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 IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was an at-will employee who served as Fire Chief for Respondent City of Stockton. After years of Petitioner's mismanagement, misconduct, and refusals to follow the orders of City management, the City terminated his employment. Petitioner sued, alleging that the termination was based on his religion. The district court granted summary judgment in favor of the City, and the Ninth Circuit affirmed.

The questions presented are:

1. Whether this Court should clarify that the third step of the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), does not require a plaintiff to disprove an employer's reasons for an adverse employment action, where (1) the decision below and the courts of appeals already generally allow a plaintiff to survive summary judgment by either disproving the employer's reasons *or* by otherwise showing discrimination, and (2) the decision below and all courts of appeals allow for a plaintiff to proceed by proving that discrimination was either a motivating factor for or a but-for cause of the employment action.

2. Whether this Court should revisit the *McDonnell Douglas* framework—a fifty-year-old statutory precedent that has been widely incorporated in federal and state anti-discrimination law—where the Ninth Circuit's decision did not turn on the application of that framework.

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STATEMENT OF THE CASE

Petitioner Mismanages The Stockton Fire Department And Is Terminated

1. Petitioner was an at-will employee of the City of Stockton. Pet. App. 6a. From 2005 to 2011, he served as the City's Fire Chief. Pet. App. 6a. Before becoming Chief, Petitioner served as president of the local firefighters' union. His ongoing loyalty to the union while serving as Chief caused him to disregard directives of City management—including with respect to budget and staffing cuts needed to address a financial crisis that would lead to the City's bankruptcy. Pet. App. 9a, 14a, 16-17a. He also overlooked or defended misconduct by union members, such as misuse of City assets, performance of union activities on City time, and timecard fraud. Pet. App. 6a-7a, 9a-10a, 13a-14a, 16a-17a, 19a-20a.

During his tenure as Chief, Petitioner shared a financial interest—a shared ownership in a vacation home—with two subordinates, one of whom was the union president. Petitioner did not disclose this shared financial interest with the City, which only learned of the vacation home from a newspaper investigation. Pet. App. 13a, 107a-108a.

Petitioner also exhibited improper favoritism toward these subordinates. For example, Petitioner resisted disciplining one for submitting falsified time records. Further, Petitioner imposed only light discipline on the other for unlawfully releasing private, HIPPA-protected medical records to the media—a leak which ultimately caused the City to endure an

expensive civil action and a preliminary injunction. Pet. App. 13a-14a.

Petitioner's misconduct and leadership failures also included the failure to properly report his own time off, his endorsement of a private consultant's business in violation of City policy, and his failure to disclose to the City a personal and business relationship with that same consultant. Pet. App. 6a, 16a, 18a, 32a, 107a.

Members of the fire department reported that Petitioner exhibited favoritism to those who shared his Christian faith. Pet. App. 8a, 24a-25a. In May 2010, Deputy City Manager Laurie Montes received a letter from a fire-department employee stating that Petitioner was corrupt and favored Christian employees by providing them "favorable treatment and assignments." Pet. App. 8a. The letter referred to Petitioner's improperly favored cohort as the "Christian Coalition," a term originating from fire-department members who expressed unhappiness that Petitioner engaged in religious favoritism. Pet. App. 8a-9a, 24a-25a. Montes became "concerned that there was a perception … that [Petitioner] was providing favorable treatments and assignments" based on religion. C.A. App. 6-ER-1396.

Montes then observed Petitioner work against the City's plans to cut costs and expenses in the midst of its financial crisis, unlike all the other City department heads during that time. Pet. App. 9a.

2. Worried by Petitioner's mismanagement, favoritism, and refusals to follow directives from City

leadership, Montes directed Petitioner to attend "a leadership training program," specifically one "intended for Fire Chiefs, or at least designed for the upper management of public entities." Pet. App. 10a.

Ignoring that directive, Petitioner instead decided to attend the Global Leadership Summit—a summit with the stated purpose of "transform[ing] Christian leaders around the world with an injection of vision, skill Development and inspiration for the sake of the LOCAL CHURCH." Pet. App. 11a. On August 5 and 6, 2010, Petitioner and three fellow firefighters attended the Summit on City time, using a City vehicle. Pet. App. 11a-12a.

In November 2010, the City issued a notice of confidential investigation to Petitioner because of Montes' perception that Petitioner had "issues of non-cooperation and poor management practices." Pet. App. 13a. After that notice, Petitioner continued to engage in conduct that City leadership found troubling. Pet. App. 13a. For example, Petitioner imposed only light discipline on the president of the fire department union—who co-owned the vacation home with Petitioner—after the latter admitted to releasing private medical records to the media. Pet. App. 13a. And Petitioner resisted disciplining another subordinate—who also co-owned the vacation home with him—for falsifying official time records. Pet. App. 14a.

Then Petitioner failed to follow a critical directive from City leadership. City Manager Bob Deis ordered all City department heads to submit layoff plans to potentially help the City avoid bankruptcy.

Pet. App. 14a. Every City department head, except for Petitioner, complied. Defying the order, Petitioner informed City leadership that "he could not agree to any layoffs or recommend a cut in staffing." Pet. App. 14a. Based on that refusal to follow a clear directive to help the City during the throes of its financial crisis, Petitioner was placed on administrative leave pending the outcome of the investigation into his conduct. Pet. App. 14a.

In March 2011, the City retained Trudy Largent, an attorney and outside independent investigator with human-resource experience to examine Petitioner's conduct. Pet. App. 6a, 14a; C.A. App. 2-ER-240. Several months later, Largent submitted a 250-page report of her findings ("Largent Report"). Pet. App. 6a, 15a. The Report sustained nearly all the prior allegations of misconduct. Pet. App. 6a-7a, 16a-17a. Specifically, the Report sustained the following allegations:

- "[L]ack of effectiveness of … ongoing supervision and leadership of the Fire Department, judgment as a department head, and … contributions to the management team." Pet. App. 16a.

