No. 23-1039

In the Supreme Court of the United States

MARLEAN A. AMES,
PETITIONER
v.
OHIO DEPARTMENT OF YOUTH SERVICES,
RESPONDENT

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, in addition to pleading and proving 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." P.A. 5a.

RELATED PROCEEDINGS

United States District Court (S.D. Ohio)

Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2022 WL 912256 (Mar. 29, 2022).

Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2023 WL 2539214 (Mar. 16, 2023). Judgment entered Mar. 16, 2023.

United States Court of Appeals (6th Cir.)

Ames v. Ohio Department of Youth Services, No. 23-3341, 87 F.4th 822 (6th Cir. 2023). Judgment entered Dec. 4, 2023.

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INTRODUCTION

Title VII provides a "broad rule of workplace equality." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). It does so in clear and plain terms, making it "unlawful" for any "employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. That mandate, as this Court has explained, serves the "central statutory purpose[] of eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Yet in several circuits for several decades, courts have made it harder to eradicate discrimination by imposing a "background circumstances" requirement on majority-group plaintiffs, and only those plaintiffs. P.A. 5a. Under that requirement, a plaintiff who is a member of the majority group must, in addition to Title VII's other elements, show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* That additional, heightened burden proved dispositive for Marlean Ames. As the Sixth Circuit acknowledged, without a "background circumstances" requirement, "Ames's prima-facie case was easy to make." *Id.* And because "Ames's evidence of pretext is notably stronger for [her sexual orientation discrimination] claim than for her" other claims, Judge Kethledge stressed that Ames was "den[ied] . . . a jury trial" "[b]ased [on] our application of the 'background circumstances' rule alone." P.A. 10a (Kethledge, J., concurring).

Ames is a heterosexual woman. P.A. 5a. She joined the Ohio Department of Youth Services in 2004, starting

out as an Executive Secretary before earning several promotions and becoming the Program Administrator for the Prison Rape Elimination Act ("PREA") in 2014. P.A. 16a–17a. Ames's 2018 review noted that she "ha[d] met all of her goals and performance expectations," that she was doing "a good job in her role as PREA Administrator," and that it was "a pleasure having Marlean on [the] team." J.A. 235. Her prior reviews had been similar; from 2016 to 2018, Ames met or exceeded expectations across every dimension in every performance review. J.A. 215–37.

In 2019, Ames applied and interviewed for a promotion to Bureau Chief, but did not get the job. P.A. 4a. Instead, the position remained vacant for eight months, before the Department offered it to a gay woman who (1) started after Ames, (2) did not interview or apply for the job, and (3) was "arguably less qualified," thereby requiring the Department to "circumvent its own internal procedures" to hire her. P.A. 20a–21a; J.A. 152; P.A. 10a (Kethledge, J., concurring) (cleaned up).

Shortly after Ames was denied the promotion, the Department also removed her from the Program Administrator role, giving her the choice between a demotion back to Executive Secretary—a position she held a decade ago—or termination. P.A. 4a; P.A. 16a. She chose the former.

In her place, the Department hired a gay man who, much like the gay woman hired for the Bureau Chief position, was "neither qualified" nor had "formally applied" for the role. P.A. 44a. Moreover, this man had told many coworkers that he "wanted Ms. Ames's job," including his first supervisor, his second supervisor, Ames herself, and Ames's supervisor. J.A. 82–83; J.A. 132; J.A. 147; J.A. 174–75. Additionally, in conversations with

Ames, he "claim[ed] that he could manipulate people to get what he wanted on the basis of being a gay man." P.A. 23a.

Such facts, the Sixth Circuit observed, would satisfy the usual prerequisites for establishing a prima facie case of discrimination: Ames's "claim is based on sexual orientation, which is a protected ground under Title VII; she was demoted from her position as PREA Administrator and had held that position for five years, with reasonably good reviews; and she was replaced by a gay man. Moreover, for the Bureau Chief position that Ames was denied, the Department chose a gay woman." P.A. 5a. (citing *Bostock v. Clayton County*, 590 U.S. 644, 649–53 (2020)). But because "Ames is heterosexual," she "must make a showing in addition to the usual ones for establishing a prima-facie case"—i.e., she must prove "background circumstances." *Id.* Majority-group plaintiffs "make that showing," the court continued, "with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group." P.A. at 5a–6a. Because Ames had done neither, her claim could not get past the first part of the first step of the *McDonnell Douglas v. Green* framework.

Put differently, if Ames were gay and the employees hired in preference of her were not, she would have established the elements necessary for her prima-facie case. P.A. 5a. But because Ames falls on the majority-group side of the majority/minority fault line, she has no legal recourse.

That jarring result cannot be consistent with Title VII. It contravenes the text because the "statute's focus on the individual is unambiguous." *Connecticut v. Teal*, 457 U.S.

440, 455 (1982). The Sixth Circuit's reading, in contrast, explicitly "treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids." P.A. 10a (Kethledge, J., concurring).

The result also conflicts with this Court's instruction that, under Title VII, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Thus, when deciding such cases, courts must apply "the same standards" to all plaintiffs alike. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). The federal government, for its part, has explicitly disclaimed the "background circumstances" requirement for decades. *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2006-1, *Section 15 Race and Color Discrimination*, at 15-II & n.23 (2006) ("Some courts . . . take the position that" a majority-group plaintiff "must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof."); *accord* EEOC-NVTA-0000-17, *Facts About Race/Color Discrimination* (1997) (same).

In short, in enacting Title VII, Congress sought the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431. The "background circumstances" requirement, as the Sixth Circuit all but acknowledges, is one of those barriers. This Court should remove it.

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 87 F.4th 822 (6th Cir. 2023) and is reproduced in the petition appendix at P.A. 2a–11a. The district court's order on Respondent's motion for summary judgment is unpublished and is reproduced at P.A. 13a–40a. The district court's order on Respondent's motion for judgment on the pleadings is unpublished and is reproduced at P.A. 42a–57a.

JURISDICTION

The Sixth Circuit issued its judgment on December 4, 2023. On February 22, 2024, the Court granted an extension of time to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on March 18, 2024, and granted on October 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Legal framework.

1. A Title VII plaintiff "may prove his case by direct or circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *id.* at 716, this Court articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a "tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination," *Comcast Corp. v. Nat'l Ass'n of Afr. Am. Owned Media*, 589 U.S. 327, 340 (2020).

For that framework, a plaintiff must "carry the initial burden under the statute of establishing a prima facie case" of discrimination. *McDonnell Douglas*, 411 U.S. at 802. "The burden of making this showing is 'not onerous.'" *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228 (2015) (quoting *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981)). In *McDonnell Douglas* itself, for instance, the plaintiff established a prima facie case "by showing (i) that he belong[ed] 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." 411 U.S. at 802.

Once the prima facie case is established, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, the burden returns to the plaintiff to show

that the employer's "stated reason" for its employment action "was in fact pretext." *Id.* at 804.

2. The "background circumstances" rule, first applied by the D.C. Circuit in *Parker v. Baltimore & Ohio Railroad*, adds to the traditional *McDonnell Douglas* framework. 652 F.2d 1012 (D.C. Cir. 1981).

