No. 20-1107

IN THE

Supreme Court of the United States

RODDIE MELVIN,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

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

MOTION FOR LEAVE TO FILE AND *AMICUS CURIAE* BRIEF FOR JOBS WITH JUSTICE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF FOR JOBS WITH JUSTICE IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2, Jobs with Justice ("JWJ") respectfully moves for leave of the Court to file the attached *amicus curiae* brief in support of Petitioner.

All parties received timely notice of JWJ's intention to file this brief on March 2, 2021. On that same day, Counsel for Petitioner gave consent to file the brief. On March 3, 2021, Counsel for Respondent responded to the notification but denied consent, making this motion necessary. Counsel for Respondent did not provide additional details as to why they did not consent.

JWJ expresses its concern over the Eleventh Circuit's variable treatment of direct and circumstantial evidence in an employment discrimination summary judgment decision. The continued application of a heightened standard of proof in this context frustrates the purpose of employment discrimination laws. JWJ respectfully asserts its legitimate, substantial, and compelling interests in protecting the purpose and usefulness of employment discrimination laws.

For these reasons, JWJ respectfully requests that this Court grant this Motion for Leave to File the attached *amicus curiae* brief in support of the Petitioner.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE[1]

Jobs With Justice ("JWJ") was founded in 1987 to advocate for working people by advancing a sustainable and powerful network of grassroots coalitions, supporting the growth and leadership of local leaders and activists, and developing strategic alliances nationally and globally that strengthen the movement for workers' rights, economic justice, and democracy.

JWJ partners with many allied community organizations, advocacy groups, worker centers, unions, and think tanks to win improvements in the lives of working families and communities. Such improvements include focusing on strengthening basic workplace rights and shaping the future of work, both of which include fighting employment discrimination. The outcome of this case will have a direct impact on JWJ's work, as well as the partners and workers that JWJ supports in its efforts.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* affirms that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2(a), *amicus curiae* have timely notified the counsel of record for all parties of its intention to file an *amicus curiae* brief in support of Petitioner. Counsel for Petitioner provided consent to file the brief, while Respondent denied consent.

SUMMARY OF THE ARGUMENT

Employment discrimination laws are designed to provide employees with recourse when subjected to prejudicial mistreatment. Yet an excessive number of federal employment discrimination lawsuits are decided on summary judgment for defendant-employers based on judge-made doctrines imposing heightened standards of proof upon plaintiff-employees and differentiating whether plaintiff-employees have produced direct or circumstantial evidence of discriminatory intent.

Following this Court's decision in *McDonnell Douglas Corp v. Green*, lower courts are split as to whether to apply special standards of proof to employment discrimination summary judgment motions. Some lower courts, such as the Eleventh Circuit, have adopted heightened standards of proof that must be met for plaintiff-employees to survive summary judgment motions. Other courts, such as the Seventh Circuit, have outrightly rejected these heightened standards.

This split in approach creates a patchwork of jurisdictions, each of which may reach different outcomes when presented with the same evidence. Moreover, the heightened standards and variable treatments of evidence distract from the true question to be answered by courts in these cases—whether unlawful discrimination has occurred.

ARGUMENT

I. Heightened Summary Judgment Standards Impose Overwhelming Barriers For Bringing Employment Discrimination Suits To Juries.

As this Court has emphasized, "few pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on race, color, religion, sex, or national origin. *Id.*; 42 U.S.C. § 2000e *et seq*. Following the passage of Title VII, Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967 prohibiting age discrimination in employment. *See* 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter to . . . prohibit arbitrary age discrimination in employment . . . ."). Title VII and the ADEA "share the common purpose of eliminating discrimination in the workplace." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). These laws demonstrate a commitment to protecting employees from discrimination. The current application of these laws, however, is in opposition with this commitment.