- "[D]elay[] in making recommendations as to appropriate level of discipline." Pet. App. 16a.

- "Use of City time and City vehicle by [Petitioner] to attend a religious event [the Summit]; … failure to properly report time off, and …potentially approving on-duty attendance at

a religious event by Fire Department managers." Pet. App. 16a.

- "Potential favoritism of employees … and conflict of interest based on financial interest not disclosed to the City." Pet. App. 16a.

- "Apparent endorsement of [a] private consultant's business … as an official of the City and potential conflict of interest … not disclosed to the City." Pet. App. 16a.

- "Potentially conflicting loyalties … in his management role, responsibilities, and his relationship with the Firefighters Local 456 Union." Pet. App. 17a.

Upon reviewing the Largent Report, Deis and Montes decided to remove Petitioner from his position as Chief but first offered to appoint him as a Battalion Chief, a role Petitioner previously had performed effectively, and which did not provide Petitioner with decision-making authority that might put Petitioner in conflict with the City's interests. Pet. App. 17a. Petitioner rejected the offer and said he would bring a lawsuit. Pet. App. 17a.

In August 2011, the City sent Petitioner a notice of intent to remove him from City service for the reasons stated in the Largent Report. Pet. App. 17a-20a. The notice included a description of the Report's findings, including that Petitioner "failed to disclose to the City" his co-ownership of the vacation home with subordinates including the union president, proposed "put[ting] firefighters on a leave of absence

instead of laying them off … contrary to a department head's duty to further the goals and policies of the City," and failed to appropriately address falsification of time records and the leaking of private medical information to the media. Pet. App. 17a-20a. The notice similarly reiterated the Report's finding that Petitioner "used City time and resources" to attend a non-job-related event, i.e., the Summit, including by approving attendance of other firefighters. Pet. App. 17a-18a.

Subsequently, the City sent Petitioner a formal notice of separation. Pet. App. 21a.

The District Court Grants Summary Judgment For The City

In March 2012, Petitioner brought employment-discrimination claims under Title VII and California's Fair Employment and Housing Act (FEHA) against the City.[1] Pet. App. 7a. Petitioner alleged

[1] Petitioner also brought other claims, but they were abandoned on appeal. Against the City, Petitioner also brought a retaliation claim, a failure-to-prevent-retaliation claim, and Title VII and FEHA claims based on a failure-to-accommodate theory. Pet. App. 109a-110a, 115a-117a, 125a-131a. Petitioner did not appeal the district court's grant of summary judgment in favor of the City on these claims. Hittle C.A. Opening Br. 15 n.2. Against Deis and Montes, Petitioner brought a 42 U.S.C. § 1983 claim alleging violation of Petitioner's First Amendment right to association. Pet. App. 110a, 132a-136a. Petitioner did not appeal the district court's grant of summary judgment in favor of Deis and Montes on that claim. Hittle C.A. Opening Br. 15 n.2. Consequently, at this stage, there are no claims against Deis or Montes.

that he was terminated "based upon his religion" and more specifically, because he had attended a religious leadership event. Pet. App. 7a.

The parties cross-moved for summary judgment. Pet. App. 7a. The district court denied Petitioner's motion and granted Defendants' motion.

The district court held that Petitioner's direct evidence of discrimination was insufficient to defeat summary judgment. The court determined that, at most, his cited evidence "amount[ed] to 'stray remarks' by Montes and other circumstantial evidence." Pet. App. 122a. The court then found that the evidence that Petitioner put forth that "touches on [his] religious beliefs" simply could not support a prima facie case of religious discrimination. Pet. App. 123a-124a. And even if Petitioner had made out a prima facie case, he "ha[d] not shown sufficient evidence of pretext." Pet. App. 125a.

The Ninth Circuit Affirms

The Ninth Circuit affirmed the district court's finding that Petitioner failed to present sufficient evidence at the summary-judgment stage to support his discrimination claim.

While setting out the *McDonnell Douglas*[2] factors for a prima facie case, the court of appeals also

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), sets forth a three-step burden-shifting evidentiary framework for a plaintiff to use to help make out a disparate-treatment claim at the summary-judgment stage. At the first step, a

recognized that Petitioner needed only show that his religion or religious practices were a "*motivating factor*" in his termination. Pet. App. 23a ("Under Title VII, the plaintiff need only 'demonstrate[] that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the [unlawful employment] practice. 42 U.S.C. § 2000e-2(m).'" (emphasis in original)).

Examining the evidence both under the *McDonnell Douglas* framework and in terms of whether the evidence relied upon by Petitioner was sufficient to allow a jury to find that his religion was a motivating factor, the Ninth Circuit explained that the evidence was insufficient to survive summary judgment. Pet. App. 24a-35a. The court specifically found that there was "no genuine issue of material

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plaintiff can make out a prima facie case, demonstrating the following factors: that

> (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.

Pet. App. 22a (citation omitted). At the second step, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802-03. And finally, at the third step, the plaintiff can overcome a summary-judgment motion by demonstrating that the employer's reason was a pretext for discrimination. *Id.* at 803.

fact that Montes and Deis were motivated by discriminatory animus toward religion." Pet. App. 32a. The court noted that, "because neither Montes nor Deis made any remarks demonstrating their own discriminatory animus toward religion—i.e., an intent to treat [Petitioner] worse because he is Christian—but focused on the Summit's lack of benefit to the City and other evidence of [Petitioner]'s misconduct, [Petitioner] failed to demonstrate that discriminatory animus toward religion was even a motivating factor in his termination." Pet. App. 30a.

