



There's No Business Like Show Business: Abandoning Color-Blind Casting and Embracing Color-Conscious Casting in American Theatre

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ABSTRACT

The commercial theatre industry suffers from institutional racism that has yet to be remedied. Currently, the industry advocates for color-blind casting as the best method to give actors of all ethnicities an equal playing field in the casting process. Unfortunately, minority actors are still cast at significantly lower rates than White actors. Instead of encouraging color-blind casting, the theatre industry should implement color-conscious casting. Under a color-conscious casting policy, race and ethnicity would be a factor that directors, casting teams, and producers must consider during the casting process to encourage more actors of color to audition. Ignoring race in an appearance-based industry, where there is a history of discrimination, only furthers discrimination. Because much artistic deference is given to casting teams, this Note will address why a color-conscious temporary affirmative action policy is necessary to remedy the effects of past discrimination in the theatre industry.

INTRODUCTION

In March 2016, the production team of *Hamilton: An American Musical* (“*Hamilton*”) released a casting notice seeking “non-white” actors to audition for the show’s Broadway replacements and future regional productions.¹ *Hamilton* portrays the life of Alexander Hamilton in a new and innovative

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¹ David Matthews, *Lawyer alleges that a ‘Hamilton’ casting call for ‘non-white’ actors is illegal*, FUSION (Mar. 30, 2016, 4:56 PM), <http://fusion.net/story/286231/hamil->

way, featuring the characters of George Washington, Thomas Jefferson, and James Madison.² These men were White, but in *Hamilton* actors and actresses of color play the Founding Fathers.³ This bold casting decision by Lin-Manuel Miranda created fascination throughout the theatre community and beyond,⁴ even receiving a blessing from the Oval Office.⁵ While in office, President Barack Obama praised the casting of *Hamilton* as a “cast as diverse as America itself.”⁶

Due to the sudden popularity of *Hamilton*, the March 2016 casting notice garnered attention because the notice explicitly excluded White actors from the audition process.⁷ A lawyer in New York claimed the notice constituted employment discrimination in the hiring process because the

ton-casting-call-non-white-civil-rights-law-violation/ [https://perma.cc/2KNJ-PGBD].

² See Charlotte Runcie, *What Is Hamilton? A 12-Step Guide to Your New Musical Obsession*, DAILY TELEGRAPH, Dec. 21, 2017, <https://www.telegraph.co.uk/theatre/what-to-see/what-is-hamilton-a-12-step-guide-to-your-new-musical-obsession/> [https://perma.cc/7X8T-Q2P8].

³ See Matthews, *supra* note 1 (noting that the only character in *Hamilton* specifically written for a White actor is the role of King George III); Michael Paulson, *Hamilton Producers Will Change Job Posting, but Not Commitment to Diverse Casting*, N.Y. TIMES, Mar. 30, 2016, http://www.nytimes.com/2016/03/31/arts/union-criticizes-hamilton-casting-call-seeking-nonwhite-actors.html?_r=0&mtref=undefined&gwh=CB241B689831D0E1CE6276C0E1FA056F&gwt=pay [https://perma.cc/X4XZ-HL2C] [hereinafter *Hamilton Producers*] (explaining that the story of *Hamilton* was written to be told through a diverse viewpoint to include minorities in the narrative of America’s history). See also Mark Binelli, *‘Hamilton’ Creator Lin-Manuel Miranda: The Rolling Stone Interview*, ROLLING STONE (June 1, 2016), <http://www.rollingstone.com/music/features/hamilton-creator-lin-manuel-miranda-the-rolling-stone-interview-20160601> [https://perma.cc/6QLC-LLPQ] (noting that Lin-Manuel Miranda, the creator of the show, said that the purpose of his show was to use “inclusive language” and to have a cast that “look[s] the way America looks now.”).

⁴ See Binelli, *supra* note 3.

⁵ See Remarks by the President at “Hamilton at the White House” (Mar. 14, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/14/remarks-president-hamilton-white-house> [https://perma.cc/5H8A-S9MJ].

⁶ *Id.*

⁷ Matthews, *supra* note 1. See, e.g., *Hamilton Producers*, *supra* note 3 (noting that creator Lin-Manuel Miranda was surprised this particular casting notice sparked controversy, especially since the same language was used when casting the original Broadway production); Binelli, *supra* note 3 (noting the original casting notice featured character descriptions like, “Javert meets Mos Def,” “John Legend meets Mufasa,” and “The Michelle Williams of Destiny’s Child” for actors to consider when auditioning); L.V. Anderson, *Here Are the Original Casting Notices for Hamilton From Before It Was a Theater Legend*, SLATE (Mar. 1, 2016, 1:47 PM), <http://>

production team set out to only audition “non-white” actors.⁸ The *Hamilton* producers responded to these allegations by stating the musical tells “birth of our nation in a singular way” by using actors and actresses of color.⁹ The producers further stated that seeking only “non-white” actors did not violate employment law standards because their needs qualified as a bona fide occupational qualification (“BFOQ”) under Title VII of the Civil Rights Act of 1964.¹⁰ In an industry where actors and actresses of color are usually disenfranchised, this casting notice re-ignited debates across the theatre industry about the limited opportunities for minority actors in commercial theatre.¹¹

“Color-blind,”¹² or non-traditional, casting is generally regarded as the best method for casting diverse theatrical productions.¹³ Color-blind casting removes race from the casting process, and employs the best actor for the

www.slate.com/blogs/browbeat/2016/03/01/hamilton_s_original_casting_notices_sum_up_each_character_from_before_they.html [https://perma.cc/UJ9N-2VRC].

⁸ Matthews, *supra* note 1. The lawyer also alleged that the casting notice violated New York Human Rights Law.

⁹ *Id.* See also *Hamilton Producers*, *supra* note 3.

¹⁰ Matthews, *supra* note 1. The producers eventually amended the casting notice to remove the “non-white” language, but the intent to hire only people of color remained. See *id.* Although the producers used a BFOQ as a defense for seeking non-white actors, race or ethnicity can never be a valid BFOQ. The courts also have never ruled on a case where the BFOQ defense is applicable to theatre or the entertainment industry in general. Jennifer L. Shepard, *Theatrical Casting—Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267, 279 (1991). *Infra* Part I.

¹¹ See, e.g., Angelica Jade Bastién, *The Case Against Colorblind Casting*, THE ATLANTIC (Dec. 26, 2015), <http://www.theatlantic.com/entertainment/archive/2015/12/oscar-isaac-and-the-case-against-colorblind-casting/421668/> [https://perma.cc/87HQ-MUDZ].

¹² *Infra* Part I.A–B.

¹³ See Mabel Ng, Note, *Miss Saigon: Casting for Equality on an Unequal Stage*, 14 HASTINGS COMM. & ENT. L.J. 451, 460 (1992); Heekyung Ester Kim, Note, *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 COMM. & ENT. L.J. 397, 415 (1998); Mervyn Rothstein, *Producer Cancels ‘Miss Saigon’; 140 Members Challenge Equity*, N. Y. TIMES, Aug. 9, 1990, http://www.nytimes.com/1990/08/09/theater/producer-cancels-miss-saigon-140-members-challenge-equity.html?page_wanted=all [https://perma.cc/8A7X-LWCD]. But see Andrea Guthmann, *‘Color-Conscious’ Casting: Putting Diversity in the Spotlight*, WTTW (Apr. 5, 2016, 5:08 PM), <http://chicagotonight.wttw.com/2016/04/05/color-conscious-casting-putting-diversity-spotlight> [https://perma.cc/AC5D-CGKQ] (quoting a playwright who believes in color-conscious casting, saying “we can’t pretend race isn’t there”).

role.¹⁴ Despite this legally sound framework, minorities are still cast at lower rates in commercial theatre productions than White actors.¹⁵ There are productions where race is integral to a show, but, apart from those few circumstances, minorities do not enjoy an equal playing field under the color-blind casting method.¹⁶ David Henry Hwang, an Asian-American playwright, commented that, “In most industries, [low minority hiring] would be considered a bad statistic, both politically and socially. . . . That’s not good for the future of theater.”¹⁷

Instead of color-blind casting, race should be a factor taken into consideration during the casting process. This is called “color-consciousness.”¹⁸ Color-conscious casting requires casting directors and producers to accept that the country is growing in diversity, and the stage should reflect the changing demographic make-up of the United States.¹⁹ The Actor’s Equity Association (“Equity”) is in a prime position to implement a temporary

¹⁴ See “How Long, O Government?,” ACTOR’S EQUITY ASSOCIATION, http://www.actorsequity.org/aboutequity/timeline/timeline_1980.html [https://perma.cc/H7HD-FB3Q] (last visited Oct. 31, 2016) [hereinafter *How Long*].

