No.

IN THE

Supreme Court of the United States

LUZ GONZÁLEZ-BERMÚDEZ,

Petitioner,

v.

ABBOTT LABORATORIES P.R. INC. AND KIM PÉREZ,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JUAN RAFAEL GONZÁLEZ MUÑOZ
JUAN C. NIEVES GONZÁLEZ
GONZÁLEZ MUÑOZ LAW OFFICES, P.S.C.
P.O. Box 9024055
San Juan, PR 00902-4055
(787) 766-5052

MICHAEL T. KIRKPATRICK
Counsel of Record
GRACE A. PARAS
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
mkirkpatrick@citizen.org

CARLOS M. VERGNE VARGAS
LAW OFFICE OF CARLOS VERGNE
24 Mariana Bracetti Street, 2nd Floor
San Juan, PR 00918
(787) 753-3799

Attorneys for Petitioner

July 2021

QUESTIONS PRESENTED

A jury returned a verdict for petitioner on her age discrimination and retaliation claims. The district court upheld the verdict, finding that a reasonable jury could infer discrimination and retaliation from the evidence presented. The First Circuit reversed, holding as a matter of law that petitioner's comparator evidence had no probative value because the comparators had different positions, duties, and supervisors. The court further held that, without more, a jury's disbelief of an employer's explanation for an adverse employment action cannot support an inference of discrimination or retaliation. The questions presented are —

1. Whether comparator evidence can support an inference of discrimination if the plaintiff and comparators do not share the same position, duties, and supervisor.

2. Whether a jury's disbelief of an employer's proffered reason for an adverse employment action can sustain an inference of discrimination or retaliation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes & Rules

Other

INTRODUCTION

A jury returned a verdict for petitioner Luz González-Bermúdez on her age discrimination and retaliation claims under the Age Discrimination in Employment Act (ADEA) and corresponding Puerto Rico laws. The district court upheld the liability verdict. The United States Court of Appeals for the First Circuit reversed in relevant part, finding that respondents were entitled to judgment as a matter of law on the ground that Ms. González's comparator evidence lacked probative value because the comparators had different positions, duties, and supervisors, and finding that the jury's disbelief of the employer's proffered nondiscriminatory and nonretaliatory reasons for its actions was insufficient to sustain an inference of discrimination and retaliation.

The First Circuit's decision conflicts with the decisions of other courts of appeals on the standard for determining whether comparator evidence can support an inference of intentional discrimination. Whereas the First Circuit mechanically applied three rigid factors to determine whether plaintiff and her proffered comparators were similarly situated, other courts of appeals apply a flexible standard focused on whether the plaintiff and comparators share enough in common to render the comparison relevant to the issue of whether intentional discrimination was at play. The Court should grant certiorari to resolve the circuit split and clarify the standard for determining whether comparator evidence supports an inference of intentional discrimination.

The First Circuit's decision also conflicts with the decisions of other courts of appeals regarding the

proper application of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, this Court held that a jury's disbelief of the employer's proffered nondiscriminatory reason for an adverse employment action can sustain an inference of discrimination. The Court also cautioned that, in reviewing a jury verdict, courts may not reweigh the evidence and substitute their judgment for that of the jury. Over time, however, the courts of appeals have adopted inconsistent approaches to applying *Reeves*. And in the First Circuit, "*Reeves* is at risk of suffering death by a thousand cuts." *Henderson v. Mass. Bay. Transp. Auth.*, 977 F.3d 20, 54 (1st Cir. 2020) (Barron, J., dissenting). This Court's review is thus needed to clarify the proper application of *Reeves*.

OPINIONS BELOW

The opinion of the First Circuit (Pet. App. 1a) is reported at 990 F.3d 37. The Omnibus Opinion and Order of the District Court for the District of Puerto Rico (Pet. App. 25a), upholding the jury verdict and granting in part and denying in part respondents' Motion for New Trial and Motion for Reconsideration, is reported at 408 F. Supp. 3d 25. The Opinion and Order of the District Court for the District of Puerto Rico (Pet. App. 79a), upholding the jury verdict and denying respondents' Motion for Judgment as a Matter of Law, is reported at 349 F. Supp. 3d 93.

JURISDICTION

The U.S. Court of Appeals for the First Circuit issued its opinion on March 3, 2021. Under this Court's order of March 19, 2020, the time for filing a petition for a writ of certiorari is 150 days from the date of the lower court's judgement for judgments

issued prior to July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 623 provides:

(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; [or]

(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.

. . .

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment … because such individual, … has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

STATEMENT OF THE CASE

Factual background

Petitioner Luz González began working at Abbott in 1984 as a Medical Sales Representative, which was a Level 12 position on the Abbott pay scale. Over the next twenty-seven years, Ms. González rose steadily through the ranks. She always received ratings of "Achieved Expectations" or "Exceeded Expectations" on her performance evaluations, and by 2010, she was a Level 18 National Sales Manager. Pet. App. 3a–4a, 83a–84a.

