors the right to a single role.[200]

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ment-com-169316 [https://perma.cc/FVD8-TR3K] (discussing how replacement actors for the role Billy Elliot were found, hired, and rehearsed before the other actors left the show); Casey Mink, *How to Become a Broadway Swing, Standby, Understudy, or Replacement*, BACKSTAGE (last updated Apr. 16, 2021), https://www.backstage.com/magazine/article/become-broadway-swing-understudy-standby-74/ [https://perma.cc/5Z24-TMEE] ("Replacements are cast as needed.").

189. *See generally* Dilella, *supra* note 188.

190. *See generally Getting Cast in Today's Musicals On and Off Broadway*, BACKSTAGE (Nov. 4, 2019), https://www.backstage.com/magazine/article/getting-cast-todays-musicals-broadway-1-30231/ [https://perma.cc/FQJ2-QP4X] (discussing how productions hold auditions even if there are no openings and how shows will keep actors "on file" for when an opening does exist).

191. *Compare Once on This Island*, *supra* note 82, *with Hairspray*, *supra* note 83.

192. *See generally* Byrne, *supra* note 107 (discussing how type pertains to physical characteristics).

193. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

194. *Id.*

195. *See generally* Chirico, *supra* note 134.

196. *See* Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 53 (2007) ("Alternatively, some listings requested a 'type' by aligning the role with an actor of a particular race.").

197. *Cf. id.* at 65–71.

198. *See Once on This Island*, *supra* note 82.

199. *See generally* Johnson v. Transp. Agency, 480 U.S. 616, 637–38 (1987).

200. *See* Robinson, *supra* note 196, at 6–7.

For purposes of this analysis, specifically examining breakdowns and typing, the germaneness of race is immaterial for purposes of determining whether racially preferential notices or race-based typing can constitute an affirmative action plan. Using race preferences in both breakdowns and type-outs will always automatically exclude people not of the target race and are thus invalid.[201] This holds true when a preference is indicated, regardless of whether race is integral to the character and story or not.[202] When race is not germane to a character's identity, but the casting team still wants an actor of a specific race, the casting team is likely to exhibit that preference from the moment they publish the casting notice until the actor is hired. This differs from looking at color-conscious casting more broadly in a way that focuses solely on the hiring of an actor.[203] In situations where a casting team genuinely holds no preference for the race of the character and considers actors of all races for that role, casting teams may then prefer the racial minority, using race as a plus factor with all else being equal, to combat past discrimination.[204] However, if the racial preference is exuded prior to that, the action cannot be defined as permissible affirmative action. This illustrates that color-conscious casting is a process, not all of which necessarily aligns with antidiscrimination laws.

Taking the framework set out by the Court in *Weber*, another glaring concern that immediately arises is the question of duration.[205] *Weber* suggests that affirmative action programs should be temporary in nature.[206] Although color-conscious casting has not been the standard method of casting, color-conscious casting is hardly a novelty because it has existed since Title VII was enacted.[207] One need only look to 1964, the year Title VII became law, to spot the Langston Hughes and William Hairston musical *Jerico-Jim Crow*, written for and performed by black actors.[208] This is evidence showing that producers have employed color-conscious casting since the 1960s and even before that.[209] Sixty years

201. *Id.* at 9.

202. For an analysis discussing instances when races may or may not be germane, *see id.* at 67–71; *see also* Hopkins, *supra* note 16, at 151.

203. *Compare generally* Robinson, *supra* note 196, at 50–74, *with* Hopkins, *supra* note 16, 152–55.

204. *See* Hopkins, *supra* note 16, at 152–53.

205. United Steelworkers v. Weber, 443 U.S. 193, 216 (1979).

206. *Id.*

207. Richard F. Shepard, *Theater: A Rousing 'Jerico-Jim* Crow', N.Y. TIMES (Jan. 13, 1964), https://www.nytimes.com/1964/01/13/archives/theater-a-rousing-jericojim-crow-langston-hughes-play-with-music.html [https://perma.cc/B7CF-JQGG].

208. *Id.* Color-conscious casting also existed when race was not germane to the role since at least the 1960s. *See, e.g.*, *Black History on Broadway: Celebrating* Hello, Dolly! *Starring Pearl Bailey*, PLAYBILL (Feb. 9, 2021), https://playbill.com/article/black-history-on-broadway-celebrating-hello-dolly-starring-pearl-bailey [https://perma.cc/B9TK-QSVT].

209. *See, e.g.*, *Black History on Broadway: Celebrating* Hello, Dolly! *Starring Pearl Bailey*, *supra* note 208. Some instances of color-conscious casting have been borne out of

certainly trumps Justice O'Connor's approximated twenty-five-year limit for affirmative action that she set in *Grutter v. Bollinger*.[210] Although Grutter was in the context of an Equal Protection Clause challenge, sixty years and counting would certainly surpass even the most liberal definitions of temporary.[211]

From the duration perspective, another concern when considering color-conscious casting as an affirmative action program is what happens once past discrimination has been remedied.[212] There is certainly great debate over how close the theater industry is to curing its issues with past discrimination, but hopefully, there will come a point when the theater industry has accounted for its past actions and developed a persistent, non-discriminatory way of operating.[213] At that point, color-conscious casting will still be necessary because producers and theater companies will still want to perform pieces that accurately depict the background that a piece was written to reflect.[214] Certainly, when this point comes, calling color-conscious casting a temporary measure would fail under any review.[215] Accurate representations do matter, and the theater industry will have to embody that idea for the long term.[216]

In *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court explicitly chose not to rule on whether affirmative action plans under § 1981 were subject to the same statutory standards as Title VII.[217] Consequently, circuit courts are divided on whether the constitutional standard or Title VII standard for affirmative action plans applies.[218] However, should the Supreme Court adopt the statutory standard for §

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discrimination themselves like when productions would cast people of color to play "servant" type roles. *See generally The History of Racial Exploitation in Theater*, THE ECHOES BLOG (Aug. 28, 2019), https://www.echoesofthestruggle.com/single-post/2018/08/29/the-history-of-racial-exploitation-in-theater [https://perma.cc/9MXT-ZVCX] (productions have a history of casting black actors in "servant" roles).

210. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

211. *Id.* at 394 (Kennedy, J. dissenting).

212. Johnson v. Transp. Agency, 480 U.S. 616, 654–55 (1987).

213. *See generally* Laura Collins-Hughes, Michael Paulson, & Salamishah Tillet, *Four Black Artists on How Racism Corrodes the Theater World*, N.Y. TIMES (last updated Sept. 22, 2021), https://www.nytimes.com/2020/06/10/theater/systemic-racism-theater.html [https://perma.cc/AWM6-8TE5] (Lydia R. Diamond, Jelani Alladin, Kenny Leon, & Sarah Bellamy discussing generally how the theater industry has a lot of work to do in terms of representation and eliminating workplace discriminatory behavior).

214. *See, e.g.*, *Anti-Racism Progress Report*, MANHATTAN THEATER CLUB (last updated Dec. 2021), https://www.manhattantheatreclub.com/edi/ [https://perma.cc/ZVY7-LWXD].

215. United Steelworkers v. Weber, 443 U.S. 193, 216 (1979).

216. Carolina Ribeiro, *Race & Theater: Creation, Casting & Content*, ONSTAGE BLOG (June 2, 2020), https://www.onstageblog.com/columns/race-theatre-creation-casting-content [https://perma.cc/R7GW-CS3J].

217. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976).

218. Glen D. Nager, *Affirmative Action after the Civil Rights Act of 1991: The Effects of a Neutral Statute*, 68 NOTRE DAME L. Rev. 1057, 1068–70 (1993) (comparing Setser v. Novak Inv. Co., 657 F.2d 962 (8th Cir. 1981) (Title VII standard), *with* Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991)) (constitutional standard).

1981, color-conscious casting as an affirmative action plan will necessarily fail for the same reasons it would under Title VII.[219]

After the foregoing examination, it is apparent that the racially preferential casting notice and race-based typing components of color-conscious casting will fail judicial review as an affirmative action plan. When race is used in breakdowns and typing, the casting team unequivocally excludes actors of other races from consideration, thus trammeling the rights of other actors.[220]

B. Dramatic Works as Protected Speech

Dramatic work grounds itself in the protection of the First Amendment.[221] Accordingly, many presume that the First Amendment certainly drives the argument in terms of defeating a claim of antidiscrimination when it comes to the expression of a dramatic work.[222] Because of the Constitution's supremacy, the First Amendment supersedes conflicting federal and state antidiscrimination laws concerning protected speech.[223] Undoubtedly, theater qualifies as protected speech because, as noted in *Schad v. Mt. Ephraim*, entertainment is protected, and the First Amendment guarantee extends to musical and dramatic works.[224] However, some First Amendment doctrines complicate the matter.

In *Claybrooks v. ABC, Inc.*, two black men who auditioned for *The Bachelor* sued ABC, the network that produces the show, claiming that ABC violated their equal opportunity to contract pursuant to 42 U.S.C. § 1981 by failing to hire them.[225] The plaintiffs attempted to demonstrate that the almost exclusive white casting history of the show exemplified how media companies segregate content to placate a predominantly white viewership and avoid perpetuating "perceived racial fears" and "outdated racial taboos" about interracial couples.[226] The defendant in this case moved to dismiss under Federal Rules of Civil Procedure 12(b)(6), relying on the First Amendment as an affirmative defense.[227] In response, the plaintiffs averred that they took issue with the casting process, not the show itself,

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219. Theater actors who are most likely to bring actions under § 1981 would do so in New York, so the Second Circuit's test would apply. The Second Circuit applies the constitutional standard for affirmative action. *See* Int'l Bhd. of Elec. Workers v. Hartford, 625 F.2d 416 (2nd Cir. 1980).

220. *See* Robinson, *supra* note 196, at 6–7.

221. Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981).

222. *See generally* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

223. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012) (citing *Hurley*, 515 U.S. at 568).

224. *Schad*, 452 U.S. at 65.

225. *Claybrooks*, 898 F. Supp. 2d at 989–90.

226. *Id.* at 990.

227. *Id.* at 991.

and that casting was not protected by the First Amendment.[228] The *Claybrooks* court rejected the plaintiffs' argument and found that casting is "part and parcel of the creative process," warranting First Amendment protection.[229] By applying § 1981, a court would have to regulate the content of the show, something the First Amendment prohibits.[230]

Because the *Claybrooks* plaintiffs relied on § 1981 in an attempt to regulate the content of the show, the court applied strict scrutiny and charged the plaintiffs with the burden of proving that § 1981 would serve a compelling government interest in the least restrictive means.[231] Ultimately, the court surmised that applying § 1981 to force casting choices on ABC was not the least restrictive means because the producers have a unilateral right to control their creative content.[232]

Likewise, in *Claybrooks*, the court quoted Supreme Court precedent in determining when conduct can become protected speech:

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.[233]

The District Court found that the conduct of casting was not too far removed from the actual expression of the piece to deny casting the protection of the First Amendment.[234] However, is the conduct of publishing racial preferences in breakdowns or the typing of actors in the casting process too far removed to be devoid of constitutional protection?

