No. 23-1039

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Title VII's "central statutory purpose[]" is to "[e]radicat[e] discrimination from the workplace." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *EMD Sales v. Carrera*, 604 U.S. ___ (2025), slip. op. at 7. How does it do that?

For Petitioner, answering that question is straightforward: Courts should apply the "same terms" and "standards" to all who seek Title VII's protection. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279–80 (1976). In the Sixth Circuit, on the other hand, judges must actually treat plaintiffs differently, by first separating them into majority and minority groups, and then imposing a "background circumstances" requirement on the former but not the latter. P.A. 5a. In other words, to enforce "Title VII's broad rule of workplace equality," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), courts must apply the law unequally.

That incongruous approach cannot be squared with Title VII's text. Respondent hardly argues otherwise. It says nothing about text until page 37 of its brief. There, it acknowledges that the Court has routinely reversed "lower courts [which have] improperly imposed an atextual requirement that plaintiffs had to meet before they could obtain relief under Title VII." Resp. Br. at 37. That doesn't apply here, Respondent contends, because "[t]he 'background circumstances' analysis, as applied by the Sixth Circuit and other courts, is not an additional element." *Id.* But the "background circumstances" rule is exactly that. The panel here said so expressly: Because "Ames is heterosexual," it explained, "she must make a showing *in addition to* the usual ones for establishing a prima-facie case." P.A. 5a (emphasis added). Thus, by

Respondent's own rubric, the "background circumstances" rule *is* atextual. On that basis alone, it should meet the same fate as the atextual rules in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), and *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768 (2015).

On top of being atextual, the "background circumstances" requirement also proves unworkable, given both demographic change generally and the many differences in any particular profession or workplace. Here too Respondent advances no serious rebuttal, instead trying to brush off such workability concerns as "miss[ing] the forest for the trees." Resp. Br. at 31. But that can't be right. After all, the cornerstone of Title VII *is* the trees: "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982). A rule requiring courts at the outset to sort plaintiffs into majority and minority groups is antithetical to that understanding.

Faced with this argument, Respondent ultimately admits there may be "confusion surrounding the language of 'background circumstances,'" and suggests that "it would make sense for the Court to follow the Third Circuit's lead." Resp. Br. at 32. But that circuit doesn't help Respondent at all, since it has—for decades—"reject[ed] the 'background circumstances' analysis set forth in *Parker, Harding,* and their progeny," on the very workability grounds Respondent tries to sidestep. *Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999); *id.* at 161 (describing "background circumstances" requirement as "irremediably vague" and "ill-defined"). It has instead applied the same analysis to majority- and minority-group plaintiffs alike. *See, e.g.*, *Durst v. City of Philadelphia*, 798 F. App'x 710, 713 & n.2 (3d Cir. 2020);

Casseus v. Kessler Inst. of Rehab., 45 F. App'x 167, 169 (3d Cir. 2002).

At most, Respondent tries to anchor its defense of the "background circumstances" rule in precedent, by claiming the Court implicitly endorsed such a requirement "as early as 1978," and that the circuits that apply it now do not actually ask majority-group plaintiffs to "bear a higher burden." Resp. Br. at 10, 13. It is mistaken on both counts.

To begin, Respondent's decision to start the clock at 1978 is hardly arbitrary. Doing so allows Respondent to bypass the throughline from (1) *Griggs v. Duke Power*, which recognized that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"; to (2) *McDonnell Douglas v. Green*, which established the elements of the prima facie case; to (3) *McDonald v. Santa Fe Trail*, which explained that these elements apply on the "same terms" to majority and minority plaintiffs alike. 401 U.S. 424, 431 (1971); 411 U.S. 792, 802 (1973); 427 U.S. at 279 & n.6. Subsequent cases, like *Furnco Construction v. Waters*, 438 U.S. 567 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), fall comfortably within this framework.

