NO. 19-_____

In the Supreme Court of the United States

JAGDISH C. LAUL,

Petitioner,

v.

LOS ALAMOS NATIONAL LABORATORIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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AUGUST 5, 2019

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QUESTION PRESENTED

Summary judgment in this typical employment discrimination case requires the trial court to weigh and choose between competing inferences of what was and was not a part of a motivation for an employment decision. Choosing among competing inferences is uniquely a jury competency. Determining motive is uniquely a jury competency. The Seventh Amendment recognizes that judges, institutionally, are not good at weighing competing inferences and deciphering motive.

Still, that is what the Circuit Court's application of the *McDonnell Douglas* burden-shifting test required of the trial court at summary judgment, to the exclusion of Dr. Laul's constitutional right to a jury determination of these classic jury questions.

QUESTION PRESENTED

Does requiring the trial judge to weigh inferences (and in some cases inferences from inferences) and determine motive from competing testimony deprive a plaintiff of his Seventh Amendment right to make his case to a jury?

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Tenth Circuit

Case Number 18-2084

Jagdish C. Laul, Plaintiff-Appellant, v.
Los Alamos National Laboratories, Defendant-Appellee

Order and Judgment Dated May 6, 2019

United States District Court for the
District of New Mexico

Case Number 16 CV 1017 JAP/KBM

Jagdish C. Laul, Plaintiff v.
Los Alamos National Laboratories, Defendant

Memorandum Opinion and Order Dated May 8, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dr. Jagdish C. Laul respectfully petitions for a writ of certiorari to United States Court of Appeals for the Tenth Circuit in its Case Number 18-2084, *Laul v. Los Alamos National Laboratories,* dated May 6, 2019.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is unpublished from United States Court of Appeals for the Tenth Circuit, Case Number 18-2084, captioned JAGDISH C. LAUL, Plaintiff-Appellant, v. LOS ALAMOS NATIONAL LABORATORIES, Defendant-Appellee, which is dated May 6, 2019. (App.1a) There was no petition for rehearing.

The decision of the District Court is at United States District Court for the District of New Mexico Case Number 16 CV 1017 JAP/KBM is captioned JAGDISH C. LAUL, Plaintiff, v. LOS ALAMOS NATIONAL LABORATORIES, Defendant, and dated May 8, 2018. (App.13a)

JURISDICTION

The opinion of the Tenth Circuit Court of Appeals was entered on May 6, 2019. (App.1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Seventh Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. § 2000e-2(a)

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) and 623(a)(2)

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

STATEMENT OF THE CASE

Dr. Laul filed suit against his former employer for failing to rehire him—indeed, for failing to even grant him an interview—for a number of positions for which he applied, alleging age and national origin discrimination and alleging retaliation based on his previous complaints of discrimination. Employer's hiring decisions were all made during Dr. Laul protracted litigation of whether his original termination was discriminatory.

His suit, like his original discrimination case before it, was dismissed by the trial court at the summary

judgment phase. Applying what has become known as the *McDonnell Douglas* test, the trial court judge, sitting without a jury, considered competing inferences (and, in some cases, inferences based on inferences) from both sides and chose among them to make its own decision concerning motive of employer.

This case is an example of how the byzantine edifice of employment discrimination law has wrought a serious wrong: It has handed over to judges the power and traditional role of the jury to determine choose among disputed inferences to find motive.

STATEMENT OF FACTS

Petitioner Dr. Jagdish Laul was a safety engineer at one of the nation's flagship nuclear laboratories in the New Mexico mountains. Dr. Laul was born in India, and became a naturalized United States Citizen in 1974. In October of 1999, at age 60, Dr. Laul began working at Los Alamos National Laboratory as a Principal Safety Engineer in the Environmental, Safety & Health Division.

Over the next decade Dr. Laul was promoted several times, received a number of professional awards, was commended for work that saved the Laboratory millions of dollars, and received favorable evaluations. But after Dr. Laul hit age 70, his supervisors alleged that his performance declined. At the end of 2013, the Laboratory terminated Dr. Laul's employment. (App.2a). Dr. Laul challenged his termination as discriminatory, and pursued his challenge all the

way to this Court (*See Laul v. Los Alamos Nat'l Labs.*, 714 F. App'x 832, 834-35 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2602 (2018)). His challenges to his termination were ultimately unsuccessful, but while they were in litigation, the facts relevant to this case unfolded.

