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 UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country focused on empowering workers' rights. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances workers' rights and serves lawyers who advocate for equality and justice in the American workplace, including representation of employees facing discrimination in the workplace.

NELA attorneys have broad experience with the divergent ways in which the lower courts have attempted to implement this Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and with the difficulties that judges and litigants have encountered as a result. While the *McDonnell Douglas* framework remains a useful way to analyze discrimination cases in some situations, NELA believes that the over-mechanization of the prima facie case has been a significant barrier to discrimination victims' right to a jury trial, contrary to the intent of both this Court and Congress. Ultimately, NELA urges this Court to affirm that the choice of whether to proceed under *McDonnell Douglas* belongs to the plaintiff—not to the defendant nor the district court.

NELA further urges the Court to reaffirm two central holdings set forth in *Bostock v. Clayton County*, 590 U.S.

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1. No counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

644 (2020): (1) discrimination based on sexual orientation necessarily constitutes illegal sex discrimination; and (2) if an impermissible criterion is either a motivating factor or a but-for cause of an adverse employment action, then an employee may prevail under Title VII, regardless of whether other factors may have motivated the employer's decision.

Finally, NELA supports the obligation of employers under Title VII to ensure equal opportunity for employees of all demographics. The question presented in this case rests on a much larger threshold issue than simply whether so-called "majority" plaintiffs should be held to a different standard; rather, it demonstrates just one among many judicially-created barriers to the right to a jury trial for employees of all races, sexes, religions, and other backgrounds. A decision reversing the Sixth Circuit below has the potential to restore the workers' rights that Congress intended, and thus would serve NELA's interests in promoting a diverse and inclusive workplace for all.

SUMMARY OF ARGUMENT

The question presented is whether "majority-group" plaintiffs, in order to establish a legally required prima facie case, must adduce evidence of special background circumstances. Before addressing the elements of such a prima facie case, however, the Court should first resolve whether Title VII plaintiffs are required to establish a prima facie case at all. If there is no prima facie case requirement, there would be no requirement that any group of plaintiffs demonstrate the existence of special background circumstances.

Federal and state trial and appellate judges have repeatedly criticized the workability and wisdom of a requirement—such as that utilized by the Sixth Circuit in this case—that Title VII plaintiffs must proceed under *McDonnell Douglas*, and must establish a prima facie case. While on the District of Columbia Circuit, then Judge Kavanaugh admonished that the debate about the contours of a prima facie case had "spawn[ed] enormous confusion and wast[ed] litigant resources." When on the Tenth Circuit, then Judge Gorsuch had criticized the "special and idiosyncratic (*McDonnell Douglas*) rules" as resulting in "more delay and more traps for the unwary."

This Court intended *McDonnell Douglas* only as an available tool to organize and present evidence of discriminatory intent, not as a mandatory and exclusive method of evaluating that evidence. If plaintiffs are required to establish a prima facie case to avoid summary judgment, every necessary element of such a prima facie case becomes, as a practical matter, a judicially-fashioned necessary element of, and thus a limitation on, a Title VII claim. Under such a scheme, any evidence that is not part of one of those elements cannot be relied on to establish the required prima facie case. Applying such a prima facie case requirement, courts can and do grant summary judgment dismissing claims regardless of whether there might be evidence—irrelevant to the missing prima facie case—which would suffice to support a jury finding of unlawful motive. That is precisely what Judge Kethledge believed had occurred in this case.

This Court has repeatedly held that once a defendant has offered a reason for a disputed employment action, it is irrelevant whether the plaintiff has established a

prima facie case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The District of Columbia Circuit, in an opinion by then Judge Kavanaugh, correctly held that *Aikens* applies at summary judgment. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (D.C. Cir.2008). Then Judge Jackson, while on the District Court, applied *Brady* in fourteen summary judgment cases. The rule in *Aikens* and *Brady* applies whenever an employer has offered a reason for its disputed action. As then Judge Sotomayor observed when on the District Court, employers always do so. Because the defendant in this action had given a reason for refusing to promote Ames, the courts below erred in nonetheless requiring the plaintiff to establish a prima facie case. Since Ames was not required to establish a prima facie case in the first place, whether a showing of special background circumstances is a required element of a prima facie case is irrelevant to her case, as it would be to virtually any other.

The Court should reverse the decision of the court of appeals. But we urge the Court not to adopt the legal argument set out in petitioner's brief. That brief assumes that the courts below were correct in requiring the plaintiff to establish a prima facie case, and in spelling out a list of mandatory elements of such a prima facie case. Ames asks only that the Court hold that proof of special background circumstances should not have been one of the mandated elements of the prima facie case she was required to establish. Such a decision by this Court would effectively codify the very lower court practices to which so many judges have objected.

