No. 23-1039

In the Supreme Court of the United States

MARLEAN A. AMES, PETITIONER

v.

OHIO DEPARTMENT OF YOUTH SERVICES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PROFESSORS KATIE EYER, SANDRA SPERINO, AND DEBORAH WIDISS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici Katie Eyer (Rutgers Law School), Sandra Sperino (University of Missouri School of Law), and Deborah Widiss (Indiana University Maurer School of Law) are Professors of Law who work in the areas of statutory interpretation and equality law. Each of the *amici* has argued in prior published work that courts

[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

should adhere to the text of Title VII, rather than engrafting non-textual rules onto the Title VII inquiry. *Amici*'s exclusive interest in this litigation is the proper application and interpretation of Title VII.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII's text provides that "it shall be an unlawful employment practice . . . 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*." 42 U.S.C. 2000e-2(a)(1) (emphasis added). Thus, the central question in a Title VII case like this is a straightforward one: Whether the alleged employment action took place "*because of* such individual's race, color, religion, sex, or national origin."[2] *Ibid.* (emphasis added).

And yet, as this case demonstrates, the lower courts have long encumbered Title VII litigation with a proliferation of judge-made rules that have no statutory basis. Rules such as the "background circumstances" rule (at issue here). The "same actor" inference. Requirements of virtually identical comparators. Categorical discounting of so-called stray remarks. And more. For decades, the lower courts' adjudication of Title VII cases

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[2] This brief deals only with cases like this one which are brought pursuant to 2000e-2(a)(1), and should be understood to be limited to the proper analysis under 2000e-2(a)(1). The brief expresses no opinion regarding the proper interpretation of, for example, 42 U.S.C. 2000e-2(a)(2), 2000e-2(m), or 2000e-2(k).

has centered far more on this series of judge-made requirements instead of, as the text provides, on whether the employer's actions were "because of" a protected trait. 42 U.S.C. 2000e-2(a)(1).

The *McDonnell Douglas* paradigm—which this Court first recognized in 1973—provides no justification for that non-textual approach. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973). This Court has long made clear that *McDonnell Douglas* may only serve as a means of structuring the "modes and orders of proof"—it may not ultimately supplant the statutory question of discrimination. See*, e.g., St. Mary's Honor* v. *Hicks*, 509 U.S. 502, 514-515, 524 (1993). Nonetheless, the lower courts have continued to engraft the *McDonnell Douglas* inquiry with additional requirements that lack a textual basis—repeatedly requiring correction and redirection by this Court. See, *e.g., Muldrow* v. *City of St. Louis*, 601 U.S. 346, 355 (2024); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

This case provides yet another opportunity for this Court to remind the lower courts that it is impermissible to apply judge-made rules that distract from the statutory question of discrimination—even where *McDonnell Douglas* is applied. At summary judgment, the relevant question in a Title VII case is whether a reasonable jury could conclude—in light of all of the facts and circumstances—that the employer acted "because of" a protected trait. 42 U.S.C. 2000e-2(a)(1); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). Lower courts that fixate their analysis on judge-made rules divorced from this

factual question (including, but not limited to, the "background circumstances" rule) are impermissibly departing from the statute.

This case also provides an opportunity to reaffirm *Bostock*'s textualist reasoning. See *Bostock* v. *Clayton County*, 590 U.S. 644 (2020). Title VII prohibits discrimination that is "because of . . . sex," *i.e.*, that would not have taken place but-for an individual's biological sex. *Id.* at 656. Discrimination against a heterosexual employee because of her sexual orientation, just like discrimination against a gay or lesbian employee, is necessarily "because of . . . sex"; it would not have occurred but-for her sex. *Id.* at 660 (sexual orientation discrimination against gay and lesbian employees is "because of . . . sex"); see also Part II, *infra* (discussing heterosexual employees). Thus, while *amici* express no opinion on whether petitioner has in fact introduced adequate evidence to prove that she was subjected to discrimination on the basis of her heterosexual orientation, such discrimination would (if proven) be "because of . . . sex." 42 U.S.C. 2000e-2(a)(1).

ARGUMENT

I. Judge-Made Rules That Are Inconsistent With The Statutory Text Are Impermissible

1. The text of Title VII is clear and simple. It provides: "it shall be an unlawful employment practice . . . 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." 42 U.S.C. 2000e-2(a)(1). Thus, the central question in a Section 2000e-2(a)(1) case is whether the employer acted "because of

such individual's race, color, religion, sex, or national origin." *Ibid.*; see also *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) ("The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'") (quoting *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)).

