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 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

This case presents a unique opportunity to review a longstanding, consequential circuit split over whether Title VII plaintiffs from majority groups bear a special burden to plead and prove "background circumstances." That additional hurdle, and it "alone," was why the Sixth Circuit "den[ied] a jury trial" to Marlean Ames, "[f]or otherwise Ames's prima-facie case was easy to make," App. 5a, App. 10a (Kethledge, J., concurring).

The weakness of Respondent's position is reflected in the first argument presented in its brief. It asks the Court to deny review because Ames did not challenge the legality of the background circumstances rule before the Sixth Circuit. BIO at 9. But in the next paragraph, Respondent acknowledges no such challenge is necessary: "[T]here is no requirement that a 'party demand overruling of a squarely applicable, recent circuit precedent'" in proceedings below. *Id.* (quoting *United States v. Williams*, 504 U.S. 36, 44 (1992)). That is because this Court may "review . . . an issue not pressed so long as it has been passed upon." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Ames has met that bar. The Sixth Circuit directly passed on the issue by applying "squarely applicable, recent circuit precedent" to bar her sexual orientation discrimination claim. *Williams*, 504 U.S. at 44, *see* App. 5a–6a. And Judge Kethledge underscored that the panel was "bound to apply this rule," even though "our court and others have lost their bearings in adopting this rule." App. 9a, 11a. Under this Court's longstanding precedents, Ames was not required to present a futile argument that the panel disregard circuit precedent.

Respondent's remaining arguments fare no better. Respondent doesn't contest that the background circumstances rule is inconsistent with Supreme Court precedent, administratively unworkable, and unmoored from the statutory text. Instead, Respondent convolutes the Question Presented, downplays the split's significance by citing an unpublished decision describing background circumstances as "not onerous," and asserts that background circumstances are a mere extension of *McDonnell Douglas*. None of these arguments hold water. In the end, what is left is an "entrenched circuit split" over a "momentous" federal law that protects millions of Americans from discrimination. *Newman v. Howard Univ. Sch. of L.*, 2024 WL 450245, at *10 n.5 (D.D.C. Feb. 6, 2024); *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 660 (2020). Ames was on the wrong side of that split, which prevented her claim from being heard at trial. App. 10a (Kethledge, J., concurring). Such circumstances fall in the heartland of questions ripe for this Court's review.

I. THIS CASE IS AN EXCELLENT VEHICLE.

To argue against certiorari, Respondent twists the Question Presented into saying something it does not. It begins by separating Ames's two adverse employment decisions into a "promotion claim" (where she was passed over in favor of Yolanda Frierson, a gay woman) and a "demotion claim" (where she was demoted and replaced by Alexander Stojsavljevic, a gay man). BIO at 5. It acknowledges, as it must, that Ames alleged sexual orientation discrimination as to Frierson, and sex and sexual orientation discrimination as to Stojsavljevic. *Id.* But it then says Ames "has not challenged the portion of

the Sixth Circuit's decision that held that the Department had nondiscriminatory reasons for demoting her." *Id.* at 16–17. Consequently, it claims, "[t]he Question Presented therefore involves only Ames's claim that the Department discriminated against her when it promoted Frierson instead of her." *Id.* at 17.

That isn't right. Ames does not seek review of her distinct sex discrimination claim. But Ames does seek review of the Sixth Circuit's holding that she was required, and failed, to prove "background circumstances" in connection with her claim of sexual orientation discrimination. That claim is, as Respondent agrees, based on non-promotion and demotion, since Ames pointed to both adverse employment decisions before the district court, the Sixth Circuit, and now this Court. *See, e.g.*, App. 5a–6a, App 30a–34a; App. 44a–45a. The Question Presented, for its part, does not distinguish between a promotion and demotion decision, much less request the Court to review one without the other. It simply asks "[w]hether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" And since "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and "the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a), Respondent's contentions are meritless.[1]

[1] Nor, for that matter, does Respondent's own Question Presented mention promotion or demotion.

