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

Motion of The National Employment Lawyers Association For Leave To Participate In Oral Argument As Amicus Curiae And For Enlargement of Time For Oral Argument

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The National Employment Lawyers Association ("NELA") moves this Court pursuant to Rule 28 for leave to participate in oral argument as an *amicus curiae*, and for enlargement of the time for oral argument.[1]

1. *Introduction* This case presents an extraordinary circumstance that warrants argument by an amicus. The court of appeals decision below rests on two holdings, *first,* that a plaintiff in a Title VII case is required to establish a prima facie case to avoid summary judgment, and *second* that a plaintiff who is a member of a majority group must demonstrate certain background circumstances in order to establish that required prima facie case. Petitioner, Respondent, and the United States ask the Court to simply assume that the first holding was correct, and to decide only the correctness of the second. But the Court itself should determine the scope of its opinion.

Whether Title VII plaintiffs are required to establish a prima facie case is far from settled law. That requirement has been rejected by several circuits, and has been criticized by two members of this Court and by numerous federal and state judges. A decision by this Court rejecting that controversial prima facie case requirement would render moot the dispute about whether satisfaction of the supposed requirement requires proof of special background circumstances. NELA, unlike the parties and the government, contends that the Court should indeed rule on whether Title VII plaintiffs must establish a prima facie case, rather than merely assuming that there is such a legal requirement. In order for the Court to vet at oral argument both sides of this dispute about the appropriate scope of its opinion, oral argument by NELA is necessary.

2. *The Scope of The Question Presented* The Sixth Circuit dismissed petitioner's claim because she could not show the required "background circumstances", and thus was unable to establish the existence of the required prima facie case of discrimination. Pet. 5a (majority opinion), 9a (Kethledge, J. concurring). The decisions below applied the rule in the Sixth Circuit (and some other circuits) that a Title VII plaintiff at least usually must establish a prima facie case in order to survive a motion for

[1] NELA earlier filed an amicus brief in support of petitioner.

summary judgment. As Petitioner and Respondent explain, that prima facie case requirement derives from the practice (in some but not all circuits) of resolving such summary judgment motions by applying the analytic method in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which does require the establishment of a prima facie case. In the instant case, as in all cases applying the disputed "background circumstances" test, that test is an additional element of the required prima facie case. The issue of whether there is indeed a prima facie case requirement at all, no less than the dispute about whether such a requirement would include in some cases a background circumstances element, is a "[q]uestion[] . . . essential to the analysis of the decisions below . . . [and thus] fairly comprised by the question presented." *City of Cherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n. 8 (2005).

3. *The Unresolved Dispute Regarding The Prima Facie Case Requirement* The correctness of the prima face case requirement applied by the Sixth Circuit is far from settled law. The imposition of that prima facie case requirement has been the subject of widespread judicial criticism. Justice Kavanaugh, while on the Court of Appeals, criticized the requirement in *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 n. 1, 494 (D.C. Cir. 2008). Justice Gorsuch, while on the Court of Appeals, criticized the use of *McDonnell Douglas*, *Walton v. Powell*, 821 F. 3d 1204, 1210-11 (10th Cir. 2016), and noted the judicial criticism of the prima facie case requirement. *Hinds v. Sprint/United Management Co.*, 523 F. 3d 1187, 1202 n. 12 (10th Cir. 2008). A substantial number of other federal and state judges have objected to the prima facie case requirement as unduly harsh or unworkable. NELA Br. 12-15.

Several circuits have expressly rejected the prima facie case requirement utilized in this case by the Sixth Circuit. The Eleventh Circuit has held that a plaintiff need not proceed under the *McDonnell Douglas* paradigm and is not required to establish a prima facie case. *Tynes v. Florida Department of Juvenile Justice*, 88 F. 4th 939, 941 (11th Cir. 2023). The Seventh Circuit has taken the same position, holding that the only issue at summary judgement is whether a reasonable factfinder could conclude that the defendant acted with an unlawful discriminatory purpose. *Ortiz v. Werner Enters., Inc.*, 834 F. 3d 760, 765 (7th Cir. 2016); *Igasaki v. Illinois Dept. of Financial and Professional Regulations*, 988 F. 3d 948, 957-58 (7th Cir. 2021).