¹⁵ See AAPAC *Theatre Diversity Study: Spotlight on Broadway and New York’s 16 Most Prominent Theatres*, GROUND UP AND RISING, <http://www.groundupandrising.org/lack-of-diversity-in-theatre.html> [https://perma.cc/ASN9-SLQR] (last visited Nov. 28, 2016) (noting that in the 2012 New York theatre season 79 percent of roles were given to White actors). In the 2014–2015 New York theatre season, 30 percent of roles went to minority actors, and 70 percent went to White actors. Michael Paulson, *Study: Diversity in New York Theater Roles Rose in 2015-15 Season*, N.Y. TIMES, May 2, 2016, http://www.nytimes.com/2016/05/03/theater/study-diversity-in-new-york-theater-roles-rose-in-2014-15-season.html?_r=0 [https://perma.cc/W4W2-76YJ]. Seventeen percent were Black actors, seven percent were Asian, and three percent were Latino. *Id.* Sixty-eight percent of roles went to White actors during the 2015-2016 season, illustrating a two percent increase in minority casting over the course of one season. Kate Shindle, ‘Hamilton’ Casting Controversy Spotlights the Importance of Diversity (Guest Column), VARIETY (Apr. 5, 2016, 7:30 AM), <http://variety.com/2016/legit/opinion/hamilton-diversity-casting-actors-equity-guest-column-1201745244/> [https://perma.cc/L5X8-G7FP].

¹⁶ See Jessica Goldstein, *Race and casting’s recurring role*, WASHINGTON POST, Jan. 24, 2014, https://www.washingtonpost.com/entertainment/theater_dance/race-and-castings-recurring-role/2014/01/23/46286efe-82d0-11e3-9dd4-e7278db80d86_story.html [https://perma.cc/4F5L-7788] (arguing that low minority employment can have damaging effects for the future and progress of any business or industry). See also Michael R. Jackson, *Unpacking “Diversity” in Musical Theatre*, HOWLROUND (Sept. 30, 2015), <http://howlround.com/unpacking-diversity-in-musical-theatre> [https://perma.cc/QW6J-VLRA].

¹⁷ Goldstein, *supra* note 16.

¹⁸ See Guthmann, *supra* note 13; T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1064 (June 1991).

¹⁹ See Guthmann, *supra* note 13, Aleinikoff, *supra* note 18, at 1064.

affirmative action plan that addresses the underlying discrimination in Broadway Equity productions.²⁰ Abandoning the color-blind casting model and replacing it with a color-conscious casting model is better suited for the theatre industry, and will lead to increased minority employment opportunities.²¹

This Note explores theatrical hiring practices in Broadway and commercial regional New York theatres, and how an affirmative action plan is necessary for this industry.²² Part I explains the current color-blind casting model. Part I also discusses why the color-blind casting model is inappropriate for the theatre industry, and why this model hurts minority employment. Part II discusses the color-conscious casting model and why the theatre industry needs, and is ready for, this hiring model. Part III explains how a color-conscious policy should be enforced by a temporary affirmative action plan by Equity, because legal remedies for disenfranchised actors cannot correct this imbalance.

I. THE CASTING PROCESS

A. *The Color-Blind Casting Model*

The theatre industry is regarded as one of the most accepting communities in the entertainment world, but employment statistics say otherwise. Today, color-blind casting is the most commonly employed form of casting for theatre.²³ As is, the color-blind casting model also complies with current employment law rules by removing factors that foster discrimination in the

²⁰ See Shindle, *supra* note 15 (Shindle is the current president of the Actor's Equity Association).

²¹ See Aleinikoff, *supra* note 18; Basti n, *supra* note 11; Teresa Eyring, *Standing Up for Playwrights and Against 'Colorblind' Casting*, AMERICAN THEATRE: THEATRE COMMUNICATIONS GROUP (Jan. 7, 2016), <http://www.americantheatre.org/2016/01/07/standing-up-for-playwrights-and-against-colorblind-casting/> [https://perma.cc/YCD5-KF7T]; Lisa Respers France, *The problem with color blind casting in 'Hamilton' and 'Harry Potter'*, CNN (June 14, 2016), <http://www.cnn.com/2016/06/13/entertainment/hamilton-potter-colorblind-casting/> [https://perma.cc/QA9L-HZE6].

²² See *About Equity*, ACTOR'S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/about/aboutequity_web.pdf [https://perma.cc/A5L2-GB47] (last visited Nov. 30, 2015) (noting that if a color-conscious policy was created, it would expand to all Agreements under Actor's Equity Association).

²³ See *Casting Call Notice Guidelines*, ACTOR'S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/auditions/Equity_JobNotice_Guidelines.pdf [https://perma.cc/X3AE-DPC9] (last visited Nov. 28, 2016).

hiring process.²⁴ Color-blind casting operates from the premise of ignoring an actor's race or sex, and casting the actor based solely on talent.²⁵ During the 2015-2016 Broadway season, 68 percent of all roles went to White actors, while 32 percent went to actors of color.²⁶ Of those 32 percent, Black, Latino, and Asian actors were only cast in 9.6 percent of the roles where race was not germane to the production, meaning that people of color are usually only hired to play roles specifically written for their race.²⁷

Equity is the labor union that regulates workers' rights in live theatre.²⁸ Most, if not all, Broadway and New York regional productions employ actors, stage managers, and other employees who are members of Equity.²⁹ Because of this, professional productions must comply with Equity guidelines from hiring to payment.³⁰ Equity is a proponent of color-blind casting and encourages all productions to follow its casting guidelines.³¹ Equity defines color-blind casting as "the casting of ethnic minority and female actors in roles where race, ethnicity, and sex are not germane."³² Theatre is an expressive art, and color-blind casting, on its face, should provide opportunities for actors to play any role that is available.³³ Looking

²⁴ See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 94 CAL. L.R. 1, 16 (2007); Alan Eisenberg, *Nontraditional Casting: When Race and Sex Don't Matter*, THE NEW YORK TIMES, Oct. 28, 1998, <http://www.nytimes.com/1988/10/23/theater/1-nontraditional-casting-when-race-and-sex-don-t-matter-486788.html> [https://perma.cc/NJ44-DFBJ]; France, *supra* note 21; *infra* Part III.

²⁵ Robinson, *supra* note 24 at 14–15; Zan Dubin, *A Demand for Nontraditional Casting*, LOS ANGELES TIMES, Oct. 13, 1988, http://articles.latimes.com/1988-10-13/entertainment/ca-4974_1_nontraditional-casting [https://perma.cc/GJA8-EGA3].

²⁶ Shindle, *supra* note 15.

²⁷ Robert Viagas, *Coalition Releases Report on Diversity in NY Theatre*, PLAYBILL (May 3, 2016), <http://www.playbill.com/article/coalition-releases-report-on-diversity-in-ny-theatre> [https://perma.cc/C3DL-RSMQ].