Most charitably, Respondent appears to suggest that, because Ames made it to (but failed to satisfy) the final step of *McDonnell Douglas* on her sex discrimination claim, "the same nondiscriminatory reasons were sufficient to resolve Ames's sex *and* sexual orientation theories." BIO at 16.

Not so. There is no logical connection between the conclusion that a plaintiff failed to show that sex was a motivating factor in taking adverse action against her and the question of whether she can show sexual orientation was a motivating factor. To the contrary, plaintiffs regularly bring several different claims based on different forms of discrimination. Courts in these situations weigh the evidence on each type of alleged discrimination and adjudicate each claim individually.

In *Murray v. Gilmore*, 406 F.3d 708 (D.C. Cir. 2005), for instance, Lucy Murray, a Black woman, alleged race and sex discrimination. Her employer pointed to a reduction-in-force plan as his "legitimate, nondiscriminatory reason for firing Murray." *Id.* at 709–10, 713. He, like Respondent, gave this same reason to head off all discrimination claims. But the D.C. Circuit rejected his effort to copy and paste the pretext analysis from one claim onto another. Instead, "Murray's two claims—race discrimination and sex discrimination—fare differently." *Id.* at 715. The court dismissed the race discrimination claim because she "was replaced by a member of the same protected class," i.e., another Black employee. *Id.* But it "reach[ed] a different conclusion" on "sex discrimination" because Murray was replaced by a man in her position and her employer had, for another similar department position, also hired a man. *Id.* (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148–49 (2000)); *see also Mitchell v. Nat'l R.R. Passenger*

Corp., 407 F. Supp. 2d 213, 236–38 (D.D.C. 2005) (dismissing age discrimination but declining to dismiss race and sex discrimination); *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 512–18 (6th Cir. 2021) (conducting different pretext analysis for wage discrimination and retaliation claims).

These principles are particularly salient here because, as Judge Kethledge noted, "Ames's evidence of pretext is notably stronger for" sexual orientation discrimination than for sex discrimination. App. 10a. That is because her sex discrimination claim involved one adverse decision: demoting her for a man. Her sexual orientation discrimination claim involved two: demoting her in favor of a gay person and denying her a promotion in favor of a different gay person. An example helps make the point. Suppose Ames continued to seek promotion within the Department. She is turned down for the next six job openings. Three go to men, three to women. All go to gay persons. Under this scenario, Ames would likely have little evidence of pretext for a sex discrimination claim. But she would have a strong case of pretext as to sexual orientation discrimination.

Respondent also asserts that the Court should decline review because Ames cannot prove "that [her] employer knew about the plaintiff's particular personal characteristic." BIO at 12 (quoting *Geraci v. Moody-Tottrup, Int'l.*, 82 F.3d 578, 581 (3d Cir. 1996)). That argument is inapposite. That Ames's claim may founder on some factual basis rather than background circumstances is not a barrier to the Court's review of the legal rule the Sixth Circuit applied and the split it implicates. The Court regularly reviews legal questions without opining on whether the plaintiff might or might

not ultimately win her case. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 473 (2023).

Regardless, Respondent's argument is a weak one which it never made below. For good reason: Viewing the facts in the light most favorable to Ames, with reasonable inferences drawn in her favor, there is evidence suggesting her employers *did* know Stojsavljevic and Frierson's sexual orientation. *See Tolan v. Cotton*, 572 U.S. 650, 651 (2014).

Ryan Gies and Julie Walburn were the decisionmakers behind Ames's employment decisions. App. 6a. Gies knew about Stojsavljevic's sexual orientation because, per the district court, "Gies had been told by others at the Department that Stojsavljevic was gay some years prior." App. 24a–25a. Nor did Stojsavljevic hide his orientation. Ames knew it, as did other colleagues and superiors, and Stojsavljevic himself wrote about it in an essay reported by the Cleveland newspaper. *Id.*; Susan Ketchum, *Last Minute Essay a Life-Changer for Normandy High Student*, Cleveland.com, https://perma.cc/S8B5-EEA3 (Apr. 15, 2011). Likewise, Frierson said she "would not call [her sexual orientation] a secret," Frierson Dep. at 11, and the district court noted that "Frierson identifies as female and gay," App. 21a. This is not, in short, a case where the key actors concealed their sexual orientation. Even if there were doubt by one (of two) decisionmakers, the totality of the evidence suggests at minimum a fact question improper for resolution at summary judgment.