The multi-faceted nature of these disagreements is illustrated by the evolution of the law in the District of Columbia Circuit. The background circumstances rule originated in a 1981 decision in that circuit. *Parker v. Baltimore & Ohio Railroad Co.*, 652 F. 2d 1012 (D.C. Cir. 1981). In 1985 the Sixth Circuit adopted the background circumstances rule from *Parker*. *Jasany v. U.S. Postal Service*, 755 F. 2d 1241, 1252 (6th Cir. 1985). In 1999 the Third Circuit rejected the *Parker* rule. *Iadimarco v. Runyon*, 190 F. 3d 151, 160 (3rd Cir. 1999). But in 2008, the District of Columbia Circuit itself effectively repudiated the underlying practice of requiring plaintiffs to establish a prima facie case. *Brady v. Office of Sergeant at Arms*, 520 F. 3d at 493-94 (opinion by Kavanaugh, J). *Brady* held that at summary judgment, if an employer has articulated a reason for the disputed action, it is be improper for a court to even consider whether the plaintiff had established a prima facie case. As Justice Sotomayor has correctly noted, employers always proffer an explanation for their actions. *Lanahan v. Mutual Life Ins. Co. of New York*, 15 F. Supp.2d 381, 384 (S.D.N.Y. 1998). The District of Columbia Circuit has not applied the background circumstances rule during the 16 years since *Brady*. *Brady* applied to summary judgment this Court's decision in *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), which held that the existence vel non of a prima facie case is irrelevant if, at trial, an employer offers an explanation for the disputed action. On the other hand, the Fourth, Fifth and Tenth Circuits have rejected *Brady* and refused to apply *Aikens* in summary judgment cases, and in that context continue to insist on the establishment of a prima facie case.[2] And their refusal to follow *Brady*, like the prima facie case requirement as such, has itself drawn lengthy judicial criticism.[3]

4. *The Need For Argument by NELA* This Court will have to decide whether to address the foundational issue of whether Title VII plaintiffs must establish a prima facie case at all (the first holding

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[2] *Hague v. University of Texas Health Science Center at San Antonio,* 560 Fed. Appx. 328, 334-35 (5th Cir. 2014); *Pepper v. Precision Valve Corp.*, 536 Fed. Appx. 335 n. * (4th Cir. 2013); *Kendrick v. Penske Transp. Services, Inc.*, 220 F. 3d 1220 1226 (10th Cir. 2000).

[3] *Hague*, 560 Fed. Appx. at 338-41 (Dennis, J., writing separately); *Wells v. Colorado Dept. of Transp.*, 325 F. 3d 1205, 1225-26 (10th Cir. 2003) (Hartz, J. writing separately).

of the court below), or to instead just assume that there is such a requirement and determine only whether proof of background circumstances is sometimes a necessary element of a (hypothetical) required prima facie case (the second holding). That fundamental threshold issue regarding the appropriate scope of the Court's opinion should be aired at oral argument.

But counsel now scheduled to argue are all on the same side of that question; none of them favors resolution by this Court of the foundational question of whether there is a prima facie case requirement at all, or of whether these cases must be decided under *McDonnell Douglas*. Respondent expressly opposes the Court reaching that issue, asserting that it should be postponed to "another day." Br. Opp. 28. The brief for the United States is devoted to argument about the scope of the prima facie case requirement, and does not acknowledge the existence of the widespread dispute about this practice. U.S.Br. 13-31.[4] Petitioner expressly takes no position on whether these cases must be decided under *McDonnell Douglas* or whether there should be a prima facie case requirement. Pet. 28 n. 3. Petitioner, Respondent and the United States all ground their respective merits arguments on the assumption that a summary judgment motion in a Title VII case must be analyzed under *McDonnell Douglas*, and that a plaintiff thus must establish a prima facie case in order to avoid summary judgment.

If this Court is to make a well-vetted decision about the scope of the issues it will choose to address, it also needs to hear oral argument on the other side, argument in favor of reaching the foundational issue of whether there is a prima facie case requirement and whether Title VII claims must be analyzed under *McDonnell Douglas*. That is the position set out in NELA's amicus brief (NELA Br. 8-18), and which we seek to present at oral argument. We contend that it would be impracticable to rule on whether the background circumstances test should be part of a prima facie case requirement without implying that there actually is such a requirement, or at the least creating further confusion among the

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[4] Several passages in the government's brief suggest that courts *must* apply *McDonnell Douglas* at summary judgment. U.S. Br. 14 ("the *McDonnell Douglas* framework . . . governs the presentation of evidence after discovery usually, as is this case, at summary judgment") (footnote omitted), 15 ("The *McDonnell Douglas* framework was . . . an exercise of this Court's 'traditional' authority to establish 'certain modes and orders of proof' for Title VII cases") (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993)).

lower courts about that question. We urge that it makes little sense for the Court to resolve the subsidiary question regarding the background circumstances test, while leaving unaddressed the sharply different approaches that the lower courts take to the analytically prerequisite question of whether there is a prima facie case requirement at all.

