No. 23-1039

In the Supreme Court of the United States

MARLEAN A. AMES,

Petitioner,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

DAVE YOST
Attorney General of Ohio
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
michael.hendershot@ohioago.gov

Counsel for Respondent

QUESTION PRESENTED

This Court's precedent offers courts a tool to evaluate some employment-discrimination claims through a three-step evidence-sorting rubric that starts with a prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Did the Sixth Circuit err when, in using that rubric, it required a discrimination plaintiff to provide some evidence that the employer had a discriminatory motive as part of the prima facie showing?

LIST OF DIRECTLY RELATED PROCEEDINGS

The petition's list of related proceedings is complete and correct.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTION

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against an individual on the basis of that individual's "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Title VII's protections apply equally to everyone. They apply with the same force to members of minority *and* majority groups. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976). The Petition argues that the circuits use differing approaches for majority- and minority-group plaintiffs for one subpart of one step of one approach to evaluating employment-discrimination claims. The Question Presented never gets off the ground: Ames did not question the Circuit's longstanding approach to the Question Presented until this Court and, not only does the Question Presented does not make a difference to the outcome of this case, it rarely makes a difference in *any* case.

Petitioner Marlean Ames never challenged the Sixth Circuit's application of the so-called "background circumstances" approach to Title VII discrimination claims for majority-group plaintiffs. Her only argument below was that she had *satisfied* that requirement. Ames should not be able to raise an argument here that she never aired in the courts below. Ames's failure bears directly on this Court's review. The Sixth Circuit has taken a nuanced approach to the background circumstances element—but none of that nuance was relevant in light of the way that Ames presented her appeal. Furthermore, at least two Sixth Circuit judges have indicated that they view *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) as

resetting the table for the Circuit's Title VII precedent, and would rule that way if the issue were properly preserved. *See Smyer v. Kroger Ltd. P'ship I*, No. 22-3692, 2024 WL 1007116, at *8 (6th Cir. Mar. 8, 2024) (Boggs, J., concurring); *id.* at *10 (Readler, J., concurring) (also noting that *Ames* did not raise the *Harvard* decision).

What is more, answering the Question Presented will not change the outcome here. Ames challenged two separate employment actions in the courts below: the Department of Youth Services' failure to promote her and its decision to demote her and replace her with another employee.

The Sixth Circuit held that Ames's demotion claim failed at a later step of the familiar three-step approach to evaluating discrimination claims (*see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). That employment decision, it held, involved no discriminatory motive. Ames's Question Presented does not challenge that aspect of the Sixth Circuit's decision and she therefore can no longer challenge the Sixth Circuit's conclusion that the demotion about which Ames complains was not discriminatory.

As for her promotion claim, Ames has affirmatively waived any challenge to the requirement that she establish a prima facie case of discrimination more generally. *See* Pet.28 n.3. And because she failed to introduce any evidence that the decisionmakers who made the employment decision that she challenges knew of her majority-group status (in this case her sexual orientation), Ames's promotion claim would have failed at the prima facie stage even if the Sixth Circuit had not used the legal framework Ames chal-

lenges. What is more, Ames's claim that she was not promoted would *also* have failed at the next step of *McDonnell Douglas*'s analysis. The Department had legitimate, nondiscriminatory, reasons for hiring someone other than Ames, and Ames has not pointed to sufficient evidence to create a genuine issue of fact about whether those reasons were pretextual.

Even without these vehicle flaws, the Court should decline review. Any divergence in how the circuits approach the Question Presented is more form than substance; regardless of how each circuit specifically describes its approach to the Question Presented, each circuit is focused on the same underlying question. Every circuit discussed in the Petition asks, in one way or another, whether a plaintiff has shown that an employer's actions, "'if otherwise unexplained," are "more likely than not based on the consideration of impermissible factors.'" *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Put another way, all the circuits are ultimately trained on the question of what—if anything—gives rise to an inference that the plaintiff is the minority or the outsider in the context of the specific employment decision the lawsuit challenges. Finally, any difference between the circuits, whether in language or substance, arose decades ago. Despite the longevity of any substantive difference, the circuit's varying formulations rarely, if ever change litigation outcomes.

STATEMENT

Marlean Ames worked for the Ohio Department of Youth Services in a variety of roles. Pet.App3a. She was working as the Administrator of the De-

partment's Prison Rape Elimination Act program when the Department created a new position, the Bureau Chief of Quality Assurance and Improvement. Pet.App.18a. Ames applied for the new position. *Id.*

The Bureau Chief position was a management role that was intended to supervise and guide the other members of the Office of Quality and Improvement. Pet.App.19a. Among the key skills that the Department was looking for in a successful candidate were management, supervision, and workforce planning. *Id.* Ames was one of three people who applied for the Bureau Chief job. *Id.* None of them were hired. Pet.App.20a. Because there was no timeline for filling the position, the Department decided to wait to hire someone until an ideal candidate could be found. *Id.*

Six months after Ames had interviewed for the Bureau Chief role, the Department hired Yolanda Frierson for the job. Pet.App.20a. Julie Walburn, the assistant director of the Department, made the decision to hire Frierson. *See* Pet.App.18a, 20a–21a. Although Frierson did not interview for the Bureau Chief job, Walburn had worked with Frierson in the past. Pet.App.21a. Walburn felt that Frierson would be a good fit for the role because, among other things, Frierson had significant management experience. *Id.* Although Frierson and Ames were both women, Frierson, unlike Ames, was gay. *Id.*

Not long after Ames interviewed for the Bureau Chief position, she was removed from her role administering the Prison Rape Elimination Act program. Pet.App.4a. When the Governor appointed a new Director of the Department, he had stressed to that Di-

rector, Ryan Gies, that addressing sexual victimization within the juvenile corrections system was a high priority. *See* Pet.App.18a, 21a–22a. Gies therefore began restructuring the Department's programs. Pet.App.21a–22a.