In November 2010, Abbott reorganized and eliminated the positions of three employees: Ms. González, Ms. Rocio Oliver, and Mr. Dennis Torres. *Id.* at 3a. Abbott reassigned the three employees to lower-level positions, but it notified them that they would continue to receive the compensation of their prior positions for an interim period of at least two years. *Id.* at 3a, 84a. Ms. Oliver and Mr. Torres were moved to Level 14 positions from their prior positions at Levels 15 and 16, respectively. *Id.* at 3a, 89a. Ms. González was named Institutional Marketing Manager, a new Level 17 position supervised by Kim Pérez. *Id.* at 3a.

In her previous position, Ms. González supervised a staff of twenty-eight, including Ms. Oliver and Mr. Torres. In her new role, she was expected to complete her tasks without any staff to assist her. *Id.* Because Ms. González was unable to timely complete all her new duties, she received a rating of "Partially Achieved" expectations on her performance evaluation for 2011. After some of her responsibilities were redistributed, she received a rating of "Achieved Expectations" for 2012. *Id.* at 3a–4a.

Following the two-year interim period, Ms. Oliver and Mr. Torres continued in their new positions and their salaries were lowered to Level 14. *Id.* at 89a. Abbott, however, did not allow Ms. González to continue as Institutional Marketing Manager with a salary adjustment from Level 18 to Level 17, as she had expected. *Id.* at 85a, 88a. Rather, in March 2013, Abbott demoted Ms. González to Project Manager, a Level 15 position. At the time, Ms. González was fifty-three years old. Ms. Oliver was forty-four and Mr. Torres was forty-one. *Id.* at 4a.

Upon being informed of her demotion, Ms. González experienced acute anxiety and immediately reported to the company doctor. The doctor referred her to the State Insurance Fund (SIF), Puerto Rico's worker's compensation agency. The SIF placed Ms. González on rest until July 10, 2013. Nevertheless, two weeks later, on April 1, Abbott sent Ms. González a letter informing her that she would be fired if she did not return to work by April 8. Against medical advice, Ms. González returned to work before the mandated rest period was over. *Id.* at 4a, 13a–14a, 100a.

On October 29, 2013, Ms. González filed an administrative claim of age discrimination based on her demotion. Her professional relationship with her supervisor, Ms. Pérez, worsened. *Id.* at 5a, 100a–01a. Two weeks later, Ms. González learned from a colleague that Abbott was hiring a Senior Product Manager, a Level 16 position. *Id.* at 5a, 113a. Although Abbott's policy was to offer promotions to qualified Abbott employees before external candidates, and although Ms. González had asked at the time of her demotion about the availability of a Senior Project Manager position, Ms. González had

not been informed of the opening, which Abbott had been recruiting for externally for more than two months. *Id.* at 5a, 102a. Abbott posted the job internally only after Ms. González inquired about it. The hiring committee included the supervisor named in Ms. González's age discrimination charge, Ms. Pérez. *Id.* at 5a. Prior to the hiring decision, Ms. Pérez discussed Ms. González's charge with each member of the selection committee, and the committee discussed Ms. González's age discrimination claim with a lawyer. *Id.* at 103a.

Ms. González and two external applicants were chosen as finalists for the position. After their interviews, the finalists were told that they would have to make a mock sales presentation to a panel of judges the following day, even though the notes from the meeting held to discuss the selection process made no mention of any presentation. *Id.* at 103a–04a. In her nearly thirty years with the company, Ms. González had never heard of such a requirement and she knew that the panel judges were already familiar with her presentation skills. Ms. González viewed the process as a sham and chose not to make the mock presentation, although she made clear her continued interest in the position. *Id.* at 6a. The day of the presentations, Abbott filled the position with one of the external candidates, who was thirty-three years old. *Id.* at 105a & n.9.

In January 2014, Ms. González applied for a promotion to Regional Sales Manager, a Level 18 position that had been posted internally. A month later, Ms. González received her performance evaluation for 2013 in which she received a rating of "Partially Achieved" expectations. Ms. González had been on track to receive a positive rating based on her

mid-year review in September 2013. *Id.* at 4a, 6a, 18a. She requested that the Human Resources department review her evaluation, and she asked that her 2013 emails be reinstated to her account so that she could demonstrate that she had achieved the goals of her position and completed her assigned projects. The Human Resources department responded that the emails had been deleted and could not be retrieved. *Id.* at 6a–7a.

Abbott chose forty-one-year-old Glamary Perez for the Regional Sales Manager position; Ms. González was now fifty-five. *Id.* at 108a & n.11. In March 2014, Ms. González requested that she be appointed Senior District Manager, the position left vacant upon Ms. Glamary Perez's promotion and a position that Ms. González had previously occupied. *Id.* at 7a. Abbott denied the request and, without posting the position, offered it to a forty-three-year-old employee. *Id.* at 7a, 109a & n.13. During the same month, the two employees other than Ms. González who had been affected by the reorganization were promoted to Level 16 positions. Ms. González, who had been their supervisor before the reorganization, remained in a Level 15 position, without any opportunity for advancement. *Id.* at 110a. In April 2014, Abbott finalized a document that identified potential promotions that employees might work toward, but it listed no next moves for Ms. González. Under a new supervisor in 2014 and 2015, Ms. González received only positive performance reviews. *Id.* at 7a.