In *Parker*, a white man "claim[ed] that his efforts to become a locomotive fireman were defeated by illegal preferences given to black and female applicants." *Id.* at 1014. In evaluating Parker's claim, the D.C. Circuit opined that "[m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can" there be an "infer[ence] [of] discriminatory motive from the unexplained hiring of an outsider rather than a group member." *Id.* at 1017. Thus, although "[w]hites are also a protected group under Title VII," the D.C. Circuit believed that "it defie[d] common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." *Id.* Consequently, "to prove a prima facie case of intentionally disparate treatment," the D.C. Circuit held that a majority-group plaintiff must point to "background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.*

3. Four other courts of appeals, including the Sixth Circuit, have since adopted a "background circumstances" requirement, generally citing either *Parker* or a subsequent case applying *Parker*. *See, e.g.*, *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455–57 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d

722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588–89 (10th Cir. 1992).

B. Factual background.[1]

1. The Ohio Department of Youth Services ("the Department") is "a state agency that oversees juvenile corrections, parole, and the rehabilitation of youth through community programs." P.A. 14a. Marlean Ames was hired as an Executive Secretary for the Department in 2004. P.A. 16a. She was promoted in 2009 to Community Facility Liaison. *Id.* In that role, Ames was supervised for several years by then-Deputy Director Ryan Gies, who "signed off on strong reviews of her performance each year between 2011 [and] 2013." P.A. 22a. These reviews described Ames as "an invaluable asset" and underscored her "contribution to the positive culture in the Division." J.A. 207; J.A. 213.

In 2014, the Department promoted Ames again, this time to PREA Administrator. P.A. 3a. In that role, Ames reported to Wendi Faulkner. J.A. 97. On Ames's 2016 year-end review, Faulkner rated Ames overall as exceeding expectations. J.A. 215–18. Faulkner observed that Ames had done "a stellar job of representing not only the division, but the agency," that Ames had "become a federally-certified PREA Auditor to further her knowledge," and that Ames was "truly . . . a value-added member of the team." J.A. 216–18.

In 2017, Ames began reporting to Ginine Trim, a gay woman. P.A. 3a. In her 2017 year-end review, Faulkner

[1] Because this matter arises in a summary judgment posture, the facts are viewed in the light most favorable to Ames, with reasonable inferences drawn in her favor. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

and Trim again rated Ames as meeting or exceeding expectations in all competencies. J.A. 220–26. It noted that she "does well working with groups," was a "team player," and "work[ed] well with others." J.A. 223; J.A. 226. "Overall," the review concluded that "Marlean is doing a good job in her role," expressed "thank[s]" for her "hard work and commitment," and stated that it was "a pleasure having [Ames] on [the] team." J.A. 226.

Her 2018 review was substantially similar. Trim rated Ames as meeting or exceeding expectations in all competencies and commended her for being "[v]ery competent in her role as PREA administrator." J.A. 229–35. The evaluation added that Ames is "always willing to assist others" and "does well coordinating and working with her peers." J.A. 230; J.A. 232. The review observed that Ames could "assume a more active role in managing" PREA grant funds, but nevertheless rated Ames as meeting expectations on this metric. J.A. 234. Ultimately, Trim noted that she looked forward to watching Ames continue to grow in her role, stated that it was a "pleasure having [Ames] on [her] team," and thanked Ames for her "dedication to ensuring sexual safety" across the Department's various facilities. J.A. 235. Ames's 2017 and 2018 reviews were both approved by Julie Walburn, then-Assistant Director of the Department. J.A. 227; J.A. 236.

2. In April 2019, Ames applied to be the Department's Bureau Chief of Quality Assurance and Improvement, after Trim posted news of the opening and invited Department employees to apply. P.A. 19a. The position would oversee PREA administration, as well as other responsibilities. J.A. 111–16; J.A. 160–61. Two other women, both heterosexual, also applied for the position. J.A. 109–10.

All three women interviewed with Trim and Walburn in April 2019. P.A. 19a; J.A. 117. Before the interview, Ames submitted her resume, J.A. 114, and undertook "research . . . look[ing] at numbers that [the] bureau compiled over a period of time," including "areas where facilities had reported some deficiencies that they would like to see changed," J.A. 113–14. From there, Ames prepared a summary of her findings and "printed off an article" about the "juvenile justice system" reflecting her vision to address challenges facing the facilities in a "more holistic fashion." J.A. 114. She presented these materials to Trim and Walburn at the interview. J.A. 115.

Although Ames was "qualified [for the promotion] and fulfill[ed] the application requirements," and although Ames believed that she received "positive feedback" during the interview, she was not offered the Bureau Chief position. P.A. 19a–20a; P.A. 44a. Neither were the other two women who applied and interviewed. J.A. 186. According to Walburn and Trim, Ames was not selected because she "failed to lay out her 'vision for . . . how to get the job done.'" P.A. 20a. Trim gave "the same reason[]"—a lack of vision—for why the other two applicants had not been offered the role. J.A. 186. Walburn and Trim did not keep notes from any of these interviews, nor did Walburn document in writing any of the reasons for denying the promotion to Ames or to the other applicants. J.A. 60–61; J.A. 181.

The position went unfilled for several months. In December 2019, Trim "offered the Bureau Chief position" to Yolonda Frierson, a gay woman. P.A. 20a. Frierson "did not apply for" nor "interview for" the role. J.A. 152. Instead, according to Frierson, "Trim came to" her when "[t]here was no one else around" and said: "I would like

for you to serve in this position, I would like you to serve in this role." J.A. 151. Frierson accepted the promotion.

Frierson had started at the Department two years after Ames. J.A. 140. At the time she was offered the Bureau Chief role, she had, unlike Ames, obtained neither a college degree nor a PREA certificate. J.A. 152; J.A. 160–61. Because Frierson "lacked the minimum qualifications for the job" and did not apply or interview for the position, Ames testified that "the Department circumvented its own internal procedures" to offer her the Bureau Chief role. P.A. 10a (Kethledge, J., concurring). In particular, a few days after Frierson's conversation with Trim, Department HR informed Frierson "that it would be best to start the [Bureau Chief] position in a temporary position" at the end of 2019. J.A. 158. According to Ames, Trim "placed [Frierson] in a temporary working level so that she got the experience" necessary to "justify awarding the position to her" on a permanent basis. J.A. 123. In January 2020, after a few weeks in this temporary role, Frierson assumed the position on a permanent basis. J.A. 150.

3. Ames was not only passed over for Bureau Chief. On May 10, 2019, Walburn and a member of the Department's HR team called Ames into a meeting to tell her that she was also being removed as PREA Administrator. P.A. 4a. When Ames "asked [Walburn] why she was doing this," Walburn "raise[d] her voice and sa[id], I'm not going to hash this out with you. You can sign the paper [accepting a demotion] and have a job, or don't sign the paper and don't [have] a job. Either way, I don't care. We're moving PREA in a new direction." J.A. 98–99. Ames was given the choice of being demoted to Executive Secretary, a role she was first hired for in 2004, or being terminated. P.A. 3a; P.A. 44a.

While weighing the choice between demotion and termination, Ames ran into Trim, and Trim told her that "if [Ames] should be mad at anyone, be mad at her." J.A. 124. Ames ultimately accepted the demotion and, as a result, her pay was cut nearly in half, from $47.22 to $28.40 per hour. P.A. 4a.

Gies, Walburn, and Trim each offered different reasons for Ames's demotion. Gies testified that he had heard from community partners that "Ames was difficult to work with" and "not collaborative." P.A. 22a. But Gies also testified that he did "not memorialize in writing" any of these concerns, J.A. 23; could not point to "any specific e-mails" or documents supporting these concerns, J.A. 20; and could not recall any examples of conflict beyond unverified complaints over Ames requesting "information on [facilities] staffing and not explaining why," J.A. 21. He further acknowledged that Ames's annual reviews did not reflect any of these issues. J.A. 32–33.