It was that restructuring that cost Ames her position. Pet.App.22a. Gies felt that Ames was difficult to work with. *Id.* And Walburn was concerned that Ames could not oversee a more proactive approach to complying with the Prison Rape Elimination Act. *Id.* Ames was reassigned to a different role within the Department, one that she had previously held and that paid less, Pet.App.18a, and Alex Stojsavljevic was selected to oversee the Prison Rape Elimination Act program, Pet.App.23a. Stojsavljevic is a gay man. *See id.*

Ames filed a complaint with the Equal Opportunity Commission and received a right-to-sue letter. Pet.App.4a. Ames then filed a complaint in federal district court. *Id.* As is relevant here, Ames's complaint alleged that the Department discriminated against her on the basis of sexual orientation (which is a form of sex discrimination) when it hired Frierson for the Bureau Chief role (call this her "promotion claim") and that it discriminated against her on the basis of both sex and sexual orientation when it demoted her and replaced her with Stojsavljevic (call this her "demotion claim"). Pet.App.5a, 6a. The district court granted summary judgment in the Department's favor on both claims, *see* Pet.App.33a, 39a–40a, and the Sixth Circuit affirmed, Pet.App.3a.

Ames's claim related to the Bureau Chief position failed, the Sixth Circuit held, because Ames could not make a prima facie case of discrimination.

Pet.App.5a–6a. Under Sixth Circuit precedent, a majority-group plaintiff like Ames must identify evidence that would "support the suspicion that the defendant is that unusual employer who discriminates against the majority." Pet.App.5a (quoting *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008)). Ames, the Sixth Circuit held, had not. Pet.App.5a–6a. Ames conceded in the district court that Walburn and Gies, neither of whom are gay, were the ones who were responsible for hiring Frierson. *see* Opposition to Motion for Summary Judgment, R.72, PageID#2488 n.1. Ames attempted to walk back that admission on appeal. She argued in the Sixth Circuit that she had demonstrated background circumstances of discrimination because a different individual made the decision to hire Frierson and *that* individual was gay. *See* Pet.App.6a. The Sixth Circuit held, however, that Ames's concession in the district court meant that she had forfeited that argument for purposes of appeal. *Id.*

The Sixth Circuit held that Ames's demotion claim failed for the same reason, at least to the extent that Ames alleged that the Department discriminated against her on the basis of her sexual orientation when it replaced her with Stojsavljevic. *See* Pet.App.6a. But because Ames had also alleged that the Department discriminated against her on the basis of sex when it demoted her and selected a man to fill her prior position, the Sixth Circuit considered the Department's proffered reasons for that employment action. Pet.App.6a–9a. It held that Ames failed to carry her burden of showing that the Department discriminated against her. *Id.* The Department, the Sixth Circuit held, had legitimate, nondiscriminatory, reasons for demoting Ames and

hiring Stojsavljevic and Ames failed to introduce any evidence that would suggest that those reasons were pretextual. *See id.*

Judge Kethledge concurred. Although he joined the opinion in full, he wrote that he disagreed with Sixth Circuit precedent to the extent that it required Ames to show, as part of her prima facie case of sexual-orientation discrimination, that the Department "is the unusual employer that discriminates against the majority." Pet.App.9a (quotation omitted).

Ames has now filed a petition for a writ of certiorari in which she challenges the Sixth Circuit's precedent, which includes a "background circumstances" component for employment-discrimination claims to proceed down the *McDonnell Douglas* path if the plaintiff is a member of a majority group. That precedent required her to point to something that indicated that the Department was the unusual employer that discriminates against the majority. *See* Pet.i. But the Question Presented does not challenge the portion of the Sixth Circuit's decision that held that the Department had legitimate, nondiscriminatory reasons for demoting Ames and replacing her with Stojsavljevic. *See, generally,* Pet.

REASONS FOR DENYING THE PETITION

I. This case provides a poor vehicle with which to address the Question Presented.

This case has numerous vehicle problems that make it a poor case in which to consider the Question Presented. Any one of those problems provides a reason to deny Ames's petition for a writ of certiorari.

The context for these vehicle flaws includes both legal and factual background.

Legally, these flaws intersect with this Court's frequently invoked tool for assessing discrimination claims in *McDonnell Douglas*. All Title VII plaintiffs, regardless of the group to which they belong, bear the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against" them. *Burdine*, 450 U.S. at 253. The Court in *McDonnell Douglas* adopted a three-step analysis to assist courts in reviewing Title VII claims. At the first step, a plaintiff bears the burden of establishing a prima facie case of discrimination. 411 U.S. at 802. Once she does so, the employer must offer a legitimate, nondiscriminatory, reason for its actions. *Id.* at 802–03. The plaintiff then bears the burden of showing that the employer's reasons were pretextual. *Id.* at 804. *McDonnell Douglas*'s test was "never intended to be rigid, mechanized, or ritualistic," however; it was simply intended to be "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Factually, these flaws intersect with Ames's two claimed acts of employment discrimination. Recall that she initially challenged both the Department's decision to promote a different person and the Department's decision to demote her when it picked a different person to fill Ames's former role. Ames challenged the promotion decision as illegal sexual-orientation discrimination and challenged the demotion decision as both illegal sex and sexual-orientation discrimination. And while the Sixth Circuit affirmed judgment against Ames on her orientation theories for failing the prima facie inquiry with respect to both her promotion and demotion claims, it

affirmed judgment against her on the sex-discrimination theory because Ames could not show any pretext in the Department's decision to demote her and to select someone to replace her at her former position. *See* Pet.App.7a–8a. The Sixth Circuit, that is, rejected Ames's claim that the Department discriminated against her when it demoted her.