Petitioner, Respondent, and the United States all assert that the prima facie case requirement (at least aside from the disputed background circumstances rule) is "not onerous" or "minimal." Pet. Br. 6, 44; Br. Opp. 30; U.S. Br. 9, 16, 26-28, 31. If that were correct, it might weigh in favor of retaining a prima facie case requirement, because an undemanding requirement would be unlikely to exclude meritorious (or indeed many) cases. NELA, on the other hand, contends that in practice the formulaic versions of the prima facie case requirement applied in most circuits are exceedingly demanding, stringent in theory and often fatal in practice. NELA Br. 19-23. In the lower courts when defending discrimination lawsuits, both the state of Ohio[5] and the United States Department of Justice[6] routinely

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[5] In 2024, Ohio moved to dismiss 5 discrimination cases for failure to establish a prima facie case of unlawful motive, and the court held that there was a prima facie case in only one instance. *Leach v. Ohio State University*, 2024 WL 4985306, at 84 (Ohio Ct. App. 10th Dist. Dec. 5, 2024) (plaintiff concedes he cannot show required similarly situated comparator); *Walenciej v. Eastern Ohio Correction Center*, 2024 WL 2784330, at *4-*6 (S.D. Ohio May 20, 2024) (no prima facie case because no similarly situated comparator); *Detillion v. Ohio Dept. of Rehabilitation and Correction*, 2024 WL 1256048, at *6-*8 (S.D. Ohio March 25, 2024) (no prima facie case because no similarly situated comparator); *Solis v. Ohio State University Wexner Medical Center*, 2024 WL 982556, at *4-*6 (S.D. Ohio March 7, 2024) (court finds prima facie case); *Hill v. Ohio Dept. of Mental Health and Addiction Services*, 2024 WL 495525, at *7-*8 (S.D. Ohio Feb. 8, 2024) (no prima facie case because no similarly situated comparator).

[6] In the last four months of 2024, the United States moved to dismiss 20 discrimination cases for failure to establish a prima facie case of unlawful motive, and prevailed on that issue in 14 of those cases. *Dixion v. Garland*, 2024 WL 4948843, at *2 (5th Cir. Dec. 3, 2024) (no prima facie case because no similarly situated comparator); *Perez v. McDonough*, 2024 WL 4844383, at *5-*6 (N.D. Cal. Nov. 20, 2024) (no prima facie case because no similarly situated comparator); *Infantino v. Austin*, 2024 WL 4728943, ad *9-*10 (D. Mass. Nov. 7, 2024) (prima facie case); *Beasley v. Kendall*, 2024 WL 4602836, at *5-*8 (D. Colo. Oct. 29, 2024) (no prima facie case); *Overton v. Mayorkas*, 2024 WL 4607470, at *4-*5 (D. Ariz. Oct. 28, 2024) (no prima facie case); *Martinez v. Mayorkas*, 2024 WL 4581443, at *3 (D. Ariz. Oct. 25, 2024) (no prima facie case because no similarly situated comparator); *Robinson v. Ahuja*, 2024 WL 4553788 at *1 (1st Cir. Oct 23, 2024) (no prima facie case because no similarly situated comparator); *Young v. Buttigieg*, 2024 WL 4553784, at *1 (9th Cir. Oct 23, 2024) (no prima facie case); *Taleb v. Guzman*, 2024 WL 4469083, at *6-*7 (E.D. Mich. Oct. 10, 2024) (no prima facie case because no similarly situated comparator); *Tummala v. Wormuth*, 2024 WL 4449477, at *3 (D. N.J. Oct. 9, 2024) (no prima facie case because no similarly situated comparator); *Morgan v. Becerra*, 2024 WL 4349371, at *5-*6 (D. N.Mex. Sept. 30, 2024) (no prima facie case); *Abayomi v. McDonough*, 2024 WL 4346759, at

argue that discrimination claims should be dismissed because the plaintiff did not establish a prima facie case, and in a majority of those cases the lower courts hold that the plaintiff failed to establish a prima facie case. The United States asserts in this Court that a plaintiff seeking to establish a prima facie case may rely on any evidence that might support an inference of discriminatory motive. U.S. Br. 4, 10, 16, 20 and 20 n. 5. NELA, on the other hand, contends that in practice the formulaic prima facie case standards by their very nature exclude consideration of most probative evidence. NELA Br. 19-20.[7] Those fundamental differences regarding the nature of the controversial prima facie case requirement at issue in this case should be aired at oral argument.