²⁸ *About Equity*, *supra* note 22.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Robinson, *supra* note 24, at 15. See also *How Long*, *supra* note 14. Color-blind casting is also referred to as non-traditional casting. *Id.*

³³ Some Broadway roles for minorities that have been attributed to color-blind casting include: Denzel Washington as Richard III in *Richard III*, Condola Rashad as Juliet in *Romeo and Juliet*, and Audra McDonald as Carrie Pipperidge in *Carousel*. Michael Kuchwara, *Denzel Washington Stars as 'Richard III' In Central Park*, ASSOCIATED PRESS (Aug. 16, 1990), <http://www.apnewsarchive.com/1990/Denzel-Washington-Stars-as-Richard-III-in-Central-Park/id-bfea5e77cca5f46de572d468650a3d29> [https://perma.cc/67V6-TDMH]; Marilyn Stasio, *Broadway Review: 'Romeo and Ju-*

beyond physical appearance gives actors a chance to grow artistically and portray a variety of characters to enhance their range and repertoire.³⁴ In an industry built on suspending belief, casting without regard to race “is consistent with the premise that the actor has accomplished the job by effectively portraying someone else.”³⁵ Like theatre, casting is also subjective, and conceptually removing racial divides in the casting process should ensure equality and fairness in the casting process.³⁶ Supporters of color-blind casting insist that this method provides more employment opportunities for minorities, and gives White actors opportunities to play roles they generally would not be considered for.³⁷

1. The Negative Effects of Color-Blind Casting

Since 1990, color-blind casting has been a widely-debated issue among the Broadway and New York theatre community. Color-blind casting came to the forefront in 1990 during the New York premiere of the musical *Miss Saigon*.³⁸ In 1989, *Miss Saigon* debuted in London starring Lea Salonga, a Filipino actress, and Jonathan Pryce, a Welsh actor making a transfer to the Broadway stage.³⁹ Pryce’s character, the Engineer, is French and Vietnamese, requiring the Welsh actor to put on yellow face.⁴⁰ Permitting yellow face on the Broadway stage was described as an “affront to the Asian American community.”⁴¹ Mere weeks before the Broadway opening, Equity met with Cameron Mackintosh, the producer of *Miss Saigon*, to address the casting

liet, VARIETY (Sept. 19, 2013), <http://variety.com/2013/legit/reviews/broadway-review-romeo-and-juliet-1200643078/> [https://perma.cc/BWA5-F4YY]; *Casting Beyond Color Lines*, NPR (Feb. 5, 2008), <http://www.npr.org/templates/story/story.php?storyId=18706620> [https://perma.cc/4233-3RC3].

³⁴ See Bonnie Chen, *Mixing Law & Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515, 521 (1999).

³⁵ *Id.* One thing is clear when it comes to color-blind casting: casting white actors donning black or yellow face in roles where the characters are meant for actors of color is generally inappropriate. *Id.* at 518. Putting on black face or yellow face to convey a different race is not acceptable given the extremely racial and prejudicial history that comes along with those methods of entertainment. *Id.*

³⁶ See Kim, *supra* note 13, at 415.

³⁷ Chen, *supra* note 34.

³⁸ See Alex Witchel, *Actors' Equity Attacks Casting of 'Miss Saigon'*, N.Y. TIMES, July 26, 1990, <http://www.nytimes.com/1990/07/26/theater/actors-equity-attacks-casting-of-miss-saigon.html> [https://perma.cc/4ZBP-4JXF].

³⁹ *Id.*

⁴⁰ Goldstein, *supra* note 16.

⁴¹ *Id.* See also Witchel, *supra* note 38.

issue.⁴² Equity expressed its concerns about the implications of casting a European actor in yellow face as the Engineer, instead of an Asian or Asian-American Equity member.⁴³ Mackintosh regarded Pryce's performance as the "artistic crux of this musical," and wanted to keep Pryce in the role.⁴⁴ He called Equity's position on this "hypocritical" given its definition of non-traditional casting.⁴⁵ Equity voted in favor of banning Pryce from the show, and as a result, Mackintosh cancelled the opening of *Miss Saigon*—which already garnered \$24 million in advance ticket sales—citing the stifling of artistic freedom as the cause.⁴⁶ *Miss Saigon* eventually opened on Broadway in April 1991, with Pryce starring as the Engineer.⁴⁷

As a blanket policy, color-blind casting should create a system of equality and fairness, but it has produced the opposite.⁴⁸ The *Miss Saigon* incident will forever be remembered as color-blind casting gone wrong. This moment illustrated that even though color-blind casting is a legal form of

⁴² *Producer of 'Miss Saigon' Will Meet With Equity*, DESERET NEWS (Aug. 25, 1990), <http://www.deseretnews.com/article/118961/PRODUCER-OF-MISS-SAIGON-WILL-MEET-WITH-EQUITY.html?pg=all> [https://perma.cc/S62U-EYBW] [hereinafter *Producer of 'Miss Saigon'*].

⁴³ In 1990, there were over 400 Asian members of Equity. Tim Appelo, *Drama Over "Miss Saigon,"* ENTERTAINMENT WEEKLY (Sept. 7, 1990), <http://www.ew.com/article/1990/09/07/drama-over-miss-saigon> [https://perma.cc/V7H8-ZKAM]; *Producer of 'Miss Saigon,'* *supra* note 42.

⁴⁴ Frank Rich, *Jonathan Pryce, 'Miss Saigon' and Equity's Decision*, N.Y. TIMES, Aug. 10, 1990, <http://www.nytimes.com/1990/08/10/theater/jonathan-pryce-miss-saigon-and-equity-s-decision.html?pagewanted=all> [https://perma.cc/F76Z-LARW].

⁴⁵ Witchel, *supra* note 38; *How Long,* *supra* note 14.

⁴⁶ *Producer of 'Miss Saigon,'* *supra* note 42.

⁴⁷ *Miss Saigon*, PLAYBILL, <http://www.playbill.com/production/miss-saigon-broadway-theatre-vault-0000012256> [https://perma.cc/Z6XE-JKXK] (last visited Sept. 25, 2017). Jonathan Pryce won a Tony Award for his performance of the Engineer, and *Miss Saigon* is the 13th longest running Broadway show in American history. *Id.*

⁴⁸ See Michael R. Jackson, *Unpacking "Diversity" in Musical Theatre*, HOWLROUND (Sept. 30, 2015), <http://howlround.com/unpacking-diversity-in-musical-theatre> [http://perma.cc/L67U-J6Z6]. See also Mallika Roa, *'Aladdin' On Broadway Faces Backlash From Arab-Americans*, HUFFINGTON POST (Apr. 2, 2014), http://www.huffingtonpost.com/2014/04/02/disney-aladdin-broadway-racist_n_5001833.html [https://perma.cc/3C6D-HU5C] (discussing that even though *Aladdin* is a fictional story, the Disney Theatrical Productions colorblind casting policy made it so no members of Middle Eastern heritage were cast in the thirty-four member cast) (internal quotations omitted).

hiring, it has serious effects on minority employment.⁴⁹ 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.⁵⁰ This sentiment is best illustrated by Cameron Mackintosh's argument that Equity was suppressing his artistic decision by casting Pryce as the Engineer in *Miss Saigon*.⁵¹ He believed he cast the best person for the role, and legally, that is color-blind casting at its core.⁵² Nevertheless, Mackintosh's decision to cast a White actor over an Asian actor is a prime example that color-blind casting is not friendly to minority actors seeking to gain employment in theatre.⁵³

Since this incident, Equity, and other performer's rights organization took a stand on this issue, urging all members to "challenge traditional stereotypes" to keep the industry growing in a diverse country.⁵⁴ Nevertheless, this has not held true.⁵⁵ In 2016, a New York regional theatre in Sag

⁴⁹ See Goldstein, *supra* note 16 (director Natsu Onoda Power stating that color-blind casting is an unworkable method because "we cannot be blind to race because we are not in real life. . . . We can do race conscious casting, fully acknowledging the race of the person and making the most interesting choice.").

⁵⁰ See Neil LaBute, *Casting for the stage should be color-blind*, LOS ANGELES TIMES, May 6, 2007, <http://articles.latimes.com/2007/may/06/entertainment/la-ca-labute6may06> [<https://perma.cc/KS6Q-SQQU>].