Although the requirement of a prima facie case can lead to the improper dismissal of meritorious claims,

plaintiffs remain free to organize their proffered evidence along the lines suggested by *McDonnell Douglas*, and to offer and emphasize the types of inculpatory evidence highlighted by that decision.

ARGUMENT

The issues posed by this case are framed and narrowed by three important and interrelated considerations. First, the background circumstances standard is not a freestanding element of a Title VII case; rather, it is (in several circuits) a necessary element of a prima facie case of unlawful motive.[2] Second, a Title VII plaintiff is not required to *plead* the existence of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Third, a Title VII plaintiff is not required to *prove* the existence of a prima facie case at trial. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).[3] The question presented thus concerns only what a plaintiff must do at summary judgment. It involves two distinct issues: whether at summary judgment a plaintiff is required to establish a prima facie case at all, and if so whether "majority group" members must establish as an element of that required prima facie case the existence of certain background circumstances.

2. Courts use the phrase "prima facie case" in a wide variety of ways. As utilized in connection with the background circumstances issue, it refers to the quantum of evidence supporting a claim of unlawful motive. It is also used in Title VII litigation, quite differently, to refer to whether a claimant has proffered evidence regarding all the needed elements of his or her claim.

3. Juries are not instructed to use the *McDonnell Douglas* methodology. *Vance v. Ball State University*, 570 U.S. 421, 445 n.13 (2013)

I. THE COURT SHOULD DECIDE WHETHER A TITLE VII PLAINTIFF CAN BE REQUIRED TO ESTABLISH A PRIMA FACIE CASE IN ORDER TO AVOID SUMMARY JUDGMENT

A. Whether There Is a Prima facie Case Requirement to Avoid Summary Judgment Is Within The Question Presented

The question presented is not whether the existence of special background circumstances is an element per se of a Title VII claim. Rather, the issue is whether, *if* a Title VII claim must be analyzed at summary judgment under the method in *McDonnell Douglas*, and *if* a plaintiff is required to establish the existence of a prima facie case of motive, the existence of such background circumstances is an element of that required prima facie case when the plaintiff is not a member of a historically disadvantaged group. Thus whether—as the Sixth Circuit (but not some other circuits) holds—this prima facie case requirement exists at all is a foundational question within the scope of the question presented.

Petitioner correctly explains that "[c]ourts that apply a background circumstances analysis require plaintiffs to show such evidence as part of their prima facie case under the *McDonnell Douglas* framework." Pet. 28 n.3. Petitioner refers to the background circumstances factor as "part of [the] 'prima facie case'" (Pet. 17), or an "element [of] a prima facie case." Pet.24. Similarly, respondent refers to the background circumstances factor as an "element" or "component" of a prima facie case. Br. Opp. 9, 10, 11, 24.

All the lower court decisions cited by the petition as imposing a background circumstances requirement are cases holding that certain plaintiffs must point to the existence of such background circumstances in order to establish a prima facie case. As respondent correctly observed, the circuit conflict about background circumstances "is a split over *how* the various circuits apply *McDonnell Douglas*." Br. Opp. 18 (emphasis in original).

In the courts below, the absence of such background circumstances mattered because it prevented the plaintiff from establishing a prima facie case, without which (under Sixth Circuit precedent) the plaintiff could not defeat the motion for summary judgment. As the district court explained, under Sixth Circuit precedent "the plaintiff alleging discrimination bears the initial burden of establishing a prima facie case...." Pet. App. 28a. The district court granted summary judgment that "Ames has failed to provide 'background circumstances' sufficient to establish a prima facie case of sexual orientation-based discrimination...." Pet. App. 30a.

The Sixth Circuit explained that, because Ames was relying on circumstantial evidence, she was "required ... to show" four elements of a prima facie case under *McDonnell Douglas*. Pet. App. 4a-5a (citing *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 776 (6th Cir.2016)). "Ames is heterosexual, ... which means she must make a showing in addition to the usual one for establishing a prima-facie case. Specifically, Ames must show 'background circumstances....'" Pet. App. 5a. The Court of Appeals upheld the award of summary judgment because Ames could not show the background circumstances that

were a necessary element of the required prima facie case. Pet. App. 5a-6a. Judge Kethledge explained that Ames's claim had failed because under the Sixth Circuit precedent applied by the majority "to establish a prima-facie case when ... the plaintiff relies upon indirect evidence of discrimination ... members of 'majority' groups must ... show 'background circumstances....'" Pet. App. 9a.