For Walburn, "[t]he lack of vision identified by Walburn during Ames's interview for Bureau Chief" necessitated "her removal from her position as PREA Administrator as well." P.A. 21a. Based on that interview, Walburn claims to have developed concerns over whether Ames "was being proactive enough" and whether Ames could "prevent[] victimization from occurring." J.A. 51; P.A. 22a. But like Gies, Walburn could not recall specific instances of communicating these concerns with Ames, never memorialized any of her alleged concerns in writing, and never placed Ames on a disciplinary or performance improvement plan. J.A. 53.

Finally, Trim pointed to "the slow rollout of grants," P.A. 22a, but acknowledged that she ultimately rated Ames as having "met expectations" on this metric in each of her annual reviews, J.A. 170; J.A. 225; J.A. 234. Trim

also admitted that "the grant money had already lapsed" by the time of Ames's demotion, so that there were no further grants to manage. J.A. 202. Ames, for her part, stated that she had "never been told any reason why [she] didn't get [the Bureau Chief] position" and had "never been told any reason why [she] was demoted." J.A. 120.

4. Two days after Ames's demotion, the Department selected Alexander Stojsavljevic, a gay man, to take her place as PREA Administrator. P.A. 4a.

Stojsavljevic joined the Department in May 2017 as a social worker in a local branch office. P.A. 43a. In October 2017, he applied for, interviewed, and was promoted to PREA Compliance Manager, and began working at Department headquarters. J.A. 78–81.

Soon after becoming Compliance Manager, Stojsavljevic expressed to Ames an "impatient attitude towards climbing the ranks within the Department" and "claim[ed] that he could manipulate people to get what he wanted on the basis of being a gay man." P.A. 23a. He also "acknowledge[d]" that he had "been angling for Ames's position for some time, stating in front of their coworkers that he wanted the PREA Administrator position." *Id.* Among those coworkers were Stojsavljevic's first and second supervisors, J.A. 82–83; Frierson, J.A. 147; Trim, J.A. 92, J.A. 174–75; Ames herself, J.A. 147; and other supervisors and members of the Department, J.A. 90–91; J.A. 125. Although Stojsavljevic initially characterized these statements "as an inside joke," P.A. 23a, he ultimately acknowledged during his deposition that he did, in fact, "want[] to be the PREA administrator" and that he also "knew [Ames] wanted to stay in that position." J.A. 82; 84. Ames, for her part, testified that she "complained to" Trim that Stojsavljevic needed "to stop walking around telling

everybody he wants my job." J.A. 130. She also alleged that Stojsavljevic "told Trim—in front of [Ames]—that [Ames] should retire." P.A. 43a.

Just before his promotion to PREA Administrator, Stojsavljevic received a preliminary probationary review, evaluating his performance as PREA Compliance Manager from late 2018 to May 2019. J.A. 238. On his overall performance, Stojsavljevic was graded as meeting expectations—the same rating Ames received as PREA Administrator. J.A. 241. His review noted that Stojsavljevic was "professional, knowledgeable, timely, [and] organized," but also that he "had some tough audits" during his first "six months" on the job. J.A. 241–42.

5. Much like Frierson with the Bureau Chief role, the Department appointed Stojsavljevic PREA Administrator "[d]espite" him never "having formally applied" or interviewed for the role. P.A. 44a; J.A. 88–90. Nor did the Department publicly post an opening, seek other applications, or consider other candidates for the PREA Administrator position. J.A. 45–46; J.A. 89; J.A. 94. Instead, Stojsavljevic was offered the job during a private, one-on-one meeting with Walburn. J.A. 89. Stojsavljevic accepted the position. J.A. 90.

Following his conversation with Walburn, Department HR "reach[ed] out to" Stojsavljevic and asked him to "fill out an application" even though he had already "verbally agreed to the job." J.A. 93. Walburn and Department HR also "instructed" Stojsavljevic "to be quiet" and "to not say anything until all the paperwork had gone through and everything [was] approved." J.A. 94. Even so, the Department at this time publicly posted an opening for the role that Stojsavljevic was leaving (his Compliance Manager position), thus prompting several coworkers to suspect that Stojsavljevic "was going to

become the PREA administrator" and to congratulate him on his promotion. *Id.*

Ames remains at the Department today. She has, following her 2019 demotion, since been promoted to Human Services Program Administrator. P.A. 18a.

C. Proceedings below.

1. On August 21, 2019, Ames filed a charge of discrimination against the Department with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission. P.A. 25a.

The EEOC conducted an investigation and determined that Ames (1) "applied and was qualified for the vacant position" of Bureau Chief, (2) "and was rejected in favor of a less qualified person outside her protected groups." J.A. 2. The investigation also found that Ames "felt compelled to fall back to her previous position with a significant loss of income" even though "others outside her protected groups were either not demoted or did not receive such a significant decrease in their compensation." J.A. 3. Accordingly, the EEOC found there was "reasonable cause to believe that [Ames] was discriminated against" on account of her age, sex, and sexual orientation. *Id.* The Commission issued Ames a right to sue letter. P.A. 25a.

2. Ames filed suit in the Southern District of Ohio. *Id.* Her complaint asserted causes of action under Title VII, the Fourteenth Amendment, the Age Discrimination in Employment Act ("ADEA"), and state law. *Id.*

On March 29, 2022, the district court dismissed Ames's Fourteenth Amendment claim, ruling that the Department was not a "person" for purposes of 42 U.S.C. § 1983. P.A. 49a–50a. It also dismissed Ames's ADEA

and state law claims, reasoning that because the State of Ohio had not "waived its immunity," the court lacked subject-matter jurisdiction. P.A. 47a; P.A. 49a.

Finally, Ames's complaint alleged three Title VII violations for (1) hostile work environment, (2) retaliation, and (3) sex and sexual orientation discrimination. P.A. 25a. The district court dismissed the hostile work environment and retaliation claims for failure to state a claim. P.A. 57a; P.A. 53a. The Department did not move to dismiss, and the district court did not address, Ames's claim of sex and sexual orientation discrimination.

3. Following discovery, the Department moved for summary judgment on Ames's remaining claim for sex and sexual orientation discrimination. P.A. 26a.

As to sex discrimination, Ames maintained that the Department discriminated against her because "she was demoted and replaced [as PREA Administrator] by Stojsavljevic," a man. P.A. 34a. On sexual orientation discrimination, Ames pointed to the fact that she was denied a promotion to Bureau Chief in favor of a gay woman and later removed from her position as PREA Administrator in favor of a gay man. P.A. 30a–34a.

In seeking summary judgment, the Department asked the court to apply the traditional "*McDonnell Douglas* burden-shifting framework" to Ames's sex discrimination claim. Dist. Ct. Dkt 71 ("Dep't MSJ") at 17. But because "Ames's claim of [sexual orientation] discrimination" was "based upon her heterosexual orientation," the Department asserted that an additional showing was necessary. *Id.* at 20. That is because "the Sixth Circuit requires a higher burden of proof for plaintiffs[] who are members of majority classifications." *Id.* Specifically, majority-group plaintiffs must "establish background

circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Id.* (cleaned up). These "[b]ackground circumstances" include "statistical evidence," "evidence that the person responsible for the employment decision was a minority," or "evidence of ongoing racial tension in the workplace." *Id.*

4. The district court granted the Department's motion.

On Ames's sex discrimination charge, the district court held that Ames had "carr[ied] her burden of establishing a *prima facie* claim" under *McDonnell Douglas*. P.A. 34a. But the Department had, in the court's view, offered "legitimate, nondiscriminatory business reasons" behind its decision: a "desire to revamp the Department's PREA strategy" and a concern over Ames's "vision, ability, [and] leadership skills." P.A. 35a. This "shift[ed]" the "burden of production" back to Ames "to show that [these] proffered reason[s] [were] pretextual." P.A. 38a. According to the district court, Ames had not cleared that bar. P.A. 38a–40a.

