No. 20-5841

ORIGINAL

SUPREME COURT OF THE UNITED STATES

GERARD NGUEDI, Pro Se,

Petitioner,

vs.

THE FEDERAL RESERVE BANK OF NEW YORK

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Does a prima facie case of intentional discrimination require a judicial finding that the defendant gave more favorable treatment to a nearly identical comparator?

II. PARTIES TO THE PROCEEDINGS BELOW

Petitioner was the plaintiff in the United States District Court Southern District of New York and the plaintiff-appellant in the United States Court of Appeals for the Second Circuit. Respondent was the Defendant in the United States District Court Southern District of New York and the defendant-appellee in the United States Court of Appeals for the Second Circuit.

III. STATEMENT OF RELATED CASES

United States District Court Southern District of New York:

Nguedi v. Federal Reserve Bank of New York, 1:16-cv-636-GHW (S.D.N.Y. Mar. 7, 2019).

United States Court of Appeals for the Second Circuit:

Nguedi v. The Federal Reserve Bank of New York, No. 19-907-cv (2d Cir. May 5, 2020).

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1. Cases

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VI. PETITION FOR WRIT OF CERTIORARI

Petitioner Gerard Nguedi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

VII. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unofficially reported at *Nguedi v. The Federal Reserve Bank of New York*, No. 19-907-cv (2d Cir. May 5, 2020). The opinion of the United States District Court Southern District of New York is unofficially reported at *Nguedi v. Federal Reserve Bank of New York*, 1:16-cv-636-GHW (S.D.N.Y. Mar. 7, 2019).

VIII. JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on May 5, 2020. This petition is timely filed. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IX. STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981(a) provides in pertinent part that, "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts." 42 U.S.C. § 1981(b) provides that, "For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

42 U.S.C. § 1983 provides in pertinent part that, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part, "It shall be an unlawful employment practice for an employer . . . 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 race, color, religion, sex, or national origin. . . ."

X. STATEMENT OF THE CASE

1. Petitioner is a highly experienced IT professional with a Master's Degree in International Trade and Finance. He was hired as a Project Manager in the Electronic Project Management Office by Respondent. Before and during his employment with Respondent, Petitioner was a person of good standing in the society who had never found himself on the wrong side of the law. He passed multiple security clearances with several government agencies as well as with Respondent's clearance program.

On December 23, 2015, Police Commissioner Bill Bratton, through Respondent's request, arrested Petitioner in his workplace for reasons that were later deemed "legally insufficient" by the New York State court. additionally, Respondent classified Petitioner as "a risk going forward" for reasons that Respondent could not substantiate even through its own video surveillance footage. David White, a close NYPD collaborator, approached Petitioner and in his attempts to mislead Petitioner, asked informed Petitioner that he would not get anything from Respondents even after Petitioner's racist statement, humiliation, harassment, and "legally insufficient" false arrest.

About two months after Petitioner's refusal to comply with Mr. White's instructions, nine NYPD officers invaded Petitioner's house for a "wellness check" and beat up and drugged Petitioner in his house, an event that triggered Petitioner to file another lawsuit in that respect.

Petitioner's humiliation began the very first day he was hired by Respondent. At Respondent's badge office where Petitioner was to be issued with an ID badge, for instance, Petitioner was treated as a very suspicious person and even mocked by one Mrs. Donna Crouch based on the "bad" picture on Petitioner's ID. She even went to the extent of showing it around the room to the rest of the team members while making fun of Petitioner. Among the members of the staff, Petitioner was the only black (African American), and based on his race, he was subjected to frequent yelling, mocking, and attacks unlike the other members of the team who faced humane treatment. Insults such as "knucklehead" were a preserve of Petitioner, while Petitioner was doing an excellent job, as Respondent has admitted multiple times.