The parties focus their briefs on the issue of whether a showing of background circumstances should for certain plaintiffs be a necessary element of a required prima facie case. But the critical foundational question is whether, because of *McDonnell Douglas*, plaintiffs asserting Title VII discriminatory treatment claims are required to establish a prima facie case *at all*. That pivotal threshold inquiry is within the scope of the question presented. *Gross v. FBL Financial Services*, 557 U.S. 167, 173 n.1 (2009). "[T]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. Rule 14.1. "Questions not explicitly mentioned but essential to the analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005).

B. The Court Should Decide The Foundational Question of Whether A Title VII Plaintiff Must Establish A Prima Facie Case to Avoid Summary Judgment

Both parties assume that it was proper for the courts below to insist that Ames's evidence be analyzed under

McDonnell Douglas[4] and that the lower courts correctly held that summary judgment should be entered against Ames unless she could establish a prima facie case. The parties disagree about how *McDonnell Douglas* and its prima-facie-case element should be applied in the circumstances of this case. Plaintiff contends that a background circumstances rule would be inconsistent with *McDonnell Douglas*, and is unnecessary as an element of a prima facie case. Pet. Br. 30-36; Pet. 28-32. Defendant urges the Court to interpret *McDonnell Douglas* in the opposite conclusion. Br. Opp. 18-20.

But there is a growing and well-justified judicial chorus objecting to this very method of analysis, arguing that plaintiffs should not be required either to proceed under *McDonnell Douglas* or to establish a prima facie case. Some courts have abandoned the *McDonnell Douglas* methodology entirely, and at summary judgment inquire only whether the plaintiff has sufficient evidence to permit a reasonable jury to find the existence of an unlawful motive. Other courts, while permitting resort to the *McDonnell Douglas* method of analysis, accord to plaintiffs the alternative of merely establishing that a reasonable jury could find an unlawful motive, rendering largely beside the point any limitations on how a prima facie case might be established.

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4. Although the Court of Appeals occasionally suggests that a plaintiff could rely instead on "direct evidence," it concedes that such direct evidence—such as telling a worker he or she is being fired for being black—is virtually non-existent. *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir.1998). This nominal exception to the prima facie case requirement is so insignificant that the Sixth Circuit often does not bother to mention it in analyzing a summary judgment motion; neither the majority nor the concurring judge in the instant case did so.

The parties do not address these widespread concerns about the Sixth Circuit's insistence on requiring a *McDonnell Douglas* analysis and proof of a prima facie case. The defendant asks the Court to ignore these underlying issues, asserting that "whether *McDonnell Douglas* has outlived its usefulness is a question that must wait for another day." Br. Opp. 28. Plaintiff "takes no position" on whether Title VII plaintiffs should be required to use the method of analysis in *McDonnell Douglas* to defeat a summary judgment motion. Pet. 28 n.3. The Court is being asked to decide the purely hypothetical question of whether, *if* proof of a prima facie case is indeed required, that proof must in certain circumstances include evidence of background circumstances.

But the Court, the lower courts, and litigants should not wait for another case to find out whether, in retrospect, this case was a waste of time, because there it turns out that there is no such prima facie case requirement. Proceeding in that fashion would squander this Court's limited resources. Now is the time to resolve whether a prima facie case is indeed necessary to defeat summary judgment. The Court should hold that it is not.

(1) Over the course of the half century since the decision in *McDonnell Douglas*, federal and state judges have struggled with the increasingly fraught consequence of treating its methodology, and the existence of a prima facie case, as strict legal requirements. Insofar as the existence of a required prima facie case is a precondition of avoiding summary judgment, every discrete element of that prima facie case is, as a practical matter, transformed into a required element of a Title VII claim. Over the years, ever more elaborate and stringent rules have grown up

delineating what facts must be shown to establish a prima facie case and thus avoid summary judgment. This Court's expectation that establishing a prima facie case would not be "onerous" has been belied by decades of experience to the contrary, as plaintiffs seeking to establish a prima facie case often have had to run a complex and intricately fact-specific gauntlet of legal requirements. A growing chorus of federal and state judges, drawing upon vast experience with this problem, have called for ending any requirement that plaintiffs establish a prima facie case in order to avoid summary judgment.

This Court recognized this very problem in *Vance v. Ball State University*, 570 U.S. 421 (2013). "The 'prima facie case and the shifting burdens confuse lawyers and judges, much less juries, who do not have the benefit of extensive study of the law on the subject.'" 570 U.S. at 445 n.13 (quoting *Armstrong v. Burdette Tomlin Memorial Hospital*, 438 F.3d 240, 249 (3rd Cir.2006)).

Justice Kavanaugh, while on the Court of Appeals, accurately described the problems that have been created by requiring proof of a prima facie case pursuant to *McDonnell Douglas*.

> Much ink has been spilled regarding the proper contours of the prima-facie-case aspect of *McDonnell Douglas*..... It has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.