In early January 2014, Richard Marquez, the Executive Director of LANL, told Dr. Laul he could apply for jobs despite having been discharged. (App.2a). Thereafter, Dr. Laul went to the Laboratory's Occupational Medical building and asked to speak with Janet McMillan, a nurse and the wife of the Laboratory Director, to entreat his case for how unfairly he had been treated. (App.2a). Ms. McMillan declined to take Dr. Laul's papers, but did not report his visit until later. (App.3a).

On September 11, 2014, Mr. Laul filed a charge of discrimination related to his termination with the New Mexico Department of Labor, Human Rights Division. (App.3a).

Between October 20, 2014, and May 4, 2015, Mr. Laul applied for 30 jobs at LANL. (App.3a). Eleven of the job postings remained unfilled and are not at issue. As to the remaining 19 jobs, Mr. Laul was not hired for any of them. All of the people hired were younger than Mr. Laul, who was then in his mid-70s, and none were of East Indian origin. (App.3a).

In June 2015, Mr. Laul returned to the Occupational Medical building and again asked to see Ms. McMillan. This time, his visit resulted in her emailing Executive Director Richard Marquez and copying her husband, the Lab director. Marquez then reported Dr. Laul to the Lab security division, which issued a

site-wide exclusion (referred to in the record as a BOLO) banning Dr. Laul from coming on the premises.

PROCEEDURAL HISTORY

In September of 2016 Dr. Laul filed this suit, alleging failure to hire was discriminatory based on his age and national origin in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), ("ADEA"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); and the New Mexico Human Right Act ("NMHRA"), N.M. Stat. Ann. § 28-1-7. He also claimed that the Laboratory failed to rehire him in retaliation for his previous charge of discrimination, and further retaliated against him by issuing a site-wide exclusion, also in retaliation for his discrimination claim. (App.5a, 61a).

Dr. Laul demanded a jury. (App.61a).

Dr. Laul did not get one. The district court ruled in favor of the Laboratory at summary judgment stage.

1. District Court Ruling On Discriminatory Failure to Hire.

For each of these 19 positions, the Laboratory professed motivations such as qualifications of other applicants for some positions, and hiring manager's knowledge of Dr. Laul's past performance as motivation for others.

For certain of the positions, the Laboratory relied on inferences of motive themselves based on inferences. For example, for an environmental position, the hiring

manager Ms. Gallegos had since passed, so a subsequent hiring manager, Ms. Payne, testified as to Ms. Gallegos' inferred motives from Ms. Gallegos' notes:

> Ms. Payne testified that there is no indication in Ms. Gallagher's records that Ms. Gallagher was aware of Plaintiff's discharge from LANS or that Ms. Gallagher was aware of Plaintiff's complaints against LANS for discrimination. (*Id.* ¶¶ 3(g), (h).) Ms. Payne testified that there is no indication that Ms. Gallagher considered Plaintiff's age, race, or national origin in making her decision. (*Id.* 3(i).) Nor was there any indication that Ms. Gallagher was told not to interview or hire Plaintiff. (*Id.* ¶ 3(f).)

(App.21a). For another trio of positions:

> Ms. Payne testified that there was no indication that in making this decision, Ms. Gallagher was aware of Plaintiff's previous performance issues at LANS, his discharge, or his discrimination claims against LANS.

Mot. Ex. 4, Payne Decl. ¶¶ 3(q), (r). (App.22a).

Based on this thin chain of inference, the trial court, candidly choosing to discount Dr. Laul's own competing testimony, granted summary judgment to the Laboratory. *See* App.50a ("At the summary judgment stage, the plaintiff's own conclusory opinions about his qualifications and about the employer's motives do not give rise to a material factual dispute. *Bullington v. United Air Lines*, 186 F.3d 1301, 1318 (10th Cir. 1999)."); *and* App.51a ("Plaintiff's subjective belief that he possessed the qualifications for these

positions is insufficient to create a fact issue capable of overcoming summary judgment. *Toney v. Cuomo,* 92 F.Supp.2d 1186, 1192 (D. Kan. 2000)."); *and* App.52a ("Plaintiff has presented no evidence, other than his subjective belief, from which the Court can reasonably infer that Plaintiff was not interviewed or hired because of his age or national origin."); *and* App.53a-54a ("Plaintiff's own testimony that he was not chosen because he is 77 years old or East Indian, is insufficient for this Court to find that LANS' reasons for not hiring Plaintiff were unworthy of belief.").