⁵¹ See Rich, *supra* note 44.

⁵² Witchel, *supra* note 38.

⁵³ In a 2014 interview, Cameron Mackintosh said that it was his "biggest mistake" not casting an Asian or Asian-American in the role of the Engineer. Dominic Cavendish, *Cameron Mackintosh: 'I have been successful beyond anyone's wildest dreams'*, DAILY TELEGRAPH, May 21, 2014, <http://www.telegraph.co.uk/culture/theatre/10842020/Cameron-Mackintosh-I-have-been-successful-beyond-anyones-wildest-dreams.html> [<https://perma.cc/N6GX-2K9Y>]. He further stated, "I was actually being stupid." *Id.*

⁵⁴ *Documents of Principle*, ACTOR'S EQUITY ASSOCIATION, <http://www.actorsequity.org/Benefits/DocOfPrinciple.asp> [<https://perma.cc/4RCL-GSCQ>] (last visited Sept. 25, 2017).

⁵⁵ In July of 2017, the producers of *Natasba, Pierre, and the Great Comet of 1812* replaced Josh Groban with Okieriete "Oak" Onoadowan in the title role of Pierre. Michael Paulson, *Diversity Concerns Prompt 'Great Comet' Casting Shakeup*, N.Y. TIMES, July 27, 2017, <https://www.nytimes.com/2017/07/27/theater/mandy-patinkin-oak-onoadowan-great-comet.html?mcubz=1> [<https://perma.cc/292D-7AMF>]. Onoadowan, a Nigerian-American actor, was expected to draw in a big crowd because of his roles in *Hamilton* and *Rocky*. *Id.* To the producers' dismay, ticket sales sharply dropped despite Onoadowan's draw. *Id.* Just two weeks into Onoadowan's run, the producers announced that Broadway veteran and White actor, Mandy Patinkin, would be the next actor to play Pierre, cutting Onoadowan's run short prompting debates on "how Black actors are supported and valued within the Broadway." Jamara Wakefield, *Okieriete "Oak" Onoadowan Departs The Great Comet*;

Harbor planned to debut a staged reading of *The Prince of Egypt*.⁵⁶ Based on the film, the reading featured a majority White cast about characters set in Egypt.⁵⁷ Cynthia Erivo, a Tony Award-winning Black actress and board member of the American Theatre Wing, tweeted her concerns. “[I]t saddens me that after such a wonderful multicultural season on Broadway a piece set in AFRICA has not one POC [Person of Color],”⁵⁸ she wrote. “[T]he piece is set in ancient EGYPT, i.e. AFRICA where people darker than I resided. That is my point.”⁵⁹ Many other theatre performers voiced their concerns, including Denée Benton, a Black actress starring in *Natasha, Pierre, and The Great Comet of 1812*.⁶⁰ *The Prince of Egypt*’s director Scott Schwartz called the actors and actresses who were concerned about the casting choices and listened to their opinions.⁶¹ In a statement, he noted that five out of the fifteen actors in the show are minorities, and that “having a diverse cast is a priority.”⁶² His statement further read, “We all care deeply about making theater and art that is reflective of the multicultural society in which we live.”⁶³ He ended by saying “All of us on the creative and producing team want to continue this conversation, not just about the ‘Prince of Egypt,’ but about diversity and authenticity in casting in all the art we create.”⁶⁴ The reading

Mandy Patinkin Will Replace, BROADWAY BLACK (July 26, 2017), <http://broadwayblack.com/okieriete-oak-onaodowan-departs-the-great-comet/> [<https://perma.cc/AQ2V-PXQW>]. This incident highlighted that initial hiring is not only a problem for actors of color, but also once they are cast they may be removed at any time, despite other factors they have no control over.

⁵⁶ Michael Paulson, ‘*Prince of Egypt*’ Musical Reading Canceled After Diversity Complaints, N.Y. TIMES, July 28, 2016, <https://www.nytimes.com/2016/07/29/theater/prince-of-egypt-musical-reading-canceled-after-diversity-complaints.html?mtrref=undefined&gwh=1B5024B1E5ACD79E432232A07D82661B&gwt=pay> [<https://perma.cc/P7TH-3B9P>].

⁵⁷ *Id.*

⁵⁸ Cynthia Erivo (@CynthiaEriVo), Twitter (July 23, 2016, 7:20 AM), https://twitter.com/CynthiaEriVo/status/756856580189093888?ref_src=twsrc%5Etfw [<http://perma.cc/QUP2-VZ5Z>].

⁵⁹ Cynthia Erivo (@CynthiaEriVo), Twitter (July 23, 2016, 7:39 AM), <https://twitter.com/CynthiaEriVo/status/756861180371664897> [<https://perma.cc/YGK2-V2R3>].

⁶⁰ Olivia Clement, *Prince of Egypt Casting Prompts Diversity Discussion; Director Responds*, PLAYBILL (July 26, 2016), <http://www.playbill.com/article/prince-of-egypt-casting-stirs-diversity-conversation> [<https://perma.cc/GMN7-GAJA>].

⁶¹ *To Members of the Online Community*, BAY STREET THEATER, <http://www.baystreet.org/letter/2016-07-25> [<https://perma.cc/N4UD-PNX7>] (last visited Feb. 24, 2017).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

was soon canceled, but the producers announced in 2017 plans to continue regional and international productions, featuring a multi-ethnic cast.⁶⁵

Another incident during the 2016 season revolved around the production *Noises Off*, produced by the Roundabout Theatre Company.⁶⁶ All nine roles in the show were given to White actors and actresses.⁶⁷ The lack of diversity in the show, about a theatre company putting on a play, “paints the picture that theatre is still only for and by only white people.”⁶⁸ The casting notice called for “All Ethnicities” for each character, but still ended up with an all-White cast.⁶⁹

These incidents illustrate that an employment casting model that ignores an actor’s race cannot achieve the goal of employing more minority actors.⁷⁰ Equity’s challenge to include more actors of color has not been realized, and legal action is needed to remedy these effects.⁷¹ Whites are still employed at higher numbers than Black or Asian actors, illustrating that the color-blind method that has been in place since the 1980s is not creating equality in the casting room.⁷²

B. *Why the Color-Blind Casting Model Is Inappropriate for Theatre*

The concept of color-blind casting operates from the premise that the United States is in a post-racial society.⁷³ Unfortunately, the United States is

⁶⁵ David Gordon, *Jason Gotay, Christina Sajous, Tom Nelis Set for The Prince of Egypt*, THEATERMANIA (Aug. 23, 2017), http://www.theatermania.com/san-francisco-theater/news/prince-of-egypt-casting_82169.html?utm_source=facebook&utm_medium=social&utm_campaign=23aug2017 [https://perma.cc/MFF8-KTTW].

⁶⁶ Mark Kennedy, *Broadway Embraces Diversity, But Have Things Really Changed?*, ASSOCIATED PRESS (June 8, 2016), <http://bigstory.ap.org/article/e09f4cdf62464188be698a6c05b81966/broadway-embraces-diversity-have-things-really-changed> [https://perma.cc/CU5U-UM2Z].

⁶⁷ *Id.*

⁶⁸ Peter J. Kuo, *Why the Roundabout Casting of Noises Off is Problematic* (Jul. 26, 2015), <http://www.peterjkuo.com/2015/07/why-roundabout-casting-of-noises-off-is.html> [https://perma.cc/6825-SBHX]. See also Kennedy, *supra* note 66.

⁶⁹ *Noises Off*, BACKSTAGE.COM, <https://www.backstage.com/casting/noises-off-63485/> [https://perma.cc/NLN9-RHKK] (last visited Feb. 24, 2017).

⁷⁰ See Bastián, *supra* note 11; Eyring, *supra* note 21.

⁷¹ See Kate Shindle, ‘Hamilton’ Casting Controversy Spotlights the Importance of Diversity (Guest Column), VARIETY (Apr. 5, 2016, 7:30 AM), <http://variety.com/2016/legit/opinion/hamilton-diversity-casting-actors-equity-guest-column-1201745244/>.

