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 THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for a covered 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." 42 U.S.C. 2000e-2(a)(1). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court set forth a three-step burden-shifting framework for cases where a plaintiff seeks to prove an employer's discriminatory intent with circumstantial evidence. The question presented is:

Whether the court of appeals erred in holding that, in addition to making out the usual prima facie case of discrimination at the first step of the *McDonnell Douglas* framework, a plaintiff who is a member of a "majority" group also must establish "background circumstances" tending to show that the employer would discriminate against a member of the majority.

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INTEREST OF THE UNITED STATES

This case concerns the evidentiary burdens applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, and the Department of Justice enforces the statute against state- and local-government employers. 42 U.S.C. 2000e-5(f)(1). Title VII also applies to the federal government as an employer. 42 U.S.C. 2000e-16. The United States accordingly has a substantial interest in this Court's resolution of the question presented.

STATEMENT

Petitioner Marlean A. Ames is an employee of respondent, the Ohio Department of Youth Services. Pet. App. 3a. Ames sued the Department, alleging that she

had been denied a promotion and then demoted because of her sexual orientation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). Pet. App. 3a-4a. The lower courts rejected her claim at the summary-judgment stage, reasoning that Ames had failed to make out a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because she had not established "background circumstances" suggesting that the Department was an "unusual employer who discriminates against the majority." Pet. App. 5a (citation omitted). This Court granted certiorari to decide whether the court of appeals erred in requiring majority-group plaintiffs to demonstrate such "background circumstances" in addition to the ordinary elements of a prima facie case.

A. Legal Background

Congress enacted Title VII to "assure equality of employment opportunities and to eliminate * * * discriminatory practices" in the workplace. *McDonnell Douglas*, 411 U.S. at 800. This case concerns 42 U.S.C. 2000e-2(a)(1), "Title VII's core antidiscrimination provision." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 61 (2006). Section 2000e-2(a)(1) makes it unlawful for an employer, including a state or local government 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." 42 U.S.C. 2000e-2(a)(1). Discrimination because of an individual's sexual orientation is a form of sex discrimination prohibited by Title VII. *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 683 (2020).

Under Section 2000e-2(a)(1), a plaintiff "may prove his case by direct or circumstantial evidence." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983). In *McDonnell Douglas*, this Court set forth a three-step "order and allocation of proof" for evaluating a claim based on circumstantial evidence. 411 U.S. at 800. First, the plaintiff carries the "initial burden" of "establishing a prima facie case" of discrimination. *Id.* at 802. Second, if the plaintiff makes that showing, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory act. *Ibid.* Third, if the employer does so, the burden returns to the plaintiff to prove that the asserted reason is a "pretext" for a "discriminatory decision." *Id.* at 804-805.

This case concerns the showing required at the first step of that burden-shifting framework. In *McDonnell Douglas* itself, the Court considered a claim brought by a Black mechanic who was not rehired after participating in a civil rights protest. In that context, the Court held that the plaintiff had established a prima facie case by showing that: (i) "he belong[ed] to a racial minority"; (ii) "he applied and was qualified for a job for which the employer was seeking applicants"; (iii) "despite his qualifications, he was rejected"; and (iv) "after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications." 411 U.S. at 802. The Court noted, however, that the required "prima facie proof" would vary in "differing factual situations." *Id.* at 802 n.13. And the Court has since made clear that a plaintiff establishes a prima facie case whenever she shows that she was qualified for the position she sought or held and that the employer took an adverse action "under

circumstances which give rise to an inference of unlawful discrimination." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).[1]

B. The Present Controversy

1. Since 2004, petitioner Marlean A. Ames has worked for the Ohio Department of Youth Services, an agency that oversees aspects of Ohio's juvenile corrections and rehabilitation system. Pet. App. 3a, 14a. Ames is a heterosexual woman. *Id.* at 3a. She began her career with the Department as an executive secretary at a regional parole office. *Id.* at 16a. By 2014, Ames had become Administrator of the Prison Rape Elimination Act (PREA). *Id.* at 3a, 17a.

At all times relevant here, Ames's supervisor was Ginine Trim, a gay woman. Pet. App. 3a. Trim's supervisor, in turn, was Assistant Director Julie Walburn, who is heterosexual. *Ibid.* And in 2019, Walburn began reporting to a newly appointed Director of the Department, Ryan Gies, who also is heterosexual. *Id.* at 3a, 15a. Gies was tasked with more proactively addressing sexual victimization in juvenile corrections, a priority of the governor's office. *Id.* at 21a-22a.

Ames alleges that, in 2019, the Department took two adverse actions against her on the basis of her sexual orientation. Pet. App. 3a-4a. Walburn and Gies were the decisionmakers for both actions. *Id.* at 6a, 20a-21a; see Pet. Br. 18.

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[1] This Court has also separately addressed the "prima facie" case in a suit alleging that an employer has engaged in a pattern or practice of discrimination against a particular group. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977). That distinct method of proof is not at issue here.

First, in April 2019, the Department denied Ames a promotion. The Department had created a new position, Bureau Chief of Quality Assurance and Improvement. Pet. App. 18a-19a. Ames and three other candidates applied for the job and interviewed with Trim and Walburn in April 2019. *Id.* at 4a, 18a-19a. Although Ames had recently received a positive performance review from Trim, *id.* at 3a, her interviewers said that they harbored concerns that she lacked the "vision" and "leadership skills" for the new role, *id.* at 19a-21a. The Department initially selected none of the applicants and left the position open. *Id.* at 3a-4a, 20a. Eight months later, the Department offered the position to another employee, Yolanda Frierson, who had not originally applied. *Id.* at 4a, 20a-21a. Frierson, a gay woman, had joined the Department two years after Ames and had held management roles but, unlike Ames, lacked a college degree. *Id.* at 4a, 21a; Br. in Opp. 15-16.