1. Typing is Protected Expressive Conduct

Claybrooks provides a strong example of typing in the casting process.[235] When auditioning for *The Bachelor*, Plaintiff Johnson arrived at the audition location where a white employee took his materials and promised to pass them on to the producers.[236] Johnson noted that white auditioners were not stopped and immediately turned away.[237] Thus, these allegations illustrate how casting teams identify individuals based on physical characteristics and separate them from other similarly situated

228. *Id.* at 993.
229. *Id.*
230. *Id.* at 999.
231. *Id.* at 993.
232. *Id.* at 1000.
233. *Id.* at 997 (quoting Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).
234. *Id.* at 999.
235. *Id.* at 990–91.
236. *Id.* at 991.
237. *Id.* at 990.

auditioners.[238] By granting ABC's motion to dismiss, the District Court implicitly found typing to be included in the "part and parcel" of casting as a whole.[239] This conclusion makes sense because, in order to cast a show, a production must of necessity eliminate other actors from consideration.[240]

Conduct constitutes protected speech when the person engaging in the conduct intends to convey a particularized message and the court determines that the message would likely be understood by those who viewed it.[241] To determine whether the government can regulate conduct, courts apply the test from *United States v. O'Brien*.[242] In *O'Brien*, the Court laid out four factors to determine whether a government regulation limiting speech that had "speech" and "nonspeech" elements was justified.[243] A regulation is justified if:

> [I]t is within the constitutional power of the Government; it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[244]

According to the District Court's ruling in *Claybrooks*, the actual act of casting itself is part of the creative expression protected in producing dramatic content.[245] However, publishing breakdowns and typing actors constitutes discrete subparts of conduct in the casting process and may merely be "kernels," unable to satisfy the expression requirements.[246] Under *Texas v. Johnson*, it appears that typing would qualify as expressive conduct.[247] Typing conveys the message that the actor is not what a production is looking for; and it relates back to the larger expression of the protected dramatic work because the very act of casting conveys the expressive message of who exists in the world created on stage.[248] That

238. *Cf. id.*

239. *Id.* at 999–1000.

240. *See generally* Elias Stimac, *Solving the Mysteries of Callbacks*, BACKSTAGE (last updated Mar. 25, 2013), https://www.backstage.com/magazine/article/solving-mysteries-callbacks-33070/ [https://perma.cc/7QDF-3RJA] (discussing how casting directors will cut a lot of auditioners for the initial callback).

241. Texas v. Johnson, 491 U.S. 397, 404 (1989).

242. United States v. O'Brien, 391 U.S. 367, 376 (1968).

243. *Id.* at 376–77.

244. *Id.* at 377.

245. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012).

246. *See* Ken Lazer, *Casting 101: Everything Actors Need to Know About the Process*, BACKSTAGE (April 12, 2023), https://www.backstage.com/magazine/article/inside-look-casting-process-13023/ [https://perma.cc/S2EM-KVHE] (discussing that creating and circulating a breakdown is the first step of casting).

247. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

248. *See* Byrne, *supra* note 107.

message is likely, if not certainly, understood by the actor who learns they are no longer in consideration,[249] as well as by perceptive audiences when a dramatic work is presented.[250] *Claybrooks* implicitly approved of typing as being covered by the First Amendment, which makes sense when considering that it is expressive conduct that the government cannot regulate.[251]

Turning to the *O'Brien* test, Congress undoubtedly has the power to enact antidiscrimination statutes pursuant to its Commerce Clause authority under the United States Constitution.[252] The government assuredly has a compelling interest in eliminating discrimination against private actors,[253] superseding the substantial interest required by the intermediate scrutiny test laid out in *O'Brien*.[254] The Court has previously held that "eliminating discrimination" is "unrelated to the suppression of expression" and "plainly serv[es] a compelling state interest of the highest order."[255] However, regulating typing would be more extensive than necessary because, as *Claybrooks* elucidates, casting is part of the protected expression of a dramatic work over which a production has unilateral control, and casting certain actors necessarily means excluding others at some point.[256] In *Claybrooks*, Johnson was typed out upon showing up to an audition, almost the earliest point at which someone can be typed out.[257] Yet, the District Court ruled that this action was protected by the First Amendment.[258]

Absent further case law, typing, which can be seen as a de facto form of segregation, is certainly legal in the context of § 1981, and likely also in the context of Title VII.[259] This is because, as previously mentioned, the First Amendment trumps the application of antidiscrimination laws.[260] While typing falls within the ambit of protected expression, publishing racially preferential breakdowns is subject to consideration under the line of cases pertaining to commercial speech.[261]

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249. *Id.*

250. *See* Robinson, *supra* note 196, at 65.

251. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 990–91, 1000 (M.D. Tenn. 2012).

252. Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964).

253. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

254. United States v. O'Brien, 391 U.S. 367, 377 (1968).

255. Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24 (1984).

256. *See generally Claybrooks*, 898 F. Supp. 2d at 997–1000.

257. *Id.* at 990–91.

258. *Id.* at 1000.

259. *Id.; see also* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995) (holding marching in a parade to be a form of expression and is therefore protected by the First Amendment).

260. *Hurley*, 515 U.S. at 561, 568, 572–73; *see also* Sarah Honeycutt, *The Unbearable Whiteness of ABC: The First Amendment, Diversity, and Reality Television in the Wake of Claybrooks v. ABC*, 66 SMU L. REV 431, 435 (2013) ("The interest in protecting speech may sometimes clash with diversity goals. In such cases, the Court has indicated that the First Amendment trumps anti-discrimination law.").

261. Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels., 413 U.S. 376, 391 (1973).