⁷² *Supra* notes 35–36.

⁷³ See Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL’Y 473, 493–94 (2011).

not post-racial.⁷⁴ Race is still a determining factor in American society, and it is “counterintuitive to argue that problems related to race can be fixed by ignoring race altogether.”⁷⁵ Taking race into account in the hiring process is not legally permitted, but, in theatre where appearance matters, race should be a factor that can legally be considered in the casting process.⁷⁶ Theatre is a unique business, where appearance is integral to the product, and, “[i]f the law forces a director to cast certain actors without regard to their race, it can be argued that the law is making artistic decisions.”⁷⁷ Color-blind casting is not a “sustainable strategy. . . [and does not] address[] the systematic problems that exist.”⁷⁸ The name color-blind, or non-traditional, casting also does not have a positive connotation. By ignoring an essential part of someone’s appearance in the casting process, it should be a novelty or regarded as non-traditional. Because color-blind casting favors the majority rather than any minority group, color-blind casting must end to ameliorate this institutional problem of discrimination against minority actors.⁷⁹

⁷⁴ Writing in for the dissent in *Schuette v. Coalition to Defend Affirmative Action*, Supreme Court Justice Sonia Sotomayor found it troubling that her colleagues “refus[ed] to accept the stark reality that race matters,” and the only “way to stop discrimination on the basis of race is to speak openly . . . [about] the racial inequality that exists in our society.” *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting). Even in his final presidential address, President Barack Obama noted, “after [his] election there was talk of a post-racial America. And such a vision . . . was never realistic.” Barack Obama, *President Obama’s Farewell Address: Full Video & Text*, N.Y. TIMES, Jan. 10, 2017, <https://www.nytimes.com/2017/01/10/us/politics/obama-farewell-address-speech.html> [<https://perma.cc/EGV7-ZHEU>]. President Obama called racial discrimination a “threat” and a “potent and often divisive force in our society”. *Id.*

⁷⁵ Bastián, *supra* note 11. *But see* *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (“Government action dividing us by race is inherently suspect because such classifications promote “notions of racial inferiority and lead to a politics of racial hostility.”) (internal quotations omitted). Chief Justice Roberts’s argument in *Parents Involved* surrounded school districts that had no history of discrimination. In the theatre industry, his argument of using race may not hold because of the detrimental discriminatory history.

⁷⁶ *See* Goldstein, *supra* note 16; Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Guthman, *supra* note 17.

⁷⁷ Chen, *supra* note 34.

⁷⁸ Bastián, *supra* note 11.

⁷⁹ *See* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL’Y 473, 474 (2011); *See* Harry Newman, *Casting a Doubt: The Legal Issues of Nontraditional Casting*, 19 J. OF ARTS MGMT. & L. 55, 61 (Summer 1989).

II. COLOR-CONSCIOUS CASTING IN COMMERCIAL THEATRE

A. *Defining Color-Consciousness*

Color-blind casting has not produced its intended result; therefore, the theatre industry should implement a color-conscious approach in the casting process. Although a color-conscious method “may be the most difficult to defend legally,” color-conscious policies permeate society in other ways and have proven to be an effective legal means of creating racial balance.⁸⁰

Affirmative action programs, for example, are inherently color-conscious.⁸¹ In *Grutter v. Bollinger*, the United States Supreme Court found that taking account of a person’s race in law school admissions as a “plus” factor does “not unduly harm members of any racial group.”⁸² The Court found importance in “individualized consideration” with regards to race-conscious policies.⁸³ The Court iterated that methods to increase diversity cannot thrive under a color-blind regime that treats everyone the same.⁸⁴ More recently, the Court held in *Fisher v. University of Texas at Austin, et al.*, that the University of Texas could continue its “race-conscious” admissions policy as long as it had clear diversity goals, the plan would be constantly under review, and there was no other way to achieve these objectives.⁸⁵ Before *Grutter* and *Fisher*, Justice Blackmun, writing a separate opinion in *Regents of California v. Bakke*, noted that considering race is the only way to include minorities into the majority process.⁸⁶ He said, “[I]t would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible.”⁸⁷ Operating under a color-blind regime cannot further the goals of ensuring minorities are properly represented, especially when ignoring race is impossible cognitively and socially.⁸⁸

⁸⁰ Newman, *supra* note 79.

⁸¹ *Id.*

⁸² *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

⁸³ *Id.* at 334.

⁸⁴ *See id.* at 337–38.

⁸⁵ *See Fisher v. University of Texas.*, 136 S. Ct. 2198, 2211–12 (2016).

⁸⁶ *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978).

⁸⁷ *Id.*

⁸⁸ Newman, *supra* note 79, at 60–61.

B. Employment Law and Color-Consciousness

An affirmative action policy is only necessary, and will be tolerated, if there is no other legal means of addressing the problem.⁸⁹ The lack of minority employment in commercial theatre highlights that legal action is needed to create an institutional change in the theatrical employment process.⁹⁰ Theatre operates in a world of artistic freedom, where no one has legally questioned artistic choices on casting and has yet to bring legal action in the courts about discriminatory casting practices.⁹¹ Therefore, it is unclear how a court would rule in a case of discriminatory casting.⁹² This Note will highlight the difficulties for an actor to bring a case to the courts for a remedy against discriminatory practices and why a color-conscious affirmative action policy is currently the only redress.

As it stands today, employment law operates under equal employment opportunity where employers cannot discriminate in the hiring process on the basis of race, ethnicity, gender, religion, or national origin.⁹³ The Civil Rights Act of 1964 prohibits discrimination on the basis of race, gender, national origin, or religion.⁹⁴ The Act, specifically Title VII, pertains to employers and their methods for hiring and employing based on the above listed traits.⁹⁵ Title VII makes it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.”⁹⁶ In addition, the Title VII provides that “it shall be unlawful . . . to print or

⁸⁹ See *infra* notes 102–08.

⁹⁰ See Morgan Greene, *A white actor is cast in ‘In the Heights,’ setting off complicated debate*, CHICAGO TRIBUNE, Aug. 14, 2016, <http://www.chicagotribune.com/entertainment/theater/ct-latino-casting-porchlight-in-the-heights-ent-0815-20160814-story.html> [https://perma.cc/6X56-3NZJ].

⁹¹ See Eriq Gardner, *‘The Bachelor’ Racial Discrimination Lawsuit Dismissed*, HOLLYWOOD REPORTER (Oct. 15, 2012), <http://www.hollywoodreporter.com/thresq/bachelor-racial-discrimination-lawsuit-dismissed-379100> [https://perma.cc/9WAV-7GPB] (illustrating that the court gave a high degree of artistic deference to the producers of *The Bachelor* in response to allegations of racial discrimination in casting).

⁹² Chen, *supra* note 34; Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 474 (2001).

⁹³ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2016). Title VII only applies to employers that employ 15 or more employees. *Id.*

⁹⁴ 42 U.S.C. § 2000e(a) (2012).

⁹⁵ 42 U.S.C. §§ 2000e-2000e-17 (2012).

⁹⁶ 42 U.S.C. § 2000e-2(a) (2012).

publish . . . any notice . . . indicating any preference . . . based on race, color, religion, sex . . .”⁹⁷ Title VII of the Civil Rights Act removes employers’ ability to use race as a factor in hiring or to say that they are looking for certain traits.⁹⁸ Despite this, there are many casting notices that already identify the age, race, and gender of certain characters “because it reflects authorial intent,” but those casting notices should not exclude anyone from the audition process.⁹⁹

Title VII also allows for an employer to hire a person based on a limited number of external traits.¹⁰⁰ Title VII states that it is not “an unlawful employment practice for an employer to hire employees . . . on this basis of [] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .”¹⁰¹ This is called a bona fide occupational qualification (“BFOQ”).¹⁰² With specificity from Congress, the only traits that are BFOQs are religion, sex, or national origin.¹⁰³ Race or ethnicity are not considered BFOQs, therefore employers are not allowed to claim an applicant’s race or ethnicity was the reason an applicant was or was not hired.¹⁰⁴ These narrow exceptions are “permissible” forms of hiring discrimination because in certain situations, it is necessary to the function of an employer’s business to have employees with certain traits.¹⁰⁵ Race was not included as a BFOQ to eradicate all instances

⁹⁷ 42 U.S.C. § 2000e-3(b) (2012).