Second, in May 2019, the Department demoted Ames. Pet. App. 4a. Walburn informed Ames that she would be terminated from the PREA administrator role and offered her the option to return to her previous position as an executive secretary, "which would amount to a demotion" with a substantial pay cut. *Ibid.* By the end of that month, Walburn and Gies had selected a new PREA Administrator, Alexander Stojsavljevic, a gay man who had been hired as a social worker a few years earlier. *Id.* at 4a, 43a. Ames claims that her demotion was the result of a "long-running scheme" involving Trim, Stojsavljevic, and others "to kick her out" because of, among other reasons, her sexual orientation. *Id.* at 21a-23a. The Department, meanwhile, maintained that it demoted Ames because of concerns that she

could not effectively lead its revamped approach to combatting sexual violence. *Ibid.*

2. Ames sued the Department in the United States District Court for the Southern District of Ohio. She alleged, as relevant here, that the denial of a promotion to Bureau Chief in favor of Frierson, a gay woman, was discrimination based on sexual orientation and that her demotion in favor of Stojsavljevic, a gay man, was discrimination based on sexual orientation and sex. Pet. App. 3a-6a.

The district court granted the Department's motion for summary judgment. Pet. App. 13a-40a. Because Ames relied on circumstantial evidence, the court evaluated her claims using the *McDonnell Douglas* framework. *Id.* at 30a-34a. Applying Sixth Circuit precedent, the court explained that a plaintiff who is "a member of a majority group" must show, in addition to the ordinary elements of a prima facie case, "'background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Id.* at 28a (citation omitted). The court rejected Ames's claims of sexual-orientation discrimination because it held that she had failed to carry that additional burden. *Id.* at 30a-34a.

The district court did not apply the "background circumstances" requirement to Ames's claim that she was demoted because she is a woman. Pet. App. 34a-35a. Instead, the court concluded that she had established a prima facie case as to that claim because it was undisputed that she "is a member of a protected class," "was qualified for her role," "was terminated," and "was replaced by a male employee." *Id.* at 35a. But the court held that Ames's claim failed at the third step of the *McDonnell Douglas* framework because she had failed to offer evidence that

the Department's stated reasons for her demotion were a pretext for discrimination. *Id.* at 34a-40a.

3. The court of appeals affirmed. Pet. App. 2a-11a. As to Ames's claim of sexual-orientation discrimination, the court stated that Ames's prima facie case would have been "easy to make" had she belonged to "the relevant minority group (here, gay people)." *Id.* at 5a. But because Ames is heterosexual, the court applied circuit precedent requiring "a showing in addition to the usual ones for establishing a prima-facie case." *Ibid.* Specifically, the court required Ames to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Ibid.* (citation omitted).

The court of appeals held that Ames had failed to satisfy that heightened standard. Pet. App. 5a-6a. The court observed that plaintiffs "typically" establish the required "'background circumstances'" by: (i) showing that "a member of the relevant minority group" made "the employment decision at issue" or (ii) adducing "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." *Ibid.* The court held that Ames had not made either showing because the decisionmakers (Walburn and Gies) were heterosexual and because, under circuit precedent, Ames could not rely on her own treatment alone to demonstrate a pattern of discrimination. *Id.* at 6a. The court accordingly held that there was no genuine issue of material fact as to whether Ames had established a prima facie case of discrimination, and it affirmed the district court's grant of summary judgment on that claim. *Ibid.*

The court of appeals also affirmed as to Ames's sex-discrimination claim, but without applying any

"background circumstances" requirement. Pet. App. 6a-8a. The court explained that although the Department conceded that Ames had established a prima facie case, it had carried its burden of production to provide non-discriminatory reasons for her demotion: Gies's recent appointment as Director, his more ambitious agenda, and Ames's recent record of merely meeting (and not exceeding) expectations. *Id.* at 6a-7a. And the court concluded that Ames had failed to offer evidence that would allow a jury to conclude that those stated reasons were a pretext for discrimination. *Id.* at 7a-8a.[2]

Judge Kethledge concurred. Pet. App. 9a-11a. Although he joined the majority opinion in full, he expressed disagreement with circuit precedent establishing the "background circumstances" requirement, which "impose[s] different burdens on different plaintiffs based on their membership in different demographic groups." *Id.* at 9a (emphasis omitted). In his view, the "background circumstances" requirement is inconsistent with the text of Section 2000e-2(a)(1), which "expressly extends its protection to 'any individual.'" *Id.* at 10a. The requirement, he explained, precluded the court from considering evidence of pretext for Ames's claim of sexual-orientation discrimination, even though Judge Kethledge viewed that evidence as "notably stronger" than the evidence supporting her claim of sex discrimination. *Ibid.*

SUMMARY OF ARGUMENT

Section 2000e-2(a)(1) applies equally to all individuals who experience employment discrimination because of a protected trait, regardless of their race, color, religion,

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[2] Ames did not seek this Court's review of the lower courts' rejection of her sex-discrimination claim. See Pet. i.

sex, or national origin. The framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), likewise imposes the same evidentiary burdens on all plaintiffs.

A. Title VII protects "any individual" from discrimination because of a protected characteristic. 42 U.S.C. 2000e-2(a)(1). Consistent with that statutory text, this Court has long held that Section 2000e-2(a)(1)'s protections apply equally to discrimination against any individual, whether she is a member of a "*minority* or *majority*" group. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (citation omitted).