As this Court has stressed, this is a factual question, which should be treated no differently than "other ultimate questions of fact." *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983); accord *St. Mary's Honor*, 509 U.S. at 524. Moreover, "the essential elements of a claim remain constant through the life of a lawsuit." *Comcast Corp.* v. *Nat'l Ass'n of African Am.-Owned Media*, 589 U.S. 327, 332 (2020). Thus, at summary judgment, the central question is the factual question of whether a reasonable jury could conclude that the employer's actions were "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1); see also *Liberty Lobby*, 477 U.S. at 248 ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

And yet the summary judgment decisions of the lower courts are littered with judge-made rules that have no basis in Title VII's text. These rules are too numerous and varied to fully describe, but include:

- The "background circumstances" test (at issue here), under which some circuits require so-called "reverse discrimination" plaintiffs to show "background circumstances to support the suspicion that the defendant is that unusual employer who

discriminates against the majority," *e.g., Arendale* v. *City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) (citation omitted);

- The "same-actor inference," under which some lower courts have adopted a "strong inference" against finding discrimination where the same employee hired and fired the employee, and require an "extraordinarily strong showing of discrimination" in order to allow a case to go to a jury, see, *e.g., Coghlan* v. *Am. Seafoods Co.*, 413 F.3d 1090, 1096-1098 (9th Cir. 2005);

- Rigid comparator requirements, either as a part of the *McDonnell Douglas* prima facie case, or at other stages of the analysis, see, *e.g., Lewis* v. *City of Union City*, 918 F.3d 1213, 1226-1227 (11th Cir. 2019) (en banc) (holding that a plaintiff *must* identify a comparator outside her protected class who is "similarly situated in all material respects," in order to proceed in a *McDonnell Douglas* case);

- The "honest belief rule," under which some courts require the plaintiff (ordinarily the non-movant), to "put forth evidence which demonstrates that the employer did not 'honestly believe' in the proffered non-discriminatory reason for its adverse employment action," see, *e.g., Blizzard* v. *Marion Tech. Coll.*, 698 F.3d 275, 286 (6th Cir. 2012); and

- The "stray remarks" doctrine, which is used to exclude discriminatory statements from the court's assessment of whether the employer's actions were taken "because of" a protected trait (most commonly, but not always, because they were remote in time, made by a non-decisionmaker, or

made outside of the context of the employment decision), see, *e.g., Wallace* v. *Methodist Hosp.*, 271 F.3d 212, 222-224 (5th Cir. 2001) (treating as a "stray remark[]" a supervisor's statement that the plaintiff was fired because "she's been pregnant three times in three years," disregarding this statement in its analysis, and granting employer's motion for judgment as a matter of law).

Some of these rules may arise from reasonable judicial intuitions about the circumstances that may make discrimination more or less likely. For example, the "background circumstances" rule at issue in this case likely arises from judicial intuitions that discrimination against majority group members is less likely than discrimination against minority group members. But such judicial intuitions are not a valid basis for supplanting the statutory standard. Cf. *St. Mary's Honor*, 509 U.S. at 514-515 (rejecting judge-made rule that a finding of pretext *required* a finding of discrimination, despite the reasonable intuition that undergirded the rule (*i.e.*, that if the employer's "legitimate" reason is false, discrimination is likely)).

Moreover, the application of such rules at summary judgment is especially problematic, insofar as they require inferences to be drawn against the non-movant at summary judgment. See, *e.g., Liberty Lobby*, 477 U.S. at 255. For example, in the case of the "background circumstances" rule, the rule requires judges to draw an inference that discrimination against majority group members is comparatively unlikely. But the likelihood that a particular employment decision was based on discrimination is a *question of fact*, to be decided in accordance with the case-specific facts and circumstances. And in

some circumstances, a reasonable jury might *not* draw the inference that discrimination against the "majority" was unlikely.

The only permissible legal rule for a court to apply at summary judgment is the rule set forth in the statute and in Rule 56: whether a reasonable jury could conclude that the employer's actions were "*because of such individual's race, color, religion, sex, or national origin*." 42 U.S.C. 2000e-2(a)(1) (emphasis added); Fed. R. Civ. P. 56. Like any other factual question at summary judgment, that inquiry must be conducted in light of all the facts and circumstances in the record, drawing all inferences in favor of the non-movant. See *Liberty Lobby*, 477 U.S. at 255. As then-Judge Gorsuch put it, "summary judgment was supposed to be that—summary. Not a maddening maze. Not a paper blizzard. Not a replacement for the trial as the preferred means for resolving disputes. But an expedited procedure . . . with the same standards for liability . . . used at all . . . stages." *Walton* v. *Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016). Judge-made doctrines that depart from this straightforward approach are impermissible.