In this Court, Ames's Question Presented targets only a component of the prima facie showing. The consequence of that choice is that Ames cannot challenge the Department's decision to demote her because she has not challenged the lower court's holdings that the demotion decision involved no pretext (and thus no discrimination).

With that legal and factual setting, the following four vehicle flaws point against granting review.

A. Ames did not challenge the Sixth Circuit's prima facie test below.

Ames never challenged the Sixth Circuit's "background circumstances" element below. She argued instead that she satisfied that requirement. While Ames's litigation strategy may not have forfeited her Question Presented in the strictest sense, it still makes this case a poor vehicle with which to consider that question.

The Court has indicated that parties need not always raise their arguments for the first time in the circuit courts. It has noted that there is no requirement that a "party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection." *United States v. Williams*, 504 U.S. 36, 44

(1992); *see also United States v. Vonn*, 535 U.S. 55, 58 (2002).

Even if Ames was not required to challenge existing Sixth Circuit precedent, she at least should not be able to benefit from her failure to do so. But that, in effect, is what she seeks to do. As discussed in more detail below, the Sixth Circuit has taken a nuanced approach to determining whether a majority-group plaintiff has identified background circumstances that suggest discrimination. *See* below at 23–24, 33–35. Among other things, it has held that the "[background circumstances] requirement is not onerous, and can be met through a variety of means." *Johnson v. Metro. Gov't of Nashville & Davidson Cnty.*, 502 F. App'x 523, 536 (6th Cir. 2012). Had Ames argued that such a requirement is inconsistent with Title VII, then the Sixth Circuit would have had the opportunity to discuss its precedent in greater detail. It could have explained, for example, that the "background circumstances" requirement is not a *higher* burden, merely a *different* one. But because Ames did not raise that issue, the panel had no reason to reject her framing of the background circumstances element of the prima facie test. Put another way, one of the reasons that Ames is now able to criticize the decision below as overly stringent and inflexible is because she herself framed it that way. And while that is not waiver or forfeiture formally, the fact that Ames "did not raise or brief" the question presented "below" is a reason to deny certiorari. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari).

B. Answering the Question Presented in Ames's favor would not change the outcome in this case because Ames cannot satisfy a separate component of the prima facie showing.

Ames has affirmatively waived any challenge to the requirement that she establish a prima facie case of discrimination. Pet.28 n.3. Her only challenge is to *how* the Sixth Circuit applied one component of that rubric in this case. Ames's Question Presented asks whether, to establish a prima facie case of discrimination under Title VII, a majority-group plaintiff must introduce evidence of "background circumstances" that suggest discrimination. *See* Pet.i. But the answer to that question will not affect the outcome of this case. Even if the answer is "no" Ames *still* could not make a prima facie case of sex discrimination. And that is a prime reason to deny certiorari. The Court should "not ... take up" a question presented if the claims underlying that question are "independently subject to" defenses that would yield the same result regardless of how the Court answers the question. *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring in the denial of certiorari)

There appears to be universal agreement that an "employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge." *Bostock v. Clayton Cty.*, 590 U.S. 644, 691 (2020) (Alito, J., dissenting). As far as the Department is aware, every circuit that has considered the question has held that in "cases involving personal attributes not obvious to the employer," a

"plaintiff cannot make out a prima facie case of discrimination unless he or she proves that the employer knew about the plaintiff's particular personal characteristic." *Geraci v. Moody-Tottrup, Int'l*, 82 F.3d 578, 581 (3d Cir. 1996); *Hunter v. UPS*, 697 F.3d 697, 703–04 (8th Cir. 2012); *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987); *Lubetsky v. Applied Card Sys.*, 296 F.3d 1301, 1305–06 (11th Cir. 2002); *cf. also Raytheon Co. v. Hernandez,* 540 U.S. 44, 54 n.7 (2003) ("If [an employer] were truly unaware that … a disability existed, it would be impossible for her hiring decision to have been based, even in part, on [the employee's] disability."); *Landefel v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181–82 (6th Cir. 1993) (same). The reverse is also true. An employer cannot discriminate *in favor* of a different employee if the employer has no knowledge of the favored employee's personal characteristics. *See, e.g.*, *Petrikonis v. Wilkes-Barre Hosp. Co., LLC*, 582 F. App'x 126, 130 (3d Cir. 2014); *Morrow v. Wal–Mart Stores, Inc.,* 152 F.3d 559, 563 (7th Cir.1998).

Ames, however, introduced no evidence that would create a genuine issue of material fact about whether the relevant decisionmakers were aware of her sexual orientation, or of the orientation of Frierson, the person who was ultimately hired for the job to which Ames had applied. The *only* evidence on that point indicated just the opposite. The only evidence related to Walburn's knowledge with respect to either woman showed that she was unaware of Frierson's sexual orientation (and was silent with respect to Ames). *See* Motion for Summary Judgment, R.71, PageID#2375 (citing Walburn Depo. R.60, PageID#668). And the only evidence related to others' knowledge of Ames's sexual orientation showed

that her direct supervisor *did not* know whether Ames was gay or straight. *See id.* at 2367 (citing Trim Depo., R.64, PageID#1511). Ames's failure to introduce any evidence on this point means that no matter how the Court answers the Question Presented her discrimination claim would still fail at the prima facia stage.

To be sure, the Sixth Circuit noted that, if not for the background circumstances element, then Ames's prima facie case would have been "easy to make." *See* Pet.App.5a. It is clear from context, however, that the Sixth Circuit was referring only to the elements of a prima facie case discussed in *McDonnell Douglas*. *See id.* Knowledge of an employee's personal characteristics is an additional, threshold, requirement of a prima facie case, however, and one that the Sixth Circuit did not discuss. *See id.*; *Geraci*, 82 F.3d at 581 (noting that *McDonnell Douglas* "quite properly makes no reference to the employer's knowledge of membership in a protected class" because some protected traits will be known to management merely by seeing the employee).