At the time of his engagement with Respondent, Petitioner was promised a contract-to-hire as a term of his contract of service. However, Respondent started altering the contract and consequently sending notices to Petitioner on the modifications made on his contract when, in fact, Petitioner was expecting a full-time offer. Throughout, Respondent subjected Petitioner to a hostile work environment and ended up terminating his engagement on racial grounds.

2. It is based on the above fact pattern that Petitioner filed a case on January 27, 2016, against Respondent. Petitioner would thereafter amend his complaint five times. His Fourth Amended Complaint was subject to a motion to dismiss, which the court granted in full on June 11, 2017. His Fifth Amended Complaint was the subject of another motion to dismiss, which the court granted in part on December 1, 2017.

In his complaint, Petitioner alleged, *inter alia*, that Respondent violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991, by discriminating against him and subjecting him to an abusive work environment because of his race and national origin.

In its December 1, 2017 opinion, the court dismissed with prejudice Petitioner's "Title VII hostile work environment claim, NYCHRL claim premised on the cafeteria workers' and ID clerk's conduct, and claims against the NYPD and Mr. Bratton."

On June 1, 2018, Respondent moved for summary judgment on all remaining claims. The court would on March 7, 2019, grant the motion for summary judgment based on Respondent's fabricated allegations and in total disregard to Petitioner's pro se status. Petitioner then appealed the decision to the United States Court of Appeals for the Second Circuit which affirmed the decision of the district court.

At the district court, the judge applied strictly the position that a plaintiff must demonstrate the existence of a valid comparator in order to establish a prima facie case. Even on appeal, after proving beyond a reasonable doubt that the defendant discriminated against him and unlawfully terminated his employment, the appeals court still affirmed the decision of the district court. The appeals court agreed with the position of the district court: that a plaintiff must demonstrate the existence of a valid comparator in order to establish a prima facie case.

This petition followed.

XI. REASONS FOR GRANTING THE WRIT

Repeated decisions of this Court have fashioned a now well-established method for organizing and evaluating claims of intentional discrimination. Once a plaintiff establishes a prima facie case, the defendant must articulate a non-discriminatory reason for the disputed adverse action; the burden then returns to the plaintiff to establish by a preponderance of the evidence that the defendant acted with a discriminatory motive. *Snyder v. Louisiana*, 128 S.Ct. 1203, 1207 (2008); *Rice v. Collins*, 546 U.S. 333, 338 (2006); *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *Johnson v. California*, 545 U.S. 162, 168 (2005). These

shifting of burdens are not intended to create substantial intermediate barriers, but are "meant only to aid courts and litigants in arranging the presentation of evidence." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff's initial burden of proving a prima facie case is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Watson*, 487 U.S. at 986; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Despite this Court's disapproval of the imposition of any demanding evidentiary burden to establish a prima facie case, the Second Circuit has created a standard that has proved virtually impossible to meet. In a long series of decisions, of which the instant case is typical, those circuits require as an essential element of a prima facie case that the plaintiff identifies a specific individual outside the protected group in question whose circumstances were nearly identical to those of the plaintiff, and who nonetheless was treated more favorably. If, as here, no such nearly identical "proper comparator" exists, the plaintiff cannot establish a prima facie case, and the discrimination claim fails.

The district court, in this case, supported by the appeals court, used this stringent rule against the pro se plaintiff. Unfortunately, the pro se plaintiff was unable to meet that standard as the mention of two comparators were not enough in the eyes of the judges. This nearly identical rule has three distinct elements. First, to establish a prima facie case of a discriminatory adverse action (e.g., a dismissal, demotion, or suspension), a plaintiff must demonstrate that he or she was treated less favorably than a similarly situated individual who is not a member of the protected group in question. Second, the individual with whom the plaintiff is compared is only similarly situated if the circumstances of that comparator and the plaintiff are "nearly identical." Third, the assessment of whether a comparator meets the nearly identical standard is a matter for the courts, not the trier of fact. In each of these respects, this rule in the second circuit has been expressly rejected by at least five other circuits.