Currently, federal courts enter summary judgment against employment discrimination plaintiffs more than any other civil claimants. The Federal Judicial Center, the research arm of the federal courts, found that summary judgment is granted, in whole or in part, in 12.5 percent of employment discrimination cases, compared to 3 percent in contract cases and 1.7

percent in personal-injury and property-damage cases.[2] An empirical study of multiple districts with varying local rules found that summary judgment was requested by and granted to defendants at a higher rate for employment discrimination claims than any other claim.[3] This rise in the grant of summary judgment can be attributed to jurisdictions instituting heightened standards and judge-made doctrines, which have "driven employment discrimination plaintiffs from our federal courts in unprecedented numbers."[4] The steepest decline in filed employment discrimination cases can be seen in the Eleventh Circuit, considered one of the "most hostile" jurisdictions for employment discrimination plaintiffs.[5]

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[2] Nathan Koppel, *Job-Discrimination Cases Tend To Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), https://tinyurl.com/8vb7ypx7.

[3] JOE S. CECIL & GEORGE W. CORT, INITIAL REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES, FEDERAL JUDICIAL CENTER 3, 9 (2008).

[4] Mark W. Bennett, *Essay: From the No Spittin', No Cussin' and No Summary Judgment Days of Employment Discrimination Litigation to the Defendant's Summary Judgment Affirmed Without Comment Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 709 (2012).

[5] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 119 (2009).

A. Plaintiff-Employees Face Heightened Standards for Surviving Summary Judgment.

As retired U.S. District Court Judge Mark W. Bennett described, federal courts were initially hesitant to grant summary judgment in employment discrimination cases because such cases "almost always turn on delicate factual nuances of intent."[6] As Judge Bennett explained, however, over time courts have created more and more doctrines to grant summary judgment.[7] Federal appellate courts' approaches to summary judgment motions evolved independently and in conflict with one another, resulting in a patchwork of jurisdictions which have variable standards. As Professor Theresa Beiner has suggested, some are comparatively more "plaintiff-sympathetic"; some are "defendant-sympathetic"; others are "confused."[8]

These variable standards result from ambiguity in how to apply the *McDonnell Douglas Corp. v. Green* three-pronged test, an approach set forth by this Court to adjudicate motions for summary judgment in employment discrimination suits. 411 U.S. 792 (1973). The third step in the *McDonnell Douglas* test asks whether an employee can show the employer's justification for their alleged discrimination is "merely a pretext for behavior motivated by discrimination."

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[6] Bennett, *supra*, at 688.

[7] *Id.*

[8] Theresa M. Beiner, *The Trouble with* Torgerson: *The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 686–93 (2014).

Id. at 802. Without explicit instructions for how to determine when the third prong is satisfied, federal appellate courts have adopted their own evidentiary standards for satisfying the final prong of the test, which incorrectly places the judiciary in a fact-finding role.[9] In *Melvin v. Federal Express Corp.*, this final pretext inquiry was critical to the Eleventh Circuit's grant of summary judgment to the defendant. 814 F. App'x 506, 512–16 (11th Cir. 2020).

Summary judgment motions in employment discrimination cases often turn on the pretext inquiry, but the federal appellate courts are split as to how to determine the issue. Notably, however, this is not the first time they have diverged on the pretext inquiry.[10] Previously, courts had adopted two evidentiary standards for satisfying the pretext requirement: a lower "pretext-only" standard and a higher "pretext-plus" standard.[11] This Court in *Reeves v. Sanderson*

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[9] *See generally* Bennett, *supra*; 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 (1993).

[10] Beiner, *supra*, at 686.

[11] *See generally* William J. Vollmer, *Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 407 (2004). A pretext-only jurisdiction required a plaintiff "establish intentional discrimination by proof that the reason articulated by the employer is not the real reason." Shannon Keating, *Employment Discrimination: Pretext, Implicit Bias, and the Beast of Burdens*, 52 NEW ENG. L. REV. 317, 325 (2018). In contrast, a pretext-plus jurisdiction required a plaintiff "establish not only that the employer's articulated reasons for the adverse action were false but also that the real reason for the adverse employment action was discrimination." *Id.*

Plumbing Prods. aimed to resolve the circuit split, seeming to do away with the higher "pretext plus" standard by holding a jury may find for the plaintiff if it disbelieves the defendant's nondiscriminatory explanation for an adverse employment action. 530 U.S. 133, 146–48 (2000); *see Jones v. Okla. City Public Sch.*, 617 F.3d 1273, 1276 (10th Cir. 2010) (interpreting *Reeves* as abolishing the pretext plus standard). Notwithstanding *Reeves*, heightened evidentiary standards are still frequently adopted and applied by federal courts, even if the pretext-only and pretext-plus designations have become uncommon.[12]