The need for oral argument by NELA to fully vet the issues presented in this appeal is illustrated by the differing positions regarding the 1981 District of Columbia Circuit decision in *Parker*. Respondent defends the background circumstances rule and *Parker*. Br. Opp. 20-23, 29. Petitioner and the United States urge this Court to reject the rule in *Parker*. Pet. Br. 21 24, 29; U.S. Br. 24-26.[8] NELA

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*3-*4 (N.D. Ill. Sept. 30, 2024) (no prima facie case because no similarly situated comparator); *Rowe v. McDonough*, 2024 WL 4361955, at *5 (E.D. Mich. Sept. 30, 2024) (no prima facie case); *Sharmia-Washington v. Garland*, 2024 WL 4576729, at *7-*8 (N.D. Fla. Sept. 23, 2024) (no prima facie case because, inter alia, no similarly situated comparator); *Burton v. DeJoy*, 2024 WL 4266596, at *2 (D. Ariz. Sept. 23, 2024) (prima facie case); *Miller v. O'Malley*, 2024 WL 4240443, at *7 (N.D. Ill. Sept. 19, 2024) (prima facie case); *Sewell v. Garland*, 2024 WL 4227291, at *5 (D. Md. Sept 18, 2024) (prima facie case); *McClintock v. Garland*, 2024 WL 4217521, at *10-*11 (M.D. Pa. Sept. 17, 2024) (prima facie case); *Burns v. McDonough*, 2024 WL 4205577, at *5-*6 (E.D. Pa. Sept. 16, 2024) (no prima facie case); *Stepien v. Raimondo*, 2024 WL 4043589, at *16 (W.D. Wa. Sept. 14, 2024) (prima facie case because no similarly situated comparator).

[7] The United States asserts that the "[c]ircumstances 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 . . . ." U.S. Br. 20 n. 5. But the Sixth Circuit applies precisely that sort of limitation; as the court of appeals below explained, that Circuit "*require[s]* [a plaintiff] to show . . . that her employer treated more favorably a similarly qualified person who was not a member of the same protected class." Pet. App. 4a-5a (emphasis added). Such a requirement by its very nature means that, absent the mandatory showing, no other evidencc can establish a prima facie case. See nn. 5 and 6 *supra.*

[8] After arguing at length that this Court should rule on the correctness of the background circumstances test as an element of a prima facie case, the government at the end of its brief comments that "given the current posture of this case, the parties' and lower courts' focus on whether Ames carried that burden [of establishing a prima facie case] was misplaced[,]" because the Respondent employer had articulated a reason for the disputed actions. U.S. Br. 31-32. Rather, the government states, "it would have been more

urges the Court to adopt yet a third course of action, adopting the 2008 District of Columbia Circuit decision in *Brady*, which effectively bars requiring proof of a prima facie case at summary judgment, and thus renders moot the dispute about *Parker* and the background circumstances rule. NELA Br. 27-28.

An order permitting NELA to present oral argument would not commit the Court to deciding the foundational issue of whether Title VII plaintiffs must (ordinarily or ever) establish a prima facie case. Rather, oral argument by NELA would merely assure that the Court's determination of the scope of its opinion will be based on a full airing of the competing arguments regarding what issues the Court should and should not decide, and regarding whether it would be prudent or practicable in this case to attempt to determine the elements of a Title VII prima facie case without first deciding whether plaintiffs need establish a prima face case at all.

The Court should grant NELA leave to participate in oral argument as *amicus curiae*, and allot 10 minutes for that argument. Because the contentions advanced by NELA would result in vacating the decision below, the time allotted for argument by Respondent should be increased to 40 minutes.

5. *The Positions of The Parties* Petitioner and Respondent oppose this motion.

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straightforward to focus directly on the dispositive question: Whether [the plaintiff] had 'produced sufficient evidence for a reasonable jury to find . . .'intentional[] discriminat[ion] . . . .'" U.S. Br. 32 (quoting *Brady*, 520 F. 3d at 494). But that is not merely "the current posture of this case," it is (as the government elsewhere acknowledges) the posture of at least virtually all cases at summary judgment. U.S. Br. 29. For that reason, NELA contends that the suggestion of the Petitioner and the United States that the Court devote its opinion to the correctness of the background circumstances test is "misplaced." The "more straightforward" resolution of the confusion and division in the lower courts would be for this Court to instead decide whether Title VII plaintiffs can be required to establish a prima facie case at all, and to unequivocally reject that requirement.

CONCLUSION

For the above reasons, the Court should grant NELA leave to participate in oral argument as *amicus curiae*, allot it 10 minutes, and increase the argument time allotted to Respondent to 40 minutes.

Respectfully submitted,

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