Proceedings below

Ms. González sued Abbott and her direct supervisor, Ms. Pérez, alleging discrimination and retaliation under the Age Discrimination in

Employment Act (ADEA), 29 U.S.C. §§ 621–634, and Puerto Rico law. The case was tried before a jury.

In *Reeves*, this Court held that a jury's disbelief of an employer's explanation for an adverse action can be sufficient to support an inference of discrimination. 530 U.S. at 147–48. Relying on *Reeves*, the district judge instructed the jury that, for both Ms. González's age discrimination and retaliation claims, it

> should consider whether defendants' produced reason for their actions is not the true reason why they took the adverse employment action, i.e., age discrimination and/or retaliation action against Ms. González and whether the true reason for the adverse action was to discriminate and/or retaliate against her because she filed a charge of age discrimination and retaliation against defendants and opposed defendants' retaliatory actions against her.

App.[1] 640. The instructions went on to explain that Ms. González "must prove by a preponderance of the evidence, not only that the defendants' purported reason for discriminating and/or retaliating against her is false, but also that it is an excuse intended to cover up the fact that age discrimination and/or age based retaliation was the reason defendants decided to act." *Id.* at 641.

After a six-day trial, the jury found in favor of Ms. González and awarded compensatory damages and backpay. Pet. App. 2a.

Among other post-judgment motions, Abbott sought judgment as a matter of law pursuant to

---

[1] "App." refers to the appendix filed with Abbott's appellate brief.

Federal Rule of Civil Procedure 50(b) and a new trial pursuant to Rule 59(a), arguing that the evidence was insufficient to support the jury's verdict. *Id.* at 80a. In separate opinions, the district court denied both motions, finding that the evidence easily supported the verdict. *Id.* at 25a–26a, 79a–80a.[2]

The district court denied Abbott's Rule 50(b) motion with respect to Ms. González's March 2013 demotion because it found that the jury had reasonably concluded that Ms. González established that age was the "but-for" cause of the demotion. *Id.* at 98a–99a. The court noted that Ms. González was significantly older than the other two employees affected by the reorganization, that the younger employees were not demoted following the two-year interim period, and that they suffered only a one-level and two-level reduction in pay compared to the three-level reduction imposed on Ms. González. The court concluded that it was reasonable for the jury to have concluded that the younger employees were "comparable" or "similarly situated" to Ms. González because they were all "in the same boat" in terms of the repercussions of the reorganization on their

[2] The jury awarded Ms. González $4 million in compensatory damages and $250,000 in backpay. Pursuant to the doubling provisions of the applicable statutes, the court entered judgment for $8,500,000 in compensatory damages and backpay. Pet. App. 26a. The district court later granted defendants' motion for remittitur, reducing the backpay award from $250,000 to $95,620.83 and ordering that the backpay would not be subject to doubling under Puerto Rico law and as liquidated damages under the ADEA. The court also decreased compensatory damages to $450,000—$400,000 against Abbott and $50,000 against the supervisor—doubled to $900,000. *Id.* at 78a.

employment and were all offered the same conditions at the time of the reorganization. *Id.* at 89a–91a.

The court held that a reasonable jury could have concluded that Abbott discriminated against Ms. González when she was treated disparately from her younger counterparts and that the jury was right to reject Abbott's assertion that deficient performance was the cause of her demotion. The court explained that a reasonable jury could have inferred that Ms. González was set up for failure when she was given "unattainable goals without the proper supporting staff" and that the jury knew Ms. González was given an "Achieved Expectations" rating on her most recent evaluation before her demotion. Having already held that "a reasonable jury could have found enough evidence was presented to support the conclusion that Plaintiff was the victim of disparate treatment on the basis of age when her position was adjusted downward," the district court found that the jury could have reasonably inferred that Abbott's claims that poor performance drove the demotion decision "were in fact pretextual and not worthy of credence" because the testimonies of Abbott's decisionmakers were riddled with inconsistencies and contradictions and their demeanor suggested that "they had something to hide." *Id.* at 91a–94a. Thus, the court held that, "taken in the light most favorable to Gonzalez," "the evidence presented at trial" was not "so overwhelmingly inconsistent with the verdict that no reasonable jury could come to the *conclusion* that defendants discriminated against Plaintiff based on her age." *Id.* at 98a (emphasis in original).

The district court also denied Abbott's Rule 50(b) motion with regard to Ms. González's retaliation claims arising from Abbott's failure to promote her

after she had complained of age discrimination and her negative performance evaluation for 2013. *Id.* at 120a. With regard to her rejection for the Senior Product Manager position in December 2013, the court found that a reasonable jury could have easily concluded that Abbott's non-retaliatory explanations for the decision were pretextual because Abbott had deviated inexplicably from its usual practices, its explanations were "hard to believe," and it was reasonable for Ms. González to have withdrawn from the presentation phase of the selection process because "the overwhelming circumstantial evidence showed that her effort and continued participation would have been futile." *Id.* at 113a–17a.