C. Even if Ames could establish a prima facie case of discrimination, the outcome of this case still would not change.

A favorable answer to the Question Presented would not change the result here for a second, independent reason—Ames's claim fails at the later stages of *McDonnell Douglas*. Even if Ames could make a prima facie case of discrimination, her promotion claim would fail at *McDonnell Douglas*'s second and third stages.

The Department had nondiscriminatory reasons for its hiring decision and Ames cannot show that those reasons were pretextual. True, the concurrence suggested otherwise below, Pet.App.10a, and Ames now makes a similar argument in her petition, *see* Pet.32. But they are both off base. In response to the Department's motion for summary judgment, Ames failed to point to any evidence that created a genuine issue of material fact about whether the Department's decision to hire Frierson (instead of Ames) was pretextual. Indeed, Ames did the opposite. She accepted the Department's recitation of the relevant facts in its summary judgment motion as correct (with the exception of two minor issues that are not relevant here). *See* Opposition to Motion for Summary Judgment, R.72, PageID#2488 n.1.

To the extent that the concurrence below suggested that Ames's case faltered only at the prima facie showing's step one, it was confused about the facts and evidence presented at summary judgment. The concurrence identified two factors that, it believed, provided strong evidence of pretext: that the Department twice promoted a gay employee in a "manner adverse to Ames" and that Frierson lacked the minimum qualifications for the job for which she was hired. It was wrong on both counts.

The first factor—which involved replacing Ames as the administrator of the Prison Rape Elimination Act program—was irrelevant. The Sixth Circuit held that the Department had legitimate, nondiscriminatory, reasons for hiring Stojsavljevic, the other gay individual that the concurrence referenced, for that position, and Ames has not challenged that portion of the Sixth Circuit's decision through her Question

Presented. Because it is now settled that the Department *did not* discriminate against Ames when it hired Stojsavljevic, that hiring decision cannot serve as evidence that the Department's other actions were pretextual. *See* Pet.12 n.2 (waiving any challenge to the Sixth Circuit's sex discrimination ruling).

As for the concurrence's second factor, it misread the record when it stated that Frierson "lacked the minimum qualifications for the job" for which she was hired. *See* Pet.App.10a. The undisputed evidence showed that Frierson *was* qualified. The job posting listed alternative qualifications: an applicant was required to have either a college degree *or* relevant work experience. Motion for Summary Judgment, East Decl., R.71-4, PageID#2419. And while Frierson did not have a degree, she did have the experience. Motion for Summary Judgment, East Decl., R.71-5, PageID#2460–68. It was that experience, in fact, that led the Department to hire her. Walburn Depo., R.60, PageID#635–37, 639. Ames may have *argued* in the Sixth Circuit that Frierson was not qualified, but she did not introduce any evidence that created a genuine issue of material fact about Frierson's qualifications. *Cf.* Ames Opposition to Summary Judgment, R.72, PageID#2488 (conceding that "[t]he Statement of Facts included in the Defendant's Motion for Summary Judgment is largely correct"). Ames's argument was different in the district court. Ames never argued in the district court that Frierson was unqualified. *See* Opposition to Motion for Summary Judgment, R.72, PageID#2495–96. She argued only that she was *more* qualified than Frierson was. *Id.*

Because the Sixth Circuit would likely "have reached the same conclusion" that the Department should prevail on summary judgment even if it agreed with Ames, certiorari is unwarranted. *See, e.g.*, *Hittson v. Chatman*, 576 U.S. 1028 (2015) (Ginsburg, J., concurring in the denial of certiorari).

D. Ames fails to distinguish between the portion of the Sixth Circuit's decision that she has challenged and the portion that she has not.

The Sixth Circuit below considered two separate discrimination claims and rejected them both. It held that Ames had failed to make a prima facie case of discrimination with respect to her promotion claim. It also held that Ames had failed to show that the Department's decision to demote and replace her was discriminatory. Ames's demotion claim rested on two theories of discrimination: sex and sexual orientation. But although the Sixth Circuit held that Ames had established a prima facie case of discrimination only with respect to her sex-discrimination theory, that does not matter; the same nondiscriminatory reasons were sufficient to resolve Ames's sex *and* sexual orientation theories. Title VII claims challenge employment actions. *See* 42 U.S.C. §2000e-2(a). And, generally, the "same legitimate, nondiscriminatory reasons that [an employer] advance[d] against a finding of … discrimination apply equally to" all similar claims of discrimination arising from the same event, even if the protected class that provides the basis for the claim differs. *Cf. Hrdlicka v. GM LLC*, 63 F.4th 555, 575 (6th Cir. 2023).

Ames has not challenged the portion of the Sixth Circuit's decision that held that the Department had

nondiscriminatory reasons for demoting her. The Question Presented therefore involves only Ames's claim that the Department discriminated against her when it promoted Frierson instead of her. *See* Pet.i. In other words, it involves only her promotion claim, not her demotion claim.

Ames confuses the Question Presented in this case by suggesting otherwise. Ames writes that this case involves a "demotion decision." *See* Pet.32. Not so. The demotion decision she references involves the demotion claim that she has not challenged through her Question Presented. Ames's failure to properly distinguish between the claim that is before the court, and the one that is not, provides just one more reason why this case provides a poor vehicle to address the Question Presented. "[A]t the very least" Ames's litigation strategy "would complicate [the Court's] review." *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., respecting the denial of certiorari). And that is reason enough to deny certiorari.