2. Breakdowns are Unprotected Commercial Speech

In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, the National Organization for Women, Inc., filed a complaint with the Pittsburgh Commission on Human Relations, stating that the Pittsburgh Press Company violated section 8(j) of the city Ordinance.[262] Section 8(j) prohibited the newspaper from aiding advertisers in publishing job listings that violated section 8(e), which "forbade employers, employment agencies, and labor organizations to submit advertisements for placement in sex-designated columns."[263] In its job listings section, Pittsburgh Press Company maintained a column that designated, upon request by advertisers or inquiry by the newspaper, work as "male wanted," "female wanted," or "female and male wanted."[264] Despite Pittsburgh Press Company's First Amendment defense, the Commission ordered the newspaper to terminate its classification system, and the Court of Common Pleas affirmed the Commission's decision.[265] On appeal, the Commonwealth Court modified the Commission's order to bar "all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission."[266] The Pennsylvania Supreme Court denied review, but the United States Supreme Court granted certiorari.[267]

Upon review, Justice Powell noted that because each advertisement was "no more than a proposal of possible employment," did not express opinions on who should fill available positions, and failed to criticize or otherwise discuss the ordinance, the advertisements were "classic examples of commercial speech."[268] Justice Powell further elaborated that a commercial advertisement can retain its identity as commercial speech even if the newspaper exercises some editorial judgment in deciding what gets published.[269] By placing advertisements under a "sex-designated column," the newspaper offered an "integrated commercial statement" that "convey[ed] the same message as an overtly discriminatory want ad."[270]

The Court continued that employment discrimination is an "*illegal* commercial activity."[271] By comparison, the Court stated that the

262. *Id.* at 379.
263. *Id.* at 380.
264. *Id.* at 379.
265. *Id.* at 380.
266. *Id.* at 380–81 (citing Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels., 287 A.2d 161 (Pa. Commw. Ct. 1972)).
267. *Id.* at 381.
268. *Id.* at 385.
269. *Id.* at 386.
270. *Id.* at 388.
271. *Id.*

Constitution could undoubtedly preclude a newspaper from publishing an advertisement "proposing a sale of narcotics or soliciting prostitutes."[272]

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.[273]

Ultimately, the Court held that restricting a newspaper from publishing illegal, discriminatory job postings, a form of commercial speech, did not violate the newspaper's First Amendment Rights.[274]

Seven years later, *Central Hudson Gas & Electric Corporation v. Public Service Commission* laid out a definitive test to determine the constitutionality of restrictions on commercial speech.[275] Because there are great concerns about the nature of commercial speech, the Court asserted that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[276] Specifically, the Constitution permits governmental bans on speech that is affiliated with illicit practices.[277] To determine whether commercial speech falls within the First Amendment's protection,

> [I]t at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[278]

Breakdowns undoubtedly fail constitutional muster under *Pittsburgh Press* and *Central Hudson*. *Pittsburgh Press* is distinguishable in that the newspaper argued that the city ordinance violated its freedom of the press.[279] However, Justice Powell clarified that just because the publication of a job advertisement requires editorialization does not mean

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272. *Id.*
273. *Id.* at 389.
274. *Id.* at 391.
275. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
276. *Id.* at 563.
277. *Id.* at 563–64 (citing Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels., 413 U.S. 376, 388 (1973)).
278. *Id.* at 566.
279. *Pittsburgh Press Co.,* 413 U.S. at 378.

that the advertisement itself loses its classification as commercial speech.[280] This necessary distinction could expose a few players in the theater industry to potential liability: productions, theater companies, and the online sources that post job listings like Playbill, Backstage, Actor's Access, etc. Looking first at these online listing sources, their role is identical to that of the newspaper in *Pittsburgh Press*.[281] These online sources merely provide an outlet for online advertisements; they do not suggest opinions as to who should be hired for a role nor criticize state or national antidiscrimination laws.[282] However, Title VII is not as broad as the questioned Pittsburgh city ordinances in that the federal statutes do not apply to just anyone who may "aid" in publishing these advertisements.[283] The online sources would assuredly fail to qualify as an employment agency under Title VII because their job is to circulate the listing, not procure employment.[284] Section 1981 may be broad enough to encompass online sources that publish breakdowns.[285] Nevertheless, states or municipalities may have statutes or ordinances that are more expansive, like that of Pittsburgh's, that could subject these online sources to liability.[286]

Now turning to the productions or theater companies themselves, these entities are employers and are within the reach of federal statutes.[287] By their very essence, these listings exude preferences for many physical characteristics, including characteristics protected by statute.[288] Similar to *Pittsburgh Press*, the breakdowns qualify as employment discrimination, which is "illegal commercial activity" because they show a preference for a certain race, in violation of the law.[289] As such, these breakdowns would fail the first part of the *Central Hudson* test, whether brought under Title VII or § 1981.[290]

When revisiting the *Hamilton* controversy, where producers sought "non-white men and women," it becomes readily apparent why such a

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280. *Id.* at 387.

281. *See generally id.* at 379–80.

282. *See, e.g.*, *The Book of Mormon (Broadway) NYC ECC Male Identifying Singers (06.27.23),* PLAYBILL, https://www.playbill.com/job/the-book-of-mormon-broadway-nyc-ecc-male-identifying-singers-06-27-23/ceb4ae52-4b32-47e1-94f5-46f0cbe2a0aa [https://perma.cc/9L7B-UM4G].

283. *See* 42 U.S.C. § 2000e-3(b).

284. *Id.*

285. *Id.* § 1981.

286. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels, 413 U.S. 376, 380 (1973) (discussing the language of the Pittsburgh Ordinance in question § 8(j)).

287. *See* 42 U.S.C. § 2000e-3(b).