At the same time, the trial court credited Dr. Laul's admission, seemingly necessary, that he was unable to read the minds of hiring managers:

> In his deposition, however, Plaintiff testified he did not know whether Ms. Gallagher discriminated against him:
>
> Q. Now tell me, do you believe that . . . you didn't get the job because Ms. Gallagher was considering your age or your race or your national origin?
>
> A. I can't read her mind, but she knows who I am.
>
> Q. You called who?
>
> A. Gallagher knows who I am.
>
> Q. Yeah.
>
> A. And I had reviewed their program, so they know it. And whether she is thinking of ruling me out on national origin, race, that is her consideration. I have no way of knowing. I can't read her mind.

(App.24a, emphasis added). And:

> Q. So you think he—he—he basically said, "Okay, I don't want the East Indians."
>
> A. That may be his thinking, but he's not telling me.
>
> Q. You don't know right?
>
> A. Yeah. I don't know, but this is my belief.

Mot. Ex. 2, Laul Dep. 700:15-701:10. (App.43a).

2. Ruling on Discriminatory Site Exclusion.

Dr. Laul argued that the dramatic change in how Lab officials treated him before and after he filed his complaint for discrimination showed motivation to retaliate. (App.2a-3a, 4a; App.17a-20a). Before his complaint of discrimination, Executive Director Richard Marquez invited Dr. Laul to apply for open positions and Ms. McMillan took no action in response to his entreaties. But after, Ms. McMillan reported Dr. Laul, characterized him as aggressive, and Richard Marquez caused a site restriction to be placed on Dr. Laul. (App.2a-3a, 4a; App.17a-20a). This happened at about the same time Dr. Laul was not offered an interview for any of the 30 positions for which he applied.

Dr. Laul argued that the Laboratory was retaliating against him for the protected activity. (App.59a). The trial court rejected Dr. Laul's claim, in part because the security department that actually issued the order did not know about Dr. Laul's prior claims of discrimination. (App.60).

Dr. Laul appealed, and the Tenth Circuit Court of Appeals in an unpublished decision tracking the district court's analysis affirmed.

REASONS FOR GRANTING THE WRIT

This case presents important issues relating to employment discrimination law, specifically when and how *McDonnell-Douglas* burden-shifting is applied at summary judgment stage and whether this framework impinges on the Seventh Amendment right to jury trial.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), this Court held that, at the trial stage of a discrimination case, credibility determinations and the weighing of evidence are reserved for the jury. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. at 150-51.

In *Reeves*, this Supreme Court rejected the so-called "pretext plus" standard that required plaintiffs using the *McDonnell Douglas* framework to both show pretext and produce "additional evidence of discrimination" in order to avoid summary judgment. *Id.* at 146-48. *Reeves* expressly held that "a plaintiff's prima facie case [of discrimination], combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. No additional evidence is necessary to show discrimination because "[p]roof that the defendant's explanation is unworthy of credence is simply one form

of circumstantial evidence that is probative of intentional discrimination." *Id.* at 147.

The *Reeves* Opinion involved judgment as a matter of law at the end of trial of a discrimination case, not summary judgment. At summary judgment phase, the Tenth Circuit Court of Appeals still feels itself constrained to apply the well-known but byzantine *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Such application has not been without notable judicial misgivings:

1. In *Paup v. Gear Prods., Inc.,* 327 F. App'x 100, 113 (10th Cir. 2009) (Gorsuch, J.), then-Judge Gorsuch wrote: "[S]ome have criticized *McDonnell Douglas* as improperly diverting attention away from the real question posed by the ADEA—whether age discrimination actually took place—and substituting in its stead a proxy that only imperfectly tracks that inquiry. But *McDonnell Douglas* of course remains binding on us." 327 F. App'x at 113 (citations omitted).

2. In *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n. 12 (10th Cir. 2008, the Tenth Circuit noted the Court will apply the test "so long as *McDonnell Douglas* remains the law governing our summary judgment analysis".