II. There is no meaningful circuit split; the differences between the circuits are largely differences in language not law.

The Court should deny certiorari even if this case's vehicle problems did not otherwise render it non-cert worthy. Ames claims to spy a circuit split with respect to the relevant prima facie test for discrimination claims brought by members of a majority group. But any differences between the circuits are more differences of terminology than consequential legal substance. Regardless of the long-standing difference in language that some circuits use, the outcome is largely the same.

A. This Court's precedent instructs that the *McDonnell Douglas* test is a flexible one.

This Court's decision in *McDonnell Douglas* provides the foundation for a large majority of Title VII claims. Ames does not dispute that every circuit, even those that she alleges conflict with one another, applies that decision to at least some degree. To the extent that Ames alleges that a split exists, it is a split over *how* the various circuits apply *McDonnell Douglas*. Before addressing Ames's claimed split, some background about that decision, and the Court's precedent interpreting and applying it, is therefore needed.

Because direct evidence of discrimination "'essentially requires an admission by the employer,' such evidence 'is rare.'" *Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008) (citations omitted). That is one reason why the Court adopted what is now known as the *McDonnell Douglas* test. Under that test, a plaintiff may rely on indirect evidence to prove a discrimination claim. The first step of *McDonnell Douglas*'s test requires a plaintiff to establish a prima facie case of discrimination by showing four things: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802. But because "facts necessarily will vary in Title VII cases," the Court in *McDonnell Douglas* acknowledged that the four-part

test it laid out will not apply "in every respect to differing factual situations." *Id.* at 802 n.13. Indeed, part one "of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *McDonald*, 427 U.S. at 279 n.6 (1976)

The Court's subsequent decisions reaffirmed that *McDonnell Douglas* was "'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco*, 438 U.S. at 577). The relevant question in Title VII cases is "always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco*, 438 U.S. at 577 (quoting *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). A plaintiff makes out a prima facie case of discrimination under *McDonnell Douglas* and Title VII by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" *Furnco*, 438 U.S. at 576 (quoting *Teamsters*, 431 U.S. at 358); *see also Young v. UPS*, 575 U.S. 206, 228 (2015) (same). *McDonnell Douglas* is not an end in itself; it exists simply to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253–54.

Consistent with the Court's precedent, lower courts have modified *McDonnell Douglas*'s test as necessary to account for a specific plaintiff's discrimination claims. They have, for example, adopted modified versions of the *McDonnell Douglas* test to govern discriminatory promotion claims, *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981), retaliation claims, *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014), and discriminatory discipline claims, *Reives v. Illinois State Police*, 29 F.4th 887, 891–92 (7th Cir. 2022); *see also Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (noting that "courts have modified the McDonnell Douglas standard to address disparate treatment cases involving all discrimination prohibited by the Act in promotion, firing, compensation or other conditions of employment").

One other modification involves claims by majority-group plaintiffs; what some call "reverse" discrimination. It is impossible to apply *McDonnell Douglas* literally to such cases. The first prong of the *McDonnell Douglas* prima facie test asks, after all, whether the plaintiff was a "racial minority." *McDonnell Douglas*, 411 U.S. at 802; *see also Parker v. Baltimore & Ohio R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). Courts must therefore always adapt *McDonnell Douglas* to at least some degree when they are confronted with a "reverse" discrimination claim. The Sixth Circuit, like many courts around the country, has adopted a prima facie test to govern discrimination claims filed by members of a majority group who allege that they were discriminated against in favor of a minority group. Those courts require a plaintiff who alleges discrimination based on the plaintiff's membership in a majority group to point to

background circumstances that provide some evidence to "support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Thistledown Racing*, 770 F.2d at 67 (quoting *Parker*, 652 F.2d at 1017). This requirement is often shorthanded as simply a "background circumstances" requirement. But regardless of its label, a majority plaintiff's burden, like the burden minority plaintiffs bear, is "not onerous." *Compare Johnson*, 502 F. App'x at 536 *with Burdine*, 450 U.S. at 253.

B. There is no meaningful disagreement between the circuits about the ultimate legal standard that *McDonnell Douglas* established.

Ames argues that there is a split over how Courts have applied *McDonnell Douglas* to "reverse" discrimination claims. She groups the circuits into three categories 1) circuits that have adopted a "background circumstances" requirement, 2) circuits that she claims do not apply a "background circumstances" requirement, and 3) circuits that have explicitly *rejected* such a requirement. *See* Pet.14–25 A close examination of the cases she cites reveals, however, that even though some circuits have used different language to describe their approach, they ultimately all focus on the same basic legal question: are there facts from which one can "infer, if such actions remain unexplained, that it is more likely than not that [an employer's] actions were based on a discriminatory criterion illegal under" Title VII. *Furnco*, 438 U.S. at 576 (quotation omitted).

1. In "reverse" discrimination cases, the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits describe the prima facie case's first step as a showing about background circumstances.

The D.C. Circuit was one of the first courts to apply *McDonnell Douglas* to a "reverse" discrimination claim. It noted that "[m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated," and that the first element of the prima facie test therefore necessarily needed to adapt when a member of a majority group filed a Title VII claim. *Parker*, 652 F.2d at 1017 Applying a modified version of *McDonnell Douglas*, it held that a plaintiff who is a member of a majority group makes out a prima facie showing of discrimination when she demonstrates that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *See id.* Such circumstances, the D.C. Circuit wrote, "served as a functional equivalent of the first *McDonnell Douglas* criterion, membership in a racial minority." *Id.* at 1018. Applying that standard, the court held that the plaintiff in *Parker* made out a prima facie case of discrimination when he pointed to a racially discriminatory work environment. *Id.* Subsequent D.C. Circuit decisions made clear that the "background circumstances" element is not intended to disadvantage plaintiffs who are members of majority groups, nor is it "an additional hurdle." *Harding v. Gray*, 9 F.3d 150, 153–54 (D.C. Cir. 1993). It is simply a tool for "determining when an employer's con-

duct raises an inference of discrimination under the Supreme Court's *McDonnell Douglas/Burdine* standard." *Id.* at 153.