288. *See How Writing the Perfect Casting Notice Will Get You the Right Cast for Your Branded Project*, BACKSTAGE (July 26, 2019), https://www.backstage.com/magazine/article/how-to-find-the-perfect-cast-for-your-next-branded-project-68440/ [https://perma.cc/48CD-SAZF].

289. *See Pittsburgh Press Co.*, 413 U.S. at 388; *see also* Robinson, *supra* note 196, at 45.

290. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

preference became controversial.[291] *Hamilton* was seeking individuals of other races to the exclusion of white actors.[292] However, in assessing the *Once on This Island* and *Hairspray* breakdowns, the producers shifted the request for characters of certain races.[293] This slight change does not create any meaningful difference as compared to *Hamilton* because the *Once on This Island* and *Hairspray* both indicate the desired race of the character but leave the direct discrimination against an employee implicit.[294] The distinction drawn here is semantical, somewhat similar to *Pittsburgh Press*, where some of the ads in question did not themselves contain a preference but were listed under a "male" or "female" category.[295] If the Court is unwilling to overlook technicalities to deem some advertisements constitutional for not placing a gender preference in the ad itself, the current Court is likewise unlikely to pretend that the use of racial preferences does not exist and will likely opt to require a color-blind or race-neutral approach.[296]

Of course, there is the possibility that a court may consider these breakdowns to be "part and parcel" of the casting process, protected by the First Amendment rather than unprotected commercial speech.[297] In fact, courts would be wise to adopt the view that breakdowns are "part and parcel" of the protected expression of a dramatic work.[298] By the time breakdowns are posted, shows have been in preproduction, developing a script and assembling a creative team, indicating that the creative expression that will ultimately be a dramatic work has already been conceived.[299] To stymie an intermediary step of an otherwise protected creative process by excising breakdowns from First Amendment protection on grounds of commercial speech would be to impose an exercise in futility on the theater industry. Production teams already have a creative vision; the Constitution should not stop that vision halfway.[300] Because breakdowns can so easily be rectified or amended without jeopardizing the content of

291. *See* Paulson, *supra* note 88.

292. *Id.*

293. *See Once on This Island*, *supra* note 82; *see also Hairspray*, *supra* note 83.

294. *Compare Once on This Island*, *supra* note 82 (stating all are welcome to audition, but specifying a preferred race and gender), *and Hairspray*, *supra* note 83 (stating all are welcome to audition, but specifying a preferred race and gender), *with* Paulson, *supra* note 88 ("'[N]onwhite men and women' to audition for the show.").

295. *See* Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels., 413 U.S. 376, 387–88 (1973).

296. *See generally* Tom I. Romero II, *The Keyes to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415, 417 (2015) (discussing how the Roberts Court "disparages all uses of race").

297. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012).

298. *Id.*

299. *See* Maggie Perrino, *Let's Put on a Show! The Frugal Dreamer's Guide to Producing a Musical*, DRAMATICS (Feb. 2018), https://dramatics.org/lets-put-on-a-show/ [https://perma.cc/NU3Q-U8RU] (discussing how auditions occur after a piece has been created or selected and after a creative team has been assembled).

300. *Id.*

the greater protected work, scholars can only speculate as to how a court would rule on a case. The need for clarification in this area is great, but the scantness of employment discrimination claims brought by actors leaves this area underdeveloped.

C. Bona Fide Occupational Qualifications

Within Title VII itself, Congress provided employers with an affirmative defense, permitting them to hire on the basis of an applicant's religion, sex, or national origin if the applicant's religion, sex, or national origin is a BFOQ that is "reasonably necessary to the normal operation of that particular business or enterprise."[301] Congress drafted, and the Supreme Court has construed, the BFOQ defense narrowly, declaring that race can never serve as the basis for a BFOQ defense.[302] In discussing why the BFOQ defense is read so narrowly, the Court relied on the text of Title VII, emphasizing Congress's use of the words "certain," "normal," "particular," and "occupational" indicate "objective, verifiable requirements" that "must concern job-related skills and aptitudes."[303]

One scholar, Lois L. Krieger, who has addressed Title VII discrimination in the theater, argues that Congress needs to provide extra protections to actors by expanding 703(e)(1) to include race as a BFOQ as it applies to theater employees in this context.[304] Abuses of such an expansion would be remedied, the argument goes, by a continued narrow reading of 703(e)(1) and an employer's burden of proof in asserting BFOQ as a defense.[305] Conversely, another scholar, Michael J. Frank, has opined that professional theater does not deserve an amendment to the BFOQs because the industry has yet to face the consequences of a Title VII violation.[306] Enacting a race BFOQ could be "premature" and may "insulate more invidious forms of race discrimination than it would exculpate benign forms."[307] After all, Congress considered including race as a BFOQ back in 1964, but ultimately rejected it.[308] Representatives Huddleston and Williams moved to add race as a BFOQ to Title VII, and in support of that motion, the pair referenced potential complications arising when a director would try to cast Othello, a role played by a black actor.[309] Congress

301. 42 U.S.C. § 2000e-2(e).

302. Int'l Union v. Johnson Controls Inc., 499 U.S. 187, 201 (1991).

303. *Id.*

304. *See* Krieger, *supra* note 148, at 865 (proposing amended language to the BFOQ in Title VII).

305. *Id.* at 865–66.

306. *See* Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 UNIV. OF S.F. L. REV. 473, 524–25 (2001) (discussing what a BFOQ that includes race would mean for the theater industry).

307. *Id.*

308. *Id.* at 496.