⁹⁸ *See id.*

⁹⁹ The *Hamilton* casting notice was condemned by Equity because it blatantly excluded an entire group from the audition process. Equity President, Kate Shindle, found that notice to be inconsistent with Equity’s policies. Robert Viagas, *Actors Equity Issues Statement Regarding Hamilton Casting*, PLAYBILL (Mar. 31, 2016), <http://www.playbill.com/article/actors-equity-issues-statement-regarding-hamilton-casting> [https://perma.cc/5M84-EH2B]. She then went on to amend her statement calling for more roles and more opportunities for actors of color, due to the popularity of *Hamilton*, and that audiences want more diversity on the stage. Robert Viagas, *Equity President Weighs in On “Daunting” Issue of Casting Diversity*, PLAYBILL (Apr. 5, 2016), <http://www.playbill.com/article/equity-president-weighs-in-on-daunting-is-sue-of-casting-diversity> [https://perma.cc/F7VN-VD5F].

¹⁰⁰ 42 U.S.C. § 2000e-2(e) (2012).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* Race and ethnicity are expressly excluded from the bona fide occupational qualification. If an employer hires or excludes someone from the hiring process on the basis of race or ethnicity it would violate federal employment law. *Id.*

¹⁰⁵ In addition, some traits that have been accepted as valid BFOQs are authenticity or genuineness. Kim, *supra* note 13, at 409.

where employers could use race as a hiring criterion.¹⁰⁶ It is not difficult to see how employers could impermissibly use race to exclude minorities by claiming that it is a BFOQ to only hire people of a certain race due to customer population, or any other reason. Race is not listed as a BFOQ, so it is very difficult to use this as a vehicle for enacting a color-conscious casting policy to include race as a factor in the hiring process. Because of this, the only redress is a temporary affirmative action policy.

In other business industries, courts seem to be sympathetic in cases where there is clear evidence of a minority party being disadvantaged.¹⁰⁷ When there is evidence of past discriminatory practices, courts have allowed disenfranchised minorities to be promoted over Whites to counter discriminatory effects.¹⁰⁸ In *United States v. Paradise*, the District Court for the Middle District of Alabama ordered the state to promote a Black state trooper for every White one due to the lack of Black state troopers.¹⁰⁹ The United States Supreme Court affirmed the District Court's ruling, holding it was necessary to implement this race-conscious policy in order to remedy the effects of discrimination in Alabama.¹¹⁰ The Court stated that "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."¹¹¹ The Court acknowledged race-conscious policies are necessary "only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on blacks."¹¹² In *Johnson v. Transportation Agency of Santa Clara County*, the Court held that promoting a woman over a man did not violate Title VII of the Civil Rights Act of 1964, with a concurring opinion noting the woman's sex was only "used as a 'plus' factor."¹¹³ There is a "firm basis" for elevating qualified members of a disenfranchised class in order to create adequate representation within Title VII.¹¹⁴ Within these two cases, it is evident that in institutions where minorities are adversely impacted, race-conscious programs could be appropriate methods of increasing minority employment.

¹⁰⁶ Frank, *supra* note 92, at 508.

¹⁰⁷ *Id.* at 476.

¹⁰⁸ Newman, *supra* note 79, at 61.

¹⁰⁹ *United States v. Paradise*, 480 U.S. 149, 153–66 (1987).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 171.

¹¹² *Id.* at 185.

¹¹³ *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring).

¹¹⁴ *Id.*

In applying these cases to the theatre industry, an affirmative action policy is necessary. These cases, although not industry parallels, are demographically similar to the theatre industry, because the theatre industry still suffers from institutional discrimination that has not been remedied. Unlike these other industries, artistic freedom in the business of theatre is a challenge that would be very hard for a minority actor or actress to overcome if seeking a remedy in court.

1. The Inefficacy of Judicial Action in the Modern Era

If an actor or actress brought a case against a casting director for discrimination on the basis of race, he or she must show either disparate treatment during the hiring process or a disparate impact as a result of the employment process.¹¹⁵ Under the disparate treatment theory, an injured party must show that racial discrimination motivated the employer's hiring decision. Under this method, an actor would be able to get relief from a specific employer, and the legal recourse would apply to all other employers who engage in this practice if brought into court.¹¹⁶ In *McDonnell Douglas Corp. v. Green*, the Court created a framework to evaluate Title VII claims of disparate treatment.¹¹⁷ First, the Court held that the plaintiff must establish that the defendant employer was discriminatory by showing: (1) the plaintiff is a member of a racial minority, (2) the plaintiff applied for a position and was qualified for the sought after position, (3) the plaintiff was rejected despite being qualified, and (4) after being rejected, the employer still sought out applicants with the same qualifications to fill the position.¹¹⁸ Once the plaintiff establishes a prima facie case of discrimination, the defendant employer is now burdened with "articulat[ing] some legitimate, non-discriminatory reason for the employee's rejection."¹¹⁹ If the court finds that the process is a fair assessment, it is up to the defendant employer to rebut the prima facie claim by stating how their hiring practices were not discriminatory.¹²⁰ If the defendant cannot give a reason why the plaintiff was rejected during the hiring process, the inquiry stops there, and the plaintiff will receive a legal remedy.¹²¹ If the defendant employer gives a nondiscrim-

¹¹⁵ 42 U.S.C. § 2000e-2(k) (2012).

¹¹⁶ *Id.*

¹¹⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹¹⁸ *Id.* at 792–93.

¹¹⁹ *Id.* at 802.

¹²⁰ *Id.* at 803.

¹²¹ *Id.*

inatory reason, the burden is shifted back to the plaintiff, and he or she must show that the discrimination was due to pretext.¹²²

The disparate treatment theory creates a very heavy burden on the plaintiff to prove that the defendant employer was discriminating.¹²³ In the theatre industry, artistic deference and the uniqueness of the business can create some difficulty for the plaintiff to move past the second prong of the *McDonnell Douglas* test.¹²⁴ Most actors and actresses do not know what the casting team specifically wants for each role, and if the casting team can articulate any reason that is not related to race for not hiring an actor or actress, that actor or actress has to still show racial motivations for not being hired.¹²⁵ With disparate treatment claims, it would be very difficult for an actor to receive an adequate remedy using this theory, especially if the defendant employer uses a BFOQ—that is not race—as the reason for not hiring the actor.¹²⁶

Under the disparate impact theory, there must be an adverse impact on a specific minority class seeking employment from a particular employer.¹²⁷ Even if the defendant employer does not have the intent to discriminate, they could still be found as discriminatory by creating a disparate impact on minority applicants.¹²⁸ In order for defendant employer to prevail the court must find “that an employer policy or practice causes an adverse or disproportionate impact on a certain protected minority class, absent a showing that the requirement is a result of a business necessity.”¹²⁹ A business necessity is a valid reason that justifies why the employer can discriminate in the hiring process due to the employer’s particular employment needs.¹³⁰ Once there is a showing that the practice creates a disparate impact, it is up to the defendant to show that the hiring agency’s practices are not discriminatory but are instead a business necessity.¹³¹ Even if a defendant employer can show his or her hiring practices serve a business necessity, the plaintiff can

¹²² *Id.* at 804. Evidence of pretext would be the defendant employer’s current lack of minority employment or their reaction to “civil rights activities.” *Id.* at 804–05.

¹²³ *Id.* at 804.

¹²⁴ See Kim, *supra* note 13, at 415.

¹²⁵ *Id.* at 405–06

¹²⁶ *Id.*

¹²⁷ *Id.* at 415.