Following *Parker*, the Sixth, Seventh, Eighth, and Tenth circuits have used the "background circumstances" language to describe the first component of a prima facie analysis for "reverse" discrimination claims. Like the D.C. Circuit, however, those circuits have emphasized that "background circumstances" component is easily satisfied. Most significantly for purposes of this case, the Sixth Circuit has held that the background circumstances "requirement is not onerous, and can be met through a variety of means." *Johnson*, 502 F. App'x at 536. A male plaintiff in a failure-to-hire case, for example, can satisfy the requirement by showing that the decisionmaker and the person ultimately hired were both women. *See* Pet.App.6a. He can demonstrate "background circumstances," in other words, by showing that he was in the minority in the relevant sense.

The Sixth Circuit's recent decisions, which make clear that a plaintiff's burden is not onerous, also put to rest any concerns in older Sixth Circuit decisions that majority-group plaintiffs may bear a high burden. *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994); *cf. Briggs v. Porter*, 463 F.3d 507, 517 (6th Cir. 2006) (describing a plaintiff's burden as "more difficult"). To the extent that the Sixth Circuit in past decades may have expressed misgivings about the "background circumstances" analysis, its more recent decisions have clarified the showing's low bar. *See Johnson*, 502 F. App'x at 536.

The Seventh, Eighth, and Tenth Circuits also do not treat the background circumstances requirement

as onerous. They too look to it as nothing more than a substitute for otherwise inapplicable elements of the prima facie test discussed in *McDonnell Douglas*. The Seventh Circuit, in adopting a background circumstances requirement, emphasized that the requirement "is not to be interpreted in a constricting fashion." *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999). And the Eighth Circuit and Tenth Circuits have likewise treated the background circumstances component of a prima facie case not as a "higher" or "additional" burden, but simply an alternative showing that plaintiffs must make "in lieu of" showing that the plaintiff belongs to a minority group. *Notari v. Denver Water Dep't.*, 971 F.2d 585, 589 (10th Cir. 1992); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *see also Duffy v. Wolle*, 123 F.3d 1026, 1035–37 (8th Cir. 1997) (applying *McDonnell Douglas* framework to a *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, (1971) claim).

Most significantly, none of the circuits that use the "background circumstances" language dispute that plaintiffs who are members of a majority group are "entitled to the same Title VII protection as a minority plaintiff." *Harding*, 9 F.3d at 153; *see also Thistledown Racing*, 770 F.2d at 67 ("Title VII, of course, prohibits racial discrimination against all groups"); *Mills*, 171 F.3d at 454–55 ("[I]t is well settled law that the protections of Title VII are not limited to members of historically discriminated-against groups."); *Schaffhauser v. UPS*, 794 F.3d 899, 902 (8th Cir. 2015) ("Title VII prohibits an employer from discriminating against *any* individual 'because of such individual's race.'" (emphasis added)); *Notari*, 971 F.2d at 588 (noting that "it is clear that Title

VII's protection is not limited to those individuals who are members of historically or socially disfavored groups").

2. The Third and Eleventh Circuits are in accord with the other circuits.

Ames argues that there is a direct conflict between the Third and Eleventh Circuits and those circuits that apply a "background circumstances" requirement as part of the prima facie test for "reverse" discrimination claims. The Third and Eleventh circuits, she claims have "explicitly rejected" such a requirement. Pet.19. Ames overreads those decisions. While the Third and Eleventh Circuits have chosen not to apply an explicit "background circumstances" requirement, those circuits still apply the same basic Title VII standard that other circuits apply.

The Third Circuit, it is true, has declined to adopt the "background circumstances" language in "reverse" discrimination cases. *Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999). But it has nevertheless recognized that there are problems with the "wording of the very first prong of the *McDonnell Douglas* [prima facie] test" that mandate at least some modification of that test with respect to "reverse" discrimination claims. *Id.* at 158. Rather than use the language of "background circumstances," however, it has held that a Title VII plaintiff "should be able to establish a prima facie case … by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated [a] plaintiff 'less favorably than others because of [his] race, color, religion, sex, or national origin.'" *Id.* at 163 (quot-

ing *Furnco*, 438 U.S. at 577). That is not meaningfully different from the legal standard that other circuits apply. The Third Circuit in fact acknowledged that the background-circumstances requirement, as applied by the circuits that have adopted it, often requires only that a plaintiff offer "sufficient evidence to support the reasonable probability of discrimination." *Id.* at 162.

At least one member of the *Iadimarco* panel believed the primary difference between the test that the Third Circuit adopted and the "background circumstances" test was their wording and that the Third Circuit's test was "merely a restatement of the *McDonnell Douglas* test." *Id.* at 163 n.10. That member of the panel rejected the "background circumstances" phrasing not because it was necessarily an incorrect statement of law, but because its framing was "just too vague and too prone to misinterpretation and confusion to apply fairly and consistently." *Id.*

The other Third Circuit decisions that Ames cites also do not support her claimed split. The Third Circuit did not discuss "background circumstances" at all in *Phillips v. Legacy Cabinets*, 87 F.4th 1313 (11th Cir. 2023). Even if it had, it would not have mattered. Because the plaintiff and the relevant decisionmaker were of different races, *see id.* at 1316, the plaintiff would have been able to demonstrate background circumstances in any event, *see* Pet.App.5a. *Ellis v. Bank of N.Y. Mellon Corp*, is even less relevant; all that the Third Circuit did in that case was state the obvious proposition that a "reverse" discrimination plaintiff "need not show she

is a member of a minority group." 837 F. App'x 940, 941 n.3 (2021).