Brady, 520 F.3d at 494; *see id* at 493 n.1 ("Disagreement and uncertainty over the content, meaning, and purpose of the *McDonnell Douglas* prima facie factors have led to a plethora of problems ... ").

Justice Gorsuch expressed similar concerns while on the Tenth Circuit.

> *McDonnell Douglas* ... has proved of limited value [in discrimination cases].... [G]iven so many complications and qualifications [in the application of *McDonnell Douglas* methodology], more than a few keen legal minds have questioned whether the *McDonnell Douglas* game is worth the candle even in the Title VII context....

Walton v. Powell, 821 F.3d 1204, 1210-11 (10th Cir.2016) (opinion by Gorsuch, J.); *see id.* at 1212 (noting that "maddening maze" and "special and idiosyncratic (*McDonnell Douglas*) rules"); *Hinds v. Sprint/United Management Co.*, 523 F.3d 1187, 1202 ., 12 (10th Cir.2008) (opinion of Gorsuch, J.) (noting criticism of the prima facie case requirement by then Judge Kavanaugh in *Brady* and by Judge Hartz in *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1225-26 (10th Cir.2003) (Hartz, J., writing separately)).

Numerous other circuit court judges have also criticized requiring proof of a prima facie case, or mandating use of the *McDonnell Douglas* methodology. In the Fifth Circuit, Judge Costa objected to use of the *McDonnell Douglas* analysis, arguing that it is a "judge-created doctrine [that] has been widely criticized for its

inefficiency and unfairness....” *Nall v. BNSF Rwy. Co.*, 917 F.3d 335, 351 (5th Cir.2019) (Costa, J., concurring specially). In the Seventh Circuit, Judges Wood, Tinder and Hamilton joined a concurring opinion objecting to “the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike.” *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir.2012); *see id.* (comparing task of federal judges applying *McDonnell Douglas* to that of “a group of Mesopotamian scholars” or dancers performing “an allemande worthy of the 16th century”). In the Eighth Circuit, Judge Magnuson objected to “the complexities and insensibility of the *McDonnell Douglas* paradigm,” noting that “since its inception, *McDonnell Douglas* has befuddled the Courts.” *Griffith v. City of Des Moines*, 387 F.3d 733, 767 (8th Cir.2004) (Magnuson, J, concurring).

While sitting by designation in the Ninth Circuit, Judge Ripple criticized the “snarls and knots” of the *McDonnell Douglas* method, commenting that it is “inflexible and relies on artificial distinctions.” *Brockbank v. U.S. Bancorp*, 506 Fed.Appx. 604, 611 (9th Cir.2013) (Ripple, J, concurring in part and dissenting in part). On the Tenth Circuit, Judge Hartz objected to the practice of “always commencing the analysis with an examination of whether the plaintiff established a prima facie case, instead of whether the evidence as a whole could support a verdict in favor of the plaintiff....” *Wells v. Colorado Dept. of Transportation*, 325 F.3d 1205, 1224 (10th Cir.2003) (Hartz, J., writing separately); *see id.* (“[r]ather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the

ultimate issue"). Judge Tymkovich agreed with Judge Wells' description of the "problems [that] arise out of the *McDonnell Douglas* framework." T. M. Tymkovich, *The Problem With Pretext*, 85 Denv.U.L.Rev. 503, 519 (2008). On the Eleventh Circuit, Judge Newsom, who had long struggled to make *McDonnell Douglas* workable, finally gave up last year: "*McDonnell Douglas*, it now seems to me, ... actually obscures the answer to the only question that matters at summary judgment...." *Tynes v. Florida Department of Juvenile Justice*, 88 F.4th 939, 949 (11th Cir.2023) (Newsom, J. concurring).

> [L]ower courts have become progressively obsessed with its minutiae, allowing it to drive substantive outcomes. The framework's constituent details have grown increasingly intricate and code-like, as courts have taken to forcing a holistic evidentiary question ... into a collection of distinct doctrinal pigeonholes.

88 F.4th at 952-53.

The Sixth Circuit itself has noted these problems:

> [W]hile the burden-shifting analysis of *McDonnell Douglas* was created to assist in the presentation of a discrimination case, it often fails to fulfill its purpose. That failure is particularly pronounced in the context of summary judgment where the burden-shifting analysis can obfuscate the appropriate question—whether there exists a genuine issue of material fact.

Provenzano v. Lei Holdings, Inc., 663 F.3d 806, 813 (6th Cir.2011).

Federal district judges, who have to struggle daily with how to apply *McDonnell Douglas* to summary judgment motions, have long found it unworkable. Over a quarter of a century ago, Judge Chin commented that

> [a]lthough the *McDonnell-Douglas* framework has been with us for some 25 years, it has proven at times to be confusing and unworkable. The criticisms of this cumbersome burden-shifting mechanism are legion,.... [T]he persistence of this analytic framework has led to widespread confusion over, and constant tinkering with, its internal mechanics....