As to sexual orientation discrimination, the district court agreed with the Department that, as "a member of a majority group," Ames "bears an additional 'burden'": She must "show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority' to establish the first prong of the *prima facie* case." P.A. 28a (first quoting *Murray*, 770 F.2d at 67; and then quoting *Parker*, 652 F.2d at 1017). To do so, Ames could come forward with evidence "that a minority employer replaced the plaintiff with another employee of the same minority group" or with a "statistical analysis of the employer's

unlawful consideration of protected characteristics in past employment decisions." P.A. 30a–31a.

Ames was "unable to meet this threshold requirement." P.A. 31a. To be sure, Trim is gay, and she was one of two people who interviewed Ames for the promotion. P.A. 20a–21a. She also told Ames, on Ames's demotion, that "if [Ames] should be mad at anyone," to "be mad at her." J.A. 124. But Trim did not have formal decision-making authority—that rested with Gies and Walburn—making Trim's role irrelevant for the "background circumstances" requirement. P.A. 6a.

Second, though Ames had pointed to several adverse employment actions taken against her, these "data points [were] not enough to establish a pattern" for the "background circumstances" rule. P.A. 32a. "[E]xtensive, rigorous evidence is required to establish a pattern for the purposes of 'background circumstances,'" and Ames's own individual experiences were insufficient. *Id.*; *accord* P.A. 6a.

5. Ames appealed her sex and sexual orientation discrimination claim to the Sixth Circuit. On sex discrimination, the Sixth Circuit affirmed the district court. P.A. 6a–8a. Ames does not seek review of that ruling before this Court.

On sexual orientation discrimination, the Sixth Circuit held that the "principal issue" was whether Ames had "made the necessary showing of 'background circumstances.'" P.A. 5a. That is because, as the panel explained, Ames's case under *McDonnell Douglas* was otherwise "easy to make." *Id.* Ames was a member of a protected class, received "reasonably good reviews" as PREA Administrator, was demoted in favor of a gay man, and was denied a promotion to Bureau Chief in favor of a

gay woman. *Id.* "Where Ames founders, however, is on the requisite showing of 'background circumstances.'" *Id.* Echoing the district court, the Sixth Circuit noted that "[p]laintiffs typically make that showing with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group." P.A. 5a–6a. Ames had checked neither box.

Judge Kethledge concurred. In line with the majority, he agreed that "background circumstances" alone prevented Ames from moving forward with her claim. "[N]obody," Judge Kethledge underscored, "disputes that Ames has established the other elements of her prima-facie case." P.A. 10a. He also emphasized that because "Ames's evidence of pretext is notably stronger for this claim than for her sex-discrimination one," "we deny Ames a jury trial" as to sexual orientation discrimination "based [on] our application of the 'background circumstances' rule alone." *Id.*

Judge Kethledge went on to "express [his] disagreement" with the "background circumstances" requirement. P.A. 9a. Although he acknowledged that circuit precedent "bound" the court, he asserted that the Sixth Circuit and several other courts of appeals had "lost their bearings in adopting this rule." *Id.*; P.A. 11a. Title VII, Judge Kethledge explained, bars discrimination based on an individual's "race, color, religion, sex, or national origin." P.A. 9a (quoting 42 U.S.C. § 2000e-2(a)(1)). "The statute," he emphasized, "expressly extends its protection to 'any individual.'" P.A. 10a. Yet a "background circumstances" requirement explicitly "treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the

statute forbids." *Id.* Judge Kethledge characterized "background circumstances" as not "a gloss upon the 1964 Act, but a deep scratch against its surface." *Id.*

SUMMARY OF ARGUMENT

I. Courts that have adopted the "background circumstances" requirement acknowledge that it imposes "a different and more difficult prima facie burden" on majority-group plaintiffs. *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006); *accord, e.g.*, *Gore v. Indiana Univ.*, 416 F.3d 590, 593 (7th Cir. 2005); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1141 (10th Cir. 2008). That heightened evidentiary burden contravenes Title VII's text, this Court's precedent, and longstanding federal government practice.

I.A. This Court has regularly and routinely rejected attempts to add to or remodel Title VII's text. Last Term, for instance, the Court unanimously rebuffed a heightened harm requirement for job transfer decisions, emphasizing that "[n]othing in the provision . . . establish[ed] an elevated threshold of harm," and chastised the court below for "add[ing] . . . significant words . . . to the statute" and "demand[ing] something more of [plaintiffs] than the law as written." *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024). Similarly, in *EEOC v. Abercrombie & Fitch Stores*, the Court declined to read an "actual knowledge" requirement into Title VII, because doing so would improperly "add words to the law" that are not there. 575 U.S. 768, 774 (2015).

If these cases show that applying heightened, extratextual burdens to *all* plaintiffs is impermissible, a heightened requirement for *just one group* of plaintiffs is

even more suspect. Title VII's text, after all, "tells us . . . that our focus should be on individuals, not groups." *Bostock v. Clayton County*, 590 U.S. 644, 658 (2020). Separating plaintiffs at the outset into groups flouts that clear instruction. Worse, "background circumstances" separates individuals based on their "race, color, religion, sex, or national origin." P.A. 9a (Kethledge, J., concurring). In applying a law whose purpose is to "eradicat[e] discrimination," then, courts that embrace a "background circumstances" requirement must "discriminate[] on the very grounds that the statute forbids." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); P.A. 10a (Kethledge, J., concurring).

I.B. "Background circumstances" also runs afoul of precedent. Shortly after Title VII's enactment, this Court explained that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Nothing in *McDonnell Douglas Corp. v. Green* holds to the contrary. In fact, *McDonnell Douglas* not only cites *Griggs* but recites the very language above. 411 U.S. 792, 800 (1973).

To be sure, the specific plaintiff in *McDonnell Douglas* was "a racial minority," which formed part of his prima facie case. *Id.* at 802. But that does not mean "the entire *McDonnell Douglas* analysis was predicated" on "[m]embership in a socially disfavored group" and that a different and more demanding showing is therefore required of non-minority plaintiffs. *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

In fact, *McDonald v. Santa Fe Trail Transportation* specifically examined this language from *McDonnell Douglas* and explained that, when it said the *McDonnell Douglas* plaintiff "belong[ed] to a racial minority," it did

so "only to demonstrate" the "racial character of the discrimination" at issue. 427 U.S. 273, 279 n.6 (1976). It was not "an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *Id.* In other words, *McDonnell Douglas* referenced the plaintiff's race because the plaintiff had brought a race discrimination claim. But while the facts will change—e.g., the plaintiffs in *McDonald* were white—the legal framework and analysis does not: "We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [a similarly situated comparator] white." *Id.* at 280.

This Court's post-*McDonald* cases are of a piece. Indeed, the Court has never endorsed the understanding that *McDonnell Douglas* was based on "the assumption" of a plaintiff's "[m]embership in a socially disfavored group." *Contra Parker*, 652 F.2d at 1017. Rather, the Court has described *McDonnell Douglas* as simply "a sensible" way "to evaluate the evidence." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Moreover, governing precedent in fact rejects the specific requirements that lower courts have imposed on plaintiffs under the banner of "background circumstances." Here, for example, the panel required Ames to either (1) show "that a member of the relevant minority group (here, gay people) made the employment decision at issue," or (2) produce "statistical evidence showing a pattern of discrimination." P.A. 5a. But "nothing in Title VII necessarily bars a claim of [sex] discrimination . . . merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

And Title VII gives "no defense for the employer to note that, while he treated [an] individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall." *Bostock*, 590 U.S. at 659. That holding makes clear no individual Title VII plaintiff—majority or minority—need marshal "extensive [and] rigorous" statistical evidence to "establish a pattern" of discrimination against a particular group. P.A. 31a–32a.