Petitioner petitioned for en banc rehearing, which the Ninth Circuit denied on May 17, 2024. The panel issued an amended opinion on the same day. Pet. App. 1a-35a.[3]

REASONS TO DENY CERTIORARI

Petitioner's various challenges to *McDonnell Douglas* provide no basis for review here. This case does not turn on—and thus offers no occasion to revisit—the *McDonnell Douglas* framework. The Ninth Circuit concluded that Petitioner failed to show discrimination under *any* approach—including a motivating-factor analysis. Moreover, none of the issues Petitioner raises is worthy of review even in the abstract.

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[3] Three judges wrote in dissent of denial of rehearing en banc: (1) Judge Callahan (joined by Judge VanDyke); (2) Judge Ikuta (joined by Judges Callahan and R. Nelson); and (3) Judge VanDyke (joined by Judge Callahan in part). Pet. App. 36a-72a.

Petitioner's challenge regarding *McDonnell Douglas*'s third step's application in the motivating-factor context is a nonissue: All the courts of appeals allow a plaintiff to proceed by proving that discrimination was a motivating factor of an adverse employment action, and none require a plaintiff to disprove an employer's reasons to show such a factor. The decision below is no exception.

Petitioner's broader challenge to step three likewise fails, because even in the context of assessing but-for causation, the courts of appeals generally allow a plaintiff to survive summary judgment by either disproving the employer's reasons *or* by otherwise showing discrimination. As for Petitioner's attack on *McDonnell Douglas* as a whole, there is no warrant to reconsider that landmark statutory precedent and settled touchstone of employment-discrimination law, which has been on the books for more than fifty years and is strongly protected by statutory *stare decisis*.

At bottom, Petitioner asks this Court to grant review based on nothing more than his dissatisfaction with the district court's and court of appeals' assessments of the summary-judgment record. This Court should reject the invitation. The Ninth Circuit correctly determined that Petitioner, who engaged in serious insubordination, misconduct, and mismanagement during his tenure as the City's Fire Chief, failed to adduce sufficient evidence that his termination was motivated even in part by discrimination.

I. The Courts Of Appeals Allow Plaintiffs To Meet Their Summary-Judgment Burden By Providing Sufficient Evidence That Discrimination Was A Motivating Factor.

Certiorari is not warranted at all, let alone on step three of the *McDonnell Douglas* framework, because this case does not turn on the application of *McDonnell Douglas*. Moreover, this Court has recently and repeatedly declined to take up the questions that Petitioner presents on step three of the *McDonnell Douglas* framework. *See Golub Corp. v. Bart*, No. 23-1346, 2024 WL 4426694, at *1 (U.S. Oct. 7, 2024); *Gladden v. Procter & Gamble Distrib., LLC*, 143 S. Ct. 1044 (2023); *Thomas v. Delmarva Power & Light Co.*, 586 U.S. 874 (2018); *see also Smith v. Vestavia Hills Bd. of Educ.*, 141 S. Ct. 663 (2020). It should do the same here.

A. The Ninth Circuit properly applied a motivating-factor analysis, and the decision would have been the same regardless of whether and how the third step of *McDonnell Douglas* applies.

This case provides no reason to revisit any aspect of *McDonnell Douglas* because the Ninth Circuit's judgment does not rest on the *McDonnell Douglas* framework and did not ignore a motivating-factor analysis. The court of appeals allowed Petitioner multiple routes to make out his discrimination claim at summary judgment—including under the *McDonnell Douglas* framework, by simply presenting direct and/or circumstantial evidence of discrim-

ination, or by showing that religious discrimination was a motivating factor in his termination. The court's conclusion that Petitioner failed to adduce sufficient evidence of discrimination under *any* approach does not warrant revisiting *McDonnell Douglas* or provide an appropriate vehicle for doing so.

To start, the Ninth Circuit was explicit that *McDonnell Douglas* provides just *one, nonexclusive* way to establish a prima facie case of discrimination. Pet. App. 21a-23a. "Alternatively," the court explained, "a plaintiff can prevail merely by showing direct or circumstantial evidence of discrimination; he or she does not need to use the *McDonnell Douglas* framework to establish a *prima facie* case." Pet. App. 23a.

Further, the Ninth Circuit expressly recognized that Petitioner merely needed to show that discrimination was a motivating factor for his termination. Pet. App. 23a-24a. And the court of appeals agreed with the district court that the evidence was insufficient to create a genuine issue of material fact even under that minimal requirement. Pet. App. 30a, 32a. In other words, both the district court and court of appeals found that Petitioner failed to supply sufficient evidence to permit a reasonable jury to find that his religion was a motivating factor in his termination—which is the established standard for assessing the evidentiary submissions at the summary-judgment stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *infra* 29-34.

Petitioner disagrees with the district court's and Ninth Circuit's assessment of the facts in applying

the motivating-factor standard. Pet. 25, 27. But this Court is not in the business of error correction. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. There is no split among the courts of appeals on whether a plaintiff can survive summary judgment by showing that religion was a motivating factor for the adverse action, nor any meaningful split on how the analysis is performed.

Petitioner asserts (at 22-25) that there are several ways courts have approached whether and how to apply step three to motivating-factor cases. But Petitioner misses the forest for the trees. Both statutory and Supreme Court authority allow plaintiffs to establish Title VII disparate-treatment liability by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m); *see, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). Not surprisingly, since the 1991 amendments to Title VII,[4] every circuit has allowed for a motivating-factor analysis. *See, e.g.*, Pet. App. 30a, 32a; *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85

[4] Section 107(a) of the Civil Rights Act of 1991 made clear that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

(2d Cir. 2015); *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283-85 (4th Cir. 2004); *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 995-96 (8th Cir. 2006).