With regard to the Regional Sales Manager and Senior District Manager positions for which Ms. González was not selected in early 2014, the court found that "[t]he cumulative effect of defendants' irregularities in the promotional processes, deviations from established policies, shifting explanations, stealthy personnel moves, contradictions and inconsistencies weighed heavily in the minds of the jury," and "the evidence from which the jury could have reasonably concluded that defendants retaliated against the Plaintiff by failing to promote her was overwhelming." *Id.* at 124a–25a. Finally, the court found that the "overall factual picture in this case" supported the jury's conclusion that Abbott's explanations for giving Ms. González a negative performance review for 2013 were pretextual and that the evaluation "was unwarranted and resulted from defendants' desire to retaliate against Plaintiff for having filed claims of age discrimination and retaliation." *Id.* at 130a–31a.

For the reasons expressed in the court's opinion and order denying the Rule 50(b) motion, the district court also denied Abbott's Rule 59(a) motion for a new trial based on the sufficiency of the evidence. The court held that "the evidence on record strongly supported the jury's verdict." *Id.* at 30a.

Abbott appealed, and the First Circuit reversed the district court's denial of defendants' motion for judgment as a matter of law on her ADEA claims and her corresponding claims under Puerto Rico law.[3] *Id.* at 2a. With respect to Ms. González's March 2013 demotion, the court of appeals held that Ms. Oliver and Mr. Torres were not similarly situated to Ms. González for purposes of showing disparate treatment because they occupied different positions and reported to different supervisors than did Ms. González, and because Ms. González presented no evidence that compared their performance ratings to hers. The court held that the lack of suitable comparator evidence was fatal to Ms. González's age discrimination claim. *Id.* at 9a. The Court also held that the jury's disbelief of Abbott's explanation for the demotion decision was insufficient to support an inference of discrimination. *Id.* at 10a–11a.

The First Circuit further held that no reasonable jury could have found that Abbott retaliated against Ms. González by denying her promotions and giving her a negative performance evaluation after she complained of age discrimination. *Id.* at 16a–17a, 20a–22a. With regard to the promotion sought by Ms.

---

[3] The First Circuit upheld the jury verdict in favor of Ms. González regarding her claim that Abbott violated Puerto Rico Law 115 by threatening to terminate her in retaliation for reporting to the SIF. Pet. App. 2a.

González in December 2013, the court found that her decision to not participate in the mock sales presentation barred her claim because it was not clear that completing the process would have been futile. *Id.* at 15a–17a. With regard to her claim that the negative performance evaluation she received soon after she complained of discrimination was retaliatory, the court acknowledged that the chronology of events could support an inference of improper motive, but found that such an inference was unreasonable in light of evidence that Ms. González had missed certain deadlines. *Id.* at 17a–21a. Finally, the court found that Abbott's refusal to promote Ms. González in early 2014 could be explained by the "Partially Achieved" performance rating she had received for 2013, despite inconsistencies in Abbott's explanations and the jury's contrary findings. *Id.* at 21a–22a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals apply a range of outcome-determinative standards for assessing whether comparator evidence is sufficient to support an inference of discrimination.

Once a discrimination case goes to trial, the question for the factfinder is whether the defendant intentionally discriminated against the plaintiff. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715–16 (1983) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A plaintiff may prove intentional discrimination using indirect, or circumstantial, evidence. *Id.* at 716 (citing *Burdine*, 450 U.S. at 256). One way a plaintiff may do so is by demonstrating that the employer treated a similarly situated individual outside the protected class more

favorably than the plaintiff. *See Reeves*, 530 U.S. at 151.

A. The courts of appeals are intractably divided.

The First Circuit held that Ms. González's comparator evidence was "unsuitable" to support an inference of discrimination. The court acknowledged that Ms. Oliver and Mr. Torres, like Ms. González, had their positions eliminated as part of the reorganization, that they were younger than Ms. González, but that they were not demoted at the conclusion of the interim period. Nonetheless, the court held that Ms. Oliver and Mr. Torres "were not similarly situated to González in several important respects," because they had different positions, duties, and supervisors. The court held that these differences stripped the comparator evidence of any probative value on the question whether Ms. González was demoted in March 2013 because of age discrimination. Pet. App. 9a. By requiring comparators' positions, duties, and supervisors to be identical to those of the plaintiff before comparator evidence can be used to prove discrimination, the First Circuit aligned itself with the most restrictive courts of appeals in a well-acknowledged disagreement regarding whether a comparator is "similarly situated" to a plaintiff such that the employer's disparate treatment of the two can support an inference of discrimination.