In *Johnson*, 545 U.S. 162 (2005), this Court granted certiorari to review a California rule that imposed an improperly restrictive standard for establishing a prima facie case of discrimination in the use of peremptory challenges. 545 U.S. at 170; see *Batson v. Kentucky*, 476 U.S. 79 (1986). The nearly identical standard utilized by the Second Circuits is, in fact, more stringent than that in *Johnson*. The practical importance of the nearly identical standard is significantly greater than the rule at issue in *Johnson*; the nearly identical standard is applied by federal courts in the states in the circuit, and the volume of employment discrimination increase case by case.

1. The Second Circuit's Requirement That A Prima Facie Case Must Include Proof That A Similarly Situated Comparator Received More Favorable Treatment Conflicts with The Standards in Other Circuits

From the Second Circuit's decision, it is apparent that in order to establish a prima facie case of discrimination, Petitioner herein needed to demonstrate that another employee was treated more favorably by Respondent. This has been a requirement in the Second Circuit for years, the Second Circuit has required that, as an essential element of a prima facie case, the plaintiff prove that the employer accorded more favorable treatment to an individual outside the protected group with the plaintiff was a member (e.g., in the instant case, to a person who is not black).

In the absence of that (or any other) essential element of a prima facie case, a plaintiff's claim fails as a matter of law. The existence of evidence of discriminatory motive–including asserted remarks about the plaintiff being a risk moving forward–was simply irrelevant. In the absence of a proper comparator, under the decision, the employer was entitled to prevail, regardless of whether or not the plaintiff had other evidence tending to show the existence of an unlawful discriminatory purpose.

While other Circuits have disagreed with the rule, the Second and Eleventh Circuit keeps applying it. See *Tomczyk v. Jocks & Jills Restaurants, LLC*, 198 Fed. Appx. 804, 809 (11th Cir. 2006) (discrimination claim dismissed for want of a proper comparator despite "a slew of vulgar and harassing comments" by the plaintiff's 13 supervisors "inflicted on [the plaintiff] because of race."); *Mack v. ST Mobile Aerospace Engineering, Inc.*, 195 Fed. Appx. 829, 838, 841 (11th Cir. 2006) (discrimination claim dismissed for want of a proper comparator even though "management directed racial derogatory words and jokes, such as 'boy,' 'nigger,' and the statement that 'you're the wrong fucking color,' toward the plaintiff.... and supervisors continued to display the [Confederate] flag.").

The Fourth,[1] Fifth[2] , and Seventh Circuits also require that a plaintiff prove more favorable treatment of a valid comparator in order to establish a prima facie case.[3] The Sixth Circuit has adopted a variant of the Second Circuit's prima facie case rule.[4] The Sixth Circuit explicitly disapproved of the Second

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[1] *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 501 (4th Cir. 1993); *Moore v. City of Charlotte, NC*, 754 F.2d 1100, 1105-06 (4th Cir. 1985).

[2] *Culwell v. City of Fort Worth*, 468 F.3d 868, 873 (5th Cir. 2006); *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507, 512-13 (5th Cir. 2001).

[3] *Filar v. Board of Ed. of City of Chicago*, 526 F.3d 1054, 1060 (7th Cir.2008); *Atanus v. Perry*, 520 F.3d 662, 672-73 (7th Cir. 2008).

[4] *Wright v. Murray Guard*, Inc., 455 F.3d 702, 707 (6th Cir. 2006).

Circuit's rule and, instead, held that evidence of more favorable treatment of a comparator need only be considered in showing pretext, and not as an essential element of a prima facie case. *Clayton v. Meijer*, Inc., 281 F.3d 605, 609-10 (6th Cir. 2002).