I.C. The EEOC has disavowed the "heightened standard of proof" required by "background circumstances." U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2006-1, *Section 15 Race and Color Discrimination* (2006). Instead, the Commission "applies the same standard of proof" to all claims, "regardless of the victim's race or the type of evidence used." *Id.* at nn. 22–24.

II.A. "Background circumstances" also asks courts to apply an "irremediably vague and ill-defined," *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999)—if not unconstitutional—requirement, *see* P.A. 11a (Kethledge, J., concurring).

To begin, none of the courts of appeals that embrace "background circumstances" have explained how one should go about determining "majority" or "minority" status. Should a judge look to the population as a whole, to the working-age population, to the make-up of a particular workplace, or to an industry as a whole? Should majority-group status be indexed to a numerical ratio based on local, state, or regional data?

Absent such guidance, all of which itself would be extratextual, the threshold question of whether a "background circumstances" requirement even applies to

a case often turns "upon personal and societal judgments that . . . vary from judge to judge." Christian Joshua Myers, *The Confusion of* McDonnell Douglas: *A Path Forward for Reverse Discrimination Claims*, 44 SEATTLE U. L. REV. 1065, 1121 (2021). Some courts, for instance, invoke "background circumstances" not based on whether a plaintiff is part of a numerical majority, but whether they fall within a group that has been "socially disfavored." *See, e.g.*, *Parker*, 652 F.2d at 1017.

But no judge should "take on the unseemly task of deciding which groups are 'socially favored' and which are 'socially disfavored.'" *Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990). Indeed, the Court has long disclaimed such an approach when it comes to Title VII, because "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than [allow for] thoughtful scrutiny of individuals." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). Put differently, a "judiciary that picks winners and losers based on the color of their skin," *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 229 (2023)—or, as is the case here, that "treat[s]" individuals "less favorably because of their" race, color, sex, religion, or national origin, P.A. 11a (Kethledge, J., concurring)—"is a remarkable view of the judicial role," *SFFA*, 600 U.S. at 230. "[R]emarkably wrong." *Id.*

II.B. The far more workable approach is to embrace the text as written and to take *McDonnell Douglas* as simply a "tool for assessing" Title VII claims. *Comcast Corp. v. Nat'l Ass'n of Afr. Am. Owned Media*, 589 U.S. 327, 340 (2020).

That tool, at the prima facie stage, eliminates the most common nondiscriminatory reasons for an adverse employment action. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). It then brings the employer to the table to "present[] a legitimate reason for the action and to frame the factual issue with sufficient clarity." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981). And it finally gives a plaintiff "a full and fair opportunity to demonstrate pretext" based on the totality of the evidence at hand. *Id.* at 256.

That framework has addressed a variety of claims in a variety of contexts. There is no need for courts to modify that framework by separating plaintiffs into groups and imposing an additional and heightened burden on majority-group (and only majority-group) plaintiffs.

ARGUMENT

I. REQUIRING MAJORITY-GROUP PLAINTIFFS TO SHOW "BACKGROUND CIRCUMSTANCES" CONTRAVENES TEXT, PRECEDENT, AND PRACTICE.

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). That mandate, as this Court has explained, means that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Moreover, Congress "proscribe[d]" such discrimination

"on the same terms" and "the same standards" for all. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279–80 (1976).

The "background circumstances" rule contravenes these fundamental principles. The requirement, as the Department admits and the case law of the Sixth Circuit reflects, imposes not just "a *different*" burden, but "a higher burden of proof for plaintiffs[] who are members of majority classifications." BIO at 10 (emphasis in original); Dep't MSJ at 20; *accord Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006) ("A reverse-discrimination claim carries a different and more difficult prima facie burden" because of "background circumstances."). That is anathema to text, precedent, and federal government practice.

A. Title VII's text bars imposing a heightened burden for some plaintiffs but not others.

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 590 U.S. 644, 673–74 (2020). "[O]nly the words on the page constitute the law adopted by Congress and approved by the President," and courts must not "add to, remodel, update, or detract" from the statutory text. *Id.* at 654–55. Consistent with that understanding, the Court has regularly rejected extrajudicial glosses on Title VII as unnecessary and unwarranted.

1. Just last Term, it repudiated a rule applied by a handful of circuits that "an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar." *Muldrow v. City of St. Louis,* 601 U.S. 346, 353 (2024). "Title VII's text nowhere establishes

that high bar." *Id.* at 350. Instead, the plain language broadly "prohibits discriminating against an individual with respect to the terms or conditions of employment because of that individual's sex" or other protected characteristic. *Id.* at 354 (cleaned up). "What the transferee does not have to show, according to the relevant text, is that the harm incurred was 'significant.'" *Id.* at 355. "To demand 'significance' is to add words—and significant words, as it were—to the statute Congress enacted." *Id.* Adding such words—just like with a "background circumstances" rule—would "impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written." *Id.*

The Term before *Muldrow*, the Court charted a similar course in *Groff v. DeJoy*, 600 U.S. 447 (2023). There, it held that the words "undue hardship" in Title VII should not be read, as "many lower courts" had done, "to mean any effort or cost that is 'more than *de minimis*.'" *Id.* at 454 (ellipsis omitted). As *Groff* notes, "undue hardship" means "something very different," and courts should, accordingly, interpret the statute to say what it means and to mean what it says. *Id.* at 469.

EEOC v. Abercrombie & Fitch Stores is of a piece. 575 U.S. 768 (2015). At issue there was whether a Title VII plaintiff may "show disparate treatment without first showing that an employer has 'actual knowledge' of the applicant's need for an accommodation." *Id.* at 772. The Court answered that question in the affirmative. Section 2000e-2(a)(1), it explained, "does not impose a knowledge requirement," and demanding such a heightened requirement anyway "asks us to add words to the law to produce what is thought to be a desirable result." *Id.* at 773–74.

2. If anything, "background circumstances" conflicts even more with Title VII's text because of *how* it is applied. *Muldrow*, *Groff*, and *Abercrombie* imposed their additional, extratextual requirements across the board. But the "background circumstances" rule goes a step further, by applying a heightened standard to only a subset of plaintiffs—majority-group plaintiffs. That approach is one that, as this Court has explained, Title VII's text contemplates and repudiates.

One could readily imagine a statute that requires courts to "consider the employer's treatment of groups rather than individuals," just as the "background circumstances" rule envisions. *Bostock*, 590 U.S. at 658. But as *Bostock* emphasizes, that is not the law Congress wrote. Instead, Title VII "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups: Employers may not fail or refuse to hire or discharge any *individual*, or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* sex." *Id.* at 658 (cleaned up) (quoting 42 U.S.C. § 2000e-2(a)(1)). The "statute works to protect individuals of both sexes from discrimination, and does so equally." *Id.* at 659; *accord Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.").

What is more, a "background circumstances" rule represents a particularly "deep scratch across" Title VII's surface because it forces courts to draw lines that intentionally and explicitly "treat[]" some plaintiffs "less favorably" *because of* their race, color, religion, sex, or national origin. P.A. 10a–11a (Kethledge, J., concurring).

