No. 24-427

IN THE

Supreme Court of the United States

RONALD HITTLE,

Petitioner,

v.

CITY OF STOCKTON, CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE* [1]

The California Employment Lawyers Association (CELA) is a statewide organization of over 1,200 California attorneys whose members primarily represent employees in a wide range of employment cases, including employment termination, discrimination, and harassment actions, and individual, class, and representative actions enforcing California's wage and hour laws, as well as actions under Title VII and state-law equivalents.

For decades, CELA has filed briefs and argued as *amicus curiae* in various state and federal appellate courts in many landmark employment law cases. CELA's members have represented hundreds of thousands of workers in state and federal courts throughout California. "CELA exists to protect and expand the legal rights and opportunities of all California workers and to strengthen the community of lawyers who represent them. We accomplish this through education and advocacy for worker justice."[2]

CELA submits this brief on behalf of its members and its members' clients, because this Petition raises fundamental questions concerning the proper

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[1] Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received timely notice of this filing. *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] CELA, *Mission Statement*, https://tinyurl.com/y94vm7ft.

framework that applies to summary judgment in Title VII actions.

SUMMARY OF THE ARGUMENT

The *McDonnell Douglas* summary judgment framework is an odd duck. Although Federal Rule of Civil Procedure 56 places the burden on summary judgment squarely on the moving party, and requires all reasonable inferences to be drawn in the non-movant's favor, *McDonnell Douglas* does away with Rule 56's prescriptions. It does so expressly, insofar as it places the burden on the non-movant—typically, the plaintiff—to disprove as pretextual a defendant's proffered explanation for the adverse action. And it also contravenes Rule 56 implicitly, by allowing courts to draw inferences against the non-movant, weigh evidence, and decide witness credibility at the summary judgment stage, instead of leaving those difficult fact-finding missions for the jury.

All of this is bad enough as a matter of doctrine, but it is even worse for Title VII plaintiffs in application. Study after study reports that Title VII plaintiffs lose at summary judgment more often than similarly-situated plaintiffs—such as those plaintiffs bringing contract or tort cases—and the *McDonnell Douglas* framework plays a critical role in erecting these unnecessary obstacles that Title VII plaintiffs are forced to navigate. The Court should grant the

petition for certiorari and resolve these issues of great importance.

ARGUMENT

I. Employee-Plaintiffs Fare Worse Than Others Because of *McDonnell Douglas*

The summary judgment framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) sets up a unique—and disadvantageous—burden-shifting framework that should be discarded.

A. Title VII Plaintiffs Are Less Likely To Proceed To Trial

Although *McDonnell Douglas* was originally thought to be "a plaintiff-friendly opinion," *Wells* v. *Colorado Dep't of Transp.*, 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz., J., concurring), insofar as it "assure[d] that the plaintiff [has] his day in court despite the unavailability of direct evidence," *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), that intention has not borne out in practice.

Instead, the opposite has come to pass. Surviving summary judgment as a Title VII plaintiff is a uniquely difficult row to hoe, even as compared to similarly-situated plaintiffs. In an article published in 2013 by Judge Denny Chin of the Second Circuit, he observed that "summary judgment was granted, in whole or in part, in employment discrimination cases approximately seventy-seven percent of the time," while "in tort cases approximately sixty-one percent of the time, and in contract cases approximately fifty-nine percent of the time." Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A*

Judge's Perspective, 57 N.Y.L. Sch. L. Rev. 671, 672–73 (2013).

This conclusion has been identified in other studies. "[R]esearch confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs[.]" Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 St. Louis U. L.J. 111, 112 & n.1 (2011) (citing studies); see also Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 709–10 (2007); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 574–75 (2001).

One comprehensive analysis was a fiscal-year 2006 study conducted by the Federal Judicial Center, submitted to the Hon. Michael Bayslon (E.D. Pa.). The FJC analyzed 179,969 cases that were terminated that year. Of those cases, the study found that 73% of summary judgment motions in employment discrimination cases were granted—while the average for all civil cases was just 60%. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to the Hon. Michael Baylson (June 15, 2007), Tables 3 & 4.[3]

B. *McDonnell Douglas* Creates This Imbalance

McDonnell Douglas has a critical role to play in the un-leveling of the playing field. By putting (at certain

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[3] Available at https://tinyurl.com/ywm734t5.

stages of the framework) the burden on the non-moving party at summary judgment, *McDonnell Douglas* leads courts to commit fundamental summary judgment errors, such as "draw[ing] inferences in defendants' favor" "weigh[ing] evidence," deciding the "credibility of witnesses" and generally "requir[ing] plaintiffs to prove their cases at the summary judgment stage." Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 228–29 (1993). And it is the steps of the burden-shifting framework themselves that shoulder most of the blame for these fundamental problems.