The Eleventh Circuit decisions that Ames cites are of even less relevance. Two of the cases did not involve *McDonnell Douglas*'s prima facie test at all. *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1104 (11th Cir. 2001) ("In this case, the County has not disputed that Bass established a prima facie case of discrimination under the McDonnell Douglas framework."); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) ("Here, Mitten did not need to rely on the *McDonnell Douglas* presumption to establish a case for the jury."). Any discussion of the "background circumstances" element in those decisions was therefore dicta. But even then, to the extent that the Eleventh District in *Bass* "explicitly" rejected anything, it was the "reverse discrimination" *label*. *See Bass*, 256 F.3d at 1102–03. Its decision, in that respect, was little more than an uncontroversial recognition that Title VII applies equally to all plaintiffs. *See id.* And *Smith*, for its part, simply cited *Bass* for the principle that a plaintiff need not show "background circumstances" that suggest discrimination. *See* 644 F.3d at 1325 n.15. But if *Bass* did not decide that question, then neither can it be said did *Smith*.

Dicta aside, the legal test that the Eleventh Circuit applied in *Smith* is, in practice, functionally similar to the test that other circuits apply. It held that a plaintiff can prevail on a discrimination claim if "the record, viewed in a light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.'"

Smith, 644 F.3d at 1328. And in other cases, the Eleventh Circuit has held that its "mosaic" standard addresses the same question as "when using the *McDonnell Douglas* framework." *Tynes v. Fla. Dep't of Juvenile Justice*, 88 F.4th 939, 947 (2023). To be sure, some members of the Eleventh Circuit would go even further and would abandon *McDonnell Douglas* completely. *See id.* at 949–58 (Newsome, J., concurring). But whether *McDonnell Douglas* has outlived its usefulness is a question that must wait for another day—and for a party to raise it. Ames has explicitly declined to do so here. *See* Pet.28 n.3.

3. The First, Second, Fourth, Fifth, and Ninth Circuits apply a largely similar prima facie standard.

Ames identifies two different categories of circuits that, she claims, have implicitly rejected a background circumstances requirement: those that have declined to decide whether to apply such a requirement and those that have been entirely silent on the question. *See* Pet.22–23.

a. The Second, Fourth, and Ninth Circuits are in the first category of cases. They have acknowledged the "background circumstances" requirement but have not decided whether such a requirement should be part of the prima facie test for "reverse" discrimination claims. The fact that they have not taken a position on the Question Presented means, by definition, that they are not part of any circuit split. That being said, however, the test that those circuits *have* applied is not meaningfully different from the test that other circuits apply. Like the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, the Second,

Fourth, and Ninth Circuits all ask whether a plaintiff has pointed to facts that would suggest the presence of discrimination.

Rather than linger on the framing of the "background circumstances" requirement, the Second Circuit has focused on the ultimate question that *McDonnell Douglas* was designed to address. The relevant question for any discrimination claim, it has noted, is whether the events that give rise to a plaintiff's complaint occurred "under circumstances which give rise to an inference of unlawful discrimination." *Aulicino v. New York Dep't of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009) (quotation omitted). In the "conflict" case that Ames cites, the Second Circuit held that it did not need to decide whether to demand evidence of "background circumstances" because the plaintiff's evidence sufficiently demonstrated those circumstances, even if that requirement applied. *Id.* at 80 n.5.

The Fourth Circuit has adopted a similar approach. It has held that plaintiffs in all discrimination cases must point to "some evidence that race was a determining factor in the employer's decision." *Holmes v. Bevilacqua*, 794 F.2d 142, 147 (4th 1986) (en banc). And while it has "expressly decline[d] to decide … whether a *higher* burden" applies to plaintiffs who bring a "reverse" discrimination claim, it has held that the burden that its precedent calls for is not meaningfully different from the standard that the D.C. Circuit discussed in *Parker*. *Lucas v. Dole*, 835 F.2d 532, 533–34 & n.9 (4th Cir. 1987) (emphasis added).

Finally, the Ninth Circuit fits into this category as well. In an unpublished decision, it also chose not

to weigh in on how the first component of the *McDonnell Douglas* prima facie test should be modified when faced with a "reverse" discrimination claim. *Zottola v. City of Oakland*, 32 F. App'x 307, 311 (9th Cir. 2002). The plaintiff's claim in that case, the court held, failed with or without a "background circumstances" requirement. *Id.* at 311. The only other Ninth Circuit decision that Ames cites also did not address the Question Presented here. The court in that case asked the same question that all other circuits ask: did the plaintiffs provide evidence that "gives rise to an inference of unlawful discrimination"? *See Hawn v. Exec. Jet Mgmt.*, 615 F.3d 1151, 1156 (9th Cir. 2010) (quotation omitted).

b. The First and Fifth Circuits belong to the second category of circuits that Ames identifies: those that have not discussed the "background circumstances" element at all. Like the circuits that have expressly declined to decide whether or how to adjust *McDonnell Douglas*'s prima facie elements to account for "reverse" discrimination claims, the silence of the First and Fifth Circuits means that they cannot be properly said to conflict with the other circuits. And even though the First and Fifth Circuits have not addressed whether a "background circumstances" element is part of the prima facie test for "reverse" discrimination claims, the legal standard that they apply is still consistent with the standard that courts that *have* adopted such a component apply.