That sort of line drawing does not eradicate discrimination. It perpetuates it.

3. Tellingly, the panel below did not mention Title VII's text. Neither does *Parker v. Baltimore & Ohio Railroad*, the case which first embraced a "background circumstances" rule. 652 F.2d 1012 (D.C. Cir. 1981). In fact, the decision below makes no attempt at all to justify the rule, other than gesturing to circuit precedent (which, in turn, traces back to *Parker*). *Parker*, for its part, rests its ruling on two bases: judicial "common sense" and a reference to a single sentence fragment from *McDonnell Douglas Corp. v. Green*. *Parker*, 652 F.2d at 1017 (discussing 411 U.S. 792 (1973)).

Regarding judicial "common sense," the Court has made clear, particularly as to Title VII, that "[i]t is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). *Bostock* only sharpens this point, by explaining that "[i]f judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." 590 U.S. at 654–55. Common sense divorced from text is not, in other words, a proper method of statutory interpretation.

B. The case law makes clear that Title VII prohibits discrimination against all individuals "upon the same standards."

On the latter basis, *Parker* hinges its ruling on seven words plucked from *McDonnell Douglas*: that, to establish a prima facie case of discrimination, "[t]he original *McDonnell Douglas* standard required the

plaintiff to show '*that he belongs to a racial minority*.'" 652 F.2d at 1016 (emphasis added) (quoting 411 U.S. at 802). Those words, *Parker* says, mean that "[m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated." *Id.* at 1017. For a majority-group plaintiff, then, "a further adjustment must be made"—i.e., a showing of "background circumstances." *Id.*

1. But that leap in logic finds no support in the case law. Several years before *McDonnell Douglas*, the Court had in fact already stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs*, 401 U.S. at 431. Nothing in *McDonnell Douglas* contradicts this understanding. *McDonnell Douglas* recites this very language from *Griggs* and adds that it is "abundantly clear that Title VII tolerates no racial discrimination." 411 U.S. at 801.

To be sure, the *McDonnell Douglas* plaintiff was a Black man and therefore belonged to a racial minority—a fact that formed part of *his* prima facie case. And the Court acknowledged that "the prima facie proof required from [this] respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

But the Court has since explained that such language was only meant to convey that, although *McDonnell Douglas* arose in the context of a rehiring decision, it could also apply in other adverse employment situations, with the prima facie elements of course adapting to account for such situations. *See, e.g.*, *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255–58 (1981) (adapting

McDonnell Douglas for discriminatory discharge). Neither *McDonnell Douglas* itself nor any other case has taken the plaintiff's membership in a racial minority in *McDonnell Douglas* as justifying a heightened burden for non-minority plaintiffs.

2. *McDonald v. Santa Fe Trail*, in fact, holds directly to the contrary. 427 U.S. 273 (1976). There, the Court examined whether two white plaintiffs, who were fired for misappropriating company cargo, could bring a Title VII claim when a Black employee was not fired despite being part of the same misappropriation scheme. *Id.* at 275–76. A unanimous Court answered that question in the affirmative.[2] Writing for the Court, Justice Marshall explained that Title VII "prohibits racial discrimination against the white petitioners in this case upon the *same standards as would be applicable*" to Black employees. *Id.* at 280 (emphasis added). "[T]o proceed otherwise would 'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII.'" *Id.* at 279–80 (quoting EEOC Decision No. 74-31, 7 FEP 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973)).

Moreover, *McDonald* specifically addressed—and rejected—the majority-group/minority-group distinction that lies at the heart of the "background circumstances" rule. In *McDonald*, the company defendant "conced[ed] that 'across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII.'" *Id.* at 280 n.8. But it "contend[ed] nevertheless that 'such discrimination in isolated cases which cannot

[2] Two Justices dissented separately as to the *McDonald* plaintiffs' 42 U.S.C. § 1981 claim.

reasonably be said to burden whites as a class unduly,' such as is alleged here, 'may be acceptable.'" *Id.* (ellipsis omitted). That contention, of course, parallels the Sixth Circuit's reasoning that, to satisfy the "background circumstances" requirement, a plaintiff must "show[] a pattern of discrimination by the employer against members of the majority group." P.A. 5a–6a. Thus, Ames's own "two data points are not enough to establish a pattern," P.A. 32a, since—in the words of the defendant in *McDonald*—"isolated cases" of majority-group discrimination "may be acceptable," 427 U.S. at 280 n.8.

Yet this Court emphatically rejected that contention: "We cannot agree." *Id.* "There is no exception in the terms of the Act for isolated cases; on the contrary, 'Title VII tolerates No racial discrimination, subtle or otherwise.'" *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 801).

What, then, to make of *McDonnell Douglas*'s observation that the plaintiff there "belong[ed] to a racial minority"? Here too *McDonald* supplies the answer. That language, the Court explained, reflects only "the racial character of the discrimination" at issue, but was not an "indication of any substantive limitation of Title VII's prohibition of racial discrimination." *Id.* at 279 n.6. In other words, *McDonnell Douglas* acknowledged the plaintiff's race because the plaintiff had brought a claim of racial discrimination, just as a court might note a plaintiff's sex or religion for a claim of sex or religion discrimination. *See, e.g.*, *Burdine*, 450 U.S. at 253 n.6 (sex discrimination). That is why, as *McDonald* underscores, "[w]e find this case indistinguishable from *McDonnell Douglas*"—even though the plaintiff in *McDonnell Douglas* was Black and the petitioners in *McDonald*

white. 427 U.S. at 282. Employment criteria "must be 'applied[] alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not." *Id.* at 283 (quoting *McDonnell Douglas*, 411 U.S. at 804).

3. Post-*McDonald* precedent follows the same course. First, the Court has said, referencing *Griggs* and *McDonald*, that it "is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). Put differently, the central inquiry in any Title VII case is whether "the employer [is] 'treating some people less favorably than others because of their race, color, religion, sex, or national origin.'" *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). No more, no less.

Second, unlike the D.C. Circuit and other courts that embrace a "background circumstances" rule, this Court has never described *McDonnell Douglas* as "a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination," nor has it suggested that "[m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated." *Parker*, 652 F.2d at 1017. It has instead held that *McDonnell Douglas* is only "a sensible, orderly way to evaluate the evidence" and "a tool for assessing claims" of discrimination. *Furnco*, 438 U.S. at 577; *Comcast Corp. v. Nat'l Ass'n of Afr. Am. Owned Media*, 589 U.S. 327, 340 (2020). Nothing about *Furnco*, *Comcast*, or the Court's other Title VII cases suggests that the *McDonnell Douglas* framework should look different for a majority-

group plaintiff who experiences the same type of discrimination as a minority-group plaintiff.

Third, Title VII forms one part of a larger set of statutes and doctrines meant to root out invidious discrimination. Within that set, the Court has declined to separate plaintiffs into majority and minority groups and impose heightened standards on one but not the other. There is only one Equal Protection Clause. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). There is only one § 1981. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987). And there is only one *Batson* framework, *Powers v. Ohio*, 499 U.S. 400, 415 (1991), even though *Batson* itself borrowed its burden-shifting framework from *McDonnell Douglas*, *see Batson v. Kentucky*, 476 U.S. 79, 94 n.18 (1986).

Finally, the Court has specifically disclaimed the methods to show "background circumstances" that lower courts have required of majority-group plaintiffs. The Sixth Circuit outlined two such methods: showing "that a member of the relevant minority group" made the decision at issue and "statistical evidence." P.A. 5a–6a. The Department, in moving for summary judgment, gave a third—"evidence of ongoing racial tension in the workplace." Dep't MSJ at 20. But it is well settled that a Title VII plaintiff need not prove any of these things, and particularly not to establish the first step of their prima facie case.