2. The doctrines described above have largely been developed in the context of the lower courts' application of the *McDonnell Douglas* burden-shifting paradigm. Under that familiar paradigm, the Plaintiff first comes forward with a prima facie case; the Defendant must then introduce evidence of its legitimate non-discriminatory reason ; and finally, the Plaintiff must prove the ultimate issue of discrimination. See, *e.g., St. Mary's Honor*, 509 U.S. at 506-507. *Amici* express no opinion on the continued vitality of the *McDonnell Douglas* paradigm, which has existed for more than 50 years, and is

not challenged by the parties in this case. Nevertheless, regardless of the vitality of *McDonnell Douglas*, that paradigm provides no license for the non-statutory approaches described above.

Indeed, this Court has already made clear that *McDonnell Douglas* is simply a method of structuring the "modes and orders of proof" in a Title VII case. *St. Mary's Honor,* 509 U.S. at 514-515. It does not, and cannot, alter the ultimate statutory question, which is the factual question of whether the Defendant acted "because of" the plaintiff's protected class status. *Ibid.*; see also *Aikens*, 460 U.S. at 716. Thus, while the lower courts may rely on *McDonnell Douglas* to structure the order of proof, their ultimate assessment must focus on the factual question of whether discrimination took place. *St. Mary's Honor*, 509 U.S. at 514-515, 524.

Application of the non-statutory rules that have grown up around *McDonnell Douglas* is especially inappropriate where, as here, the Defendant has already articulated a legitimate non-discriminatory reason for the challenged action. As this Court held forty years ago, at that point, "the defendant has done everything that would be required of him [by the *McDonnell Douglas* paradigm] if the plaintiff made out a prima facie case." *Aikens*, 460 U.S. at 715. As such "whether the plaintiff really did so is no longer relevant." *Ibid.* Instead, the relevant question for the court is—as the statute provides—the factual question of whether the employer took its adverse action "because of such individual's race, color, religion, sex, or national origin." *Id*. at 716; 42 U.S.C 2000e-2(a)(1); *accord Brady* v. *Off. of Sergeant of Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (Kavanaugh, J.) (applying *Aikens* to the summary judgment context,

and observing that the prima facie case has "spawn[ed] enormous confusion and wast[ed] litigant and judicial resources").

In this case, the employer disclosed evidence supporting its claimed rationale for the challenged action during the discovery process, and argued this evidence at length in its summary judgment briefing. See D. Ct. Doc. No. 123, at 24-25. This will commonly be true in *McDonnell Douglas* cases: the employer often articulates its asserted legitimate non-discriminatory reason as early as agency proceedings before the Equal Employment Opportunity Commission and that rationale is virtually always a topic of discovery. See, *e.g., Brady*, 520 F.3d at 493 ("[T]he employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision [before summary judgment]—for example, through a declaration, deposition, or other testimony from the employer's decisionmaker."). In any such case, under *Aikens*, the relevant question at summary judgment is whether a reasonable jury could conclude, based on the evidence as a whole, that the defendant acted "because of" the protected characteristic. 42 U.S.C. 2000e-2(a)(1); see *Aikens*, 460 U.S. at 715-716.

This assessment should be based on a fair consideration of all of the relevant evidence presented in the case, when considered in the light most favorable to the nonmovant. That evidence *can* include, as this Court has recognized, whether the employer's articulated non-discriminatory reasons appear to be pretextual. See, *e.g., Reeves*, 530 U.S. at 147. This is because, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Ibid.*

As this Court recognized in *Reeves*, "[s]uch an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Ibid.* (quoting *Wright* v. *West*, 505 U.S. 277, 296 (1992)).

But it is important to stress that pretext is no more talismanic to answering the statutory question of discrimination than the prima face case. As this Court recognized in *St. Mary's Honor*, the ultimate question in a Title VII case is whether the plaintiff proved *discrimination*, not pretext. See 509 U.S. at 514-515, 524. And, as this Court has further emphasized, it is entirely possible for a plaintiff to have been subjected to discrimination, even where an employer's "legitimate non-discriminatory reason" is not wholly pretextual. See, *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 & n.10 (1976) (allowing a race discrimination case to proceed where the employer's legitimate reason was undoubtedly true, but was unevenly applied); *Bostock*, 590 U.S. at 656 ("[T]he traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision.").