Lapsley v. Columbia University-College of Physicians and Surgeons, 999 F.Supp. 506, 513-14 (S.D.N.Y.1998). Judge Constance Baker Motley warned that "it is becoming increasingly apparent that discrimination cases would progress more sensibly without ... [the] peculiar definition of prima facie case that 'can only bring confusion to our craft.'" *Cully v. Milliman & Robertson, Inc.*, 20 F.Supp.2d 636, 641 (S.D.N.Y.1998) (quoting *Bickerstaff v. Vassar College*, 992 F.Supp. 372, 374 (S.D.N.Y.1998)).

State court judges have joined in this criticism. *Adams v. CDM Media USA, Inc.*, 346 P.3d 70, 93-94 (Haw.2015) (summarizing judicial criticism of *McDonnell Douglas* standard); *Daniels v. Narraguagus Bay Healthcare Facility*, 45 A.3d 722, ¶ 29 (Me.2012) (Silver, J., concurring) ("the analysis is outdated, confusing, and unworkable"); *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 783 (Tenn.2010) ("the shifting burdens of the *McDonnell Douglas* framework obfuscate the trial court's summary judgment analysis.").

Faced with these vexing problems, many circuits have attempted to reframe *McDonnell Douglas* in a manner that would be more workable, or have held that litigants are not required to use the *McDonnell Douglas* method of analysis, but may instead advance any argument showing that a reasonable jury could find the existence of an unlawful motive. The Seventh Circuit took that step in 2016. "Th[e] legal standard ... is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir.2016). "[A] plaintiff need not use the *McDonnell Douglas* framework after *Ortiz*. At summary judgment, '[w]hat matters is whether [a plaintiff] presented enough evidence to allow the jury to find in [his] favor.'" *Igasaki v. Illinois Dept. of Financial and Professional Regulations*, 988 F.3d 948, 957-58 (7th Cir.2021) (quoting *Vega v. Chicago Park Dist.*, 954 F.3d 996, 1004 (7th Cir.2020)). The Eleventh Circuit followed suit last year, holding that a plaintiff is not required either to proceed under *McDonnell Douglas* or to establish a prima facie case. "*McDonnell Douglas* ... is not a set of elements that the employee must prove—either to survive summary judgment or prevail at trial." *Tynes v. Florida Department of Juvenile Justice*, 88 F.4th 939, 941 (11th Cir.2023). "What *McDonnell Douglas* is *not* is an independent standard of liability under either Title VII or § 1981. Nor is its first step, the prima facie case...." 88 F.4th at 944-45 (emphasis in original).

(2) Under these circumstances, it would be unwise for this Court to undertake to decide whether background circumstances are a necessary element of a legally

required prima facie case without first determining whether Title VII plaintiffs are required at all to establish a prima facie case at the summary judgment stage.

In light of the widespread dissatisfaction among the courts of appeals regarding any prima facie case requirement, and the increasingly divergent approaches that the circuits are taking to this exceptionally important problem, this Court will inevitably have to address that question. If the Court eventually holds, as many judges clearly hope it will, that a prima facie case is not required at summary judgment, this Court's efforts in the instant case to define the elements of that no longer extant requirement will have been wasted. In the absence of a prima facie case requirement, there will be no background circumstances rule. The Court should address that underlying issue now, rather than issue what may well prove to be an advisory opinion that will be rendered moot before it can appear in the bound volumes of United States Reports.

Equally problematically, it will be virtually impossible to pass on whether background circumstances should be an element of a prima facie case without discussing the purpose and role of a prima facie case, explaining the rationale of such an assumed requirement while somehow avoiding addressing whether it is required at all. Defendant insists that the "'background circumstances' element that [the Sixth Circuit] applies to 'reverse' discrimination claims reflects this Court's own focus on whether a plaintiff's allegations 'if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Br. Opp. 33 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). To which plaintiff responds, "that overreads

McDonnell Douglas" (Pet. Reply 9). Defendant objects that "[i] the Court were to hold ... that Ames established a prima face case of discrimination in this case anyway, then *McDonnell Douglas*'s prima facie screening test will have lost almost all of its meaning." Br. Opp. 35. Plaintiff assures the Court that "removing 'background circumstances [would not] render *McDonnell Douglas* toothless." Pet Br. 45.

It is difficult to imagine how the Court could write an opinion resolving these competing arguments without addressing whether—and if so why—there needs to be a "*McDonnell Douglas* prima facie screening test" at all. At the least, an opinion of this Court regarding whether to include a background circumstances rule in a prima facie requirement would be permeated with hints about the purpose and existence of such a requirement, leading to yet further confusion among the lower courts.