1. For starters, the requirement that the non-movant set forth a prima facie case that he is protected under Title VII (*McDonnell Douglas*'s first step) is "often . . . wrongly treat[ed] . . . as a substantive standard of liability." *Tynes* v. *Fla. Dep't of Juv. Just.*, 88 F.4th 939, 949 (11th Cir. 2023) (Newsom, J., concurring). That is in part because one of the elements of making out a prima facie case—that the employee "was qualified for his position," *Fonseca* v. *Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004)—requires a plaintiff effectively to disprove an employer's argument for why the employee was not qualified. *Menard* v. *First Sec. Servs. Corp.*, 848 F.2d 281, 285 (1st Cir. 1988) ("To establish that he was qualified a complainant must show that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative."); *Kizer* v. *Children's Learning Ctr.*, 962 F.2d 608, 611–12 (7th

Cir. 1992) (plaintiff must prove she met employer's expectations in order to establish "qualified" prong of prima facie case); *Richmond* v. *Board of Regents Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (in order to make out qualified prong of prima facie case, employee must disprove defense that she was not performing adequately); *Aungst* v. *Westinghouse Elec. Corp.*, 937 F.2d 1216, 1221 (7th Cir. 1991) (plaintiff "must disprove Westinghouse's primary reason for choosing him for the RIF—lack of versatility"), *overruled on other grounds by Ortiz* v. *Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016).

This "trend is particularly damaging to a plaintiff who is defending against a summary judgment motion because it shifts the burden from the movant to the plaintiff to disprove the defense without the benefit of cross-examination." McGinley, *Credulous Courts*, *supra* at 231.

Thus, as then-Judge Kavanaugh explained, the "prima facie" element "is a largely unnecessary sideshow" that "has not benefited employees or employers; nor has it simplified or expedited court proceedings" and in fact "has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." *Brady* v. *Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008).

2. The third step of the *McDonnell Douglas* framework also wrongly encumbers Title VII plaintiffs. That step requires the employee to provide evidence that the employer's stated reason for termination is in fact pretextual. See *McDonnell Douglas*, 411 U.S. at 804.

The 'pretext' prong of the *McDonnell Douglas* framework has disadvantaged Title VII plaintiffs in at least two ways.

First, "the defendant has no burden to prove that the articulated reason is the actual reason for discrimination; the burden is merely to produce a non-discriminatory reason for the actions." McGinley, *Credulous Courts*, *supra* at 231. That is not a high bar to satisfy. *Ring* v. *Boca Ciega Yacht Club Inc.*, 4 F.4th 1149, 1163 (11th Cir. 2021) ("articulat[ing]" nondiscriminatory reasons for the adverse action is enough); *Chiaramonte* v. *Fashion Bed Grp., Inc., a Div. of Leggett & Platt, Inc.*, 129 F.3d 391, 399 (7th Cir. 1997) (referring to "the mere production of these reasons" being enough to "shift[] the burden to" the plaintiff) *overruled on other grounds by Ortiz*, 834 F.3d at 765.

Indeed, some courts have refused to find the third prong satisfied where the plaintiff chose to poke holes in the employer's proffered reasons for the adverse action—which, in effect, requires a plaintiff to *prove* their case at summary judgment. *Gadson* v. *Concord Hosp.*, 966 F.2d 32, 35 (1st Cir. 1992) ("Gadson cannot meet his burden of proving pretext simply by questioning [defendant]'s articulated reasons.")

Second, "many courts are extremely hesitant to interfere with the business decisions of the employer." McGinley, *Credulous Courts*, *supra* at 231 (citing, *inter alia*, *Rossy* v. *Roche Prods. Inc.*, 880 F.2d 621, 625 (1st Cir. 1989) ("Our role is not to second-guess the business decisions of an employer[.]")); *Aungst,* 937 F.2d at 1220 ("We must give the employer

the benefit of the doubt regarding its explanation of employment decisions.").