A heightened evidentiary burden for employment discrimination plaintiffs ignores that cases with "direct, overt, and obvious evidence of discrimination"[13] are rare and that providing such evidence at the summary judgment stage poses a greater challenge for employment discrimination plaintiffs more than perhaps any other civil plaintiff.[14] Often, whether a plaintiff suffered discrimination in the workplace turns on "subtle questions of credibility and intent."[15] As members of the judiciary and legal scholars explain, these intricate questions are best evaluated by a jury "faced with a live witness."[16]

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[12] *See* Vollmer, *supra*, at 415.
[13] *See* Bennett, *supra*, at 705.
[14] *Id.*
[15] McGinley, *supra*, at 208.
[16] *Id.*; Beiner, *supra*, at 673; Bennett, *supra*, at 697.

B. Judge-Made Doctrines Benefit Defendant-Employers At The Expense Of Working Plaintiffs.

Federal courts have adopted and applied judge-made doctrines that have the effect of excluding evidence of discrimination a reasonable juror may find compelling.[17] These doctrines push the scale in favor of defendant-employers and appear across federal appellate courts and by many names, including: the "same-actor inference,"[18] the "temporal nexus" requirement,[19] and the "stray remarks" doctrine.[20] In the *Melvin v. Federal Express Corp.* decision, the Eleventh Circuit used its judge-made "convincing mosaic" standard to grant summary judgment to the defendant-employer despite evidence of ageist remarks. 814 F. App'x at 512.

In *Melvin*, the Eleventh Circuit stated the ageist remarks made by the plaintiff's supervisor "certainly

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[17] *See generally* Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231 (2018); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111 (2011).

[18] Under the "same-actor inference" doctrine, a court chooses to determine an employer's stated reason for an adverse employment action is not pretextual if that employer hired or promoted that employee in the past. Stone, *supra*, at 126.

[19] Under the "temporal nexus" doctrine, a court chooses to impose an arbitrary timeframe in deciding whether the comment and adverse employment action occurred too far apart from one another. *Id.* at 134–35.

[20] Under the "stray remarks" doctrine, a court chooses to exclude discriminatory remarks from its determination of a plaintiff-employee's claim. *Id.* at 131.

support[] a showing of discriminatory intent if we interpret the remark[s] in the light most favorable" to the plaintiff. *Id.* at 513. Nevertheless, the Eleventh Circuit found the "comments alone [were] not sufficient to meet Melvin's burden of creating a triable issue of discriminatory intent" because, according to the Eleventh Circuit, the comments did not establish a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker." *Id.* at 512–13.

II. The Outcome Of An Employment Discrimination Summary Judgment Motion Depends More On Jurisdiction Than Underlying Evidence.

Because direct evidence of discrimination is rare, evidence provided by plaintiffs at the summary judgment stage tends to be circumstantial in nature.[21] Circumstantial evidence is used to prove a defendant's intent in tort cases,[22] but federal courts tend to view the same evidence with skepticism in employment discrimination cases. This is in direct contradiction with this Court's statements that under the law, circumstantial and direct evidence carry the same weight. *Holland v. United States*, 348 U.S. 121, 140 (1954). Reinforcing the legal equivalence between the two, this Court has "acknowledged the utility of circumstantial evidence in discrimination cases" and

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[21] *See* McGinley, *supra*, at 215.

[22] Stone, *supra*, at 143 ("[T]he requisite intent to be proven by a plaintiff complaining of an intentional tort may be proven via circumstantial evidence.").

has explained the "reason for treating circumstantial and direct evidence alike is both clear and deep rooted." *Desert Palace v. Costa*, 539 U.S. 90, 99–100 (2003).