Importantly, neither *Furnco* nor *Burdine* bear the weight Respondent tries to assign them. Respondent, for instance, claims a plaintiff must in their prima facie case both "raise an inference of discrimination" and tie that inference "back to Title VII's ultimate causation requirement." Resp. Br. at 25–26. But *Furnco* expressly rejected this argument, holding that the lower court there "went awry" when it "equat[ed] a prima facie showing under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII."

438 U.S. at 576. *Burdine* further underscores that the prima facie case "is not onerous," 450 U.S. at 253, a conclusion which refutes Respondent's call for the Court to "level up" the prima facie case—not just for majority-group plaintiffs but all plaintiffs, Resp. Br. at 47.

Respondent's second argument, that a "background circumstances" requirement does "not impose a heightened burden" on majority-group plaintiffs, is weaker still. *Id.* at 26. Here, Respondent tries mightily to walk back its earlier assertion that Ames bore a "higher" evidentiary burden; it characterizes this argument as a "stray" comment. *Id.* at 29. But it wasn't that at all. It was the central argument which formed the basis for the Sixth Circuit's decision. P.A. 5a–6a.

The panel's reasoning, furthermore, highlights *why* it operates as a higher burden. The "background circumstances" rule required Petitioner here to point to statistical evidence reflecting "a pattern of discrimination" or information on the minority-group identity of the decisionmaker. *Id.* Moreover, it asked Petitioner to produce that evidence at the first step of a multi-step evidentiary framework. But this Court has held that a Title VII plaintiff need not offer such evidence—statistical proof or the minority status of the decisionmaker—at *any* stage of their case to prove discrimination. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Bostock v. Clayton County*, 590 U.S. 644, 658–59 (2020).

Finally, Respondent reprises several vehicle-related arguments from its brief in opposition. Resp. Br. at 7, 34. Those arguments lacked merit then and are beside the point now. After all, as Respondent concedes, nothing bars the Court from addressing the question at hand:

whether the "background circumstances" requirement is consistent with Title VII. *Id.* at 42. The answer is no. This Court should reverse.

ARGUMENT

I. THE "BACKGROUND CIRCUMSTANCES" REQUIREMENT FLOUTS PRECEDENT.

A. Title VII bars discrimination against all plaintiffs under "the same standards."

1. The plaintiff in *McDonnell Douglas* carried his prima facie burden "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. 792, 802 (1973). *McDonnell Douglas*, in addition, notes that because "[t]he facts necessarily will vary in Title VII cases," these elements have the flexibility to adapt to "differing factual situations." *Id.* at 802 n.13.

As this Court's subsequent cases demonstrate, any such changes reflect the *type* of claim brought. Plaintiffs bringing a failure-to-hire claim, like in *McDonnell Douglas*, meet element (ii) when they can show they "applied and [were] qualified for a" vacant position. *Id.* at 802. But that element cannot map on exactly to a discharge claim, since a discharged employee usually hasn't "applied" for anything. Thus, plaintiffs asserting discriminatory discharge satisfy element (ii) by showing they were "qualified" and "enjoyed a satisfactory

employment record" before termination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 505–06 (1993).

The elements of the prima facie case, however, do not change based on *who* brings a Title VII claim. *McDonald v. Santa Fe Trail,* 427 U.S. 273 (1976), makes this point clear. There, the Court held "that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they" a racial minority. *Id.* at 280. In reaching this conclusion, it specifically addressed element (i) from the prima facie case in *McDonnell Douglas*—the plaintiff's "belong[ing] to a racial minority." *Id.* at 279 n.6. That language, *McDonald* explains, speaks "only to . . . the racial character of the discrimination" at issue in that case. *Id.* It is not "an indication of any substantive limitation of Title VII's prohibition of racial discrimination," *id.*, because "[t]he Act prohibits All racial discrimination in employment, without exception for any group," *id.* at 283. Put differently, *McDonald* did not require, and the majority-group plaintiffs there did not provide, evidence of "background circumstances."