B. Just as Title VII applies equally to all plaintiffs, the *McDonnell Douglas* framework's evidentiary standards do not vary depending on a plaintiff's race, sex (including sexual orientation), or other protected characteristics. Under that framework, a plaintiff has the initial burden to present a prima facie case of discrimination. If the plaintiff carries that burden, it establishes a rebuttable presumption of discrimination that shifts a modest burden of production to the employer, which must articulate some legitimate, nondiscriminatory reason for the challenged action. If the employer does so, the burden shifts back to the plaintiff to prove that the employer's stated reason was a pretext for discrimination. *McDonnell Douglas*'s intermediate burdens of production serve to progressively sharpen the inquiry into that ultimate question. And the principal function of a prima facie case is simply to force the employer to come forward with a nondiscriminatory reason for its action, which the employer is in the best position to identify.

Accordingly, the plaintiff's burden at the first step of the *McDonnell Douglas* framework is "not onerous." *Texas*

Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248, 253 (1981). This Court has held that a plaintiff generally must show that she was qualified for the position she held or desired and that the employer took an adverse action against her "under circumstances which give rise to an inference of unlawful discrimination." *Ibid.* In *McDonnell Douglas*, for example, the plaintiff established a prima facie case by negating the two most common legitimate reasons why an employer might reject a job applicant—lack of qualifications and the absence of a vacancy. 411 U.S. at 802. Because employers ordinarily do not act arbitrarily, that evidence—if left unanswered—justified a presumption that the employer acted based on impermissible factors.

The requirements of a prima facie case do not vary depending on the plaintiff's protected characteristics. To the contrary, this Court has squarely held that Title VII "prohibits racial discrimination against * * * white [plaintiffs] upon the same standards as would be applicable" if they were Black. *McDonald*, 427 U.S. at 280. The EEOC, too, has long understood Title VII to require that the claims of minority- and majority-group plaintiffs be assessed in the same fashion.

C. The court of appeals erred in requiring "majority group" plaintiffs to satisfy a different and higher evidentiary standard by showing "background circumstances" suggesting that "the defendant is that unusual employer who discriminates against the majority." Pet. App. 5a (citation omitted).

The "background circumstances" requirement has no basis in Title VII's text, and it contradicts this Court's precedent, including the Court's assurances that all plaintiffs may proceed according to the same standards. The requirement also frustrates the proper

administration of the *McDonnell Douglas* framework, transforming the first step from a flexible evidentiary standard into a heightened—and unworkable—requirement that forecloses some claims that would satisfy Title VII's ultimate standard for liability.

The courts that adopted the "background circumstances" requirement generally did so because they believed that *McDonnell Douglas*'s rebuttable presumption was predicated on the plaintiff's membership in a minority group. But nothing about this Court's reasoning in *McDonnell Douglas* turned on the plaintiff's race—as this Court made clear a few years later by applying the same standards in a similar case involving white plaintiffs. See *McDonald*, 427 U.S. at 280.

The Department, for its part, has not defended the imposition of different evidentiary burdens depending on a plaintiff's protected characteristics. Instead, it has maintained that the "background circumstances" requirement is not a heightened standard at all. But the court of appeals' test—as articulated and as applied—improperly limits the type of evidence that a majority-group plaintiff may use to raise a presumption of discrimination, and it demands that such plaintiffs adduce more evidence than this Court has required for minority-group plaintiffs. The "background circumstances" requirement accordingly cannot be squared with Title VII's promise of evenhanded treatment.

D. Because the court of appeals improperly imposed an additional evidentiary burden on Ames, this Court should remand to allow the court of appeals to apply the correct standard in the first instance.

ARGUMENT

Title VII applies equally to all plaintiffs who allege discrimination on the basis of "race, color, religion, sex,

or national origin." 42 U.S.C. 2000e-2(a)(1). The framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), likewise imposes the same evidentiary burdens on all plaintiffs, regardless of their race, religion, sex, or other protected characteristics. The court of appeals' imposition of an additional burden on majority-group plaintiffs is inconsistent with Title VII's text, this Court's precedent, and the purpose and operation of the *McDonnell Douglas* framework.

A. Section 2000e-2(a)(1) Prohibits Discrimination Against "Any Individual" Because Of A Protected Characteristic, Without Regard To The Prevalence Of That Characteristic

Section 2000e-2(a)(1), by its terms, protects "any individual" who experiences discrimination based on a protected characteristic. 42 U.S.C. 2000e-2(a)(1). The provision makes it unlawful 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." *Ibid.* (emphases added).

This Court has long held that the statutory text bars adverse employment actions based on an individual's protected characteristic—that is, based on a particular individual's "race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2(a)(1)—without regard to how common that characteristic may be. In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), for example, the Court explained that Section 2000e-2(a)(1)'s coverage is "not limited to discrimination against members of any particular race." *Id.* at 278-279. Instead, the statute prohibits "discriminatory preference for *any*

racial group, *minority* or *majority*." *Id.* at 279 (brackets and citation omitted). The Court thus held that a Title VII claim by plaintiffs alleging that they suffered discrimination because they were white must be adjudicated "upon the same standards as would be applicable" had they been members of a minority group. *Id.* at 280.

More recently, this Court reaffirmed that Section 2000e-2(a)(1)'s text focuses on "individuals, not groups." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 658 (2020). Because a disparate-treatment claim (unlike a disparate-impact claim) under Section 2000e-2(a)(1) does not depend on "the employer's treatment of groups," it is no defense for an employer to "give[] preferential treatment to female employees overall" if he treats an "individual woman worse than he would have treated a man." *Id.* at 658-659. Rather, the statute "works to protect individuals of both sexes from discrimination," including discrimination on the basis of sexual orientation, "and does so equally." *Id.* at 659.