Several courts apply a far less rigid standard than the First Circuit adopted here. In the Seventh Circuit, for example, "[s]o long as the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is

satisfied." *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (cleaned up). Under this "flexible standard," the plaintiff and comparator must share "enough common factors ... to allow for a meaningful comparison in order to divine whether intentional discrimination was at play" and "the number of relevant factors depends on the context of the case." *Id.* at 846–47 (cleaned up). Thus, in the Seventh Circuit, the standard for whether a comparator and the plaintiff are sufficiently similar to support an inference of discrimination "is really just the same requirement that any case demands—the requirement to submit relevant evidence." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018). Evidence of what has happened to other employees is relevant if the other employees are "in the same boat as the plaintiff." *Id.*

The Sixth Circuit also uses relevancy as the touchstone for examining comparator evidence. "The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered similarly-situated." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (cleaned up). Rather, the plaintiff need only show that he or she is similar to the comparator "in all *relevant* respects." *Id.* at 353 (emphasis in original). The Eighth Circuit also uses the "all relevant respects" standard, but it conducts the inquiry in a more rigid manner than the Sixth and Seventh Circuits. *E.g.*, *Torgerson v. City of Rochester*, 643 F.3d 1031, 1051 (8th Cir. 2011) (characterizing its relevancy standard as rigorous).

In the Second Circuit, a plaintiff can raise an inference of discrimination by showing that she was treated differently than a comparator to whom she

was "similarly situated in all material respects," *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997), but the plaintiff's and comparator's circumstances need only bear a "reasonably close resemblance." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 230 (2d Cir. 2014) (citing *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000)).

The Ninth Circuit characterizes its test the same way, *e.g.*, *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006), but emphasizes that "[m]ateriality will depend on context and the facts of the case," and "cannot be mechanically resolved." *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157–58 (9th Cir. 2010).

In stark contrast, the Fifth Circuit requires that a comparator be "nearly identical" to the plaintiff to support an inference of discrimination. *E.g.*, *Morris v. Town of Indep.*, 827 F.3d 396, 401 (5th Cir. 2016). The Fifth Circuit requires the plaintiff and the proffered comparators to have had the same job or responsibilities, and to have shared the same supervisor or had their employment status determined by the same person. *Id.* (citing *Lee v. Kans. City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009)). Notably, the Fifth Circuit has recognized the tension between its "nearly-identical" standard and the Sixth Circuit's focus on the relevance of any differences between a plaintiff and a comparator. *Id.* at 402 (citing *Ercegovich*, 154 F.3d at 353).

In addition, whereas the Eleventh Circuit, like the Second and Ninth Circuits, articulates its standard as "similarly situated in all material respects," *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019) (en banc) (cleaned up), it applies a far more restrictive test than those Circuits. The Eleventh

Circuit has previously "bounc[ed] back and forth (and back and forth) between two standards," ranging from "nearly identical" to "same or similar," which left its law in disarray. *Id.* at 1217–18, 1224. Under the Circuit's newly adopted standard, "a plaintiff and her comparators must be sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'" *Id.* at 1228 (quoting *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 231 (2015)). In adopting this standard, the Eleventh Circuit expressly rejected both the Fifth Circuit's "nearly-identical" standard and the Seventh Circuit's "not-useless" standard, finding the former "too strict" and the latter "too lax." *Id.* at 1224.

"The mess" of the law in this area has been repeatedly recognized by commentators as well. *See* Alexander S. Edmonds, Note, *Mopping Up The Mess: A Call to Adopt the Seventh Circuit's Standard for Assessing Comparator Evidence in Title VII Discrimination Claims*, 55 Ga. L. Rev. 911, 919–28 (2021) (describing the differences between the Seventh and Eleventh Circuits' standards for comparator evidence and arguing for Supreme Court review); *see also*, *e.g.*, Sandra F. Sperino, *Into the Weeds: Modern Discrimination Law*, 95 Notre Dame L. Rev. 1077, 1096–98 (2020) ("There is a split among circuits (and even within some circuits) about how similar the plaintiff must be with the comparator."); Robert Iafolla, *Judging Job Bias by Comparing Workers: Circuit Court Rules Vary*, Bloomberg Law (April 11, 2019)[4] ("Standards for handling comparator evidence vary by circuits."); Charles A. Sullivan, *The*

---

[4] https://news.bloomberglaw.com/daily-labor-report/judging-job-bias-by-comparing-workers-circuit-court-rules-vary.

Phoenix from the Ash: Proving Discrimination by Comparators, 60 Ala. L. Rev. 191, 223 (2009) (explaining that, on the issue of "when the putative comparator is similar enough to justify the inference [of discrimination], … the circuits seem hopelessly lost"); Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. Pa. J. Bus. & Emp. L. 459, 472 (2008) ("The differing standards across the circuits cause a great deal of uncertainty in discrimination cases generally.").

Given the deep, intractable, and widely acknowledged split among the circuits on the proper standard for evaluating comparator evidence, the Court should grant review.