II. A DISCRIMINATION PLAINTIFF SHOULD NOT BE REQUIRED TO ESTABLISH A PRIMA FACIE CASE OR TO USE THE *MCDONNELL DOUGLAS* METHOD OF ANALYSIS

(!) The *McDonnell Douglas* methodology was intended by this Court as a suggested approach regarding the presentation and consideration of evidence, one which the Court anticipated litigants would find helpful in organizing their proof and that courts would find useful in weighing it. A plaintiff who chooses to establish a prima facie case will as a result compel the employer to offer an explanation of its conduct. *McDonnell Douglas* set out a list of prima facie case elements appropriate for the circumstances of that particular case, and invited the lower courts to devise other prima facie case element lists.

So long as the use of the *McDonnell Douglas* methodology, and the creation of a prima facie case, remained voluntary, this approach had the potential to be helpful, and in any event could not obstruct the enforcement of Title VII itself. Plaintiffs were free to ignore it, and instead address directly the ultimate issue, arguing that their evidence was sufficient to support a finding of discrimination. But if a court *requires* a plaintiff defending a summary judgment motion to proceed in this manner, the consequences of this prima facie case and its components are dramatically different. If a plaintiff is unable to establish any element on that list, summary judgment will be granted. Any inculpatory proof that does not support a mandated element will—at the summary judgment stage—be legally irrelevant. A list of prima facie case elements, only intended by this Court as suggested types of *evidence*, becomes instead essential *components* of a Title VII claim.

That was precisely the effect in this case of the background circumstances element of the Sixth Circuit-required prima facie case. Ames' inability to establish that single element of the required prima facie case required dismissal of her action. And all the other inculpatory evidence she proffered was beside the point. Judge Kethledge pointed to important items of evidence supporting Ames' claim that had become irrelevant under the Sixth Circuit precedents. Pet. App. 10a. And there was, Judge Kethledge believed, substantial evidence that the defendant's explanation for not promoting Ames was pretextual. *Id*. The majority did not disagree with any of that. But because the Sixth Circuit required Ames to establish a prima facie case, and had established a list of required elements, one of which Ames could not establish,

all of the alleged inculpatory evidence described by Judge Kethledge was legally irrelevant.

This was not some special limiting procedure for majority-group plaintiffs. Rather, as the decision below made clear, this was a routine application of the Sixth Circuit insistence that Title VII plaintiffs, on pain of entry of summary judgment, establish every one of the court-created elements of the required prima facie case. Pet. App. 4a-5a (citing list of required prima facie case elements from *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.2d 769, 776 (6th Cir.2016)).

For example, the Sixth Circuit has a general rule requiring that a Title VII plaintiff alleging discrimination in promotions establish as part of the required prima facie case that "other employees of similar qualifications who were not members of the protected class received promotions." *Sutherland v. Michigan Dept. of Treasury*, 344 F.3d 603, 614 (6th Cir.2003). The imposition of that element would facilitate any number of discriminatory practices. An employer who objected to women with pre-school age children working outside the home could prefer to promote women with no children, although it drew no such distinction among men. An employer who decided to make no promotion, rather than promote a black worker, would be immune from suit.

The Sixth Circuit's prima facie standard for claims of discriminatory discipline has a similar feature. The Court of Appeals requires the plaintiff in such a case to prove that the employer treated more favorably a specific identified "similarly-situated" worker who was not a member of the protected group at issue. *Mitchell v.*

Toledo Hosp., 964 F.2d 577, 583 (6th Cir.1992).[5] If there does not happen to be such a similarly situated worker with whom the plaintiff can be compared, the plaintiff's claim must be dismissed, which is precisely what occurred in *Mitchell*. The absence of that element of the required prima facie claim is fatal, regardless of what other evidence the plaintiff may have. An employer could engage in litigation-proof discrimination by firing a black worker for some particular type of alleged misconduct in which no white subordinate of the same supervisor at issue had ever engaged.

Under the compulsory *McDonnell Douglas* methodology, a court only considers evidence of pretext if the plaintiff has succeeded in creating a prima facie case. If any of the required elements is missing, summary judgment must be granted, even though it might be patently obvious that the employer's explanation for its conduct was a complete fabrication. Thus, in deciding whether to dismiss a claim for want of a prima facie case, the Sixth Circuit would ignore any evidence of pretext, as it did in this case.

The problem with the Sixth Circuit requirement—that plaintiffs establish a prima facie case, and adduce all of the judicially-created list of elements—is not that in the instant case the list contained an improper element, but that there is such a list at all. The disputed

5. "[T]o be deemed 'similarly situated,' the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."

background-circumstances prima facie case element in this case is just the tip of a larger and far more harmful iceberg of judicially fashioned requirements. By insisting that a plaintiff at summary judgment establish a prima facie case, the Sixth Circuit has turned what this Court intended as a helpful procedural tool into a substantive narrowing of Title VII itself.