In fact, precedence shows that the Second Circuit has not been consistent with its application of this rule. One would, therefore, wonder why it was strictly applied in the present case. In its 2000 decision, the Second Circuit held that a plaintiff, in order to establish a prima facie case, need only show that the disputed adverse action "occurred under circumstances giving rise to an inference of discrimination." *Graham v. Long Island Rail Road*, 230 F.3d 34, 38 (2nd Cir. 2000). In 2004, the same court would hold that,

> "Defendants are wrong in their contention that [a plaintiff] cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently... Although her case would be stronger had she provided ... such evidence, there is no requirement that such evidence be adduced."

Back v. Hastings on Hudson Union Free School District, 365 F.3d 107, 121 (2d Cir.2004).

The Third Circuit is another Circuit that has rejected the prima facie case rule. In *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3d Cir. 1996), the defendants argued that the standard for a prima facie case "encompasses the requirement that plaintiff shows that similarly situated unprotected employees [were treated more favorably.]" 91 F.3d at 510 (quoting Brief for the employer) (emphasis in opinion). The Third Circuit rejected that proposed requirement in language that aptly described the fatal flaw in the nearly identical standard. The Third Circuit stated,

> "[W]e reject Defendants' argument because it would seriously undermine legal protections against discrimination. Under their scheme, any employee whose employer can for some reason or other classify him or her as "unique" would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-impossible situation of having to offer direct proof of discrimination.... [A]rguments as to the employee's uniqueness should be considered in conjunction with, and as part of, the employer's rebuttal – not at the prima facie stage."

91 F.3d at 510-11.

Similarly, the Ninth Circuit in *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) held that the district court had erred in limiting in that way the manner in which a plaintiff may establish a prima facie case. It stated,

> "A plaintiff may show either that similarly situated individuals outside her protected class were treated differently or "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."

Id. (emphasis in original; quoting *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 603 (9th Cir.2004)).

Likewise, the Tenth Circuit has repeatedly rejected the position that a plaintiff must demonstrate the existence of a valid comparator in order to establish a prima facie case. In *Nguyen v. Gambro BCT, Inc.*, 242 Fed. Appx. 483 (10th Cir. 2007), the district court had applied the Second Circuit's standard, requiring the plaintiff to show that she was "treated less favorably than a person outside the protected group." 242 Fed. Appx. at 487. The Tenth Circuit expressly disapproved of that standard in establishing a prima facie case. It stated thus,

> "The district court erred ... in its articulation and application of prima facie case standards... We held in *Kendrick [v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir. 2000)] that the lower court committed an error "in requiring [plaintiff] to show that [the employer] treated similarly-situated nonminority employees differently in order to [establish a prima facie case]." [220 F.3d at 1229]; see also *English v. Colo. Dept. of Corrections*, 248 F.3d 1002, 1008 (10th Cir. 2001) ("[I]n disciplinary discharge cases ... a plaintiff does not have to show differential treatment of persons outside the protected class to meet the initial prima facie burden....")."

242 Fed. Appx. at 488.

The District of Columbia Circuit has also rejected the Second Circuit's rule. In *Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007), the district court had held that to establish a prima facie case, a plaintiff "must demonstrate that she and a similarly situated person outside her protected class were treated disparately." 475 F.3d at 365. The District of Columbia Circuit disapproved of that standard. "As we said in *George v. Leavitt* [407 F.3d 405 (D.C.Cir.2005)], ... '[t]his is not a correct statement of the law.' 407 F.3d at 412." *Id.*

> "One method by which a plaintiff can satisfy [the prima facie case standard] is by demonstrating that she was treated differently from similarly situated employees who are 19 not part of the protected class... But that is not the only way."

George v. Leavitt, 407 F.3d at 412.

2. The Second Circuit's Rule That Courts Are to Determine Whether Comparators Are Sufficiently Similar Conflicts with the Standards in Six Circuits

Proceeding in a manner consistent with the longstanding Second Circuit practice, the court in this case made its own determination as to whether the proffered comparators were sufficiently similar to the plaintiff, rather than treating those circumstances as evidence to be evaluated by the trier of fact.