B. This case illustrates the need for a consistent standard.

Although the jury found that age discrimination was the but-for cause of Ms. González's demotion, the First Circuit, applying its narrow conception of comparators, held as a matter of law that comparator evidence did not support the finding because Ms. González and her comparators did not share the same position, duties, and supervisor. Pet. App. 9a. Had her case been heard in any of several other circuits, the jury's verdict would have been upheld. *See*, *e.g.*, *Coleman*, 667 F.3d at 849 (holding that "different titles and duties do not defeat, as a matter of law, the probative value" of comparator evidence); *Hawn*, 615 F.3d at 1157 (rejecting a requirement that plaintiff and comparators share the same supervisor because whether such a fact is material will vary depending on the context and facts of the case).

For example, in *Ercegovich*, the plaintiff was terminated after his position was eliminated in a reorganization. Two younger employees whose positions were also eliminated were treated more favorably and transferred to other jobs within the company. 154 F.3d at 349. The plaintiff brought an age discrimination claim based on comparator evidence. *Id.* at 349–50. The district court held that the plaintiff's evidence was insufficient to support an inference of discrimination because the younger employees had different positions and performed different duties. *Id.* at 349. The Sixth Circuit reversed, holding that job titles and activities are not always relevant to a claim that a defendant denied an employee an opportunity because of age. *Id.* at 353. "[W]hen an employer makes selective offers of transfer following a reduction in force or a reorganization, differences in the job activities previously performed by transferred and non-transferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees." *Id.* Thus, the court held that a reasonable jury could conclude that the plaintiff "was not offered the opportunity to transfer because of age discrimination." *Id.* at 354.

Had the First Circuit applied the same approach as the Sixth Circuit, it would have held that a reasonable jury could conclude that Ms. González was treated differently than her younger colleagues following the reorganization when she was demoted and they were not. The application of a different standard was outcome determinative. And because the outcome of Ms. González's discrimination claim would have been different in other circuits, this case is an excellent vehicle for the Court to clarify the

proper standard for determining whether comparator evidence supports an inference of intentional discrimination.

Indeed, Ms. González presented comparator evidence relevant to her age discrimination claim. Only three employees had their positions eliminated as part of Abbott's reorganization: Ms. González, Ms. Oliver, and Mr. Torres. Pet. App. 3a. Ms. González was significantly older than the other two, and she alone was demoted after the transition period. *Id.* at 4a. The younger employees were both promoted. *Id.* at 110a. Although the three employees were not similarly situated in all respects, they shared enough similarities that their disparate treatment was relevant to the issue of age discrimination. *See* Fed. R. 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.").

The First Circuit erred by holding that Ms. González's comparators were not similarly situated as a matter of law because they did not have the same title, duties, and supervisor. Pet. App. 9a. The court's formalistic and inflexible standard denies a plaintiff the chance to have a jury determine as a matter of fact whether the plaintiff and comparators had enough in common to create an inference that discrimination was at play. The need for flexibility is particularly acute when a plaintiff, like Ms. González here, occupies a unique position. In such circumstances, to require a plaintiff "to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class receiving more favorable treatment" effectively removes "employees occupying 'unique' positions" "from the protective reach of the

anti-discrimination laws." *Ercegovich*, 154 F.3d at 353.

A case-by-case approach to comparator evidence, where specific factors may serve as a guide but do not apply formulaically, best allows "plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993). Because "there will seldom be 'eyewitness' testimony as to the employer's mental processes," *Aikens*, 460 U.S. at 716, this Court should reject the First Circuit's rigid test for comparator evidence in favor of a test that rests on traditional notions of relevance.

II. The courts of appeals apply inconsistent standards for evaluating whether an employer's proffered explanation for an adverse employment action is pretextual.

In *Reeves*, this Court held that a trier of fact may infer intentional discrimination from the falsity of the employer's nondiscriminatory explanation for its decision.[5] "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive,"

---

[5] The plaintiff must also establish the elements of a prima facie case, but there is no dispute that Ms. González satisfied that requirement. In any event, once an employer proffers a nondiscriminatory reason for the challenged employment action and the case advances to trial, the mandatory inference of discrimination created by the plaintiff's prima facie case drops out and the factfinder must decide the ultimate question of intentional discrimination. *See*, *e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 510–12; *Aikens*, 460 U.S. at 714–15; *Burdine,* 450 U.S. at 255–56.

because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation." 530 U.S. at 147. Although disbelief of an employer's proffered explanation might not "*always* be adequate to sustain a jury's finding of liability," *id.* at 148 (emphasis in original), instances in which courts should grant Rule 50 motions in favor of employers "will be uncommon," *id.* at 154 (Ginsburg, J., concurring).

Concurring in *Reeves*, Justice Ginsburg observed that it might become "incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond" that from which a rational factfinder could conclude that an employer's proffered explanation for its actions was false. *Id.* The First Circuit's opinion below—and the inconsistent standards applied by the courts of appeals in similar cases—demonstrates that the time has come for the Court to better define the applicable standard.

In this case, reversing the jury's verdict for Ms. González on her age discrimination and retaliation claims, the First Circuit found that her evidence of pretext was insufficient to support the verdict. The opinion does not cite *Reeves*, and its decision continues the First Circuit's drift away from *Reeves* and towards a return to the pretext-plus standard that *Reeves* sought to curtail. That pattern has been noted with concern by First Circuit Judge Barron, who stated: "I am concerned that, through a series of individualized, seemingly fact-dependent rulings, *Reeves* is at risk of suffering death by a thousand cuts." *Henderson*, 977 F.3d at 53 (Barron, J., dissenting).