¹²⁸ In *Griggs v. Duke Power Co.*, the Court held that in disparate impact cases, a remedy will be granted if the employer’s practice if the hiring practices are not a “reasonable measure of job performance.” 401 U.S. 424, 436 (1971).

¹²⁹ Kim, *supra* note 13, at 406; see also *Griggs*, 401 U.S. at 431.

¹³⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

¹³¹ *Id.*

rebut that showing by providing an alternative practice that could better serve the employer's needs without creating a disparate impact.¹³² If an actor wanted to bring a claim to court for a remedy, the disparate impact theory would have more success in theatre because there is less of a burden on the plaintiff.¹³³ The plaintiff would have to find more actors who have been discriminated against by the specific employer, as these are usually class actions suits.¹³⁴ Like disparate treatment, the business necessity defense allows employers to articulate any other reason other than race for an employee not getting hired, making it harder for an employee to overcome the burden.¹³⁵ As seen with both theories, it can be very difficult for a minority to make a showing of discrimination in the casting process, which is why Equity needs to step in to combat discriminatory casting.¹³⁶

III. DEVELOPING THE COLOR-CONSCIOUS CASTING MODEL

A. *Equity and Color-Consciousness*

Casting for professional commercial theatre is governed by Equity.¹³⁷ In turn, Equity, as a labor union, must comply with federal employment law.¹³⁸ In addition to federal law, Equity has developed its own guidelines that casting teams must adhere to throughout the hiring process.¹³⁹ Equity encourages artistic teams to be as descriptive as possible when listing the roles they are auditioning for.¹⁴⁰ Equity also states that “[c]asting policies [are] designed to expand employment opportunities for . . . actors of color” through non-traditional casting, and “[d]iscrimination on the basis of race, gender, age, national origin . . . is prohibited in all agreements.”¹⁴¹ Equity’s intentions to employ more actors of color are important, but as evidenced above, a policy of color-blind casting is not the best method to do so.¹⁴²

As it stands today, employment law operates under equal employment opportunity where employers cannot discriminate in the hiring process on

¹³² 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012).

¹³³ Kim, *supra* note 13, at 408.

¹³⁴ *Id.*

¹³⁵ *Id.* at 408–09.

¹³⁶ Frank, *supra* note 92, at 475; *see also* Greene, *supra* note 90.

¹³⁷ *About Equity*, *supra* note 22.

¹³⁸ *Id.*

¹³⁹ *Casting Call Notice Guidelines*, *supra* note 23.

¹⁴⁰ *See id.*

¹⁴¹ *About Equity*, *supra* note 22.

¹⁴² *See supra* Parts I, II.

the basis of race, ethnicity, gender, religion, or national origin, but where there is unbalance, instituting a temporary affirmative action policy is allowed.¹⁴³ Creating an affirmative action policy for commercial theatres to be color-conscious and to employ more minorities would not be discrimination against Whites, but would increase diversity and rectify past employment practices.¹⁴⁴

B. Evidence a Color-Conscious Policy is the Only Redress

Although not codified or represented in the law today, discussions about actors and casting in the entertainment industry came up extensively on the floors of the House of Representatives and Senate while legislators drafted the Civil Rights Act of 1964.¹⁴⁵ The congressmen discussed how the entertainment industry may have to take race into account when casting, and the difficulties that would arise with a race-neutral law.¹⁴⁶ In the House of Representatives, an amendment was offered to add race or color to the BFOQ defense.¹⁴⁷ Congressman George Huddleston, Jr.¹⁴⁸ of Alabama said:

I have in mind a situation where a theatrical group wants to put on Shakespeare's great tragedy "Othello." They need a particular type of individual to play the part of Othello. How could that be accomplished unless the gentleman's amendment is adopted? How could they possibly get the type of individual to play that part unless we incorporate the words "race or color" in this section?¹⁴⁹

Rep. John Williams noted that not including race or color in the BFOQ is "impracticable and unworkable" in the few situations where race does matter for employment reasons.¹⁵⁰ Adding to Huddleston's concern, Representative James O'Hara of Michigan also said:

[S]ome particular role may require a person whose skin is of a particular hue . . . the trouble with the amendment . . . is that it opens it up a good

¹⁴³ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, *supra* note 93.

¹⁴⁴ See Greene, *supra* note 90.

¹⁴⁵ 110 CONG. REC. 2550 (1964).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ It is worth noting that George Huddleston, Jr. had a reputation for being a racist, and was probably arguing this side for race to be considered in the process because he wanted to codify racism in the law. *Cf.* Brett J. Derbes, *George Huddleston, Jr.*, ENCYCLOPEDIA OF ALABAMA, <http://www.encyclopediaofalabama.org/article/h-3329> [https://perma.cc/27W3-RJAJ] (last visited Feb. 23, 2017).

¹⁴⁹ 110 Cong. Rec. 2550 (1964).

¹⁵⁰ *Id.*

deal more than the case of a casting director looking for actors to play certain roles in a dramatic production. If it was limited to that, it would be a lot more acceptable than it is.¹⁵¹

The Congressman's point illustrates the dichotomy between the theatre industry and other businesses, and how race and color cannot be avoided in the theatre industry.¹⁵² The unique process of the theatre industry distinguishes it from other industries.¹⁵³ These discussions show that in the theatre industry, in productions where race is germane, that appearance matters, and it would be difficult to not use appearance in the casting process. The same goes for where race is not germane because appearance still matters.

Despite these conversations on the floor of Congress, race was not added to the BFOQ defense, and no specific exceptions were created for entertainment industries throughout Title VII. Nevertheless, these discussions highlight the importance of appearance and race in the theatre industry and how it is integral to the theatre business in the hiring process. Understandably, Congress wants to keep "overt racial discrimination" from being codified in the law.¹⁵⁴ Casting teams use neutral practices that allow them to preference White actors over Black ones because the casting teams are not bound by anything to actually increase minority employment, besides Equity considerations, because any casting reason could be defended on grounds of artistic freedom.¹⁵⁵ For a business where only 32 percent of actors are minorities, a new method needs to be implemented in order to remedy past and ongoing discriminatory practices.¹⁵⁶ Due to the uniqueness of the theatre business, requiring that a casting director hire more minorities could be seen as overstepping boundaries, because the theatre business relies on a great degree of artistic freedom and deference.¹⁵⁷ Challenging that artistic freedom could be seen as a threat not only to personal artistic choice but First Amendment rights.¹⁵⁸ Some people also find that because there is a lack of blatant discrimination in the theatre industry, there is no problem that needs to be remedied.¹⁵⁹ Arguments can also be made that the casting choices are just a reflection of what audiences really want and the casting

¹⁵¹ *Id.* at 2256

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ LEX K. LARSON, *LARSON'S EMPLOYMENT DISCRIMINATION* § 20.04 (2d ed. 1997).

¹⁵⁵ *See Kim, supra* note 13, at 414–15.

¹⁵⁶ *See Shindle, supra* note 15.

¹⁵⁷ *See Frank, supra* note 92, at 520; Kim, *supra* note 13, at 414–15.

¹⁵⁸ *See Frank supra* note 92, at 514–15.

¹⁵⁹ *See id.* at 513–14.

reflects the populations of those coming to the shows.¹⁶⁰ Most theatergoers are white females, therefore it could be said that shows are just reflecting the current audiences.¹⁶¹

C. *The New Affirmative Action Casting Model*

Using federal guidelines,¹⁶² Equity should create a temporary affirmative plan that allows for a color-conscious model to be in place for Broadway productions, since having a color-blind policy alone does not hold producers accountable.¹⁶³ In implementing this policy, Equity should be held responsible for enforcement; specifically, Equity's Equal Employment Opportunity committee ("EEO") should be responsible for oversight. EEO should decide the optimal balance of White actors and actors of color. This optimal balance should include the percentages across the board for White actors versus actors of color, as well as actors of color in roles where race is not germane to a production. Since this temporary plan would not be court mandated, Equity should follow the sample plans given by the Department of Labor to comply with federal law at every step of the process.¹⁶⁴

At the outset, several factors will affect how this plan will fluctuate from season to season. These factors include but are not limited to: the number of productions on Broadway in any given year, the number of production companies as a whole Equity will be dealing with in any given year, the uncertainty of a production closing prematurely, the number of roles available in each production, and the number of Equity actors. Nevertheless, using the federal affirmative action sample plan, Equity can construct a plan to increase the number of actors of color on the stage.