Individuals of all races, sexes, religions, and national origins are thus entitled to the same statutory protection from discrimination, regardless of whether a majority of the population shares their protected trait. And as particularly relevant here, Ames, a heterosexual woman, has the same protection from discrimination based on sexual orientation as employees who are gay.

B. Section 2000e-2(a)(1) Does Not Require Different Evidentiary Showings Depending On The Prevalence Of A Plaintiff's Protected Characteristic

Just as Section 2000e-2(a)(1) protects equally "any individual" who experiences employment discrimination because of a protected characteristic, the statute also imposes the same evidentiary burdens on all plaintiffs seeking

to prove a violation—including plaintiffs who invoke the *McDonnell Douglas* framework. That framework plays an important but limited role in structuring the presentation of evidence and requiring an employer to come forward with a nondiscriminatory reason for a challenged employment action. It is not a basis for imposing a heightened evidentiary burden based on a particular plaintiff's race, sex (including sexual orientation), or other protected characteristics.

1. In *McDonnell Douglas*, this Court established an "order and allocation of proof" when a plaintiff relies on circumstantial evidence of discrimination in an action under Section 2000e-2(a)(1). 411 U.S. at 800. Under the *McDonnell Douglas* framework, the plaintiff has the initial burden to come forward with "a prima facie case" of discrimination. *Id.* at 802. If the plaintiff carries that burden, it establishes a rebuttable presumption of discrimination that shifts the burden to the employer "to articulate some legitimate, nondiscriminatory reason" for the challenged action. *Ibid.* If the employer does so, the burden then shifts back to the plaintiff to prove that the employer's stated reason was a pretext for discrimination. *Id.* at 804-805.

This Court's subsequent decisions have clarified the function and operation of the *McDonnell Douglas* framework. It is "an evidentiary standard, not a pleading requirement," and it thus does not apply at the motion-to-dismiss stage. *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 510 (2002). Instead, it governs the presentation of evidence after discovery—usually, as in this case, at summary judgment.[3] In addition, the *McDonnell Douglas*

[3] The petition mistakenly frames the question presented as one about what a plaintiff must "plead[]." Pet. i. This case was resolved at summary judgment, Pet. App. 3a-4a, and it thus concerns the

framework shifts only a "burden of production," not a burden of persuasion. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981). At the second step, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254. Instead, the defendant carries its burden as long as it "clearly set[s] forth, through the introduction of admissible evidence," a "legitimate, nondiscriminatory reason" for its action. *Id.* at 254-255. And if the defendant does so, the presumption created by the plaintiff's prima facie showing "drops from the case." *Id.* at 248 n.10.

The *McDonnell Douglas* framework was thus an exercise of this Court's "traditional" authority to establish "certain modes and orders of proof" for Title VII cases. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 514 (1993). Under the statute, a defendant's liability always turns on whether its action "was the product of unlawful discrimination." *Ibid.* And "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. "The *McDonnell Douglas* division of intermediate evidentiary burdens" simply "serves to bring litigants and the courts expeditiously and fairly to this ultimate question." *Id.* at 248. And the framework's principal practical function is to ensure that an employer confronted with a prima facie case of discrimination is forced to come forward with a nondiscriminatory reason for its action, thereby "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8; see

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evidentiary showing required at that stage, not what a plaintiff must plead to survive a motion to dismiss.

Hicks, 509 U.S. at 510-511 & n.3 (describing this "practical" operation of the framework).

2. That function of the *McDonnell Douglas* framework has informed this Court's articulation of the showing a plaintiff must make at the first step. In general, the Court has held that a plaintiff must establish that she was qualified for the position she held or desired and that the employer took an adverse action against her "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. The Court has instructed that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.' " *Swierkiewicz*, 534 U.S. at 512 (citation omitted). And consistent with its limited role in shifting a modest burden of production to the defendant, the Court has emphasized that the requirements for a prima facie case are "minimal," *Hicks*, 509 U.S. at 506, and "not onerous," *Burdine*, 450 U.S. at 253.

In *McDonnell Douglas* itself, for example, the Court set forth a "model" for a prima facie case of discrimination when an employee alleged that he was not hired based on a protected trait (there, his race). *Burdine*, 450 U.S. at 253 n.6. The plaintiff in *McDonnell Douglas* 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 applications"; (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 [the plaintiff's] qualifications." 411 U.S. at 802. In *Burdine*, the Court similarly explained that a plaintiff "proved a prima facie case" of sex discrimination by showing "that she was a

qualified woman who sought an available position, but the position was left open for several months before she was finally rejected in favor of a male" who had "been under her supervision." 450 U.S. at 253 n.6.

This Court has explained that such a showing constitutes evidence that the employer's action "did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1997). And the Court has reasoned that such evidence justifies imposing a rebuttable presumption that shifts the burden of production to the employer because "more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Accordingly, if an employee has made the required prima facie showing and the employer's action is "otherwise unexplained"—that is, if the employer ultimately fails to offer any legitimate, nondiscriminatory reason—a court is justified in presuming the employer acted based on "impermissible factors." *Ibid.*

That rebuttable presumption, a "traditional feature of common law," thus operates as a "'device for allocating the production burden'" on a discrete issue—the defendant's asserted reason for acting. *Burdine*, 450 U.S. at 255 n.8 (quoting Fleming James & Geoffrey C. Hazard, *Civil Procedure* § 7.9, at 255 (2d ed. 1977)); see James Bradley Thayer, *A Preliminary Treatise on Evidence* 313-317, 346 (1898); Fed. R. Evid. 301. That allocation of the burden furthers the "expeditious[] and fair[]" resolution of Title VII cases, *Burdine*, 450 U.S. at 253,

because the employer is the party best able to provide evidence of its own reasons for acting. See John MacArthur Maguire, *Evidence, Common Sense and Common Law* 185 (1947) (presumptions can serve "to bring out evidence of the actual specific facts from the parties who can get at that evidence most easily"); James & Hazard § 7.9, at 257 ("Access to evidence is often the basis for creating a presumption.").