Respondent offers no meaningful response to *McDonald*. It cabins its entire discussion of the case to a single paragraph. There, it says *McDonald* "was concerned with the question of whether Title VII's prohibition on racial discrimination applies equally to minorities and non-minorities." Resp. Br. at 38. Not so. This Court did not take up *McDonald* simply to restate what it had already said in *Griggs* and repeated verbatim in *McDonnell Douglas*: that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. 424, 431 (1971); 411 U.S. at 800.

Nor was *McDonald* a case, as Respondent claims, "about Title VII's *ultimate* burden." Resp. Br. at 38. The defendants in *McDonald* did not provide a non-discriminatory reason for their action, nor did the lower courts conduct a pretext analysis. 427 U.S. at 275. Rather, *McDonald* addressed whether the majority-group plaintiffs there had established their prima facie case. *See id.* at 282–83. That is why *McDonald* examined *McDonnell Douglas*, explained that *McDonnell Douglas*'s language referred to the character of the discrimination at issue, and concluded that *McDonald* was "indistinguishable from *McDonnell Douglas*." *Id.* at 282.

2. Respondent fixates on a single phrase from *Furnco* and *Burdine*—that plaintiffs must "raise[] an inference of discrimination"—and extrapolates from these words that those cases implicitly imported a "causal nexus" into the prima facie burden. Resp. Br. at 13–16. Majority-group plaintiffs show that nexus, per Respondent, only by satisfying the "background circumstances" requirement *Id.* at 26.

But *Furnco* and *Burdine* contravene, rather than support, Respondent's back-door causation theory. That's because *Furnco* says "[a] *McDonnell Douglas* prima facie showing is *not* the equivalent of a factual finding of discrimination." 438 U.S. at 579 (emphasis added). *Furnco* further adds that the prima facie elements do not vary based on whether the claim is brought by a majority- or minority-group plaintiff: "[T]he obligation imposed by Title VII is to provide an equal opportunity for *each* applicant." *Id.* (first citing *Griggs*, 401 U.S. at 430; and then citing *McDonald*, 427 U.S. at 279).

Burdine similarly emphasizes that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253. And the *Burdine* plaintiff did not, contrary to Respondent, offer some robust causation narrative to carry her prima facie burden. She simply "show[ed] that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male." *Id.* at 253 n.6. That showing alone, as *Furnco* notes and *Burdine* reaffirms, "raises an inference of discrimination." *Furnco*, 438 U.S. at 577; *see also Burdine*, 450 U.S. at 253–54.

How do we know that? Because, even before *Furnco* and *Burdine* (and before Respondent's 1978 year of demarcation), this Court had already explained that establishing this prima facie showing rules out "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." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). "Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." *Id.*

Furnco adds that the inference arises "because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." 438 U.S. at 577. It is this "common experience" with employers that raises an inference of discrimination, *id.*—not, as Respondents assert and the "background circumstances" rule presumes, membership within a disfavored group, Resp. Br. at 22, 39–40.

Of course, an employer can and often does give an explanation "for [its] action," which "frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255–56. Causation thus plays out primarily at *McDonnell Douglas* steps two and three, not step one. Step one is meant to screen out cases for "the most common nondiscriminatory reasons" and, once it has done so, to ask the employer to "come forward" with an explanation for its actions. *Id.* at 254; *Hicks*, 509 U.S. at 511; *accord* Gov. Br. at 9.

3. Respondent resists this understanding, arguing that "[s]uch a low burden" would "transform the prima facie requirement into an empty formality." Resp. Br. at 23–24. But as Petitioner's opening brief outlines, lower courts regularly dismiss claims at the prima facie stage, such as when a plaintiff fails to "identif[y] a cognizable adverse" action or fails to show that they were "qualified for" a position. Pet. Br. at 45 (first quoting *Stratton v. Bentley Univ.*, 113 F.4th 25, 41 (1st Cir. 2024); and then quoting *Ibanez v. Tex. A&M Univ. Kingsville*, 118 F.4th 677, 685 (5th Cir. 2024)). That is exactly as *Furnco*, *Burdine*, and *International Brotherhood* contemplate.