However, deferring to business decisions in the context of evaluating whether a stated rationale is pretextual is particularly ill-suited for the court system. "An Article III judge is not a hierophant of social graces." *Gallagher* v. *Delaney*, 139 F.3d 338, 347 (2d Cir. 1998). Thus, "[e]valuation of ambiguous acts . . . presents an issue for the jury," not for the judge, *ibid.*, and summary judgment is "[n]ot a replacement for the trial as the preferred means for resolving disputes," *Walton* v. *Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016) (Gorsuch, J.).

C. The Decision Below Is Emblematic Of *McDonnell Douglas*'s Problems

The "misuse or misapplication" of multiple strands of the *McDonnell Douglas* framework has "hinder[ed] a non-movant plaintiff's entitlement to have a court fully evaluate all appropriate evidence in the light most favorable to her." Stone, *Shortcuts in Employment Discrimination Law*, *supra* at 123.

The instant appeal is case in point. Before the U.S. District Court for the Eastern District of California, Hittle alleged that the City of Stockton engaged in discriminatory conduct that adversely affected his employment. See *Hittle* v. *City of Stockton*, 2022 WL 616722, at *3–4 (E.D. Cal. Mar. 2, 2022). Hittle was therefore required to establish a *prima facie* case that he was protected under Title VII pursuant to the *McDonnell Douglas* framework. See *id.* at *4. The district court assumed without deciding that he established his *prima facie* case. *Id.* at *8. Then, the

district court held that the City met its burden of production to articulate legitimate, non-retaliatory reasons for terminating him. *Id.* at *9. In so holding, the district court endorsed as sufficient the City's provision of a notice of removal that "summarized" instances of alleged misconduct by Hittle, which "supported the City's conclusion" to terminate him, regardless of whether any of the listed instances was an *actual* reason for firing him. *Id.* at *9 (internal brackets omitted).

Hittle thus had to provide evidence that the City's proffered reasons for his termination were a pretext for intentional discrimination. *Id.* at *6; see also *id.* at *8 ("[A] plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer is pretext for [discrimination].").

To this end, Hittle proffered evidence that, *inter alia*, (1) the City's Human Resources Director saw no legitimate business reason to terminate Hittle, and (2) the City's proffered reasons for Hittle's termination (*e.g.*, his alleged failure to disclose co-ownership of a cabin with two potential conflicts of interest; failure to recommend appropriate discipline for two employees; and failure to prevent members of the public from perceiving that firefighters were engaged in union activities while on duty) were false. See *id.* at *9–10.

The district court rejected Hittle's proffered evidence, determining that (1) was "of questionable relevance," *id.* at *9, and that (2) was "unpersuasive," *id.* at *10. In other words, after the district court *weighed* the evidence and "abdicate[d] its responsibility to read the record in the light most

favorable to Hittle at the summary judgment stage," *Hittle* v. *City of Stockton*, 101 F.4th 1000, 1021 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc), the district court held that "[n]one of [Hittle's] assertions are evidence from which a reasonable factfinder could infer that [the City's] proffered explanations are pretext[ual]," *Hittle*, 2022 WL 616722, at *10. Accordingly, the district court granted summary judgment to the City. *Id.* at *12.

On appeal before the Ninth Circuit, Hittle argued the district court erred when it concluded that he failed to demonstrate a genuine issue of material fact as to whether the City's proffered reasons for firing him were pretextual. See *Hittle* v. *City of Stockton, California*, 76 F.4th 877 (9th Cir. 2023). But the Ninth Circuit panel repeated the district court's errors.

For starters, the panel dismissed Hittle's evidence that a confidential investigation report (the "Largent Report") made and submitted to the City by an outside investigator demonstrated the City's reasons for firing Hittle were pretextual. 101 F.4th at 1016–17. Although the panel recognized that numerous "instances of Hittle's misconduct alleged by the City" were "deemed as not sustained" within the Largent Report, it nonetheless concluded that this exoneration "d[id] not show that the other allegations were pretexts and the real reason was discriminatory animus to religion." *Id.* at 1016.

Thus, the panel refused to draw any (let alone all) reasonable inferences from the Largent Report in the light most favorable to Hittle, even in the same breath

as it readily acknowledged that "an aspect of Largent's Report and the notice terminating Hittle was the *religious nature* of the leadership event" he attended. *Id.* at 1017 (emphasis added); see also *id.* at 1025 (VanDyke, J., dissenting from denial of rehearing en banc) ("Perhaps most damning to the City's cause is the substance of the lengthy final report the investigator eventually published, forty-seven pages of which were devoted to the allegations pertaining to Hittle's religion. Two of the four 'most serious acts of misconduct' described in [it] pertained explicitly to the religious nature of the Summit [Hittle attended], and its conclusions expressly invoked religion no less than ten different times.").