3. The burdens imposed by the *McDonnell Douglas* framework do not vary depending on the race, sex (including sexual orientation), or other protected characteristics of the plaintiff. Like any other plaintiff, a member of a majority group must establish that she was qualified for the position she held or desired and that the employer took an adverse action against her "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. Like any other plaintiff, a member of a majority group who eliminates the "most common nondiscriminatory reasons" for an adverse employment action is entitled to an inference that the challenged action, "if otherwise unexplained," was the result of discrimination. *Id.* at 254. And like any other plaintiff, a member of a majority group faces an imbalance of access to evidence of the employer's motive that justifies shifting to the employer a modest burden to articulate its reasons for the challenged action.

That is why, three years after *McDonnell Douglas*, this Court in *McDonald* treated a similar case involving white plaintiffs as "indistinguishable" from *McDonnell Douglas* itself. *McDonald*, 427 U.S. at 282. "Title VII," the Court explained, "prohibits racial discrimination against the white [plaintiffs] *upon the same standards* as would be applicable" if they were Black. *Id.* at 280

(emphasis added). The Court recognized that *McDonnell Douglas* had referred to the plaintiff's membership in a "racial minority" group in describing the prima facie showing in that case. *Id.* at 279 n.6 (quoting *McDonnell Douglas*, 411 U.S. at 802). But that reference did not reflect "any substantive limitation of Title VII's prohibition of racial discrimination" or any special standard of proof for minority plaintiffs. *Ibid.* Instead, it was set out only to pinpoint the "character" of the alleged discrimination—there, "racial" discrimination. *Ibid.*

Consistent with *McDonald*, the EEOC has long understood Title VII to require that the claims of minority- and majority-group plaintiffs be assessed in the same fashion. EEOC, *Compliance Manual* § 15-II (Apr. 19, 2006), https://perma.cc/GBS5-T7ZT. The EEOC has rejected the approach of some courts of appeals, including the court of appeals below, that apply a "heightened" evidentiary standard to "majority"-group plaintiffs, explaining instead that the "same standard of proof" applies regardless of the plaintiff's protected trait. *Ibid.* (citing *McDonald*, 427 U.S. at 280).[4]

That means that a plaintiff from a "majority" group, like a plaintiff from a "minority" group, establishes a prima facie case of discrimination so long as she shows that (i) she is a member of a protected class who (ii) was

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[4] In *McDonald*, the United States adopted a different reading of *McDonnell Douglas*, suggesting that "[a] white [plaintiff]," "unable to show membership in a minority, would have to supply an appropriate substitute for the first element" of the *McDonnell Douglas* test "in order to establish a presumption of racial discrimination." U.S. Amicus Br. at 11-12, *McDonald*, *supra* (No. 75-260). But the Court specifically rejected that approach, explaining that *McDonnell Douglas*'s reference to membership in a "racial minority" served only to identify "the racial character" of the discrimination alleged there. *McDonald*, 427 U.S. at 279 n.6.

"qualified" for the relevant position, but (iii) was subject to an adverse employment action that (iv) was taken "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. In the failure-to-hire context, for instance, the fact that an employer "continued to seek applicants from persons of [the plaintiff's] qualifications" or hired a plaintiff of a different race (or other protected characteristic) suffices to create a presumption of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802; see, *e.g.*, *Burdine*, 450 U.S. at 253 n.6. But "the prima facie case operates as a flexible evidentiary standard" that can be satisfied in many different ways. *Swierkiewicz*, 534 U.S. at 512. The critical point is that all plaintiffs are subject to the same standard, regardless of their race, sex (including sexual orientation), or other protected characteristic.[5]

C. The Court Of Appeals Erred By Imposing Additional Requirements On Majority-Group Plaintiffs

The Sixth Circuit has imposed a "different and more difficult prima facie burden" on what it calls "'majority'"-group plaintiffs. *Briggs* v. *Potter*, 463 F.3d 507, 517 (6th

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[5] Circumstances that may give rise to an inference of discrimination include—but are not limited to—the selection (or more favorable treatment) of a person who does not share an employee's protected characteristic, see, *e.g.*, *Hicks*, 509 U.S. at 506; *Young* v. *United Parcel Serv., Inc.*, 575 U.S. 206, 228-229 (2015), an employer's derogatory commentary about the employee's protected characteristic, *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 (1983), or a "sequence of events leading [up] to" the challenged action that suggests animus, *Leibowitz* v. *Cornell Univ.*, 584 F.3d 487, 502 (2d Cir. 2009), superseded by statute on other grounds as stated in *Vogel* v. *CA, Inc.*, 662 Fed. Appx. 72 (2d Cir. 2016) (citation omitted); see also, *e.g.*, *Chappell-Johnson* v. *Powell*, 440 F.3d 484, 488-489 (D.C. Cir. 2006) (identifying forms of potentially sufficient evidence).