When it comes to the decisionmaker's identity, for instance, it is black letter law that "nothing in Title VII necessarily bars a claim of discrimination 'because of sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Oncale v. Sundowner Offshore Servs.*,

523 U.S. 75, 79 (1998). Indeed, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 78 (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

On "statistical evidence showing a pattern of discrimination," P.A. 5a, here too the Court's instruction is clear: "The statute's focus on the individual is unambiguous." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). Title VII does not give employers a free bite of the discrimination apple until a "pattern of discrimination" emerges. P.A. 5a. Put another way, "[i]t's no defense for the employer to note that, while he treated [an] individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall." *Bostock*, 590 U.S. at 659; *accord Teal*, 457 U.S. at 455. There may be no statistical evidence or a pattern of discrimination in this scenario. It is still illegal.

Requiring evidence of ongoing tension is likewise inappropriate. *Bostock* is again instructive: "[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally." 590 U.S. at 659. There could, in this example, plausibly be no tension against a specific majority or minority group. Nonetheless, "in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." *Id.*

C. The federal government has long disavowed a "background circumstances" requirement.

Though text and precedent are the touchstones for any Title VII analysis, the Court has also looked to the interpretations of the EEOC, the federal agency tasked with enforcing Title VII. *See, e.g.*, *McDonald*, 427 U.S. at 279. Those interpretations have consistently disclaimed a "background circumstances" requirement.

1. The EEOC Compliance Manual states, for instance, on Race and Color Discrimination that "Congress drafted the statute broadly to cover race or color discrimination against anyone." *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2006-1, *Section 15 Race and Color Discrimination* (2006). The Manual acknowledges that "[s]ome courts, however, take the position that if a White person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof." *Id.* Here, the guidance drops a footnote to several courts of appeals cases, including *Mattioda v. White*, 323 F.3d 1288 (10th Cir. 2003), in which the "plaintiff failed to establish [a] prima facie case because he did not present '*background circumstances* that support an inference that the defendant is one of those unusual employers who discriminates against the majority.'" EEOC Manual at n.23 (quoting *Mattioda*, 323 F.3d at 1292) (emphasis added).

The Manual then cites *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999), which it explains "reject[ed] [the] heightened 'background circumstances' standard." EEOC Manual at n.23 (quoting *Iadimarco,* 190 F.3d at 163). And the Commission came down firmly on the *Iadimarco* side of the split: "The Commission, in

contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used." *Id.*

2. The EEOC has extended the same understanding to sexual orientation discrimination.

In *Baldwin v. Foxx*, for instance, the EEOC described discrimination against gay and straight employees as two sides of the same coin. EEOC No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015). It specifically offered two examples to support its assertion that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.*

The first example involved a lesbian employee: "[A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII." *Id.*

But rather than ending the hypothetical there, the EEOC provided a second example: "*The same result holds true if the person discriminated against is straight*. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex." *Id.* (emphasis added).

3. Finally, one year after *Bostock*, the EEOC published several resources addressing the impact of that

decision. Those resources included a landing page where the EEOC stated that harassment can include "offensive or derogatory remarks about sexual orientation (e.g., being gay or straight)." U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, https://perma.cc/7RQC-2WHJ. The Commission also published a technical assistance document which addressed the following question: "Are *non-LGBTQ+* job applicants and employees also protected against sexual orientation and gender identity discrimination?" U.S. Equal Emp. Opportunity Comm'n, NVTA-2021-1, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (2021). The EEOC answered "yes," emphasizing that "employers are not allowed to discriminate against" employees because they "are, for example, straight or cisgender." *Id.*

II. THE "BACKGROUND CIRCUMSTANCES" RULE IS "VAGUE," "ILL-DEFINED," AND UNWORKABLE.

As reflected both here and in other cases, the "background circumstances" rule often stymies credible claims of individual employment discrimination. *See, e.g.*, P.A. 5a; P.A. 10a (Kethledge, J., concurring). Indeed, more than twenty years ago, the Sixth Circuit expressed "serious misgivings about the soundness of a test which imposes a more onerous standard" on majority-group plaintiffs because, in some cases, "application of a heightened" burden "could be the difference between granting and denying summary judgment." *Zambetti v. Cuyahoga Comm. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002).

Moreover, by imposing different standards for different plaintiffs for the same discrimination, the requirement plainly disserves the EEOC's mission to "[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all." U.S. Equal Emp. Opportunity Comm'n, *Overview*, https://perma.cc/22BP-36B7.

A "background circumstances" requirement also disserves the courts that must apply it, because the rule is "irremediably vague," "ill-defined," and potentially unconstitutional. *Iadimarco*, 190 F.3d at 161. To see why, consider the steps required of a court charged with applying "background circumstances."

A. Requiring majority-group plaintiffs to show "background circumstances" places courts in a difficult and legally problematic position.

1. First, the court must determine who falls inside the majority group and who does not. But how does a court make that call? We live, after all, "[i]n a world where it has become increasingly difficult to determine who belongs in the majority," *Smyer v. Kroger*, 2024 WL 1007116, at *7 (6th Cir. Mar. 8, 2024) (Boggs, J., concurring), and for "a variety of factors," many states, localities, and industries "do not reflect the diversity of our Nation as a whole," *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

On this threshold question—who's in the majority and who isn't—there is virtually no guidance. None of the courts of appeals applying "background circumstances" have "squarely addressed the issue [of] whether minority status for purposes of a prima facie case could have a regional or local meaning" or a national one. *Bishopp v.*

District of Columbia, 788 F.2d 781, 786 n.5 (D.C. Cir. 1986).

2. At best, *Parker* suggests majority- and minority-group status should be determined not by numerical considerations, but on whether a group is "socially disfavored." *Parker*, 652 F.2d at 1017. But that only leads to another problem: It "forc[es] the courts to take on the unseemly task of deciding which groups are 'socially favored' and which are 'socially disfavored.'" *Collins v. Sch. Dist. of Kan. City*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990).

Such a task poses, at best, formidable hurdles regarding the theoretical and practical distinctions judges must draw. At worst, it asks courts to classify based on "incoherent" and "irrational stereotypes," *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 216 (2023), with "attempts to divide us all up into a handful of groups . . . becom[ing] only more incoherent with time," *id.* at 293 (Gorsuch, J., concurring). Indeed, as Judge McKee observed, in a case rejecting "background circumstances," the rule "is just too vague and too prone to misinterpretation and confusion to apply fairly and consistently." *Iadimarco*, 190 F.3d at 163 n.10.

3. This line drawing also runs headlong into constitutional difficulties. As Judge Kethledge noted, "[i]f the statute had prescribed this rule expressly, we would subject it to strict scrutiny," at least as to race, national origin, and several other categories. P.A. 11a. Or take Title VII's protection against religious discrimination. Many judges would, quite understandably, be "extremely hesitant to delve into determinations of what religious beliefs are sufficiently 'mainstream' to warrant the imposition of a heightened *prima facie* case

requirement." *Barnes v. Fed. Express Corp.*, 1997 WL 271709, at *6 (N.D. Miss. May 15, 1997). Such inquiries would implicate a different (but equally serious) set of constitutional concerns. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 761 (2020) (declining to "decid[e]" certain questions because doing so "would risk judicial entanglement in religious issues"); *Larson v. Valente*, 456 U.S. 228, 245 (1982) (discussing "constitutional prohibition of denominational preferences").