3. And, perhaps most clearly, in *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1224-28 (10th Cir. 2003) Judge Hartz wrote a concurrence separately (from his own authored panel opinion) "to express my displeasure with the mode of analysis employed in the panel opinion (which I authored)". Judge Hartz explained:

The *McDonnell Douglas* framework only creates confusion and distracts courts from "the ultimate question of discrimination *vel non*." *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). *McDonnell Douglas* has served its purpose and should be abandoned. Moreover, and perhaps more importantly, the Supreme Court has recognized the problems created by *McDonnell Douglas* and given us a precedent which enables us to ignore *McDonnell Douglas* without violating our lower-court duty to follow the dictates of the Supreme Court. *See Aikens,* 460 U.S. at 714-16, 103 S.Ct. 1478.

The *McDonnell Douglas* framework is a departure from the approach appellate courts customarily use in evaluating the sufficiency of the evidence to sustain a plaintiff's case, whether reviewing judgments after trial or summary judgments. Our usual procedure is to set forth the elements of the plaintiff's cause of action and then determine whether there is sufficient evidence for a reasonable person to find that each element has been proved. If the defendant relies on an affirmative defense (where the defendant has the burden of persuasion), we may need to conduct a similar analysis with respect to the elements of the defense. In evaluating the sufficiency of the evidence to support an element of the claim or defense, we employ an informed common sense. We are guided by the thinking expressed by other courts.

> But, recognizing that every case is unique, we know that we cannot simply incorporate some formula and make our task a mechanical one.

Wells v. Colo. Dep't of Transp., 325 F.3d at 1224-28.

4. Tenth Circuit jurist Judge Tymkovich has written a scholarly article aptly named "The Problem with Pretext." *See* Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U.L. REV. 503, 528-29 (2008). Judge Tymkovich argues that "[w]hile the Supreme Court initially insisted that [the *McDonnell-Douglass* burden-shifting framework] was necessary to ensure that plaintiffs have their day in court," there now is widespread recognition that the framework creates only confusion. *Id.* Judge Tymkovich provides as examples the compartmentalization of evidence, the artificial dichotomy between direct and circumstantial evidence, the artificial dichotomy between mixed-motive and single-motive cases, and the circuit split on the issue of whether judges should give the *McDonnell-Douglass* framework as a jury instruction. *Id.*

5. The Tenth circuit faced the Tenth Circuit 7–7 *en banc* split that resulted from review of the panel opinion in *Zamora v. Elite Logistics, Inc.,* 449 F.3d 1106 (10th Cir. 2006), *vacated on review en banc* by 478 F.3d 1160 (10th Cir. 2007). The fourteen judges on the Tenth Circuit diverged on fact-bound summary judgment issues in an employment discrimination case. Judge Hartz, concurring in the en banc decision, wrote specifically to state that "I continue to believe that we should not apply the framework of *McDonnell Douglas*." "Applying that framework is inconsistent with Supreme Court authority, adds unnecessary

complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on 'the ultimate question of discrimination *vel non*.'" *Zamora v. Elite Logistics, Inc.,* 478 F.3d 1160 (10th Cir. 2007) (en banc) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 (1983)).

6. Finally, application of the *McDonnell Douglas* framework at the summary judgment stage usurps the function of the jury.

Our foundational summary judgment case cautions that: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Thus summary judgment is necessarily circumscribed by the Seventh Amendment. It serves to determine "whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby,* 477 U.S. at 250. Even in a case of indirect evidence of discrimination, which is entirely about inferences of employer's motive, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. at 150.

At the start of every jury trial in every state of the union the jury is instructed that it is the judge's job to answer questions of law, and the jury's job to determine questions of fact. *See Baylis v. Travelers' Ins. Co.,* 113 U.S. 316, 320-21 (1885) (disputed questions of fact must be submitted to the jury). A century ago,

the Supreme Court confirmed "that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence." *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 387 (1913) (emphasis added). Alexander Hamilton noted that the right to a jury trial was one of the few areas of consensus among the Framers. *The Federalist*, No. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting that the Framers "concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

This Court has long proclaimed plaintiffs' Seventh Amendment right to trial by jury to be a "fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 446 (1830), *overruled on other grounds, NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). This Court has deem the right "justly dear." *Id.* And, as "an object of deep interest and solicitude," for which this Court has consistently warned that "every encroachment upon it has been watched with great jealousy." *Slocum v. N.Y. Life Ins. Co.,* 228 U.S. 364, 378 (1913). Every restriction on the right to trial by jury "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). As Justice Rehnquist reminded us in his dissent in Parklane Hosiery, our founders literally fought the revolutionary war to secure the right to try questions of inference to a jury: The right's "deprivation at the hands of the English was one of the important grievances leading to the break with England." *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