Cir. 2006) (citation omitted). The court, like several other circuits, requires such a plaintiff to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Pet. App. 5a (citation omitted); see, *e.g.*, *Hammer* v. *Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Mills* v. *Health Care Serv. Corp.*, 171 F.3d 450, 454-455 (7th Cir. 1999); *Notari* v. *Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992); *Parker* v. *Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017-1018 (D.C. Cir. 1981). That additional requirement is improper, and none of the purported justifications for it have merit.

1. The Sixth Circuit's "background circumstances" requirement has no basis in Title VII's text, contradicts this Court's precedent, and frustrates the proper administration of the *McDonnell Douglas* framework.

a. A heightened standard for majority-group plaintiffs finds no footing in the statutory text, which applies equally to "any individual" alleging discrimination on the basis of a protected characteristic. 42 U.S.C. 2000e-2(a)(1); see pp. 12-13, *supra*. A heightened standard keyed to "background circumstances" also ignores that the ultimate issue in a disparate-treatment claim under Section 2000e-2(a)(1) is the employer's treatment of the plaintiff, not the broader group to which the plaintiff belongs. See p. 13, *supra*. Under the court of appeals' test, it is not enough for the plaintiff to establish a prima facie case that the employer has impermissibly discriminated against *her*; the plaintiff also carries the initial burden of showing that the employer is "that unusual employer who discriminates against the majority" as a group. Pet. App. 5a (citation omitted).

This Court has rejected that form of analysis, explaining that it is no defense to a claim of intentional discrimination if the employer ordinarily treats members of the plaintiff's class well. *Bostock*, 590 U.S. at 659; see *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-312 (1996). By the same token, there is no requirement that an employer generally treat members of the plaintiff's class poorly or that there be a statistical pattern of discrimination—"[t]here is no exception in the terms of the Act for isolated cases." *McDonald*, 427 U.S. at 280 n.8. Although evidence of a broader discriminatory pattern or practice may help a plaintiff prove her case, *Teamsters*, 431 U.S. at 336-338, the only requirement under Section 2000e-2(a)(1) is that the employer discriminate against "an[] individual" because of "such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

b. The Sixth Circuit's heightened requirement for majority-group plaintiffs also contravenes this Court's precedents. Most obviously, it directly contradicts the Court's assurance that *all* plaintiffs may proceed with circumstantial evidence according to the "same standards," regardless of their race, sex, or other protected characteristics. *McDonald*, 427 U.S. at 278-280; see pp. 18-19, *supra*.

What is more, the court of appeals' "background circumstances" test imports into the first step of the *McDonnell Douglas* framework evidentiary requirements ordinarily reserved for the third step. The court of appeals focused on whether Ames had produced "evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue" or "statistical evidence showing a pattern of discrimination by the employer against members of the

majority group." Pet. App. 5a-6a. While a plaintiff may choose to support a prima facie case with evidence of "background circumstances" suggesting discrimination, including statistical evidence, it is at *McDonnell Douglas*'s third step that plaintiffs would ordinarily rely on any such evidence. See *McDonnell Douglas*, 411 U.S. at 804-805 (considering the employer's "general policy and practice with respect to minority employment" at the third step); see also *Furnco*, 438 U.S. at 580 (similar).

By "'cramming' the 'background circumstances' inquiry into the first prong," the court of appeals upset *McDonnell Douglas*'s careful allocation of burdens. *Iadimarco* v. *Runyon*, 190 F.3d 151, 163 (3d Cir. 1999). The "background circumstances" test risks forcing plaintiffs to prove their entire case before learning the employer's "legitimate, nondiscriminatory reason" for the challenged action, and with no opportunity to demonstrate that the stated reason is a "pretext." *McDonnell Douglas*, 411 U.S. at 802, 804-805. Instead of "expeditiously and fairly" bringing the parties to the ultimate question of discrimination, *Burdine*, 450 U.S. at 253, the test effectively shifts the entire burden of production to the plaintiff at the outset.

In doing so, moreover, the "background circumstances" requirement transforms the first step of the *McDonnell Douglas* framework from a "flexible evidentiary standard," *Swierkiewicz*, 534 U.S. at 512, into a heightened requirement that forecloses some claims that would satisfy Title VII's ultimate standard for liability. As this case illustrates, the background circumstances requirement forces courts to turn a blind eye to evidence of discrimination unless a plaintiff adduces some *other* evidence—aside from her own treatment—

suggesting that her employer is likely to discriminate against the majority group. Pet. App. 5a-6a. Judge Kethledge, for instance, viewed Ames's evidence supporting her sexual orientation claim as "notably stronger" than the evidence for "her sex discrimination one," but the court of appeals declined to consider that evidence because Ames could not point to additional "background circumstances" to support her prima facie case. *Id.* at 10a.

c. The "background circumstances" requirement is also difficult to administer. The test is "vague and ill-defined," *Iadimarco*, 190 F.3d at 161, because it is difficult to delineate what "background circumstances" are necessary to establish a prima facie case beyond the "usual ones" that *McDonnell Douglas* instructed courts to consider, Pet. App. 5a. The Sixth Circuit, for example, has held that "background circumstances" will typically fall into two categories: (i) evidence that the decisionmaker was not a member of the plaintiff's protected class; or (ii) statistical evidence demonstrating a pattern of discrimination outside of the plaintiff's own case. *Id.* at 5a-6a. But the court did not explain what distinguishes those two categories of evidence from the many other circumstances that might give rise to an inference of discrimination. See p. 20 n.5, *supra*.