First, Equity should remove its policy of non-traditional casting, and institute a policy of color-conscious casting. To do this, Equity must create a new definition of color-conscious casting. This definition must use language stating that where race is not germane to a production, a person's color will not be ignored and will not be used in a negative way in the audition process, but will be used to affirm and give meaning to a person's identity as an

¹⁶⁰ Kim, *supra* note 13, at 410.

¹⁶¹ *The Demographics of the Broadway Audience 2014-2015 Season*, THE BROADWAY LEAGUE, <https://www.broadwayleague.com/research/research-reports/> [https://perma.cc/4RAR-YHMX] (last visited Nov. 28, 2016).

¹⁶² DEPT. OF LABOR, SAMPLE AFFIRMATIVE ACTION PROGRAM, https://www.dol.gov/ofccp/regs/compliance/AAPs/Sample_AAP_final_JRF_QA_508c.pdf [https://perma.cc/WM3G-7U6N] [hereinafter SAAP].

¹⁶³ See *supra* Part II.A.

¹⁶⁴ See SAAP, *supra* note 162.

acknowledgment of discrimination in the industry.¹⁶⁵ With dancer and chorus auditions, dancers can be “typed-out” based on body shape and weight, and since actors of color have different body types, this physical appearance criteria must also be considered when creating the new definition for color-conscious casting.¹⁶⁶

Once Equity has established a clear definition of color-conscious casting, it must monitor the casting process to ensure that actors of color are being included.¹⁶⁷ Equity must encourage and recruit more actors of color to become members of Equity to audition for all productions with the notion they will all seriously be considered for roles.

Before the casting process begins, Equity should require that all production companies seeking to cast through Equity sign a form stating that they will engage in color-conscious casting when race is not germane for certain roles, and they will not indicate a character’s race just to do an end run around color-conscious casting. The form should include check box for producers to agree they will use the phrase “Equal Opportunity/Affirmative Action Employer” on all casting notices. This will lead to a greater accountability for the producers to show that Equity truly is encouraging all productions to be aware of who is being cast.

Currently, when submitting casting notices to Equity, producers must give Equity the type of notice, dates, locations, type of performers (Equity or non-Equity) and a cast breakdown.¹⁶⁸ Under the color-conscious plan, the employee at Equity responsible for approving all casting notices should carefully review the notices to ensure they are color-conscious and welcoming to all.¹⁶⁹ This employee should also be responsible for ensuring producers are posting casting notices where people can find them. The notices in the cast breakdowns must give accurate descriptions, and where race is not germane state that all races will be considered, and that the producers will be operating under a color-conscious policy.

When the production has been fully cast, each production must furnish to Equity a breakdown of principal, supporting, and chorus roles by race. In addition to this casting reform, all running productions should provide data to Equity on a continual basis. Since the length of time a Broadway show runs is uncertain, this data should be furnished every six months, so that

¹⁶⁵ See *supra* Part II.A.

¹⁶⁶ *Equity Chorus Call Audition Procedures*, ACTOR’S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/auditions/AEA_Chorus_Auditions.pdf [https://perma.cc/U8AA-RHX3] (last visited Sept. 29, 2017).

¹⁶⁷ See SAAP, *supra* note 162.

¹⁶⁸ *Casting Call Notice Guidelines*, *supra* note 23.

¹⁶⁹ See SAAP, *supra* note 162, at 18.

Equity can keep track of who is in a show. This data should include: the number of actors in a production, their race, how many of the members are Equity actors, and the production's process for recruiting new members to replace actors when necessary. This continual monitoring should give Equity the opportunity to assess this method, and then remove the policy when an optimal balance is reached.

Allowing casting directors to use race in their hiring decisions could present problems, especially if it is used impermissibly. This affirmative action policy created by Equity should not only state the purpose for the role, but the consequences of using this policy in an improper way. As seen with *Miss Saigon*, Equity has power.¹⁷⁰ With this power and knowledge, Equity must realize that color-blind casting has not fulfilled its promise. Increasing minority employment must be a priority, and including an actor's race as a factor during the audition process is the only way of doing so. We know the industry is susceptible to discrimination, that the existing disparate impact and treatment framework is particularly unable to address that discrimination through litigation, and that color-blind casting is not working. Because of this knowledge, Equity's temporary policy is the only way to ensure that minority actors are employed and represented on the stage.

With a new definition of color-conscious casting, and creating a temporary policy for Equity, the number of performers of color on the Broadway stage should increase. This process is not going to be easy. Individual businesses and organizations, not overarching unions, usually implement affirmative action programs, which may create a challenge for implementation.¹⁷¹ Equity will also have to determine how long this policy should be in place and will need to continuously be reevaluating this process.¹⁷² Broadway theatre is also different because shows can close at any time. Eventually this policy should span all theatres that hire Equity actors, but starting with companies putting productions on Broadway is a great place to start, because there are only a select number of Broadway shows, making it a controlled number of actors to deal with.

Having a color-conscious policy will not erase appearance, but includes it in the hiring process. Current employment law's purpose is to forbid employers from discriminating, specifically against minorities.¹⁷³ Yet, in the theatre industry, this is not helping minorities. Even courts have found that using race is acceptable when there is past evidence of discrimination.¹⁷⁴ For

¹⁷⁰ See *supra* Part II.B.1.

¹⁷¹ 41 C.F.R. § 60.

¹⁷² See Fisher, 136 S.Ct. at 2210.

¹⁷³ See generally Civil Rights Act of 1964, Title VII.

¹⁷⁴ Cf. SAAP, *supra* note 162.

the reasons stated above, Equity should work with producers and playwrights to create a color-conscious policy until optimal balance is achieved.¹⁷⁵ This temporary plan will allow employers to consider race in the casting process to combat discrimination and increase not only minority employment, but also minority attendance to the theatre.¹⁷⁶

CONCLUSION

Shows like *Hamilton*, *Miss Saigon*, *The Prince of Egypt*, and *Noises Off* illustrate that casting choices have grave ramifications to the theatre industry. Ignoring race in the hiring process is no longer the direction that members of the theatre community are advocating. Color-consciousness in theatrical casting is essential to ensure that minority performers are represented on the stage.¹⁷⁷ From a legal perspective, although ignoring race in terms of employment may seem like the best method for hiring without discrimination, it has the reverse outcome.¹⁷⁸ Color-blind casting creates negative effects on minority casting, therefore color-conscious casting should replace the color-blind casting model. A temporary affirmative action plan promulgated by Equity that allows casting directors to use race permissibly in the casting process to increase minority employment is essential for increasing the number of employed actors and actresses of color.¹⁷⁹ Having casts that reflects American society not only has important social implications, but it is also good business.¹⁸⁰ To further theatre as a business and an art, audiences that can see themselves in theatrical productions will surely continue to support commercial theatre as the demographics of America change.

¹⁷⁵ See Frank, *supra* note 92, at 475.

¹⁷⁶ See Aleinikoff, *supra* note 18; Bastién, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21.

¹⁷⁷ See Aleinikoff, *supra* note 18; Bastién, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21.

¹⁷⁸ See Michael Paulson, *Study: Diversity in New York Theater Roles Rose in 2014-15 Season*, N. Y. TIMES, May 2, 2016, http://www.nytimes.com/2016/05/03/theater/study-diversity-in-new-york-theater-roles-rose-in-2014-15-season.html?_r=0 [https://perma.cc/435T-BSQN].

¹⁷⁹ See Aleinikoff, *supra* note 18; Bastién, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21.

¹⁸⁰ Goldstein, *supra* note 16.

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