Respondent offers no reply to these examples; its brief just ignores them. And rather than marshaling any cases of its own, Respondent falls back on a "thought experiment," in which a man and woman who "both apply for a job for which they are equally qualified" are not hired. Resp. Br. at 25. These candidates, Respondent claims, can't possibly both make out a prima facie case. *Id.*

The problem with this hypothetical is that the Court has already considered and rejected it. As *Bostock* notes,

Title VII "works to protect individuals of both sexes from discrimination, and does so equally." 590 U.S. at 659. "So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally," *id.*—a scenario mirroring Respondent's thought experiment. "But," *Bostock* explains, "in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." *Id.*

B. The "background circumstances" requirement imposes a heightened standard on majority-group plaintiffs.

Respondent's secondary argument, that the "background circumstances" rule does not impose a "heightened burden," Resp. Br. at 26, is equally unavailing.

1. Respondent itself argued in district court that "plaintiffs[] who are members of majority classifications" bear "a higher burden of proof." Dep't MSJ at 20. And in the Sixth Circuit, it relied on *Treadwell v. American Airlines, Inc.*, 447 F. App'x 676, 679 (6th Cir. 2011), a case that described the "background circumstances" rule as reflecting "[o]ur circuit's heightened standard for reverse-discrimination cases." Dep't Sixth Cir. Br. at 31. Only now, under the glare of this Court's review, has Respondent tried to backtrack.

Respondent claims what it said below was just a "stray comment," and that it "has not used the term 'higher' to describe" the burden on majority-group plaintiffs "since." Resp. Br. at 29. Wrong.

For almost two decades, Respondent has argued that "[t]he plaintiff's *prima facie* showing includes another element when a member of a majority group is claiming discrimination"—that element being the "background circumstances" requirement. *Bush v. Ohio Department of Rehabilitation & Correction*, No. 5-CV-667, Dkt. 22 at 7–8 (S.D. Ohio Oct. 30, 2006). It prevailed in *Bush*, with the district court finding that the plaintiff could not meet this "more difficult" burden. Dkt. 31 at 9. Respondent spoke in even clearer terms a year later: "When, as here, the plaintiff claims reverse race and reverse sex discrimination, he faces a more difficult *prima facie* case. In addition to the elements set forth above, [the plaintiff] must show 'background circumstances.'" *Clark v. Ohio Dep't of Rehab. & Corr.*, No. 6-CV-2651, Dkt. 19 at 19 (N.D. Ohio Oct. 29, 2007).

And it continues on the same course today. Five months after the district court granted summary judgment here, Respondent moved for summary judgment in *Petersen v. Ohio State Highway Patrol*. Its motion argued that the majority-group plaintiff in that case could not "establish a *prima facie* case" because such plaintiffs "face a 'higher burden'" due to the "background circumstances" requirement. No. 22-CV-2300, Dkt. 21 at 9 (N.D. Ohio Aug. 15, 2023) (quoting *MacEachern v. Quicken Loans, Inc.*, 2017 WL 5466656, at *3 (6th Cir. Oct. 17, 2017)).

2. This consistent, long-held litigating position did not come out of nowhere. It reflects the law of the circuit, which has held repeatedly that a majority-group plaintiff "carries a different and more difficult prima facie burden" because of the "background circumstances" rule. *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006); *Pierce v.*

Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (expressing "misgivings about" the circuit's "more onerous standard" for majority-group plaintiffs). Respondent's brief mentions none of this authority.

Instead, it holds up *Johnson v. Metropolitan Government of Nashville and Davidson County*, 502 F. App'x 523, 536 (6th Cir. 2012), for the proposition that the "background circumstances" showing is "not onerous" and "can be met through a variety of means." Resp. Br. at 26. But that unpublished decision cannot overrule or abrogate binding circuit precedent. And in any event, the Sixth Circuit has reiterated, pre- and post-*Johnson*, that the "background circumstances" rule is, in fact, "a higher burden." *Philbrick v. Holder*, 583 F. App'x 478, 483 (6th Cir. 2014); *accord Treadwell*, 447 F. App'x at 679.