309. 110 CONG. REC. 2550 (1964) (statement of Rep. George Huddleston); *see* Latonja Sinckler, *And the Oscar Goes To … Well, It Can't Be You, Can It?: A Look at Race-Based*

declined to add race likely because such a BFOQ would not be limited to scenarios of casting directors looking for actors, and such an amendment may allow the law to permit overt racial discrimination in other industries.[310] Moreover, Congress may have rejected a race BFOQ because it considered race discrimination to be more "harmful than discrimination on the basis of religion, sex, or national origin."[311] Ultimately, members of Congress did not want to create a "loophole" that would "destroy the principle" behind Title VII: prohibiting discrimination in employment based on race or color.[312]

Interestingly, the EEOC has considered BFOQs for actors in the context of sex.[313] The EEOC cited actors as examples of situations wherein the use of a sex BFOQ would be "necessary for the purpose of authenticity or genuineness."[314] Despite its recognition of the necessity for authenticity or genuineness with respect to dramatic arts, the EEOC has not expanded the same rationale to suggest that a race BFOQ may be appropriate for actors.[315] Even in reference to casting a play or movie, various courts have noted that, due to race's exclusion from the BFOQ defense, parties may not try to defend against discrimination claims by raising race as a BFOQ.[316] Hopes of procuring a race BFOQ seem to have dissipated.

Scholars interested in amending the language of the BFOQ to permit discriminatory casting practices should turn their attention elsewhere.[317] Perhaps their focus should be on adding language to Title VII that preserves existing BFOQs while creating a specific exemption for professional theater, allowing the industry to be exempt from specific provisions of Title VII in certain defined circumstances. Given the inefficacy of affirmative action and the First Amendment in this context, such an exemption may be the best way forward.

IV. CREATING STATUTORY EXEMPTIONS TO TITLE VII AND § 1981

To deal with racially preferential breakdowns, the theater industry must look beyond affirmative action plans and First Amendment

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Casting and How It Legalizes Racism, Despite Title VII Laws, 22 AM. U. J. GENDER SOC. POL'Y & L. 857, 887 (2014) (citing 110 CONG. REC. 2556 (1964)).

310. 110 CONG. REC. 2550 (1964) (statement of Rep. George Huddleston).

311. Frank, *supra* note 306, at 496.

312. *Id.* at 497 (citing 110 CONG. REC. 2556 (1964) (statement of Rep. O'Hara)).

313. *Bona Fide Occupational Qualifications*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications [https://perma.cc/8GG8-WBRU].

314. *Id.*

315. *Id.*

316. Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 654 (5th Cir. 1980); Ferrill v. Parker Grp., Inc., 168 F.3d 468, 474 n.10 (11th Cir. 1999).

317. *See, e.g.*, Krieger, *supra* note 148, at 865.

protection.[318] Rather, the theater industry needs an exemption from 42 U.S.C.S. § 2000e-3(b). Such an exemption might allow theater companies and productions to publish preferential casting breakdowns based on protected characteristics, when race is integral to the story and even when it is not, so long as there is no invidious purpose behind the notice. Suggested language for the amendment may look like:

> A professional theatrical production is exempt from complying with 42 U.S.C. § 2000e-3(b) but must comply with all other provisions under this Title. Notwithstanding the last sentence, a professional theater production may be subject to liability under 42 U.S.C. § 2000e-3(b) if that professional theater production engages in conduct that would violate that section in an invidious manner.

This language circumvents the traditional BFOQ arguments by exempting professional theatrical productions from the scope of Title VII on a limited basis. The new amendment should also include a definition of professional theatrical production. That definition should read something like:

> A professional theatrical production refers to any company or organization whose main purpose or one of its main purposes is to present live theatrical productions open to the public. Said companies or organizations shall either produce a live theatrical performance through a contract with Actors' Equity Association or pay their actors for services rendered in producing the performance. In either case, both kinds of productions are still subject to the requirements of an employer set forth in 42 U.S.C. § 2000e.

Such an exemption in the statute may very well encourage similarly situated industries, like advertising or film, to seek similar treatment.[319] While concerns about a flood of suggested amendments to the statute could overwhelm Congress, Congress should be cognizant of the reality of modern casting practices on stage, on film, and in print.[320] Casting decisions based on race, particularly when they are necessary to honor the source material, are widely accepted and even encouraged in these

318. Because typing has been afforded First Amendment protection, this section will not address that part of the casting process. *See supra* Section III.B.

319. *See generally* Frank, *supra* note 306, at 519–22 (discussing a race BFOQ in the context of film and media).

320. *See* Hopkins, *supra* note 16, at 145 (acknowledging that certain racially discriminatory practices are used in the theatrical hiring process).

industries.[321] The purpose of Title VII is to eliminate artificial barriers to *invidious* discrimination.[322] What the theater and similarly situated industries are setting out to do lacks an invidious intent behind it. These industries are attempting to enhance representation, which may in turn lead to reduced incidences of workplace discrimination and even societal discrimination at large.[323] Congress, however, may be hesitant to make such amendments considering the almost nonexistence of cases raising Title VII claims with respect to casting.[324]

Moreover, a statutory exemption, as opposed to a BFOQ, would provide the theater industry with the necessary flexibility to publish breakdowns that consider preferences related to sexual orientation, disability, and other relevant characteristics during the casting process.[325] In theory, the exemption would preclude future challenges as the theater industry gets more specific, narrow, and restrictive with its casting preferences and criteria.[326] A § 1981 statutory exemption may look like:

> For purposes of this section, a professional theatrical production does not interfere with a person's right to make and enforce contracts by publishing casting breakdowns that specify by race, provided that such breakdown is not published with an invidious intent to discriminate.

The statute would further define a professional theatrical production in a nearly identical fashion to the proposed Title VII definition noted above. To prove an invidious intent to discriminate, both Title VII and § 1981 would use the same following test.

To establish liability for invidious discrimination under the last sentence of the proposed exemptions, a proposed tripartite test is presented,

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321. *Id.* (recognizing that these discriminatory practices are used to "'reflect[] authorial intent'") (citation omitted).

322. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

323. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace?renderforprint=1 [https://perma.cc/MNG9-VXSU] (explaining one risk factor strategy available to reduce harassment is increasing diversity).

324. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 996 (M.D. Tenn. 2012) ("With respect to casting decisions for an entertainment program of any kind, it appears that no federal court has addressed the relationship between anti-discrimination laws and the First Amendment"); *see also* Hopkins, *supra* note 16, at 144.

325. *See, e.g.*, Marc Tracy, *Who Can Play the King? Questions of Representation Fuel Casting Debates*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/28/theater/richard-iii-casting-debates.html [https://perma.cc/H429-LBZ9].

326. *Id.* ("While many celebrate the move away from old, sometimes stereotyped portrayals and the new opportunities belatedly being given to actors from a diverse array of backgrounds, others worry that the current insistence on literalism and authenticity can be too constraining. Acting, after all, is the art of pretending to be someone you are not.").

based off the burden-shifting test in *McDonnell-Douglas*.[327] First, to establish a prima facie case, the plaintiff must show that the professional theater production (1) published a racially preferential breakdown (2) that lacked any legitimate artistic purpose. Second, the burden would shift to the professional theater production to demonstrate that there was a legitimate artistic purpose, whether textual, directorial, or otherwise, for the decision. Third, the burden would then shift back to the plaintiff to prove that the legitimate artistic preference was merely pretext, and that the professional theater production published those breakdowns with an invidious intent. This framework will still protect plaintiffs while affording theater companies and productions more latitude to conduct their business.

This proposed statutory exemption necessarily conflicts with the views proffered by Professor Russell K. Robinson.[328] Professor Robinson has suggested "ban[s] on discriminatory breakdowns with exceptions where a ban would impose a substantial burden on the narrative."[329] In the context of film, Professor Robinson argues that the procedural burden on a film studio would not be too high because some studios cast without publishing breakdowns, and banning such breakdowns would not compel a studio to cast an actor of a certain race.[330] In theory, these bans would open casting opportunities to "previously excluded actors" and "cause decision makers to rethink their assumptions in a subset of cases."[331] Professor Robinson defends his ban on grounds that it would "confer important legal and practical benefits" such as industry understanding that these breakdowns are "immoral and illegal" and a desire to "adopt proactive measures to increase diversity in entertainment."[332] Professor Robinson supports his ban by indicating that studios should be open to rewriting certain roles, as long as doing so does not pose a "substantial burden" on studios to revise storylines where race is "integral to the narrative."[333] One of the primary aims of Professor Robinson's ban is to "broaden[] employment opportunit[ies] for excluded groups."[334]

Though Professor Robinson's proposed ban is well-supported, it would be unworkable in the theater industry. In the theater industry, playwrights maintain much more control over their work compared to screenwriters, especially once screenwriters have sold their scripts to

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327. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

328. *See* Robinson, *supra* note 196, at 4.

329. *See id.*

330. *Id.* at 50–51. I believe that Professor Robinson's point that banning such breakdowns would not compel casting someone of a specific race identifies why a court is unlikely to find casting breakdowns as "part and parcel" of the casting process: the breakdowns come so early in the process and in no way inhibit or control the ultimate protected expressive idea which a production intends to convey.

331. *Id.* at 52.

332. *Id.* at 55.

333. *Id.* at 52, 65–66.

334. *Id.* at 4.

studios.[335] Consequently, playwrights would shoulder a more substantial burden in redrafting their works compared to studio script editors.[336] Similar to film, theater sometimes casts without publishing notices, particularly when casting celebrities.[337] However, in theater, multiple individuals are responsible for playing a role due to understudies, standbys, and covers. Even with a celebrity in the lead role, theater productions still require excess performers that the film industry need not worry about.[338] These factors make Professor Robinson's plan incompatible with the theater.

Similarly, theater spawns countless tours, professional productions, amateur and educational productions, as well as revivals.[339] As a result, casting remains an ongoing process even after the original production has been staged, and it is exceedingly unlikely that playwrights would want to continually revise their work.[340] Occasionally, plays or musicals do go through some revisions for a revival.[341] If a piece undergoes such revisions specifically to address the race of the characters, those responsible for casting a show would be exceedingly more likely to emphasize race in casting to accomplish the desired changes to the script.[342]

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335. *See generally* Jeff Lyons, *Story Talk: Playwrights Have It Better Than Screenwriters – or Do They?*, SCRIPT MAG. (Oct. 10, 2012), https://scriptmag.com/features/story-talk-playwrights-have-it-better-than-screenwriters-or-do-they [https://perma.cc/3W22-VFAW].

336. *Id.*

337. *See, e.g.*, Jason P. Frank, *Who's the Greatest Star? A Timeline of Casting Funny Girl*, VULTURE (last updated Mar. 2, 2023), https://www.vulture.com/article/lea-michele-beanie-feldstein-funny-girl-casting-timeline.html [https://perma.cc/TVT6-26KG] (explaining that once it was announced that Beanie Feldstein was leaving "Fanny" in *Funny Girl*, the role was given to Lea Michele); *see also* Josie Greenwood, *11 Actors Who Don't Have to Audition for Roles Anymore*, MOVIEWEB (Jan. 21, 2023), https://movieweb.com/actors-dont-audition-offer-only/ [https://perma.cc/U9MV-YWFW] (explaining some famous actors do not have to audition for roles anymore).

338. *See* Mink, *supra* note 188.

339. *See, e.g.*, *Show History*, MUSIC THEATRE INT'L, https://www.mtishows.com/show-history/801 [https://perma.cc/2CHH-HSUG] (providing a history of major touring and revival productions of *Fiddler on the Roof* as well as place to request a license to perform the musical).