The District of Columbia Circuit, however, treated this as a matter for resolution by the trier of fact. *George v. Leavitt*, 407 F.3d 405, 414 (D.C. Cir. 2005) (quoting *Graham*).

> "[I]t should be resolved in the first instance by a jury, whose decision should be disturbed on appeal only if it could not reasonably be based upon the evidence properly received."

Barbour v. Browner, 181 F.3d 1342, 1345 (D.C.Cir.1999).

A similar decision has always been made by the Tenth Circuit, which treats this issue as a question of fact for the jury. *Riggs v. Airtran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) (quoting *George*). Further, the Ninth Circuit "agree[s] with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact." *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 885 n.5 (9th Cir. 2007) (citing decisions in the Second, Tenth, and District of Columbia Circuits).

In *Molloy v. Blanchard*, 115 F.3d 86 (1st Cir.1997), the First Circuit upheld a jury's finding of discrimination reasoning, in part, that the plaintiff had "presented evidence sufficient for the jury to have found that ... 'similarly situated' males had received dissimilar treatment." 115 F.3d at 92. In a series of decisions, the Third Circuit also has held that the trier of fact is responsible for evaluating whether a comparator is similarly situated with the plaintiff. *Messina v. E.I. DuPont de Nemours & Co., Inc.*, 141 Fed. Appx. 57, 59 (3d Cir. 2005) (comparative evidence "sufficient at the prima facie stage for a reasonable fact finder to conclude that [the defendant] treated [plaintiff] less favorably than others because of his race"); *Bennun v. Rutgers State University*, 941 F.2d 154, 179 (3d Cir.1991) ("factfinder ... did not clearly err by drawing the conclusion that differing standards were applied [to plaintiff and to comparator]").

In fact, the most recent Sixth Circuit decision insists that the evaluation of comparative evidence should be made by the trier of fact, so long as "a reasonable jury could infer that [the comparator's] conduct was of comparable seriousness." *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357, 369-71 and n.8 (6th Cir. 2007).

3. The Second Circuit's Standard for A Prima Facie Case Rule Conflicts with The Decisions of This Court

A. The Second Circuit's insistence that a prima facie case must include evidence of differing treatment of a similarly situated comparator (however defined) is inconsistent with the decisions of this Court. "The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). *Johnson*, 545 U.S. 162 (2005), explained,

> "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose."

545 U.S. at 169 (quoting *Batson*, 476 U.S. at 94) (footnote omitted). Accordingly, the application of any fixed formulation as to the elements of a prima facie case is inconsistent with *Johnson* and *Aikens*.

Additionally, the particular rigid prima facie case rule established by the Second Circuit – requiring (at least in discipline and dismissal cases) proof of a similarly situated comparator – is inconsistent with this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996). *Armstrong* held that in the special circumstances of a claim of race-based selective prosecution, the defendant asserting such a claim must, as part of his prima facie case, identify individuals of a different race who had engaged in the same conduct but had not been prosecuted. That decision, however, was expressly limited to selective prosecution claims, which touch upon the unique discretion of the Executive Branch, and which unless carefully limited could chill law enforcement. 517 U.S. at 464- 66. *Armstrong* made clear that this requirement did not apply to ordinary discrimination claims, such as a *Batson* claim, 517 U.S. at 467. The United States in *Armstrong* emphasized that that similarly situated comparator requirement should be limited to selective prosecution cases, and would not be appropriate in resolving a Title VII or *Batson* claim.

B. The standard utilized by the Second Circuits is also inconsistent with the decisions of this Court. This Court has repeatedly held that the standard for establishing a prima facie case is "not onerous." "Onerous" is precisely the term for the Second Circuit's standard, a standard which no appellate litigant in an employment discrimination case in that circuit has been able to satisfy. Such is a requirement which this Court has expressly rejected by stating,

> "None of our cases announces a rule that no comparison is probative unless the situation of the individuals is identical in all respects, and

> there is no reason to accept one... A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005). "Inoperable" is precisely what the federal prohibitions against discrimination become when subjected to the "nearly identical" rule.