The other courts of appeals that have adopted a "background circumstances" rule are of a piece. The Tenth Circuit, for instance, has ruled that, for majority-group plaintiffs, "a prima facie case of discrimination requires a stronger showing." *Argo v. Blue Cross & Shield of Kansas, Inc.*, 452 F.3d 1193, 1201 (10th Cir. 2006). Their "burden is higher" because they must provide "proof of 'background circumstances.'" *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1141 (10th Cir. 2008). The Seventh Circuit has likewise described "background circumstances" as a "major hurdle," *Katerinos v. U.S. Department of Treasury*, 368 F.3d 733, 736 (7th Cir. 2004), and an "added burden," *Gore v. Indiana Univ.*, 416 F.3d 590, 593 (7th Cir. 2005). And both the D.C. and Eighth Circuits have acknowledged that majority-group plaintiffs "need[] to show more" or are "required" to offer "additional" evidence compared to a similarly situated minority-group plaintiff. *Lanphear v.*

Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Woods v. Perry*, 375 F.3d 671, 673 (8th Cir. 2004).

3. The impact of that higher standard is clear. Consider this case. In the panel's view, Ames could show "background circumstances" with "evidence that a member of the relevant minority group (here, gay people) made the employment decision" or "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." P.A. 5a–6a. But this Court has held that a Title VII plaintiff need not show either type of evidence at any stage of the case, much less for their prima facie case.

On the former, the Court has held that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998). That is why "nothing in Title VII" bars a sex discrimination claim "because the plaintiff and the defendant . . . are of the same sex." *Id.* at 79. Likewise, requiring statistical evidence of a pattern of discrimination contravenes "[t]he statute's focus on the individual." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). Employers do not have a hall pass to discriminate against any individual—minority or majority—until a plaintiff can rack up the "[e]xtensive, rigorous evidence [that] is required to establish a pattern for the purposes of 'background circumstances.'" P.A. 32a.

On this score, Respondent acknowledges Petitioner is "right": A plaintiff "need not prove any of the things that the Sixth Circuit discussed." Resp. Br. at 27 (internal quotation marks omitted). Yet Respondent claims there

may be other "types of evidence" that can satisfy the "background circumstances" requirement. *Id.* But it never says what that evidence might be. And when it moved for summary judgment here, it pointed to the same criteria the district court and Sixth Circuit used: statistical evidence and the minority status of the decisionmaker. Dep't MSJ at 20. It also gave a third—"evidence of ongoing racial tension in the workplace," *id.*—but the Court has also rejected that reason as a prerequisite for Title VII liability, *see Bostock*, 590 U.S. at 659 ("It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall.").

4. As a final resort, Respondent proposes a sweeping change to the law: that the Court "rais[e] the bar" by, presumably, imposing a "background circumstances" requirement on all. Resp. Br. at 47. This is a radical proposal. No one else has suggested it—not the courts below, not Petitioner, not any amici. That is because, as the government notes, "it makes little sense to rely on a more stringent version of the prima facie case as a screening device." Gov. Br. at 28.

This Court has, indeed, repudiated Respondent's offhand suggestion several times over. First, raising the bar would run counter to the understanding that the prima facie case is "not onerous" and is meant to be a "minimal" burden. *Burdine*, 450 U.S. at 253; *Hicks*, 509 U.S. at 506. Second, doing so here would transform a rule that applies now only to some plaintiffs (those deemed in the majority) into an across-the-board, atextual requirement for all—which would lead to a result the Court has consistently rejected. *See Muldrow v. City of*

St. Louis, 601 U.S. 346, 350 (2023); *EEOC v. Abercrombie & Fitch*, 575 U.S. 768, 773–74 (2015). And third, requiring all plaintiffs to muster statistical evidence or point to the minority-group status of a decisionmaker flies in the face of *Oncale*, *Bostock*, and *Manhart*.