The sacredness of a jury is not mere constitutional nostalgia—it is rooted in the very practical idea that the core competencies of a citizen panel are very different from the core competencies of a career judicial officer, and that some decisions—fact decisions generally and inferences from circumstantial evidence particularly—are far better when made by juries. Our system uses juries to find facts, which is what makes the judicial branch at all democratic: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

It is the jury's historic prerogative to select from among competing inferences. In 1944, in *Tennant v. Peoria & Pekin Union Railway*, the Supreme Court explained that "select[ing] from among conflicting inferences" was "[t]he very essence of [the jury's] function." *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 35 (1944). The Court admonished courts not to substitute their own inferences for those drawn by the jury. *Id.* ("Courts are not free to reweigh the evidence . . . merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."). Choosing from conflicting inferences is the core competency of a jury over a judge. *See Standard Oil Co. v. Van*

Etten, 107 U.S. 325, 334 (1882) ("The very spirit of trial by jury is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties.").

A companion foundational principle of the jury system is that when parties disagree about a question of motive, "the jury is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1997) (internal quotation marks omitted). It is uniquely the skill set of a jury to determine intent from circumstantial evidence.

7. Pretext under the McDonnell Douglas test is necessarily a factual finding of motive indirectly based on competing inferences. The ordinary meaning of PRETEXT is: A reason that you give to hide your real reason for doing something. PRETEXT, Merriam-Webster Dictionary (2016); *see also* PRETEXT, Black's Law Dictionary (7th ed. 1999) ("[a] false or weak reason or motive advanced to hide the actual or strong reason or motive"); John Bouvier, Pretext, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* (1856) ("[t]he reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation; or which if true are not the true reasons for such act").

Pretext evidence is any evidence tending to show that a stated reason is not the real reason. *See* Fed. R. Civ. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.")

Key here is the logical necessity, recognized by this Court in *Reeves*, that by putting forth evidence from which the fact-finder could conclude the employer's stated reasons are pretext, an employee necessarily provides facts to support a discriminatory motive. The pretextual reason would not be used or needed but for the discrimination. See, *e.g.*, *Reeves*, 530 U.S. at 143 ("by showing that the employer's proffered explanation is unworthy of credence"). Put plainly: In every conceivable case posing a *McDonnell Douglas* pretext issue, there are at least two competing inferences the parties contend can be drawn from circumstantial evidence of motive.

8. Take this case: Dr. Laul's theory of the case is that either or both age and national origin discrimination were among the motives for not re-hiring him. His former employer responded with circumstantial evidence of successful candidate's qualification. Dr. Laul responded that this testimony is mere code for the fact employer found him too old, too earnest, and foreign-born. At the end of the day, citing *McDonnell Douglas*, a federal judge, without a jury, laid out all the inferences urged by both parties and that judge weighed them and chose from among them.

9. Finally, federal case data confirmed that the *McDonnell Douglas* framework for summary judgment is a broken system. The Federal Judicial Center has noted that "[s]ummary judgment motions by defendants are more common in [employment discrimination] cases, are more likely to be granted, and more likely to terminate the litigation." *Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr.,*

to Judge Baylson, 3 (Aug. 13, 2008)[1] ("[T]he prominent role of summary judgment in such cases is striking.").

Two Cornell University professors have demonstrated this particular hostility by analyzing data on employment discrimination cases in federal district and circuit courts. See, *e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009). According to Clermont and Schwab, "[j]obs cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts." *Id.* at 104.

The disparate impact of summary judgment on employment cases has been alarming to numerous scholars. See, *e.g.*, William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Trina Jones, *Anti-Discrimination Law in Peril?,* 75 MO. L. REV. 423 (2010); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109 (2007); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 315 (2010) ("Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias."); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence,* 73 MO. L. REV. 481, 482 (2008) ("These are rough times for employment discrimination plaintiffs in federal court."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555

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[1] available at https://www.uscourts.gov/sites/default/files/sujulrs2.pdf

(2001); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111 (2011).

Thus employment plaintiffs are far less likely to get their case before a jury than other types of plaintiffs, even though the legal framework of almost every employment case will be the quintessential jury question of what were the real motives of the employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 5, 2019