4. What is more, the "background circumstances" requirement fails to grapple with the realities of the many forms that discrimination takes today and how those forms may overlap and intersect for any particular plaintiff.

This case sharply illustrates that point. Ames alleged both sexual orientation and sex discrimination. She premised the former on her being demoted in favor of a gay man and being denied a promotion in favor of gay woman; she based the latter solely on her demotion. As Judge Kethledge observed, Ames's "evidence of pretext is notably stronger" as to sexual orientation discrimination than sex discrimination: She experienced two adverse decisions instead of one. P.A. 10a. And the EEOC determined, as to Ames being passed over for that promotion, that Ames "was qualified for the vacant position and was rejected in favor of a less qualified person outside her protected groups." J.A. 2. In addition, this "less qualified person" (Frierson) had neither applied nor interviewed for the position.

But when it came to applying circuit law to the facts at hand, the Sixth Circuit handled these claims very differently. On sex discrimination, the Sixth Circuit did

not require "background circumstances," instead applying the traditional *McDonnell Douglas* framework—finding that Ames had established a prima facie case, that the Department had offered a legitimate reason, and concluding, at the last step, that Ames had failed to show pretext. P.A. 6a–8a.

But on sexual orientation discrimination, Ames never even got to the second step of *McDonnell Douglas*, much less had the opportunity to present her "notably stronger" "evidence of pretext" before any court. P.A. 10a (Kethledge, J., concurring). That result—a stronger claim of discrimination being curtailed at an earlier stage of litigation—cannot be what Congress envisioned when it enacted Title VII or what this Court intended when it decided *McDonnell Douglas*.

5. Finally, even if a court were to sort through all of the preceding steps, it would still have to determine what evidence of "background circumstances" it can and should evaluate. Yet as illustrated above, that itself is another minefield. After all, many of this Court's precedents have disclaimed the need to show statistical evidence, the minority status of the decision-maker, or minority-group tension in the workplace as a *sine qua non* before proceeding under Title VII.

The absence of concrete indicia has, not surprisingly, led to unpredictable rulings and results. Some courts, for instance, have ruled that "background circumstances" are met when a majority-group plaintiff becomes a "situational minority" in "their workplace." *Telep v. Potter*, 2005 WL 2454103, at *6 (E.D. Va. Sept. 30, 2005). Others have arrived at the very opposite conclusion. *See Jackson v. Ill. Dep't of Hum. Servs.*, 2009 WL 1259082, at *5 (S.D. Ill. Apr. 30, 2009). And still others resort to an

even more amorphous consideration: whether "there is something 'fishy' about the facts of the case." *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *Phelan v. City of Chicago*, 347 F.3d 679, 684 (7th Cir. 2003). But that criterion is no criterion at all, since "[w]hat may be 'fishy' to one [judge] may not be to another." Christian Joshua Myers, *The Confusion of* McDonnell Douglas*: A Path Forward for Reverse Discrimination Claims*, 44 SEATTLE U. L. REV. 1065, 1121 (2021).

B. Majority-group plaintiffs should be subject to the same standards as all other plaintiffs.

By striking the "background circumstances" rule from the law, the Court would restore across all courts of appeals the understanding "that Title VII prohibits" discrimination against majority-group plaintiffs "upon the same standards as would be applicable" to minority-group plaintiffs. *McDonald*, 427 U.S. at 280. The standard is not higher. It is not different. And it is not one where a lower court must go searching for some "functional equivalent" of the first *McDonnell Douglas* criterion. *Parker*, 652 F.2d at 1018. It is the same.

Such a result, to be clear, does not leave courts blind to the realities on the ground. What might be a sufficient discrimination claim in one context will often be quite different from a sufficient discrimination claim in another. "Context matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships," all of which judges and juries can, do, and should consider in every Title VII case. *Id.* (quoting *Oncale*, 523 U.S. at 81–82). That is because in every case the trier of fact will ultimately have to determine whether

an inference of prohibited discrimination is reasonable under all the circumstances. Equality in statutory proof standards does not require courts or juries to forget what they know about the real world. Rather, it guarantees to every plaintiff an equal opportunity to prove their case using all of the facts and circumstances at hand, and without arbitrary, extratextual, and one-sided requirements on majority-group, but not minority-group, plaintiffs.

Many circuits, indeed, already embrace such an approach for all plaintiffs, with several rejecting "background circumstances" in name, *see Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011), and others in practice, *see Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000). These courts, consistent with this Court's precedent, simply evaluate whether the plaintiff has "present[ed] sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated [the] plaintiff less favorably than others because of his race, color, religion, sex, or national origin." *Iadimarco*, 190 F.3d at 163 (quoting *Furnco*, 438 U.S. at 577) (internal quotation marks omitted).

Nor would removing "background circumstances" render *McDonnell Douglas* toothless. The "background circumstances" requirement affects only a subset of plaintiffs, for one part of one step of a multi-step evidentiary framework. Yet for this group of plaintiffs, an extratextual requirement at this step "can make a real difference." *Muldrow*, 601 U.S. at 355. That result is particularly inappropriate because this Court has emphasized that the prima facie burden—is "not onerous," and is meant only to "eliminate[] the most

common nondiscriminatory reasons." *Burdine*, 450 U.S. at 254; *accord St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). It does that already. *See, e.g.*, *Stratton v. Bentley Univ.*, 113 F.4th 25, 41 (1st Cir. 2024) (failure to "identif[y] a cognizable adverse employment action"); *Ibanez v. Tex. A&M Univ. Kingsville*, 118 F.4th 677, 685 (5th Cir. 2024) (failure to show "qualified for" position). It will continue to do that absent a "background circumstances" requirement.

Once those common nondiscriminatory reasons are set aside, "[t]he presumption of discrimination introduced by the prima facie case . . . helps narrow things down and 'frame the factual issue' by drawing out an explanation" from the employer. *Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 945 (11th Cir. 2023). The prima facie case is not, in other words, meant to weed out legitimate claims of discrimination or to sort plaintiffs into majority and minority groups. It seeks to establish only the minimal evidence necessary to justify asking the employer to "come forward" with some explanation for its actions. *Id.* (quoting *Hicks*, 509 U.S. at 511). It can do so equally well, using the same standards and analytical framework, for all parties who seek Title VII's protection.

* * *

The "background circumstances" requirement "was likely a good faith effort to address societal concerns perceived by" the judges that first adopted the rule. *Smyer*, 2024 WL 1007116, at *9 (Readler, J., concurring). But judicial glosses, however well-intentioned, are not the law. Instead, "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its

plain terms based on some extratextual consideration." *Bostock*, 590 U.S. at 674. "[T]he law as written" makes Title VII's objectives clear: "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

That is exactly and only what Marlean Ames seeks. When asked "what you hope to gain from" this lawsuit, her answer was unequivocal:

> I want to be whole again. I want to not go to work and cry. I want to not hear about this and cry. I don't want to feel this ball up every single time somebody looks at me like I have no idea what I'm doing because I'm a secretary. I've worked 30-plus years to get the knowledge, skills and ability to be where I was. I want to feel whole again.

J.A. 137. Whether Marlean Ames will be made whole remains unclear. She would, just like every other Title VII plaintiff, need to demonstrate before a jury that "the defendant intentionally discriminated against" her. *Aikens*, 460 U.S. at 715. But what is clear is that "background circumstances," as an "artificial, arbitrary, and unnecessary barrier[]" to relief, robbed her of any opportunity to do so. *Griggs*, 401 U.S. at 431.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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