The Sixth Circuit has also strayed from the rule announced in *Reeves* by approving a jury instruction stating that "it is not enough for plaintiff simply to prove or claim that the stated reasons for [employer's] actions with regard to plaintiff were not believable or are not the true reasons for the actions." *Brown v. Packaging Corp. of Am.,* 338 F.3d 586, 593 (6th Cir. 2003). According to the Sixth Circuit, a jury may not infer discrimination unless the plaintiff submits evidence beyond that from which the jury can conclude that that the employer's stated reason for its action was a pretext. *Id.* at 593–94; *see Williams v. Eau Claire Pub. Schs.*, 397 F.3d 441, 445–46 (6th Cir. 2005) (affirming the district court's refusal to instruct the jury that, if it did not believe the employer's asserted non-discriminatory reasons, it could infer discrimination and conclude that the plaintiff had met her burden of proving intentional discrimination).

The Seventh Circuit has also shirked *Reeves*. In a discrimination case based on circumstantial evidence, it held that "it is not enough for the jury to disbelieve the explanation of the employer." *Waite v. Bd. of Trs. of Ill. Cmty. Coll. Dist. No. 508*, 408 F.3d 339, 344 (7th Cir. 2005). In *Waite*, a supervisor's remark that a Caribbean employee had a "plantation mentality" was enough additional evidence of discriminatory animus for the Seventh Circuit to uphold the jury's verdict for the plaintiff on her national-origin discrimination claim, but the court explained that, without evidence of the supervisor's remark, the jury's disbelief of the supervisor's reason for terminating the plaintiff would not have been sufficient to support the verdict. *Id.* at 344–45.

In contrast with the decisions of the First, Sixth, and Seventh Circuits, other courts of appeals hold that

disbelief of an employer's proffered explanation for its decision can alone support an inference of discrimination. For example, in *Cross v. New York City Transit Authority*, 417 F.3d 241, 250 (2d Cir. 2005), the Second Circuit found that an employer's insistence that it had not provided the plaintiff with lesser training than that which younger employees received could lead a reasonable jury to conclude "not only that there was a disparity in the training received by the plaintiffs compared to younger [employees] but that [the employer's witness] deliberately testified falsely on this material fact." The court concluded that a factfinder's disbelief of the reasons put forward by the defendant, accompanied by a suspicion of mendacity, can support an inference of discrimination. *Id.* (citing *St. Mary's Honor Ctr.*, 509 U.S. at 511; *Reeves*, 530 U.S. at 147); *see also Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir. 2001) (Sotomayor, J.) (holding that "retaliatory intent may … be shown, in conjunction with the plaintiff's prima facie case, by sufficient proof to rebut the employer's proffered reason for" the adverse action (citing *Reeves*, 530 U.S. at 148)).

Similarly, the Fifth Circuit, relying on *Reeves*, has emphasized that disbelief of an employer's proffered reason for an adverse employment action permits a jury to conclude that the employer engaged in unlawful discrimination. In *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 224–25 (5th Cir. 2000), that court, noting that it "will not second guess [the jury's] rejection of defendants' proffered justification," reversed the district court's grant of the employer's motion for judgment as a matter of law, finding that the plaintiff "provided sufficient evidence to create a jury issue that [the employer's] justification

was pretextual." Likewise, in *Ratliff v. City of Gainesville*, 256 F.3d 355, 359–62 (5th Cir. 2001), the Fifth Circuit held that the district court erred by refusing to instruct the jury that "[i]f the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you may presume that the employer was motivated by age discrimination." The court emphasized that "if the plaintiff establishes that the defendant's reasons are pretextual, the trier of fact is permitted, but not required, to enter judgment for the plaintiff." *Id.* at 361; *accord Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) ("Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive.").

In light of the stark differences in the lower courts' understanding and application of *Reeves*, this Court's review is needed.

III. The First Circuit erred by substituting its judgment for that of the jury.

As this Court held in *Reeves*, judgment as a matter of law is appropriate only if there is no legally sufficient evidentiary basis to support the jury's verdict. A reviewing court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves,* 530 U.S. at 150. And it "must disregard all evidence favorable to the moving party that the jury is not required to believe," *id.* at 151, because it is the function of the jury—not the appellate court—to weigh conflicting evidence and inferences and determine the credibility of witnesses.

See Appelbaum v. Milwaukee Metro. Sewerage Dist., 340 F.3d 573, 581 (7th Cir. 2003) ("[W]hat [jurors are] for is to bring their human experience and their knowledge of people and life experiences and look into the eyes of the witnesses that have been up here on the stand and figure out who is telling the truth.") (cleaned up); *Russell*, 235 F.3d at 225 ("The jury, with its ability to listen to live testimony, was in a better position to judge the credibility of the witnesses and the accounts of the events" than was the court.).