In other words, no matter how they get there, every circuit honors this alternative motivating-factor basis for liability. Petitioner's contention that some courts may allow a motivating-factor analysis to proceed under the *McDonnell Douglas* framework—while other courts may not—is thus a distinction without a difference.

To start, as noted above, the Ninth Circuit here found that Petitioner "failed to demonstrate that discriminatory animus toward religion was even a motivating factor in his termination." Pet. App. 30a; *see* Pet. App. 32a. Petitioner contends (at 25) that "[t]he Ninth Circuit's reliance on the City's purported nondiscriminatory reasons to grant summary judgment under a motivating-factor theory was inconsistent with Title VII." But that misconceives what the court did. The court merely identified "the legitimate reason" for the remarks that Petitioner complained about—evidence of Petitioner's religious favoritism, *see supra* 2-3, *infra* 31-32—which is not prohibited. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989).

If there had been no legitimate reason, of course, that would be relevant to a potential inference of discrimination—and thus the Ninth Circuit's identification of a legitimate reason was perfectly appropriate. What *is* forbidden is presupposing that the

existence of a legitimate reason necessarily means that another motivating reason cannot exist. *See id.* The court, however, never engaged in such fallacious reasoning. To the contrary, the court pinned religion not being a motivating factor on "neither Montes nor Deis ma[king] any remarks demonstrating their own discriminatory animus toward religion." Pet. App. 30a.

More generally, Petitioner's attempt to gin up a meaningful split on the motivating-factor question falls flat. Petitioner takes aim (at 24-25) at the supposed rule of the Seventh, Eighth, Ninth, Tenth, and D.C. Circuit: that they "apply an unmodified version of *McDonnell Douglas* in motivating-factor cases using indirect evidence of discrimination" that requires disproof of an employer's reasons for its adverse action. That is incorrect. As explained below (at 17-24), none of these circuits require disproof of an employer's reasons even in the but-for cause context. They certainly do not require it in motivating-factor cases.

The authorities that Petitioner cites (at 24) all confirm as much. *See Runkel v. City of Springfield*, 51 F.4th 736, 743 (7th Cir. 2022) (in a motivating-factor case, a plaintiff rebutting pretext under step three of *McDonnell Douglas* "need not present evidence that race was the sole cause or even a but-for cause"; "[r]ace discrimination claims under Title VII simply require that race be a motivating factor in the defendant's challenged employment decision" (cleaned up)); *Mayorga v. Merdon*, 928 F.3d 84, 89 (D.C. Cir. 2019) (under a "single-motive" or "pretext theory of discrimination," a plaintiff must prove that "the employer's improper consideration of a protect-

ed characteristic was a but-for cause of an adverse employment action," whereas a "'mixed-motive' theory of liability pursuant to 42 U.S.C. § 2000e-2(m) allows a plaintiff unable to establish but-for causation to prevail as long as he can show that unlawful discrimination was 'a motivating factor' for the decision"); *Banks v. Deere*, 829 F.3d 661, 666 (8th Cir. 2016) (pretext not shown in a motivating-factor cause because the plaintiff had "not adduced any evidence race 'was a motivating factor' in [his employer]'s decision to discipline [him]"); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1225-26 (10th Cir. 2008) (plaintiff may establish a motivating factor "through the use of direct or circumstantial evidence" under the *Price Waterhouse* framework rather than the *McDonnell Douglas* framework; if the plaintiff cannot establish a motivating factor under the former, then "she may rely on the familiar three-part *McDonell Douglas* framework").[5]

[5] Petitioner does not cite any Ninth Circuit decisions outside of the decision below to show a split. As explained above (at 14-15), however, the decision below did not require Petitioner to disprove the City's reasons to satisfy the motivating-factor standard. And other Ninth Circuit decisions are in accord. *See, e.g.*, *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (pretext in motivating-factor case may be shown by producing evidence of "a discriminatory motive *or* show[ing] that the [employer]'s explanation" for its adverse action "is not credible" (emphasis added)).

C. There is no split among courts of appeals over whether the plaintiff must disprove the employer's reasons for an adverse employment action at the third step of the *McDonnell Douglas* framework even in the but-for context.

Petitioner's contention (at 16-22) that there is a more general circuit split at step three fails entirely. In Petitioner's telling (at 17, 19), the crux of the supposed split is whether, even in the but-for cause context, disproving the employer's reason is the *exclusive* way to show pretext, or whether there are additional ways a plaintiff could establish pretext instead. This claimed split is illusory: None of the cases Petitioner cites adopts the categorical view that a plaintiff must show the employer's stated reasons are false. Rather, the cases Petitioner relies on are much more similar than they are different. And at the bare minimum, the Ninth Circuit does not use the claimed categorical approach that Petitioner decries, and this case is not a proper vehicle to address that purported issue.

Ninth Circuit. Most importantly for present purposes, the Ninth Circuit does not require a plaintiff to disprove an employer's reason for its action. The Ninth Circuit has been clear:

> [A] plaintiff can prove pretext in multiple ways, either: (1) directly, by showing that unlawful discrimination more likely than not motivated the employer; (2) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is

> internally inconsistent or otherwise not believable; or [3] via a combination of these two kinds of evidence.