The defendant correctly describes the Sixth Circuit as utilizing a "prima facie screening test." Br. Opp. 35. That prima facie case screening test is important—indeed it only matters—insofar as it is *more* stringent than the usual summary judgment standard, whether there is sufficient evidence to permit a reasonable jury to find the existence of an unlawful motive. If the prima facie screening test were less stringent than the reasonable jury standard, it would be irrelevant. The sole function of the prima facie screening test thus is to mandate dismissal at summary judgment of claims that a reasonable jury could indeed sustain. That stands on its head this Court's insistence that what is required to establish a prima facie is less—indeed "much less[]"—than what would be required to establish liability at trial. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514-15 (1993); *see Johnson v. California*, 545 U.S. 162 (2005). In the instant case, the Sixth Circuit did not deny that a reasonable jury could find that Ames was the victim of intentional discrimination.

The Court should reverse the decision of the court of appeals. But we urge the Court not to adopt the legal argument set out in petitioner's brief. Doing so would codify this very ill-considered scheme to which so many judges have objected. Ames' analysis takes as a given a requirement that plaintiffs establish a prima facie

case at summary judgment. Ames does not object to the imposition of a judicially-mandated list of prima facie case elements; instead, she proposes her own list. Pet. Br. 6.; Pet. 6. Ames asks only that this Court excise from any list of required prima facie case elements the background circumstances standard that disadvantages majority-group plaintiffs, leaving in place all the other mandatory prima facie case elements that regularly compel rejection of the far larger number of claims of women, minority, and LGBTQ plaintiffs.[6] Such a halfway measure would create precisely the dissimilar treatment of different groups that Ames emphatically condemns. Rather, this Court should end outright and for all protected groups the requirement that plaintiffs establish a prima facie case at summary judgment, and by doing so should abolish the fashioning of lists of prima facie case elements that function as substantive limitations on the scope of Title VII.

(2) This Court never intended *McDonnell Douglas* and its progeny to work a substantive narrowing amendment of Title VII, or to require a plaintiff to prove more at summary judgment than he or she has to show at trial. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978), explained that "the method suggested in *McDonnell Douglas* ... is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." The *McDonnell Douglas* method is not the exclusive means of demonstrating that a plaintiff has a triable case; it is "a"

6. *E.g.*, *Leeth v. Secretary of Veterans Affairs*, 716 F.Supp.3d 562, 572 (S.D.Ohio 2024) (gay plaintiff asserting sexual-orientation discrimination failed to establish a prima facie case because more favorably treated heterosexual worker was not "similarly situated" under *Mitchell*).

way to evaluate the evidence, not the only permitted way to do so. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), offered the same account of the limited role of *McDonnell Douglas*.

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.... The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

450 U.S. at 253. *McDonnell Douglas* was intended to suggest one possible way to resolve that ultimate question, not to alter the question itself.

This Court has repeatedly made clear that the *McDonnell Douglas* method of analysis is not the exclusive manner by which evidence of unlawful motive can be evaluated. *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 121 (1985), held that the plaintiffs in that case were not required to establish a prima facie case of discrimination under *McDonnell Douglas*, because "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." But that did not mean that a plaintiff is limited to either proceeding under *McDonnell Douglas* or offering direct evidence (however defined). *Swierkiewicz* explained "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. *For instance*, if a plaintiff is able to

produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case." 534 U.S. at 511 (emphasis added). It would make no sense to permit a plaintiff to rely on direct evidence, but forbid reliance on circumstantial evidence unless it fits within the *McDonnell Douglas* framework. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

In discrimination cases arising under prohibitions other than Title VII, this Court has repeatedly evaluated evidence without requiring a showing of a prima facie case or resorting to the *McDonnell Douglas* paradigm. Only three years after *McDonnell Douglas*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 US 252, 267-71 (1977), assessed the evidence of racial discrimination in that case without ever referring to *McDonnell Douglas* or to the possible existence of a prima facie case. *Hazen Paper Co. v. Biggins*, 507 US 604, 613 (1993), held that a plaintiff could prove a claim of age-based discriminatory dismissal with circumstantial evidence that he had been replaced by a younger worker, that he had been required to sign a confidentiality agreement not demanded of others, and that his employer's explanation was unworthy of credence, again without suggesting that the plaintiff had established a prima facie case. *Batson v. Kentucky*, 476 U.S. 79 (1986) held that a litigant can prove racial discrimination in jury selection *either* by establishing a prima facie case of such discrimination, shifting the burden to the state to articulate an explanation of its actions, *or* simply by pointing to persuasive circumstantial evidence, such as the "seriously disproportionate exclusion of Negroes from

jury venire." 476 U.S. at 93 (quoting *Washington v. Davis*, 429 U.S. 229, 241 (1976)).