Here, substantial evidence supported the jury's determination that Abbott's proffered reasons for its actions were pretext to cover up unlawful discrimination. With regard to the March 2013 demotion, some of Abbott's witnesses falsely denied the fact that Ms. González had even been demoted. The First Circuit dismissed this evidence as a "rather trivial disagreement among Abbott witnesses." Pet. App. 10a. But under *Reeves*, a reasonable jury could find such mischaracterization of the adverse employment action as mendacity, calling for an inference of pretext. 530 U.S. at 147 (citing *St. Mary's Honor Ctr.*, 509 U.S. at 511).

Abbott also attempted to justify the demotion by claiming that Ms. González had poor performance, which was contradicted by her "Achieved Expectations" performance rating for 2012. Abbott's witnesses sought to overcome the discrepancy by claiming that Ms. González had achieved a positive performance evaluation only because of a reduction in her workload and that the demotion was made to reflect that some of her duties had been reassigned, but the evidence showed that, upon reassignment, she had been saddled with substantial new responsibilities while her support staff was reduced

from twenty-eight to zero. Pet. App. 4a. Thus, as the district court found, it was reasonable for the jury to conclude that, after twenty-seven years of success in positions of increasing responsibility, Ms. González had been set up to fail when she was given "unattainable goals without the proper supporting staff." *Id.* at 92a. The First Circuit, defying *Reeves* and weighing the evidence itself, held that such a conclusion was mere speculation. *Id.* at 10a.

Finally, the First Circuit found that the demotion could be attributed to "a difficult professional relationship" between Ms. González and her supervisor. *Id.* at 11a. In so doing, the court wrongly substituted its judgment for that of the jury. *See Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1284–85, 1286 (9th Cir. 2001) (holding that the district court erred by failing to inquire whether plaintiff's performance review "was itself based on improper discriminatory or retaliatory motives" especially where "the record reflects [supervisor's] exasperation, lack of sympathy, and even animosity toward [plaintiff]").

Ms. González also presented substantial evidence from which a jury could infer that she was denied a promotion in December 2013 in retaliation for her complaint of age discrimination, which the selection committee discussed during the selection process, although they knew it was not relevant. Pet. App. 5a, 103a. The First Circuit found that Ms. González had sacrificed this claim by failing to participate in the mock sales presentation, *id.* at 15a, but as the district court explained, there was significant evidence from which a jury could infer that participation would have been futile, *id.* at 117a. Indeed, given the evidence that Abbott had never previously imposed such a

requirement, it was reasonable for the jury to infer that the new requirement was imposed to provide a nonretaliatory—but pretextual—excuse for denying Ms. González the promotion. The First Circuit found Abbott's deviation from its usual practice to be "beside the point" and did not even "consider her other arguments for why the jury could have found retaliation." *Id.* at 16a, 17a n.3. By failing to "review all of the evidence in the record," the court violated the standard set out in *Reeves*. 530 U.S. at 150.

With regard to Ms. González's claim that her performance evaluation for 2013 was retaliatory, the First Circuit recognized that the chronology of events could support an inference of retaliatory motive, but it weighed the evidence when it questioned the reasonableness of that inference in light of Abbott's assertion that the evaluation was deserved because of missed deadlines. Pet. App. 17a–19a. The court also rejected the jury's inferences of retaliation based on evidence that Ms. González's supervisor deprived her of important information, and that Abbott failed to place Ms. González on a performance-improvement plan or identify developmental actions for her. *Id*. at 19a–20a; *compare, id.* at 110a–11a. The court held that this evidence, even when "viewed collectively," was not enough to allow a reasonable jury to find that Abbott's explanation was pretextual and to infer that the real reason for the poorer performance rating was retaliation, *id*. at 21a, even though the district court held that a jury "could have reasonably found that defendants deviated from the Company's performance evaluation policy and that the shifting explanations they offered were incongruous," *id.* at 130a. In doing so, the court of appeals failed to "draw all reasonable inferences in favor of the nonmoving party," and

refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Reeves*, 530 U.S. at 150.

Because the First Circuit "impermissibly substituted its judgment concerning the weight of the evidence for the jury's" in reviewing the district court's judgment in favor of Ms. González for her discrimination and retaliation claims, *Reeves*, 530 U.S. at 153, its decision should be reversed.

CONCLUSION

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

Respectfully submitted,

JUAN RAFAEL GONZÁLEZ MUÑOZ
JUAN C. NIEVES GONZÁLEZ
GONZÁLEZ MUÑOZ LAW OFFICES, P.S.C.
P.O. Box 9024055
San Juan, PR 00902-4055
(787) 766-5052

MICHAEL T. KIRKPATRICK
Counsel of record
GRACE A. PARAS
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
mkirkpatrick@citizen.org

CARLOS M. VERGNE VARGAS
LAW OFFICE OF CARLOS VERGNE
24 Mariana Bracetti St., 2d Floor
San Juan, PR 00918
(787) 753-3799

Attorneys for petitioner

July 2021