Opara v. Yellen, 57 F.4th 709, 723 (9th Cir. 2023) (cleaned up); *see, e.g.*, *Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024) (same); *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1094-95 (9th Cir. 2005) (pretext can be shown by "mak[ing] an affirmative case that the employer is biased" *or* "by showing that the employer's proffered explanation for the adverse action is unworthy of credence" (cleaned up)). Under that standard, comparator evidence—that is, "showing that the [employer] treated similarly situated employees outside [the] protected class more favorably"—can also be used to establish pretext. *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). There is no reason to believe that the Ninth Circuit here departed from that flexible approach; the court cited both *Opara* and *Coghlan*. Pet. App. 23a, 24a, 29a. Indeed, the court cited *Opara* for the issue of pretext. Pet. App. 23a.

Even Petitioner acknowledges (at 21) that the Ninth Circuit here "offered an option beyond falsifying the employer's reasons." But Petitioner quibbles with the precise wording—lifted verbatim from this Court's opinion in *Burdine*—that the Ninth Circuit employed in describing that alternative option: that "[a] plaintiff meets his or her burden [of showing pretext] 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"

Pet. App. 22a (quoting *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981)).

Specifically, Petitioner complains (at 21) that "the alternative requirement to show that discrimination 'more likely motivated' the employer … mistakenly required [Petitioner] to disprove the employer's allegedly nondiscriminatory reasons to survive summary judgment," contrary to *Bostock*'s admonition that there may be multiple but-for causes of an adverse employment action (and *Bostock*'s recognition that, in motivating-factor cases, something less than a but-for cause can suffice). Petitioner reads too much into the Ninth Circuit's stray quotation of this Court's pre-*Bostock* formulation of pretext from *Burdine*. That incidental quotation does not demonstrate any true departure of the Ninth Circuit's clear post-*Bostock* recognition—from an opinion that the court also cited here—that a plaintiff can show pretext merely "by showing that unlawful discrimination *more likely than not* motivated the employer." *Opara*, 57 F.4th at 723 (emphasis added).

Petitioner's reliance (at 21) on *Curley v. City of North Las Vegas*, 772 F.3d 629 (9th Cir. 2014), is also misplaced. There, the plaintiff *chose* to show pretext via "attack on [his] employer's legitimate, nondiscriminatory reasons," but at most rebutted only one of four separate rationales. *Id.* at 632-33 & n.3. In other words, *Curley* did not involve a situation where a plaintiff presented evidence showing that unlawful discrimination more likely than not motivated the employer. Consequently, *Curley* cannot upset the Ninth Circuit's rule—cleanly stated in *Opara*, *Kama*, *Coghlan*, and other decisions—that

this route of proving pretext exists outside of disputing the employer's reasons. *See id.*

First, Fourth, Sixth, Seventh, and Eleventh Circuits. The absence of Petitioner's complained-of rule in the Ninth Circuit suffices to deny certiorari on the question, but Petitioner also fails to evidence that other circuits categorically require a plaintiff to show that the employer's reason for an adverse reaction was false.

Take Petitioner's citation (at 17) of the First Circuit's decision in *Rios v. Centerra Group LLC*, 106 F.4th 101 (1st Cir. 2024). Petitioner claims that, to establish pretext, *Rios* requires the plaintiff to disprove the employer's reason for its action. Pet. 17 (citing *Rios*, 106 F.4th at 113). But two paragraphs later in that opinion, the court recognizes an alternative way to show pretext: "by showing plaintiff was treated differently than similarly situated employees." 106 F.4th at 114. For that proposition, *Rios* cites a First Circuit opinion that confirms that the court does not narrowly constrain the analysis to showing that the employer's reason was false. Just the opposite, a plaintiff can show pretext "in any number of ways," including through comparator evidence. *Kosereis v. Rhode Island*, 331 F.3d 207, 213-14 (1st Cir. 2003); *accord Ramos v. Roche Prods., Inc.*, 936 F.2d 43, 48 (1st Cir. 1991) (plaintiff can "show employer's motive unworthy of belief or offer proof of another motive").

Petitioner's Fourth Circuit decision likewise does not establish a categorical rule requiring disproof of an employer's reasons. Petitioner cites (at 17) *Sem-*

powich v. Tactile Systems Technology, Inc., which merely states that, "to show pretext, a plaintiff *may* show that an employer's proffered nondiscriminatory reasons for the termination are inconsistent over time, false, or based on mistakes of fact." 19 F.4th 643, 652 (4th Cir. 2021) (cleaned up) (emphasis added). Other Fourth Circuit decisions confirm that disproving the employer's reason is not the *only* way to show pretext. For example, the court has held that a plaintiff may demonstrate pretext by "show[ing] that the employer's proffered explanation is unworthy of credence, thus supporting an inference of discrimination, or offer other forms of circumstantial evidence sufficiently probative of intentional discrimination." *Dugan v. Albemarle Cnty. Sch. Bd.*, 293 F.3d 716, 721 (4th Cir. 2002); *accord Morgan v. Wells Fargo Bank, Nat'l Ass'n*, 585 F. App'x 152, 153 (4th Cir. 2014); *Martin v. Brondum*, 535 F. App'x 242, 245 (4th Cir. 2013); *Atkins v. Holder*, 529 F. App'x 318, 320 (4th Cir. 2013); *see also Dawson v. Washington Gas Light Co.*, No. 19-2127, 2021 WL 2935326, at *5 (4th Cir. July 13, 2021) (plaintiff can rely on comparator evidence to demonstrate pretext).

The Seventh Circuit's decision that Petitioner cites (at 17) is similar. *See Anderson v. Street*, 104 F.4th 646, 654 (7th Cir. 2024). Demonstrating that the employer's reason is false is not the exclusive way for a plaintiff to prevail at the third step in the Seventh Circuit. Instead, the plaintiff's case failed at step three in *Anderson* because the plaintiff "ha[d] identified no facts giving rise to a reasonable inference that the stated reasons for her firing were false, *or that some other reason for firing her existed*." *Id.* (emphasis added); *accord Russell v. Acme-Evans Co.*,

51 F.3d 64, 67 (7th Cir. 1995) (summary judgment may be avoided if there is "an issue of fact as to whether the reasons offered by the company were sincere … or other, discriminatory reasons had played a role in motivating the actions").