Respondent engages with none of this authority, relying instead only on a concurrence from a state court case on a state law claim that had little to do with Title VII. *Id.* at 48 (quoting *Tex. Tech Univ. Health Sci. Ctr.-El Paso v. Flores*, 2024 WL 5249446 (Tex. Dec. 31, 2024) (Blacklock, J., concurring)). That is no basis to upend Title VII law.

II. RESPONDENT'S RECYCLED VEHICLE ARGUMENTS FAIL.

Respondent reprises several arguments from its brief in opposition. They were unavailing then and remain so now.

1. Respondent first says Petitioner did not challenge the legality of the "background circumstances" rule—which was binding circuit precedent—before the Sixth Circuit. Resp. Br. at 6, 42. But Respondent then admits no such challenge was necessary and that nothing prevents the Court from addressing the question presented, rendering these assertions irrelevant. *Id.* at 42; BIO at 9.

2. Next, Respondent goes back and forth over whether Ginine Trim, a gay woman who supervised Ames, was "the relevant decisionmaker" here. Resp. Br. at 41–42. This too misses the point. The *only* reason Trim's minority-group status and decision-making authority matters is *because* of the "background circumstances"

rule. That rule required Ames to show—contra *Oncale*—that "a member of the relevant minority group (here, gay people) made the employment decision at issue." P.A. 5a. Without that rule, whether Trim had formal decision-making authority or played a more complementary role, by (i) being one of two people who conducted Ames's promotion interview and (ii) telling Ames that "if [Ames] should be mad at anyone" for her demotion, to "be mad at her," becomes a distinction without a difference. P.A. 19a; J.A. 124.

3. Respondent similarly contorts itself over whether Yolonda Frierson, the gay employee who received the Bureau Chief promotion over Ames, met the qualifications for that role (and if she did, whether she was less qualified than Ames). Resp. Br. at 44; *accord* BIO at 15. Yet as *McDonnell Douglas* instructs, a plaintiff must, to establish their prima facie case, show they were qualified. 411 U.S. at 802. They need not show others were unqualified or less qualified. To the contrary, "[u]nder this Court's decisions, qualifications evidence" may be enough "to show pretext" when a plaintiff "was in fact better qualified than the person chosen for the position." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006). In other words, whether Frierson was "less qualified" (as the EEOC here found, J.A. 2) or "arguably less-qualified" (as Judge Kethledge noted, P.A. 10a) is a question for *McDonnell Douglas* step 3. The panel did not get to that step because of the "background circumstances" rule.

4. Respondent next claims Petitioner has committed a "fatal" admission because, when opposing summary judgment in district court, Petitioner purportedly acknowledged "that if the Department had preferred a

gay employee over her only once, then that single decision arguably would not have created an inference of discrimination." Resp. Br. at 43.

Here is what Petitioner said: "If Ms. Ames had been overlooked for promotion in favor of another heterosexual person, or if she had been replaced by another heterosexual person, the Defendant might have an argument that promoting a homosexual person over Plaintiff was simply a coincidence." Opp'n SJ at 5. "[S]ince it happened twice, it constitutes a pattern." *Id.* That is no admission, much less a fatal one. It just says the obvious: A single instance of discrimination can give rise to a Title VII claim; two instances of discrimination merely increase the likelihood discrimination occurred.

5. Finally, Respondent tries to split Petitioner's case in two, between a "demotion claim" and "promotion claim," and asserts that "the Sixth Circuit rejected Ames's demotion claim after conducting a full *McDonnell Douglas* analysis." Resp. Br. at 45. Respondent made the same meritless argument when opposing certiorari, BIO at 6–7, and its brief addresses none of the reasoning Petitioner marshalled in its cert. reply.