Respondent makes a final vehicle-related argument, disputing Judge Kethledge's characterization of Frierson as "lack[ing] the minimum qualifications for the job," by describing that characterization as "confused about the

facts." BIO at 14–15. This factual argument again has nothing to do with the threshold legal question of whether majority-group plaintiffs must show background circumstances. It is also a weak one, because it is undisputed that Frierson did not apply for the position, App. 20a; that Frierson did not have a college degree while Ames did, BIO at 15; and that Frierson had less experience than Ames at the Department, having joined two years after her, App. 21a.

And Ames, moreover, need not even show Frierson lacked all minimum qualifications. All she need establish is that she "applied and was qualified for a job for which the employer was seeking applicants," that "despite [her] qualifications, [she] was rejected," and that, "after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Ames has done that. And as the Sixth Circuit emphasized, she would have been able to move forward with her claim had she *not* been a majority-group plaintiff. App. 5a; App. 10a (Kethledge, J., concurring). Contrary to Respondent's assertions, such circumstances make this case an excellent vehicle for review.

II. THE COURTS OF APPEALS ARE DEEPLY SPLIT.

Respondent does not contest that the circuits are split on the background circumstances rule. In fact, it embraces Ames's organization, acknowledging that five circuits require background circumstances, two reject it, and the remaining circuits do not apply it or decline to

take a side. At most, Respondent tries to (a) downplay the significance of background circumstances, (b) quibble with whether the Third and Eleventh Circuits have truly rejected the rule, and (c) describe the requirement as a minor variation on *McDonnell Douglas*. Each argument misses the mark.

Start with Respondent's claim "that the background circumstances 'requirement is not onerous.'" BIO at 23 (quoting *Johnson v. Metro. Gov. of Nashville & Davidson Cnty., Tenn.*, 502 F. App'x 523, 536 (6th Cir. 2012)). Or put another way, "the 'background circumstances' requirement' is not a *higher* burden, merely a *different* one." *Id.* at 10. That is demonstrably untrue. The Sixth Circuit has said so: A majority-group plaintiff "carries a different *and more difficult* prima facie burden" because of "background circumstances." *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006) (emphasis added). So have the Seventh and Tenth Circuits. *Katerinos v. U.S. Dep't of Treasury*, 368 F.3d 733, 736 (7th Cir. 2004) (background circumstances are "major hurdle"); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1141 (10th Cir. 2008) (majority-group plaintiffs carry "higher" burden). Cases from the D.C. and Eighth Circuits likewise affirm that, but-for the rule, several plaintiffs could have moved forward with their Title VII claims. Pet. at 16, 18.

Against this authority, Respondent insists the Sixth Circuit's more "recent decisions" have "clarified" the "concerns" raised by *Briggs*. BIO at 23. They haven't. The only recent case Respondent points to is *Johnson*, an unpublished decision that plainly cannot "clarif[y]" *Briggs*, which is binding circuit precedent. To make that point clear, the district court here surveyed several of those precedents and concluded that "[t]hese cases

demonstrate that extensive, rigorous evidence is required to establish a pattern for the purposes of 'background circumstances.'" App. 32a.

Next, Respondent argues mightily that the Third and Eleventh Circuits have not actually split from courts that embrace the background circumstances rule. They have. The Third Circuit has said that "rather than require 'background circumstances,'" majority-group plaintiffs—just like all other Title VII plaintiffs—need only present "sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff less favorably than others." *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999) (cleaned up). The Eleventh Circuit is even more explicit: "We, however, have rejected a background circumstances requirement." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

Finally, Respondent nods to a footnote in *McDonnell Douglas*, which states that "[t]he facts necessarily will vary in Title VII cases," and the "proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. From here, Respondent argues that Title VII embraces flexibility, with background circumstances a justified extension of that flexibility. BIO at 19–21.