As such, neither *McDonnell Douglas*, nor the host of technical rules that have grown up around it, can supplant the statutory question of discrimination. See *St. Mary's Honor*, 509 U.S. at 514-515, 524. Indeed, where, as here, the employer has come forward with its legitimate non-discriminatory reason, *Aikens* holds that the prima facie case is simply irrelevant. *Aikens*, 460 U.S. at 715-716; *accord Brady*, 520 F.3d at 494 (Kavanaugh, J.). And while an employer's pretextual reason-giving

may, as in any other type of case, serve as evidence supporting liability, the ultimate question at Step 3 of *McDonnell Douglas* is not pretext but discrimination. See *St. Mary's Honor*, 509 U.S. at 514-515, 524 (ultimate question in a *McDonnell Douglas* case is discrimination, not pretext); see also *Reeves*, 530 U.S. at 147 (pretext evidence may serve as evidence of discrimination).

3. The non-textual rules described above are not new. Nor are this Court's efforts to repudiate them. As early as 1978, in *Furnco Construction Corp.* v. *Waters*, this Court stressed that the *McDonnell Douglas* paradigm was "never intended to be rigid, mechanized, or ritualistic." 438 U.S. at 577. In *Aikens*, in 1983, this Court chastised the lower courts for their excessive focus on technical rules, noting "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." 460 U.S. at 716. In 1993, in *St. Mary's Honor* the Court stated clearly that *McDonnell Douglas* is simply a means of "order[ing] . . . the presentation of proof" and that the courts should ultimately focus their inquiry on the factual question of discrimination. 509 U.S. at 506, 524. In *Reeves* in 2000, the Court yet again reiterated that courts should not "'treat discrimination differently from other ultimate questions of fact,'" while reversing a lower court decision that had relied on judge-made rules to grant judgment as a matter of law. 530 U.S. at 148 (quoting *St. Mary's Honor* and *Aikens*). In 2024, just last Term, this Court again held it is impermissible for the courts to "add words . . . to the statute Congress enacted" or "to 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." *Muldrow*, 601 U.S. at 355.

Despite these repeated admonitions, the lower courts have continued to apply a proliferation of non-textual rules instead of the statutory question of discrimination in Title VII (and other employment discrimination) cases. See *supra* Part I. Indeed, they have sometimes done so despite this Court's rejection of *the very same rules* they have later continued to apply. For example, the court of appeals in *Reeves* had relied on the "stray remarks" doctrine to discount ageist comments made by a high-level supervisor. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 692 (5th Cir. 1999). This Court directly repudiated that approach, observing that the court of appeals had "failed to draw all reasonable inferences in favor of petitioner" and "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 152-153. And yet, both the Fifth Circuit, and other circuits, have since returned to applying the doctrine in much the same form. See, *e.g., Auguster* v. *Vermilion Par. Sch. Bd.*, 249 F.3d 400, 404-405 (5th Cir. 2001) (justifying returning to reliance on the "stray remarks" doctrine despite *Reeves*); *Webber* v. *Int'l Paper Co.*, 417 F.3d 229, 236 n.3 (1st Cir. 2005) (same); *cf. Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 229, (5th Cir. 2000) (initially observing that "[i]n light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called 'stray remarks' must be viewed cautiously").

Individual lower court judges have voiced concern with the extent to which these judge-made rules depart from the statutory standard, as well as the unnecessary confusion and redundancies they may entail. See, *e.g., Coleman* v. *Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("I write separately to call atten-

tion to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike."); *Walton*, 821 F.3d at 1210 (Gorsuch, J.) (discussing the "confusion and complexities" that often arise from the application of the *McDonnell Douglas* paradigm and its subsidiary rules). However, they also have expressed uncertainty about the extent to which they may properly depart from circuit precedent enshrining such rules. See, *e.g.*, *Wells* v. *Colo. Dep't of Transp.*, 325 F.3d 1205, 1212 (10th Cir. 2003) (Hartz, J., concurring) ("I write separately to express my displeasure with the mode of analysis employed in the panel opinion (which I authored).")

In short, the lower courts are sorely in need of guidance, and this case presents an opportunity to provide it. The "background circumstances" test is just one small part of what has proven to be an intractable problem: the substitution of judge-made rules for the statutory question of discrimination. This Court should reiterate—as it has already held in cases such as *Aikens*, *St. Mary's Honor*, *Reeves*, and *Muldrow*—that the substitution of such judge-made rules for the statutory question of discrimination is impermissible. See, *e.g.*, *Aikens*, 460 U.S. at 716; *St. Mary's Honor*, 509 U.S. at 506, 524; *Reeves*, 530 U.S. at 148-49; *Muldrow*, 601 U.S. at 355.