To reiterate, Ames does not seek review of her distinct sex discrimination claim. Rather, she seeks review of the Sixth Circuit's holding that she was required, and failed, to prove "background circumstances" for her sexual orientation discrimination claim. That claim, as the district court and Sixth Circuit recognized, is predicated on both the non-promotion and demotion actions taken by Respondent. *See* P.A. 5a–6a; P.A. 30a–34a.

Second, Respondent overreads the Sixth Circuit's decision. The panel held that the Department did not discriminate against Ames as a woman when it demoted

her in favor of Alexander Stojsavljevic, a man. But there is no logical connection between the conclusion that a plaintiff failed to show that sex was a motivating factor in the adverse action taken against her and whether she can show that sexual orientation was a motivating factor. After all, if a plaintiff brought claims of sex and race discrimination and, during discovery, found no evidence of sex discrimination but uncovered a company memo declaring its intent to discriminate based on race, the court might well grant summary judgment to the defendant on the sex discrimination claim. Yet no one thinks that such a decision would shield the company from all Title VII liability.

The Court need not, in any event, rely solely on Petitioner's hypothetical. The case law has time and again rejected Respondent's theory. In *Murray v. Gilmore*, 406 F.3d 708, 709 (D.C. Cir. 2005), for instance, the plaintiff asserted both race and sex discrimination as a basis for her firing. The defendant, in response, offered the same nondiscriminatory reason for its termination decision. The court dismissed the plaintiff's race discrimination claim, but "reach[ed] a different conclusion" on the "sex discrimination claim," by evaluating that claim individually—exactly as Title VII instructs, rather than the copy-and-paste approach Respondent advocates. *Id.* at 715.

Several other decisions—all cited in Petitioner's cert. reply, all of which Respondent fails to address—reaffirm this basic point. *See Mitchell v. Nat'l R.R. Passenger Corp.*, 407 F. Supp. 2d 213, 236–38 (D.D.C. 2005) (dismissing an age discrimination claim but declining to dismiss race and sex discrimination claims); *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 512–18 (6th Cir. 2021)

(conducting different pretext analyses for wage discrimination and retaliation claims).

III. REVERSAL IS APPROPRIATE.

The panel here erred by granting judgment based on the "background circumstances" requirement. That much is clear. Even one of Respondent's amici says so. NAACP Br. at 27–30. Less clear, arguably, is what relief the Court should order.

Petitioner asks the Court to reverse. The government seeks vacatur. And amici urge affirmance on alternative grounds. *Id.* at 32–33. Either of the first two options is appropriate. The third is not.

1. That is because when the Court determines in a Title VII case that a lower court committed legal error, it has either reversed, *Abercrombie & Fitch*, 575 U.S. at 775, or vacated, *Muldrow*, 601 U.S. at 360. Respondent's amici did not identify—and Petitioner has not found—a single instance where the Court has, after finding legal error in a Title VII case, affirmed on alternative grounds.

Amici's suggestion is especially inappropriate given this case's posture. For Petitioner's sexual orientation discrimination claim, neither the district court nor the Sixth Circuit reached the second and third steps of *McDonnell Douglas*. *See* P.A. 6a; P.A. 33a. To get to the result amici wants, then, the Court must (1) rule in Petitioner's favor on the question presented, (2) by finding that the Sixth Circuit erred, but then (3) borrow the non-discriminatory reason Respondent offered for a separate claim, (4) undertake its own pretext analysis, and (5) enter judgment against Petitioner by (6) finding as a matter of law that there is nothing in the record to

"create[]" an "issue of material fact as to whether th[ese] reason[s] [were] pretextual." *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 217 (2015).

2. Even were the Court to undertake a step two and three analysis here, there would be no basis to affirm.

After all, a plaintiff can establish a dispute of material fact on pretext by "cast[ing] doubt" on or substantially showing "that respondent's explanation was false." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 144–45 (2000). Respondent and its amici assert two such explanations in this case: that Petitioner "was difficult to work with," Resp. Br. at 5; and that Petitioner did not have the right "vision" for the Bureau Chief role, NAACP Br. at 32. But those assertions are just that—assertions—without support from the rest of the record.