340. *Cf.* Lyons, *supra* note 335 (stating that playwrights "never suffer rewriting" and maintain a large degree of creative control).

341. *See* Michael Schulman, *Revival or Revisal? How Broadway is Retrofitting Its Past*, NEW YORKER (Jan. 13, 2012), https://www.newyorker.com/culture/culture-desk/revival-or-revisal-how-broadway-is-retrofitting-its-past [https://perma.cc/9WUA-QDG4] (discussing how older works sometimes get "gutted and refurbished" for a major subsequent production); *see also* Michael Paulson, *As Broadway Returns, Shows Rethink and Restage Depictions of Race*, N.Y. TIMES (last updated Nov. 10, 2021), https://www.nytimes.com/2021/10/23/theater/broadway-race-depictions.html [https://perma.cc/F66Q-E9YS] (discussing how during Covid-19 some writers of long-running shows took time to revise parts of the show).

342. *See* Ben Brantley, *Review: A Smashing 'Oklahoma!' Is Reborn in the Land of Id*, N.Y. TIMES (Apr. 7, 2019), https://www.nytimes.com/2019/04/07/theater/oklahoma-review.html [https://perma.cc/WR4S-GPNG] (remarking that this show, that had undergone

Moreover, including "previously excluded actors" serves as a compelling policy rationale supporting Professor Robinson's ban.[343] However, the social justice movement permeating the theater industry provides a better framework for including these actors: theaters should diversify the repertoire of musicals and plays they choose to produce.[344] By elevating BIPOC playwrights, the theater industry can naturally include diverse actors because BIPOC playwrights often include characters from BIPOC backgrounds.[345]

Another distinguishing factor is that theater runs continuously instead of being filmed and released, allowing casting directors to develop an evolving understanding of a character's needs.[346] As a result, casting directors can "rethink their assumptions" as the show plays on.[347] And of course, commercial theater is a business like any other that should be loath to expend resources seeing more actors for no net gain.[348]

While Professor Robinson suggests that banning preferential breakdowns would benefit regarding its moral practices, this is not necessarily true.[349] Such a victory is meaningless. Current theatrical breakdowns that specify race are not immoral because they are not published with an invidious purpose.[350] Likewise, these breakdowns are not immoral because there are breakdowns that specify for all races; it is not being used for exclusively one race of actors.[351] Though the current breakdowns are certainly illegal under current federal antidiscrimination laws, they should not be.[352] Banning these breakdowns and taking a color-blind approach to casting will not create the diversity that Professor Robinson seeks, especially given producers' predilection to default to white actors.[353]

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major revisions form the original production in 1943, had been cast in a "nontraditional[]" manner).

343. *See* Robinson, *supra* note 196, at 52.

344. *See* Michael Paulson, *Broadway is Brimming with Black Playwrights. But for How Long?*, N.Y. TIMES (last updated Oct. 6, 2021), https://www.nytimes.com/2021/09/16/theater/broadway-black-playwrights.html [https://perma.cc/Z44F-K8VK].

345. *See id.* (revealing that the number of diverse playwriters is increasing).

346. *Cf.* Daley, *supra* note 106 (discussing how certain productions felt it was necessary to hire new actors to keep the performances fresh).

347. *Contra* Robinson, *supra* note 196, at 52.

348. *See* ADLER, *supra* note 6, at 16.

349. *See* Robinson, *supra* note 196, at 55.

350. *See, e.g.*, Hopkins, *supra* note 16, at 151. Caring about the "appearance" of actors matters whether race is germane to the character or not does not qualify as invidious. *Id.*

351. To see how different productions specify a variety of racial and other preferences, *see Job Listings*, PLAYBILL, https://www.playbill.com/jobs [https://perma.cc/LHK7-HGNV].

352. Robinson, *supra* note 196, at 10 (revealing the "prevalence of race and sex classifications in role specifications.").

353. *See* Hopkins, *supra* note 16, at 141–42, 151.

CONCLUSION

Understanding color-conscious casting requires acknowledging that these plans are comprehensive and include more than simply hiring an actor because of the actor's race. It includes publishing preferential breakdowns and utilizing typing as a means of separating and eliminating applicants.[354] As noted above, such comprehensive plans are currently illegal.[355]

Color-conscious casting, with respect to both typing and breakdowns, fails as an affirmative action plan because such plans necessarily trammel the rights of actors of different racial backgrounds.[356] However, after *Claybrooks*, typing enjoys the protections of the First Amendment as "part and parcel" of the casting process.[357] Nevertheless, the First Amendment does not exculpate breakdowns because such speech is "illegal commercial activity."[358]

Absent invidious discrimination, the theater industry should have unfettered discretion not only to hire whomever they choose but also to exclude certain people from auditions, even if purely from a desire to conserve resources. Breakdowns that specify *all* the characteristics that a production is seeking gives the theater industry that power. Thus, the most tenable action that the theater industry can take to protect its current hiring process is to seek a statutory amendment exempting the theater industry from certain provisions of Title VII and § 1981. Despite a lack of actors challenging these provisions, Congress should be obliged to codify existing practices.

Today, Mr. Friedman's nickname, "The Great White Way," is highlighted as an emblem for its racial undertones, but the nickname holds more power than that. "The Great White Way" is really the blueprint for the theater industry on how to use a color descriptor.

354. *See supra* Sections II.A, II.B.
355. *See supra* Part IV.
356. *See supra* Section III.A.
357. Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012).
358. Pittsburgh Press Co. v. Pittsburgh Com. on Hum. Rels., 413 U.S. 376, 388 (1973).