Notwithstanding this Court's instruction, the Eleventh Circuit severs evidence in cases of employment discrimination into categories of direct and circumstantial evidence. Specifically, in the Eleventh Circuit, when a plaintiff is unable to produce a comparator and relies on circumstantial evidence for support, a triable issue exists sufficient to survive summary judgment only when the record presents "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (citing *Silverman v. Board of Educ. of City of Chicago*, 637 F.3d 729, 734 (7th Cir. 2011)).

In contrast to the Eleventh Circuit, the Seventh Circuit has rejected the distinction between direct and circumstantial evidence:

> Today's decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled "direct" and "indirect," that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole.

> That conclusion is consistent with *McDonnell Douglas* and its successors.

Ortiz v. Werner Enters., Inc., 834 F.3d 760, 766 (7th Cir. 2016). The Seventh Circuit expressed frustration over the judge-made doctrines which complicate employment discrimination law and distract from the true question to be answered by courts in these cases—whether unlawful discrimination has occurred.[23]

As a result of this split, the opportunity for a plaintiff-employee to convince a jury they have suffered discrimination depends on geography more than underlying evidence. In stark terms, a plaintiff-employee subjected to discrimination in the workplace may not survive summary judgment under a "convincing mosaic" standard, but that same plaintiff-employee may be entitled to a trial by jury in a jurisdiction which does not distinguish between evidence types.

The courts' heightened standards and variable evidentiary treatments also manifest in how they describe summary judgment in employment discrimination suits. Courts which are comparatively more "plaintiff-sympathetic," such as the Second,

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[23] *Ortiz*, 834 F.3d at 764 ("[L]ooking for a 'convincing mosaic,' detracted attention from the sole question that matters: Whether a reasonable juror could conclude" that workplace discrimination occurred).

Fourth, Fifth, and Sixth Circuits,[24] "urge caution in granting summary judgment," reminiscent of Judge Bennett's description of earlier employment discrimination cases.[25] Courts which are "defendant-sympathetic," such as the Third, Eight, Tenth, and Eleventh Circuits, impose higher standards on plaintiff employees and "no longer invoke any type of caution in describing the standard for granting summary judgment in employment discrimination cases."[26]

Inconsistent application of summary judgment defangs federal employment discrimination laws. The current split approach to summary judgment motions in employment discrimination cases unjustly enables defendant-employers seek to take advantage of heightened standards to attempt to escape liability. Depending on where they file their case, a plaintiff-employee may be required to surpass variable hurdles to present evidence of discrimination to a jury,

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[24] *See, e.g., Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 178 (2nd Cir. 2012) (stating summary judgment in employment discrimination cases "should be used sparingly"); *Ballinger v. N.C. Agric. Extension Serv.*, 815 F.2d 1001 (4th Cir. 1987); *Hayden v. First Nat'l Bank of Mount Pleasant*, 595 F.2d 994 (5th Cir. 1979) ("When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting of summary judgment is especially questionable."); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 721 (6th Cir. 2006).

[25] Beiner, *supra*, at 686.

[26] *Id.* at 690; *see, e.g., Chapman v. AI Transp.*, 229 F.3d 1012, 1025–26 (11th Cir. 2000); *Fuentes v. Perskie*, 32 F.3d 759, 762 (3rd Cir. 1994); *Torgerson v. City of Rochester,* 643 F.3d 1031, 1052 (8th Cir. 2011); *Jones*, 617 F.3d at 1280.

contrary to this Court's express wishes that a plaintiff be provided the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons." *Reeves,* 530 U.S. at 143; *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Desert Palace*, 539 U.S. at 100 ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.").

This Court should grant certiorari because federal employment discrimination laws lose their purpose when plaintiff-employees cannot defeat summary judgment despite the presence material facts that could be decisive in a jury trial. The Eleventh and Seventh Circuits have split with regard to what standard is applicable for employment discrimination summary judgment motions. Further, the "convincing mosaic" standard utilized by the Eleventh Circuit deprives plaintiff-employees their day in court and treats evidence based on categorical labels contrary to this Court's express directives. Amicus respectfully requests this Court grant certiorari to resolve this split and reject the "convincing mosaic" standard in favor of a framework that ensures the durability and force of federal protection from discrimination in the workplace.

CONCLUSION

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

Respectfully submitted,

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