3. Start with whether Ames was difficult to work with. That comes from deposition testimony by then-Department Director Ryan Gies. Resp. Br. at 5 (citing P.A. 22a). And it parallels the facts in *Reeves*, where "the evidence supporting respondent's explanation for petitioner's discharge consisted primarily of testimony" from the company's director and president. 530 U.S. at 143. But just like *Reeves*, Gies's testimony finds no support in the written record.

In fact, when asked to elaborate on this reasoning at his deposition, Gies admitted that he did "not memorialize in writing" any of these concerns, J.A. 23; could not point to "any specific e-mails" or documents supporting these concerns, J.A. 20; and that Ames's annual reviews did not reflect any of these issues, J.A. 32–33.

On this score, amici assert—without any citation—that Petitioner had "lukewarm performance reviews." NAACP Br. at 32. Not true. On every dimension in every

performance review, Ames met or exceeded expectations. J.A. 203–37. And on the specific issue of Ames's working relationships with others, here is what her reviews say:

Review	Evaluation
2018	"Marlean does well coordinating and working with her peers, as well as facility staff to accomplish outcomes." J.A. 232.
2017	"Marlean does well working with groups, such as CCF's and Facility staff to assist them in preparing for PREA audits." J.A. 223.
2016	"Marlean represents the agency in numerous ways. She does a stellar job of representing not only the division, but the agency." J.A. 216.

In short, after the Department was sued, the Department's former Director gave one story at his deposition. The written, contemporaneous evidence tell a different and contradictory story—something even the Department Director admits. And amici, without identifying a single piece of evidence otherwise, asks the Court to just take the Department's word for it and deny relief to an individual employee. That is not how the pretext analysis works.

4. The alternative explanation, Ames's lack of vision for Bureau Chief, also lacks merit. Three employees, all heterosexual, applied and interviewed for that position. J.A. 185–86. All three were qualified. All were rejected,

and all "[f]or the same reasons": a lack of "vision." *Id.* at 186. The position was left open for several months before being offered to Frierson, a gay employee. But it is unclear how Frierson could have even articulated a vision for the Bureau Chief position, since she (1) indicated she was "not interested in the position," J.A. 142–43; (2) did not "apply for th[e] position," J.A. 142; and (3) did not interview for the position, Resp. Br. at 5.

Were that not enough, Petitioner has presented evidence showing that she was more qualified than Frierson, which may "suffice" to "show pretext." *Ash*, 546 U.S. at 457. Here too amici get it wrong, saying Petitioner is relying only on her "own subjective view." NAACP Br. at 33. The EEOC's finding that Ames "was rejected in favor of a less qualified person" is not a subjective view. J.A. 2. Judge Kethledge's observation that Frierson was "arguably less-qualified" is not a subjective view. P.A. 10a. Ames's half-decade of PREA experience, including "becom[ing] a federally-certified PREA Auditor," whereas Frierson had little PREA experience before becoming Bureau Chief, is not a subjective view. J.A. 217, 160.

5. Between vacatur and reversal, the former is a suitable path forward, but the latter may also be appropriate given the circumstances here.

For one, the Court has reversed when a lower court's ruling conflicts with the statutory text, *Murray v. UBS Secs., LLC*, 601 U.S. 23, 32 (2024), or with this Court's precedent, *Wilkinson v. Garland*, 601 U.S. 209, 226 (2024). The panel's decision checks both boxes, something Respondent all but acknowledges by offering no counterargument on text, misreading this Court's precedent, and recycling arguments from its certiorari

briefing. And as outlined, the record offers ample "[p]roof that the defendant's explanation is unworthy of credence." *Reeves*, 530 U.S. at 147. Vacatur may thus only add time and expense, delaying Petitioner from proceeding to a jury and resolving this matter.

CONCLUSION

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

Respectfully submitted,

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