The Eleventh Circuit decision that Petitioner cites (at 17) is much the same. *See Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1197-98 (11th Cir. 2024). It effectively allows a plaintiff to show the equivalent of pretext via the Eleventh Circuit's "convincing mosaic" alternative. Under that methodology, a

> plaintiff will always survive summary judgment if [s]he presents ... a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination. … A plaintiff's mosaic may be made up of, among other things, (1) suspicious timing, ambiguous statements, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) systemically better treatment of similarly situated employees; and (3) evidence that the employer's justification is pretextual.

Id. (cleaned up); *accord Torres-Skair v. Medco Health Sols., Inc.*, 595 F. App'x 847, 853 (11th Cir. 2014) (at pretext stage, plaintiff can "survive summary judgment by presenting sufficient circumstantial evidence to raise a reasonable inference of intentional discrimination" (citations omitted)).

The closest Petitioner comes to showing a categorical rule is in the Sixth Circuit's approach, but

even that court does not strictly require the employee to directly prove the employer's reasons are false. Indeed, the Sixth Circuit has disavowed any "formalis[tic]" approach to pretext, instead providing plaintiffs a variety of ways to present evidence sufficient to satisfy this third step. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009). One of those ways is to rely on comparator evidence—an approach that the circuits above also adopted. *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 303-04 (6th Cir. 2016) ("Although a plaintiff can prove pretext in several ways, evidence '[e]specially relevant to such a showing' is proof that an employer treated similarly situated … employees differently."); *Miles v. S. Cent. Human Res. Agency, Inc.*, 946 F.3d 883, 891-92 (6th Cir. 2020).

Comparator evidence, as Petitioner notes, is precisely what courts on the other side of this purported split have recognized as yet another way for plaintiffs to satisfy *McDonnell Douglas*'s third step. *See* Pet. 19-20 (citing comparator approaches as an alternative way to show pretext in *Qin v. Vertex, Inc.*, 100 F.4th 458, 474-75 (3d Cir. 2024); *Williams v. United Parcel Serv., Inc.*, 963 F.3d 803, 808 (8th Cir. 2020); *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008)). So, even taking Petitioner's proposed split on its own terms, his cited cases line up on the same side.

None of the remaining cases Petitioner cites is inconsistent with any of this. As Petitioner notes, the Second, Fifth, and Tenth Circuit cases cited all allow plaintiffs to prevail at the third step in various ways, not just by proving the employer's proffered reason is

false. *See Bart v. Golub Corp.*, 96 F.4th 566, 570 (2d Cir. 2024) (alternative of showing that "impermissible factor was a *motivating factor*"); *Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 368-69 (5th Cir. 2021) (alternative of showing "evidence of disparate treatment"); *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1081-82 (10th Cir. 2023) (alternative of showing that "discrimination was a primary factor in the employer's decision" or that employer failed to investigate). In fact, these alternative methods are remarkably similar to those identified in cases that, in Petitioner's view, lie on the other side of the split and narrowly require the plaintiff to disprove the employer's reason.

II. Whether *McDonnell Douglas* Should Be Overruled Does Not Warrant Review.

There is no reason or need to revisit *McDonnell Douglas*. *McDonnell Douglas* is a well-settled statutory precedent, repeatedly reaffirmed by this Court over the past fifty-plus years. *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228 (2015); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993); *Burdine*, 450 U.S. at 252-56; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978). Petitioner argues (at 13-15) that the framework is causing courts to ignore Title VII's text and the summary-judgment standard. But as explained above (at 13-24), all of the courts of appeals allow plaintiffs to show discrimination through evidence that discrimination was either a motivating factor or but-for cause of an adverse employment action, and how courts do so is a distinction without a difference.

Notably, this Court has consistently denied review of whether *McDonnell Douglas* should be overruled, including as recently as three years ago. *See Sprowl v. Mercedes-Benz U.S. Int'l, Inc.*, 141 S. Ct. 1239 (2021); *Graham v. Gonzales*, 548 U.S. 925 (2006). The Court should deny review here, too.

Statutory *stare decisis* also strongly counsels against this Court's intervention. "*[S]tare decisis* carries enhanced force when a decision, like [*McDonnell Douglas*], interprets a statute." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). "That is true … regardless whether [the] decision focused only on statutory text or also relied, … on the policies and purposes animating the law." *Id.*

> Indeed, [this Court] appl[ies] statutory *stare decisis* even when a decision has announced a judicially created doctrine designed to implement a federal statute. All [this Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

Id. (cleaned up).

"Congress's continual reworking of [Title VII]—but never of the [*McDonnell Douglas* framework]—further supports leaving the decision in place." *Kimble*, 576 U.S. at 457. Since *McDonnell Douglas*'s issuance, Congress has amended Title VII three

times—through the Pregnancy Discrimination Act of 1978, the Civil Rights Act of 1991, and the Lilly Ledbetter Fair Pay Act of 2009—and in each instance left *McDonnell Douglas* intact. That *McDonnell Douglas* has remained unscathed is particularly notable because Congress has not been shy to overturn this Court's Title VII precedents. For example, Congress's "'unambiguou[s]' intent in passing the [Pregnancy Discrimination] Act was to overturn" *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which had held that Title VII did not reach pregnancy discrimination. *Young*, 575 U.S. at 227 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983)).