II. Sexual Orientation Discrimination Against a Heterosexual Employee Is "Because of . . . Sex"

Neither party in this case disputes that—if proven by the plaintiff—discrimination against an employee because she is heterosexual is discrimination "because of

. . . sex." See Pet. 26; Br. in Opp. 5.[3] The court of appeals also properly treated this question as a foregone conclusion in light of *Bostock*. See Pet. App. 5a. Thus, it would be appropriate for this Court simply to take as given that *Bostock* applies here, and that petitioner can prevail if she demonstrates that she was subjected to adverse actions because of her (heterosexual) orientation.

But if this Court engages in a more fulsome analysis, it should conclude, as the court of appeals assumed, that discrimination against a heterosexual plaintiff because of sexual orientation is "because of . . . sex." 42 U.S.C. 2000e-2(a)(1). Such a conclusion follows ineluctably from *Bostock*, and from the language of Title VII itself. See *ibid.*; *Bostock*, 590 U.S. at 659-661; see also *Santa Fe Trail*, 427 U.S. at 280 (holding that Title VII protects both majority and minority group members according to "the same standards").

First, this Court has held in numerous cases, including but not limited to *Bostock*, that the plain language of Title VII ("because of") connotes, at most, a but-for causation standard. See, *e.g., Bostock*, 590 U.S. at 656; see also, *e.g.*, *Gross* v. *FBL Fin. Serv. Inc.*, 557 U.S. 167, 176 (2009); *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350-352 (2013); *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 711 (1978). The second key term in Title VII, "sex," means at a minimum, biological sex (*i.e.*, "sex assigned at birth"). *Webster's New Int'l Dictionary* 2296 (def. 1) (2d ed. 1953) (defining "sex" as "[o]ne of the

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[3] *Amici* avoid the use of the term "reverse discrimination." Like many of the rules discussed herein, that concept has no basis in the statute.

two divisions of organisms formed on the distinction of male and female").

Thus, as this Court held in *Bostock*, Title VII's prohibition on employment actions taken "because of . . . sex" proscribes, at a minimum, actions that would not have been taken "but for" the employee's biological sex. 590 U.S. at 656. Just as in *Bostock*, it is not necessary to consider other causation standards (such as Title VII's "motivating factor" standard), or arguments that "sex" in Title VII carries a more expansive meaning (such as including concepts related to sexual orientation or gender identity). "Nothing . . . turns on the outcome" of such disputes, given that, as elaborated, *infra*, sexual orientation discrimination is proscribed even under the narrowest textual approach. *Bostock*, 590 U.S. at 655-656.

Thus, as this Court recognized in *Bostock*, Title VII's prohibition of employment actions that would not have been taken but-for the employee's "biological sex," necessarily leads to the conclusion that sexual orientation discrimination is proscribed. "That's because it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex." *Id.* at 660.

This Court went on to provide an example of "an employer with two employees, both of whom are attracted to men." *Ibid.* "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." *Ibid.* In other words, "the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge . . . ." *Ibid.*

That same reasoning applies when a heterosexual employee claims sexual orientation discrimination. For example, petitioner Marlean Ames' claim here that she was subjected to discrimination based on her heterosexual orientation necessarily entails the claim that if she were a man who was sexually attracted to men—rather than a woman who is sexually attracted to men—her employer would have treated her more favorably. See Pet. 3 (claiming that Ames was disfavored for two positions because she is heterosexual, *i.e.*, because she is a woman who is sexually attracted to men). If Ames can prove that argument, her sex would indeed be a but-for cause of the adverse actions taken against her.

Amici express no views on whether a reasonable jury could conclude that Ames was (or was not) treated differently because of her sexual orientation. But to the extent she can prove that her sexual orientation was a reason for her demotion and non-promotion, such actions were "because of . . . sex." 42 U.S.C. 2000e-2(a)(1). Because a man identical to petitioner in all material respects (including attraction to men) would have been treated more favorably, such discrimination is "because of . . . sex." *Ibid.*; see *Bostock*, 590 U.S. at 660.

CONCLUSION

Neither Title VII's text nor this Court's precedents are ambiguous. At summary judgment, the decisive question must be whether a reasonable jury could conclude that the employer's actions were "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Judge-made rules that depart or distract from this statutory standard are impermissible.

So too, sexual orientation discrimination—including, as in this case, sexual orientation discrimination against a heterosexual employee—is "because of . . . sex." *Ibid.* Any time an employee is subjected to discrimination based on their sexual orientation they are subjected to adverse actions that would not have occurred "but for" their biological sex. This is as true in cases involving heterosexual employees, as it is in cases involving gay and lesbian employees.

Respectfully submitted.

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