In addition, the court of appeals' approach requires courts to decide which groups should be subjected to an additional "background circumstances" requirement. The D.C. Circuit has suggested that the requirement applies to any plaintiff who is not a member of a "socially disfavored group" when viewed from a national perspective. *Parker*, 652 F.2d at 1017. But the court has left open the question "whether minority status for purposes of a prima facie case could have a regional or

local meaning." *Bishopp* v. *District of Columbia*, 788 F.2d 781, 786 n.5 (D.C. Cir. 1986). Rather than requiring courts to grapple with those questions, this Court should adhere to its instruction that a Title VII claim must be evaluated "upon the same standards" regardless of the plaintiff's race, sex, or other protected characteristics. *McDonald*, 427 U.S. at 280.

2. None of the purported justifications for the "background circumstances" requirement have merit.

a. The courts that adopted the "background circumstances" requirement generally did so because they believed that the *McDonnell Douglas* framework was "predicated" on the plaintiff's membership in a "socially disfavored group." *Parker*, 652 F.2d at 1017; see *Murray* v. *Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (adopting *Parker*'s reasoning); *Mills*, 171 F.3d at 454-455 (similar). When a "plaintiff is a member of a minority group," those courts reasoned, "an 'inference of discrimination' arises when the employer passes over the plaintiff for a promotion to a position for which he is qualified." *Harding* v. *Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (citation omitted). But those courts have declined to draw the same inference when "the plaintiff is a white man" because "[i]nvidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant." *Ibid.*

Those courts misunderstood the rationales animating the *McDonnell Douglas* framework. In adopting and refining that framework, this Court did not rely on any empirical judgment about the probability that a member of a "disfavored group" would endure discrimination or the frequency of such discrimination relative

to that experienced by members of "majority" groups, *Parker*, 652 F.2d at 1017. Rather, the Court reasoned that because employers generally "do not act in a totally arbitrary manner," a showing that negates the most common nondiscriminatory reasons for an adverse employment action justifies a presumption of discrimination "in the absence of any other explanation" from the employer. *Furnco*, 438 U.S. at 577, 580. The validity of that inference does not turn on the plaintiff's membership in a particular group.

That is not to say that a plaintiff's membership in a "socially []favored" or "disfavored" group will prove irrelevant in Title VII cases. *Parker*, 652 F.2d at 1017. If a group is in fact more often the target of discrimination, members of that group will more often bring and prevail in Title VII suits. And if a group is "disfavored," *ibid.*, that animus would manifest in different and pernicious ways, such as a historical pattern of disparate hirings or firings in an industry or organization, or a history of stereotyping or derogatory remarks within the company. Plaintiffs can marshal all of that evidence to prosecute their case, including in rebutting the employer's neutral rationale at *McDonnell Douglas*'s third step. Courts and juries may also bring "[c]ommon sense[] and an appropriate sensitivity to social context" when evaluating Title VII cases, and they may "f[i]nd the inference" of discrimination "eas[ier] to draw" in certain cases based on their own experiences. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 82 (1998). But Title VII does not tilt the scales in favor of any particular group, and each plaintiff must prove discrimination according to the "same standards." *McDonald*, 427 U.S. at 280.

b. Some courts have suggested that the "background circumstances" requirement is necessary to ensure that the prima facie case "screen[s] out" majority-group plaintiffs who "fail[] to distinguish [their] case from the ordinary, legitimate kind of adverse personnel decision." *Mills*, 171 F.3d at 457. But the *McDonnell Douglas* prima facie case was never meant to be "onerous." *Burdine*, 450 U.S. at 253. Its purpose is not to prove the case but merely to begin "fram[ing] the factual issue," which becomes increasingly "specific[]" as the inquiry proceeds to the ultimate question whether the plaintiff has carried her burden of proving intentional discrimination. *Id.* at 255.

The prima facie case serves that purpose without requiring a majority-group plaintiff to establish "background circumstances." In the failure-to-hire context the Court addressed in *McDonnell Douglas* itself, for example, the first element of the prima facie case (plaintiff's membership in a protected class) is a preliminary fact that shapes Section 2000e-2(a)(1)'s application, working in combination with the third element (the adverse action) to identify the character and form of the alleged discriminatory treatment. But those elements do only part of the work to justify a rebuttable presumption. See *Teamsters*, 431 U.S. at 358 n.44 ("An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based."). The inquiry's second element (plaintiff applied and was qualified) and fourth element (employer continued to seek applicants of the plaintiff's qualifications) serve to eliminate common "legitimate reasons" for the employer's actions—"an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Ibid.* With those common

reasons eliminated, discrimination becomes the "more likely" cause of the challenged action unless the employer can come forward with another permissible reason. *Furnco*, 438 U.S. at 577.

Nor must the prima facie case do additional "screening" work to weed out meritless cases. Although the plaintiff's burden at the first step is "not onerous," *Burdine*, 450 U.S. at 253, the employer's burden of production to rebut that prima facie case is similarly light; it need only "'set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks*, 509 U.S. at 507 (emphasis omitted). If the employer satisfies that minimal burden, the burden returns to the plaintiff to persuade the fact-finder that the employment action was taken for discriminatory reasons.