Since then, this Court has held that "an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework," *id.* at 228, recognizing that "the Act was designed to 'reestablis[h] the law as it was understood prior to'" *Gilbert*—law which included *McDonnell Douglas*, *id.* at 222-23 (quoting S. Rep. No. 95-331 at 8 (1978)). Similarly, in the 1991 Act, "Congress … rejected [*Price Waterhouse*] to a substantial degree" by explicitly adding motivating-factor liability to Title VII and eliminating an employer's complete affirmative defense to motivating-factor claims. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348-49 (2013); *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 n.5 (2009). Yet there, too, Congress did not spurn the longstanding precedent allowing plaintiffs to prove their claims under the *McDonnell Douglas* framework. Congress's acquiescence gives

"*stare decisis* … special force." *Watson v. United States*, 552 U.S. 74, 82 (2007).

Further entrenching the decision, reliance interests are high. *Contra* Pet. 16. Federal courts generally have extended the *McDonnell Douglas* framework to various disparate-treatment contexts, including housing discrimination, public-accommodations discrimination, discrimination in government programs, and even Equal Protection claims. *See EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 615 n.6 (5th Cir. 2009) ("[T]he *McDonnell Douglas* framework … is used in cases alleging discrimination under many different statutes, and courts regularly employ definitions and standards used in the *McDonnell Douglas* framework under multiple statutes."); *see also Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003) (describing *McDonnell Douglas* as generally applicable in "discriminatory-treatment cases" and applying it to an Americans with Disabilities Act claim); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000) (recognizing that the courts of appeals have applied *McDonnell Douglas* "to analyze ADEA claims" and assuming that "the *McDonnell Douglas* framework is fully applicable" in analyzing such a claim). That federal courts greatly rely on the framework is itself sufficient to leave it alone. *See, e.g.*, *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 698-99 (2011).

And reliance extends far further. Multiple states have adopted the *McDonnell Douglas* framework for state anti-discrimination laws—including Alaska, New York, New Jersey, Florida, Texas, Illinois, and Ohio. *See Ross v. Alaska State Comm'n for Hum.*

Rts., 447 P.3d 757 (Alaska 2019); *Forrest v. Jewish Guild for the Blind*, 819 N.E.2d 998 (N.Y. 2004); *Bergen Com. Bank v. Sisler*, 723 A.2d 944, 954 (N.J. 1999); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla. 1989); *Texas Tech Univ. Health Scis. Ctr.-El Paso v. Flores*, 612 S.W.3d 299 (Tex. 2020); *Zaderaka v. Illinois Hum. Rts. Comm'n*, 545 N.E.2d 684 (Ill. 1989); *Barker v. Scovill, Inc., Schrader Bellows Div.*, 451 N.E.2d 807, 809-10 (Ohio 1983). Civil-rights agencies have likewise embraced the framework to adjudicate discrimination claims. *U.S. Dep't of Hous. & Urban Dev. v. Marilyn Frisbie*, HUDALJ No. 07-91-0027-1, at *6 (May 6, 1992), https://perma.cc/6YFY-4922 (noting that HUD's chief ALJ adopted the *McDonnell Douglas* framework in Fair Housing Act cases, an approach that was affirmed in the courts); U.S. Dep't of Justice, Civil Rights Div., *Title VI Legal Manual* § VI.B.3 (2017), https://perma.cc/RX5L-2RCA (as part of DOJ's responsibility for coordinating agency enforcement efforts under Title VI, discussing the *McDonnell Douglas* framework as a means of proving intentional discrimination).

Petitioner presents no sound justification for this Court to intervene now and upend this widely established legal framework.

Petitioner argues (at 16) that *McDonnell Douglas* was wrongly decided. But "'wrong on the merits'-type arguments" have never been enough to overrule a precedent—especially a statutory precedent. *Kimble*, 576 U.S. at 462. Moreover, *McDonnell Douglas*—a procedural device which simply "sharpen[s] the inquiry into the elusive factual question of intentional

discrimination," *Hicks*, 509 U.S. at 506—accords with both Title VII and Rule 56. "[I]t is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577.

Petitioner's contention (at 16) that "*McDonnell Douglas* is unworkable" and has been "undermined by later precedents" is refuted by the repeated reaffirmations and extensions of *McDonnell Douglas*'s framework. If the framework were truly unworkable, courts would not have continued to adopt it so pervasively. Nor is workability undermined by Petitioner's citation (at 16) of this Court's instruction that both direct and circumstantial evidence can prove discrimination in mixed-motive cases and in that sense are "treat[ed] … alike." *Desert Palace*, 539 U.S. at 100. *McDonnell Douglas* is not to the contrary—it allows both direct and circumstantial evidence to prove discrimination. Indeed, this Court cited a decision applying *McDonnell Douglas* to support this "treat[ed] … alike" proposition. *Id.* (citing *Reeves*, 530 U.S. at 147). This Court's reliance on *McDonnell Douglas*'s progeny undermines the suggestion that *McDonnell Douglas* is unworkable. Quite the opposite: "To discard or restrict the [*McDonnell Douglas* framework] now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp.*, 564 U.S. at 699.

III. The Decision Below Is Correct.

Finally, review is unwarranted because the Ninth Circuit properly granted summary judgment.

Petitioner contends (at 27) that the Ninth Circuit improperly required him to disprove the City's reasons for his termination, rather than apply a but-for causation test. This is incorrect. "[A] but-for test directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020). Petitioner's evidence did not raise a genuine issue of material fact under that standard. As the Ninth Circuit found, "the City articulated an overwhelming number" of "non-discriminatory reasons for terminating [Petitioner's] employment, which were independently verified by an outside investigator." Pet. App. 33a (internal quotations omitted). In other words, removing any ground involving religion from the equation, the City had plenty of reasons to terminate Petitioner. For example, his resistance to disciplining his subordinates for timecard fraud and leaking private medical records, undisclosed co-ownership of a vacation home with subordinates, and endorsement of a private business in contravention of City policy were all independently sufficient reasons for his termination. Pet. App. 13a-14a, 16a-20a, 33a, 107a-108a. So too were his refusals to follow budget directives despite the City's financial crisis. Pet. App. 9a, 14a, 19a. As a result, Petitioner cannot claim that, but for the termination grounds allegedly involving religion, he would not have been terminated.