Moreover, the panel's refusal to credit Hittle's evidence was punctuated by its blind deference to what it described as the City's "overwhelming number" of justifications for terminating Hittle, which—despite its legal irrelevance—were "independently verified by an outside investigator." *Id.* at 1017. In these ways, the panel plainly "privileg[ed] the City's other nondiscriminatory reasons that supposedly justified Hittle's firing," *id.* at 1033 (VanDyke, J., dissenting from denial of rehearing en banc), and, by requiring Hittle to prove pretext without drawing inferences in his favor, turned the summary-judgment burden—which belonged to the City—on its head.

II. *McDonnell Douglas* Is Inconsistent With Rule 56

Further, the *McDonnell Douglas* summary-judgment framework is inconsistent with Federal

Rule of Civil Procedure 56. "[T]oday[,] motions practice, and especially summary judgment motions practice, seems to have assumed a place near the center of the legal universe: almost no one makes it to trial anymore." *Walton*, 821 F.3d at 1212 (Gorsuch, J.). This is especially true in Title VII cases. Compared to other claims, remarkably few Title VII plaintiffs make it past summary judgment to a trial on the merits. Chin, *Summary Judgment in Employment Discrimination Cases*, *supra* at 672–73; *Tynes* v. *Fla. Dep't of Juv. Just.*, 88 F.4th 939, 950 (11th Cir. 2023) (Newsom, J., concurring) ("Many, if not most, Title VII cases are decided at summary judgment."). It is critical that the summary-judgment framework for Title VII cases be rock-solid—but, regrettably, *McDonnel Douglas*, as interpreted by the courts today, leaves much to be desired.

A. Rule 56 is plain in its directive: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *McDonnell Douglas*, however, permits dismissal of cases that satisfy Rule 56.

For example, "[a] plaintiff who can marshal strong circumstantial evidence of discrimination but who, for whatever reason, can't check all of the *McDonnell-Douglas*-related doctrinal boxes—for instance, because she can't *quite* show that her proffered comparator is sufficiently "similarly situated,'—may well lose at summary judgment." *Tynes*, 88 F.4th at 955 (Newsom, J. concurring). "Especially in light of Rule 56's plain language—which focuses on the

existence of a 'genuine dispute as to any material fact,'"—that "seems a little topsy-turvy." *Ibid.*; see also *Wells*, 325 F.3d at 1225 (Hartz, J., concurring) ("[T]he use of the *McDonnell Douglas* framework so readily lends itself to consideration of formalities instead of the essence of the issue at hand—the sufficiency of the evidence.").

B. What is more, the application of *McDonnell Douglas* to summary-judgment motions is dubious in the first place.

Although "*McDonnell Douglas*'s burden-shifting framework has become the presumptive means of resolving Title VII cases at summary judgment," *Tynes* at 952 (Newsom, J. concurring), as Judge Newsom pointed out in his concurrence in *Tynes, McDonnell Douglas* itself arose from bench-trial proceedings, not on summary judgment, see *Green* v. *McDonnell-Douglas Corp.*, 299 F. Supp. 1100, 1102 (E.D. Mo. 1969). Moreover, this Court has specifically addressed *McDonnell Douglas*'s application at summary judgment only once—and in that decision it held that it did not apply, *see Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 118–19 (1985). Indeed, this Court has emphasized that *McDonnell Douglas*'s "procedural device" was intended "only to establish an order of proof and production." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 521 (1993).

This Court's opinion in *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711 (1983), highlights the confusion with respect to whether *McDonnell Douglas* is meant to apply on summary judgment. As the Court explained in *Aikens*,

"when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the ***fact finder*** must then decide whether the rejection was discriminatory within the meaning of Title VII," *id.* at 714–15 (emphasis added), and so, "[a]t this stage, the *McDonnell Douglas–Burdine* presumption 'drops from the case,'" *ibid.* (quoting *Texas Dep't of Cmty. Affs.* v. *Burdine,* 450 U.S. 248, 255 n.10 (1981)).

Given this Court's statements in *Aikens*, "[o]ne therefore wonders why we need to have this artificial, often confusing, framework." *Wells*, 325 F.3d at 1226 (Hartz, J., concurring). And "[t]he answer is that there is no need." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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