Decisions in the Second Circuit have emphatically rejected suggestions that a plaintiff could rely on evidence of more favorable treatment of a comparator who was merely similar, or whose misconduct was of comparable seriousness to that of the plaintiff. But those are precisely the standards approved by this Court. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court emphasized that in evaluating *Green's* discrimination claim,

> "[e]specially relevant ... would be evidence that white employees involved in acts against [the employer] of comparable seriousness to [the actions of the plaintiff] were nevertheless retained or rehired."

411 U.S. at 804 (emphasis added). *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), reiterated that standard, stating,

> "Of course, precise equivalence in culpability between employees is not the ultimate question.... [T]hat other "employees involved in acts [against the employer's rules] of comparable seriousness ... were nevertheless retained ..." is adequate...."

427 U.S. at 283 n.11 (emphasis added; quoting *McDonnell Douglas*).

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the standard applied by this Court was whether white and black prospective jurors were "similarly situated." 545 U.S. at 247 n.6. The Court found probative comparisons of white and black jurors who were merely "much [a]like" or "comparable," 545 U.S. at 248, 250 n.8, noting as to one pair of jurors that there were "strong similarities as well as some differences." 545 U.S. at 247. That comparative evidence was relied on to support, not a mere prima facie case, but a determination by this Court that the trial court's failure to find intentional discrimination was "wrong to a clear and convincing degree."

In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), this Court found probative the fact that a white juror had a "substantially more pressing" need to avoid jury service (business obligations, a sick wife, and children to take to and from school) than the black prospective juror who was removed (the need to make up two days of student teaching). 128 S.Ct. at 1211. Under the Second Circuit's rule, that evidence would have been dismissed precisely because the white juror's

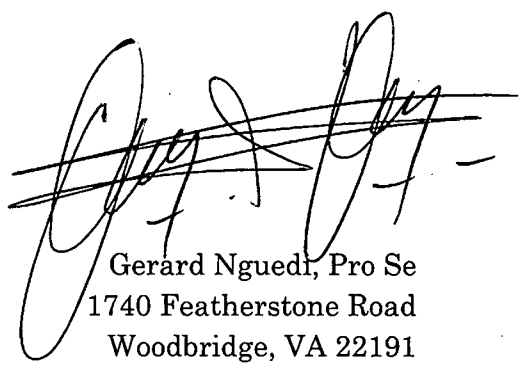
obligations were entirely different from those of the black juror. If a comparison short of near identity is sufficient to demonstrate the exceptional circumstances needed to overturn on appeal a *Batson* claim rejected by a trial court, surely that evidence can be sufficient to meet the far less demanding standard of establishing a mere prima facie case.

The Second Circuit's rule is indistinguishable from the California prima facie rule rejected in *Johnson*, 545 U.S. 162 (2005). The state courts, in that case, had held that to establish a prima facie case of a *Batson* violation, a litigant must "show that it is more likely than not [that] the other party's peremptory challenges, if unexplained, were based on impermissible group bias." 545 U.S. at 168 (quoting *People v. Johnson*, 30 Cal.4th 1302, 1318, 71 P.2d 270, 280 (2003)). This Court rejected that standard as unduly burdensome. The Second Circuit's "nearly identical" requirement is, if anything, more stringent than the California standard disapproved in *Johnson*. Evidence that a white comparator had been treated more favorably despite "nearly identical" circumstances would indeed demonstrate – if unexplained – that discrimination was "more likely than not." The Second Circuit's standard differs from the California standard rejected in *Johnson* only in that the Court of Appeals restricts litigants to the use of only a single type of evidence–proof of a nearly identical comparator–to meet that legally excessive burden.

XII. CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,



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XIII. APPENDIX

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