As a practical matter, moreover, it makes little sense to rely on a more stringent version of the prima facie case as a screening device—let alone a screening device that applies only to claims by plaintiffs of certain races, sexes, or other protected characteristics. Again, the *McDonnell Douglas* framework is "not a pleading requirement" and thus provides no basis for dismissing a complaint before discovery. *Swierkiewicz*, 534 U.S. at 510. And "by the time the district court considers an employer's motion for summary judgment or judgment as a matter of law, the employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision—for example, through a declaration, deposition, or other testimony from the employer's decisionmaker." *Brady* v. *Office of the Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (Kavanaugh,

J.). That is because "in the real-life sequence" of litigation, the defendant feels a "practical coercion" to "articulate some legitimate, nondiscriminatory reason" without waiting to see whether the court concludes that "the plaintiff's prima facie case is *proved*." *Hicks*, 509 U.S. at 510 n.3. This is a case in point, as the Department here did all that the second step requires—articulate a non-discriminatory reason for its employment actions—before the district court considered whether Ames had established a prima facie case of discrimination. Pet. App. 20a-23a.

c. In opposing certiorari, the Department did not attempt to defend the imposition of a different and higher evidentiary burden on majority-group plaintiffs. To the contrary, the Department acknowledged (Br. in Opp. 1) that "Title VII's protections" apply "with the same force to members of minority *and* majority groups." But the Department maintained (*e.g.*, *id.* at 17) that the "background circumstances" requirement is not a heightened standard at all, but simply a "difference[] of terminology." That account cannot be reconciled with the court of appeals' decision and the precedents on which the court relied.

In this case, the court of appeals explicitly held that because Ames is heterosexual, her sexual-orientation claim required her to make a "showing *in addition* to the usual ones for establishing a prima-facie case." Pet. App. 5a (emphasis added). And the court held that Ames had failed to make that showing even though everyone agrees that equivalent evidence *did* make out a prima facie case on her sex-discrimination claim, which was not subject to the "background circumstances" requirement. *Id.* at 6a.

Nor is the decision below an outlier. The Sixth Circuit has long recognized that the "background circumstances" requirement is a "more onerous" standard, *Zambetti* v. *Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (2002) (citation omitted), that imposes "a different and more difficult prima facie burden" on majority-group plaintiffs, *Briggs*, 463 F.3d at 517; see, *e.g.*, *Pierce* v. *Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) (acknowledging that the requirement "imposes a more onerous standard for plaintiffs who are white or male"), overruled on other grounds by *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

d. Relatedly, the Department has suggested that the court of appeals' "background circumstances" requirement is not as demanding as the decision below suggests and instead "may be satisfied 'through a variety of means.'" Br. in Opp. 33 (quoting *Johnson* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 502 Fed. Appx. 523, 536 (6th Cir. 2012)). But again, that is not how the requirement was applied here. See pp. 22-23, *supra*. To the extent the test could be reformulated to be broad enough to capture the full range of "circumstances which give rise to an inference of unlawful discrimination," Br. in Opp. 29 (citation omitted), it would be inoffensive but also "unnecessary," *Iadimarco*, 190 F.3d at 161. And to the extent the test continues to limit the types of evidence that majority-group plaintiffs may use to raise an inference of unlawful discrimination—or demands that such plaintiffs adduce more evidence than this Court required for a minority-group plaintiff in *McDonnell Douglas*—it contravenes Title VII's promise of evenhanded treatment. See pp. 12-13, *supra*. Either way, this Court should make clear that "[t]here is no need to embark upon the problematic detour of

showing 'background circumstances.'" *Iadimarco*, 190 F.3d at 162.

D. This Court Should Remand For The Court Of Appeals To Properly Apply The *McDonnell Douglas* Framework

Because the court of appeals improperly imposed an additional evidentiary burden on Ames, this Court should follow its usual practice by remanding to allow the court of appeals to apply the correct legal standards in the first instance. See, *e.g.*, *Muldrow* v. *City of St. Louis*, 601 U.S. 346, 360 (2024).

Here, the court of appeals has already suggested that, without the "background circumstances" requirement, Ames easily established a prima facie case of discrimination. Pet. App. 5a. For her promotion claim, she showed that she was qualified for the new position she sought and that the Department "continued to seek" applicants of similar qualifications for months after rejecting Ames, *McDonnell Douglas*, 411 U.S. at 802. See Pet. App. 3a, 19a-20a. For her demotion claim, Ames also adduced evidence to support an inference of discrimination, including that she was replaced by a person outside her protected class, and the parties disputed below whether the Department's selection of other candidates proceeded according to normal processes. See Pet. 7-9; Pet. App. 4a, 20a-25a. Taken together, such evidence likely discharged Ames's "minimal" burden at the first step of the *McDonnell Douglas* framework. *Hicks*, 509 U.S. at 506.

This Court's rejection of the "background circumstances" requirement would provide important guidance for litigants and courts by correcting a widespread error about a plaintiff's burden at the first step of the *McDonnell Douglas* framework. We note, however, that given the current posture of this case, the parties'

and the lower courts' focus on whether Ames carried that burden was misplaced. This Court has explained that where, as here, "the defendant has already done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff actually did so is no longer relevant." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983); see *Hicks*, 509 U.S. at 510 (explaining that if the defendant has articulated a nondiscriminatory reason for its action, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant"). Accordingly, rather than asking whether Ames had established a prima facie case, it would have been more straightforward to focus directly on the dispositive question: Whether she had "produced sufficient evidence for a reasonable jury to find that the [Department's] asserted non-discriminatory reason was not the actual reason and that the [Department] intentionally discriminated against her" because of her sexual orientation. *Brady*, 520 F.3d at 494.

That does not mean that Ames will necessarily defeat the Department's motion for summary judgment. What the court of appeals referred to as "background circumstances"—such as the employer's hiring patterns—may be relevant in determining at the third step whether the Department was motivated by a legitimate or discriminatory purpose. That the relevant decisionmakers are heterosexual, like Ames, also could be relevant (Pet. App. 3a), as could the claimed absence of evidence demonstrating that those decisionmakers even knew of Ames's sexual orientation (Br. in Opp. 11-13). The court of appeals, however, did not consider those questions, and this Court should remand so it has the opportunity to do so in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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