The First Circuit in *Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000), for example, stated that the burden of establishing a prima facie case under *McDonnell Douglas* is "not onerous." *Id.* at 19. To the extent that the First Circuit did not discuss the

components of the prima facie test in greater detail, that is because, after briefly discussing those elements, it largely "put[] aside" those elements and "as [it has] often done," turned "to whether there is evidence that, notwithstanding the employer's stated reasons for the termination, the real reason, at least in part, was … discrimination." *See Fontanez-Nunez v. Janssen Ortho, LLC*, 447 F.3d 50, 56 (1st Cir. 2006) (quotation omitted). That is, it focused on the question of pretext. Having done so, it held that the plaintiff's claim failed because his evidence did not "support a reasonable inference that [the employer] acted out of a discriminatory purpose." *Williams*, 220 F.3d at 20.

The Fifth Circuit's approach in *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419 (5th Cir. 2000) is similar. Like the First Circuit in *Williams*, it also did not discuss a "background circumstances" approach to the prima facie test like the one that some circuits have used. *See id.* 425–27. It asked instead whether the plaintiff had carried his burden of producing "sufficient evidence indirectly demonstrating discriminatory intent." *Id.* at 427. The plaintiff in *Williams* had not done so, the Fifth Circuit held, because the only evidence of discrimination he had offered was "his subjective belief." *Id.* The Fifth Circuit's requirement that a plaintiff introduce enough indirect evidence to suggest a discriminatory motive is not meaningfully different from the "background circumstances" requirement that other circuits have adopted. The main difference is the label that those circuits have assigned to that element of the prima facie test.

C. District court uncertainty is not a reason to grant Ames's petition for a writ of certiorari.

Having failed to make a compelling case that the circuits are divided in a way that meaningfully affects the outcome of Title VII cases, Ames turns to the district courts. But even if she is right that some district courts are confused about how to apply *McDonnell Douglas*'s test to "reverse" discrimination claims, the remedy for that confusion is further review in the *circuit* courts. Those courts, not this one, are best suited to resolve any district court uncertainty or disagreement. *See* Stephen Shapiro, et al., *Supreme Court Practice*, 505 (10th ed. 2013) (federal district court conflicts "can be eliminated by the courts of appeals"); *see also* S. Ct. Prac. R. 10 (focusing on United States courts of appeals decisions when considering whether certiorari is warranted).

* * *

At bottom, the circuits' slight variations in approaching "reverse" discrimination claims involves an almost-never-dispositive difference that largely boils down to differing verbal formulations. And those differences cropped up decades ago. If this is a split at all, it is stale and largely irrelevant.

III. The Sixth Circuit faithfully applied this Court's precedent when it held that Ames had not made out a prima facie case of discrimination.

Regardless of whether a circuit split exists, the Sixth Circuit faithfully applies this Court's precedent when reviewing Title VII claims. It has recognized that "Title VII, of course, prohibits racial discrimina-

tion against all groups." *Thistledown Racing*, 770 F.2d at 67 (citing *McDonald*, 427 U.S. at 276, 279 (1976)). The "background circumstances" element that it applies to "reverse" discrimination claims reflects this Court's own focus on whether a plaintiff's allegations "'if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" *Burdine*, 450 U.S. at 254 (quoting *Furnco*, 438 U.S. at 577). And just like this Court has held that *McDonnell Douglas*'s prima facie standard "was 'never intended to be rigid, mechanized, or ritualistic,'" *Aikens*, 460 U.S. at 715, the Sixth Circuit has recognized that its "background circumstances" requirement is "not onerous" and may be satisfied "through a variety of means," *Johnson*, 502 F. App'x at 536.

To the extent that the panel's decision in this case can be read as inflexibly applying a "background circumstances" requirement, that is likely because of the way Ames chose to litigate her appeal. She did not challenge the "background circumstances" requirement in any way and, by arguing that she had demonstrated background circumstances, implicitly accepted it. *See*, Ames Br., App.R.21 at 17–20. In doing so, she offered two reasons why background circumstances existed: the identity of the decisionmaker (an argument that the panel held she had forfeited, *see* Pet.App.6a) and her own experiences. *See id.* The fact that the panel focused solely on those elements shows only that it engaged with Ames's arguments and wanted to succinctly dispose of her claims. That the panel did not more thoroughly discuss an issue that neither of the parties had raised is, at most, a drafting issue that does not cre-

ate a circuit split—let alone warrant this Court's review.

This case shows why all plaintiffs, including those who bring "reverse" discrimination claims, must make some threshold showing that suggests discrimination. And it shows why, even if the circuit split that Ames purports to identify exists, there is no meaningful split about the *outcome* of this case. The acid test for cert-worthiness is whether a case would come out different in different circuits. This case would not.

Ames's evidence in this case was this: She was a woman who did not receive a job for which she qualified and to which she had applied. Walburn, one of the individuals who was responsible for hiring for that job, was also a woman. And the person who was ultimately hired for the job was *also* a woman—and was qualified for the position. The woman who was hired was gay, however, and Ames was not.

Ames did not identify any evidence that suggested sexual orientation played any role in the hiring decision, however. She did not point to any evidence indicating that the relevant decisionmakers were gay. Nor did she point to any evidence suggesting that the decisionmakers knew the sexual orientation of either Ames or of the woman that they ultimately hired. She instead conceded in the district court that the Department's statement of the facts was correct. *See* Opposition to Motion for Summary Judgment, R.72, PageID#2488 n.1. Without such evidence, there is nothing that "raises an inference of discrimination … if otherwise unexplained." *See Burdine*, 450 U.S. at 254 (quotation omitted). Thus, under any formulation of *McDonnell Douglas*'s prima facie

test, Ames's claim would fail. If the Court were to hold otherwise, and if it were to hold that Ames established a prima facie case of discrimination in this case anyway, then *McDonnell Douglas*'s prima facie screening test will have lost almost all of its meaning.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
michael.hendershot@ohioago.gov

Counsel for Respondent
Ohio Department of Youth Services

MAY 2024