That overreads *McDonnell Douglas*. The language Respondent quotes reflects the case's particulars, where the plaintiff alleged race discrimination from a failure to hire. As Respondent correctly notes, Title VII of course covers more than just failure-to-hire claims. As such, courts have readily modified the test to embrace employee promotion, retaliation, and discipline. *Id.* at 20. But the prima facie test's first prong, as articulated by

McDonnell Douglas, asks whether the plaintiff "belongs to a racial minority." 411 U.S. at 802. It is here where the circuits are split.

Some, like the Sixth Circuit, require plaintiffs to produce "extensive, rigorous evidence," such as "statistical evidence showing a pattern of discrimination" or "that a member of the relevant minority group . . . made the employment decision." App. 5a, App. 32a. That is a rigid threshold: meet it or, as in Ames's case, face dismissal, despite considerable other prima facie evidence of discrimination. Other courts, like the Eleventh Circuit, simply ask that plaintiffs show they are "a member of a protected class." *Smith*, 644 F.3d at 1325. One burden is less demanding than the other, a point recognized by multiple courts of appeals. *Briggs*, 463 F.3d at 517; *Katerinos*, 368 F.3d at 736.

That said, the approach of the Eleventh Circuit and other courts does not render *McDonnell Douglas*'s first prong a nullity. Title VII bars employers from discriminating "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). If a plaintiff were to allege discrimination based on an unprotected characteristic—for instance, being an Orioles fan—that would not be actionable.

But this Court has never—contra the Sixth Circuit and the other courts that require background circumstances—read *McDonnell Douglas* as an invitation to treat plaintiffs differently based on their race, sex, or other protected characteristic. To the contrary, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" through Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Foisting a more demanding

pleading standard on some plaintiffs *because* of their race or sex transgresses that understanding.

III. THE BACKGROUND CIRCUMSTANCES RULE FLOUTS TEXT AND PRECEDENT.

This Court has "stressed over and over again in recent years" that, in reading Title VII, "interpretation must begin with, and ultimately heed, what [the] statute actually says." *Groff*, 600 U.S. at 468 (cleaned up); *see Bostock*, 590 U.S. at 673–74. It reaffirmed that understanding just this Term in *Muldrow v. City of St. Louis*, where it rejected a rule applied by some circuits requiring plaintiffs to meet some "heightened threshold" even though "the text of Title VII impose[d] no such requirement." 144 S. Ct. 967, 973–74 (2024).

The opposition is silent on these precedents, citing none beyond a stray reference to *Bostock*'s dissent on an unrelated point. That is because the principles from these cases answer the question here. As Judge Kethledge observed, the background circumstances requirement has no textual basis. App. 9a–10a. Worse, because *only* majority-group plaintiffs need check the background circumstances box, the rule "impose[s] different burdens on different plaintiffs *based on their membership in different demographic groups*." App. 9a. That is, as Judge Kethledge notes, not just atextual. It is the very opposite of what the text requires, because Title VII "bars discrimination against 'any individual'" based on a protected characteristic. App. 9a.

If that were not enough, the widespread, entrenched nature of this split makes it particularly untenable. A plaintiff like Ames should not, in bringing her Title VII

case, shoulder a heightened pleading standard in Ohio, App. 5a; face no such heightened standard one state over in Pennsylvania, *Iadimarco*, 190 F.3d at 163; and be subject to the luck of the district-court draw in South Carolina, *Owen v. Boeing Co.*, 2022 WL 5434230, at *7 n.6 (D.S.C. Mar. 3, 2022). This Court should grant review and hold, as it did in *Bostock*, *Groff*, and *Muldrow*, that Title VII means what it says. The statute protects against all discrimination, and majority-group plaintiffs need not prove more to benefit from it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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