Petitioner also argues (at 25, 27) that the Ninth Circuit wrongly concluded that religion was not a motivating factor for his termination. Petitioner is mistaken. Viewing the facts in the light most favorable to him, the Ninth Circuit concluded:

> [B]ecause neither [of Petitioner's managers] made any remarks demonstrating their own discriminatory animus toward religion—i.e., an intent to treat [Petitioner] worse because he is Christian—but focused on the Summit's lack of benefit to the City and other evidence of [Petitioner's] misconduct, [Petitioner] failed to demonstrate that discriminatory animus toward religion was even a *motivating factor* in his termination.

Pet. App. 30a (emphasis added). The reality, as shown by the summary-judgment record, is that the City opposes discrimination in all forms, including religious discrimination, and the record simply does not support that the latter was even a motivating factor in Petitioner's termination.

Petitioner posits that the Ninth Circuit should not have treated "repetition of other persons' use of pejorative terms" as reflecting "concerns about other persons' perceptions." Pet. App. 25a; *see* Pet. 28-29. Petitioner also takes issue with the Ninth Circuit's view that statements regarding not favoring one religion over another appropriately reflect "concern[s] that the City could violate constitutional prohibitions and face liability if it is seen to engage in favoritism with certain employees because they happen to be members of a particular religion." Pet. App. 25a; *see* Pet. 28-29. Petitioner's concerns are unfounded. The court was right to treat these remarks as referencing "legitimate constitutional and business concerns" rather than "discriminatory animus." Pet. App. 26a. The City could reasonably be concerned about the repeated claims and evidence of favoritism

based on religion—which extended to special employee assignments, Pet. App. 8a, invitations to and approval of attendance at a non-job-related event (the Summit) on paid City time using a City vehicle, Pet. App. 12a, 26a-28a, 32a, and refusal to discipline favored individuals for falsifying time records, including for attendance at the Summit, Pet. App. 14a*; see, e.g.*, C.A. App. 2-ER-53-54, 263. Such preferential treatment could easily give rise to potential Title VII and other statutory violations. And Petitioner can hardly claim to have any First Amendment right to engage in such favoritism in the workplace. Thus, at both ends of the analysis, Petitioner is simply wrong (at 28) to liken the issue here to "a government entity's concerns about phantom constitutional violations justify[ing] actual violations of an individual's First Amendment rights." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). So, too, this is not a case where "'a coworker's dislike of religious practice and expression in the workplace' … justif[ied] religious discrimination." Pet. 29 (quoting *Groff v. DeJoy*, 600 U.S. 447, 472 (2023)).

And while Petitioner seeks to diminish the nondiscriminatory concerns that led to Petitioner's termination (e.g., Pet. 28), the summary-judgment record strongly supported those reasons. As the Ninth Circuit noted, the City's reasons were backed up by a report "total[ing] over 250 pages and referenc[ing] more than 50 exhibits." Pet. App. 15a. The City's reasons for terminating Petitioner were well-documented and entirely appropriate for the Ninth Circuit to rely upon. And any discussion of Petitioner's attendance at a religious event centered on the fact that the training was of no benefit to the City

because it was not geared to Fire Chiefs or upper management of public entities (as was directed by Montes), was not approved, and yet was attended on paid work time with three other firefighters, also on paid work time, using a City vehicle. Pet. App. 26a-28a, 32a.[6] As Petitioner admitted, C.A. App. 2-ER-269, his conduct violated express City policies both prohibiting the use of City funds for travel unless it was "for the benefit of the City," and requiring the submission of a "professional memorandum highlighting [the] conference/training['s] benefits," C.A. App. 4-ER-726-727, 729-739.

Finally, Petitioner fails to show that the Ninth Circuit did not read the facts of the case in the light most favorable to him. Petitioner cites (at 30) the specifics of the training he attended, which he claims are "hotly disputed." The record shows no such material dispute. Although Petitioner asserts (at 30) that Montes never specified that the leadership training he attend be related to the public sector, Petitioner testified that Montes wanted him to obtain training similar to the leadership training attended

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[6] As Montes stated:

> [I]f Mr. Hittle had attended a fantasy football training program on City time or had participated in an Outward Bound mountaineering leadership seminar on City time, that type of conduct would be just as egregious and improper as this situation where four top ranking Fire Department staff were paid two days of time to attend a religious training program unrelated to their Fire Department duties.

C.A. App. 6-ER-1386.

by police management. C.A. App. 6-ER-1280 ("Q. But she wanted you to attend leadership training similar to what the police officers did? A. Yeah."). Petitioner also contends (at 30) that he believed the training satisfied Montes's request. But Petitioner acknowledged that the Summit did not include training specific to fire-department or government management. C.A. App. 6-ER-1286-87 ("Q. Were there any trainings or talks at the conference that were specific to firefighters? A. Nothing specific to firefighters."). And indeed, the City's focus all along has been Petitioner's egregious performance-related issues, which were numerous and pervasive. *See, e.g.*, *supra* 1-6; C.A. App. 6-ER-1381-97. Simply because Petitioner did not receive his desired outcome does not mean that the Ninth Circuit failed to construe the summary judgment evidence in the light most favorable to him.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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