(3) A rule that plaintiffs, to avoid summary judgment, must establish a prima facie case of discrimination would be inconsistent with *Aikens.* 460 U.S. 711 (1983). Following a bench trial of the discrimination claim in that case, the government continued to contend that the plaintiff's claim should be rejected because he had failed to establish a prima facie case. The Court rejected that argument.

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non.... [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII.

460 U.S. at 713-15. Although *Aikens* arose in the context of a case that had gone to trial, the reasoning of the decision was not limited to that situation.

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer

> relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253).

This Court applied *Aikens* in *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003), a summary judgment case. The defendant's explanation of its action had

> plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. Thus, the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision ... was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision [for an unlawful reason].

540 U.S. at 53-54; *see Hernandez v. New York*, 500 U.S. 352, 359 (1991) (whether defendant established prima facie case of race-based use of preemptory challenges irrelevant once prosecutor proffered an explanation for his actions).

Several courts of appeals have correctly concluded that at the summary judgment stage, under *Aikens*, once a defendant offers a neutral explanation for the disputed conduct at issue, it is irrelevant whether the plaintiff

established a prima facie case.[7] The District of Columbia Circuit adopted that rule in a decision by then Judge Kavanaugh.

> In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?

Brady, 520 F.3d at 494; *see Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C.Cir.2008) (opinion by Kavanaugh, J.). While serving on the District Court, Justice Jackson applied *Brady* in fourteen summary judgment cases. *See*, *e.g.*, *Davis v. Yellen*, 2021 WL

7. *See Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 296 (7th Cir.1998) (prima facie case irrelevant at summary judgment where defendant has offered a reason for its action); *Taub v. Fleishman-Hillard, Inc.*, 256 Fed. App. 170, 171-72 (9th Cir.2007) (same); *Wells v. Colorado Dept. of Transportation*, 325 F.3d 1205, 1226-28 (10th Cir.2003) (Hartz, J., writing separately).

2566763, at *16 (D.D.C.June 21, 2021); *Ng v. LaHood*, 952 F.Supp.2d 85, 92 (D.D.C.2013).

Of course, *Aikens* and its progeny apply only when a defendant has given an explanation for the adverse action in question. But, as then Judge Sotomayor correctly observed, "it is the rare case in which a defendant will not have proffered such a reason...." *Lanahan v. Mutual Life Ins. Co. of New York*, 15 F.Supp.2d 381, 384 (S.D.N.Y.1998); *see Adeyemi v. District of Columbia*, 525 F.3d at 1226 ("an employer almost always will [offer a reason for its actions] by the summary judgment stage of an employment discrimination suit."); *Wells v. Colorado Dept. of Transportation*, 325 F.3d at 1224 ("proof of the prima facie case puts the burden on the employer to produce evidence of proper motive. But doesn't the employer always do that?").

In the instant case, the defendant offered a specific explanation both for its decision not to promote Ames (Pet. App. 20a), and for its decision to instead promote another worker. Pet. App. 21a. Under these circumstances, which would be similar to virtually every other Title VII case, requiring proof of a prima facie case was improper. Because Ames should not have been required to establish a prima facie case at all, it is irrelevant here—as it would be in essentially any case—what the appropriate elements of such a prima facie case might be.

(4) Nothing we have said precludes a plaintiff from *voluntarily* organizing his or her evidence in the manner suggested by *McDonnell Douglas*. The difficulties that have arisen regarding the *McDonnell Douglas* method

of analysis and the concept of a prima facie case derive largely from judicial efforts to require that all Title VII disparate treatment cases fit within those strictures. But outside the context of such a judicially-imposed prima facie case requirement, *McDonnell Douglas* can remain a useful tool for litigants and courts alike.

The types of prima facie case elements suggested by *McDonnell Douglas* can narrow the focus of the litigation because they may "eliminate[] the most common nondiscriminatory reasons for the" adverse action at issue. *Burdine*, 450 U.S. at 254. And *McDonnell Douglas* calls attention to the potential importance of proof that an employer's proffered explanation is unworthy of belief. "In 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." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). But a plaintiff is not required to support an inference of discrimination in that or any other particular manner. The ultimate issue at summary judgment remains whether a reasonable jury could conclude that the defendant acted with an unlawful purpose, not whether the plaintiff has proffered some specific type of evidence which the court mistakenly believes is required by *McDonnell Douglas*, or which a judge may think would be especially persuasive.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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