No. 21-138

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

BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Abbott Laboratories P.R. Inc. is an indirect wholly owned subsidiary of Abbott Laboratories, a publicly held corporation. No other publicly held corporation owns 10% or more of Abbott's stock.

STATEMENT OF RELATED CASES

Luz Gónzalez-Bermúdez v. *Abbott Laboratories PR Inc.*, Civil No. 14-1620 (D.P.R) (ongoing proceedings on remand from *Luz González-Bermúdez* v. *Abbott Laboratories PR Inc.*, No. 19-2249 (1st Cir. Mar. 3, 2021), the First Circuit decision that Petitioner is asking this Court to review in the petition for writ of certiorari).

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BRIEF IN OPPOSITION

The petition asks this Court to resolve a purported conflict among the courts of appeals on the standard for assessing whether a plaintiff claiming discrimination has shown that she was treated differently from "similarly situated" employees. She further claims that this case reflects some courts of appeals' defiance of this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Neither the alleged conflict nor the claimed defiance exists.

Although the Circuits use slightly different words to describe the test for determining whether comparator employees are "similarly situated," the tests are substantively similar and do not result in different outcomes in their practical application. Moreover, Petitioner's proposed comparable employees would not be considered similarly situated in any circuit, so this case would be a poor vehicle for resolving any alleged conflict.

The First Circuit's analysis here is also fully consistent with *Reeves*' teaching. The unanimous First Circuit panel here carefully assessed the record evidence and concluded that Petitioner failed to show age discrimination or retaliation as a matter of law. *Reeves* recognizes that even where "the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, [there will be instances when] no rational factfinder could conclude that the [employer's] action was discriminatory," including whether "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or … the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue." *Id.* at 148.

The issues presented do not warrant review; and, even assuming *arguendo* that they did, this case would be a poor vehicle for their consideration.

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Employment at Abbott

1. *Initial Employment.* Petitioner, Ms. González, joined Abbott in November 1984 as a Medical Representative. Pet. App. 3a. By 2009, she had become a National Sales Manager, overseeing sales of pediatric and adult nutrition products to healthcare professionals. *Id.*; JA216. The position was a "Level 18" on Abbott's pay scale. Pet. App. 3a.

2. *Job Change in Reorganization.* In November 2010, Abbott reorganized its Nutrition Division and eliminated Petitioner's position and the positions of two other employees, Rocio Oliver and Dennis Torres. Pet. App. 3a. Instead of laying off the affected employees, Abbott offered to retain them in different positions with lower pay-grade levels and to mitigate that adverse pay impact by compensating them at their prior pay levels for two years. JA217-21; JA328.

Petitioner accepted the offer and assumed the position of Institutional Marketing Manager, a Level 17 position Abbott created specifically for her. Pet. App. 3a. The General Manager of Abbott's Nutrition Division, Matt Harris, and the Division's Marketing Manager, Kim Pérez, hoped Petitioner could use her relationships with healthcare professionals to develop marketing strategies and promotional materials that would appeal to them. JA395-96.

Petitioner's transition to the new position did not go smoothly. Pet. App. 3a. Petitioner testified that Ms. Pérez was critical of her performance from "the beginning." JA230-31. Ms. Pérez testified that Petition-

er had difficulty organizing information, communicating with the marketing team, and meeting deadlines. JA401-02. When Ms. Pérez increased her oversight, Petitioner "felt harassed" and complained that Pérez was "documenting" her performance in a file. JA233.

3. *Harassment Complaint Not Based on Age.* In November 2011, Petitioner filed an internal complaint with Abbott's Human Resources department, Pet. App. 3a, claiming that she was being "[l]eft behind" by Ms. Pérez, and there was "no teamwork," a "[l]ack of communication," and a "lot of pressure which [she] interpreted as a hostile environment." JA882. She did not claim that the alleged harassment was because of her age. JA216; JA530. Her complaint was that Ms. Pérez did not tell her things directly, asked "what is pending to be completed" not what she "has done," and sent numerous "follow up" emails about pending assignments. JA882-83.

Human Resources investigated Petitioner's complaint and found that Ms. Pérez engaged in no "inappropriate conduct." JA883; Pet. App. 3a. Petitioner testified that she "trusted and respected Abbott's investigatory process," but disagreed with its conclusion. JA357-58; see also JA883.

Shortly after filing the harassment complaint with Human Resources, Petitioner reported to the State Insurance Fund Corporation of Puerto Rico ("SIF"), which placed her on medical leave for six months, until June 2012. JA423.

4. *Deficient Performance in 2011.* When Petitioner returned from leave, she received her performance evaluation, which said she "Partially Achieved" Abbott's expectations in 2011. JA406; JA911. The evaluation said that Petitioner was several months late in

preparing marketing materials and budget reports. JA409; JA412-13; JA902-03. In one instance, Abbott's sales force had contracted for a venue and notified healthcare professionals about a seminar, but had to reschedule the training because Petitioner failed to develop the materials on time. JA410; JA412-14; JA905. Petitioner also failed effectively to coordinate with U.S. marketing teams. JA411-12; see JA416-17 (because Petitioner failed to communicate the date of training by the U.S. marketing team, Puerto Rico healthcare professionals had to be trained separately).

Petitioner did not dispute any of these documented deficiencies. She did, however, dispute the assessment of her performance on two financial objectives. JA419. General Manager Harris reviewed Petitioner's objections, found them meritorious, and modified that portion of the evaluation. JA529-30; JA907-09. The changes, however, did not alter the overall "Partially achieved" rating. JA502.

5. *Reduced Job Duties and Improved Performance in 2012.* In 2012, Petitioner told Ms. Pérez that she could not perform all of her duties and said it would "be good" if Ms. Pérez "could redistribute" some of them to others. JA358-59. Ms. Pérez acceded to Petitioner's request. Pet. App. 3a-4a; see also JA424-25; JA431 (transferring responsibility for coordinating the speakers program and for the WIC program).

Petitioner received an overall rating of "Achieved expectations" for 2012, but a "partially achieved" rating in two categories relating to communication, organization, and meeting deadlines. Pet. App. 4a; see JA426-28; JA885-86 (because Petitioner failed to meet deadline for submissions for magazine for nutrition conference, Abbott was excluded); JA426 (Abbott incurred overtime costs because Petitioner did not

ensure that a speaker for a seminar was certified in advance); JA886 (failure to complete product pricing strategy); JA427 (missed deadlines for expense reports and sales reports). Petitioner signed her 2012 performance evaluation and testified that she agreed with the overall rating of "Achieved expectations." JA352; JA887.

6. *Reassignment to Lower Paying Position in 2013.* In January 2013, two years had passed since the reorganization of the Nutrition Division, and Abbott's commitment to pay Petitioner at the temporary grade expired. Because Abbott had acceded to Petitioner's request to transfer some of her responsibilities to others, Abbott's Human Resources Director met with Ms. Pérez to evaluate the job duties Petitioner was actually performing and to determine the appropriate pay level for those duties. JA430. They determined that Petitioner was actually performing the duties of a Level 15 product manager position. *Id.* They therefore abolished the Marketing Manager position created for Petitioner and designated her a Product Manager at a Level 15 pay grade. *Id.*

At this time, the two other employees whose positions were eliminated in the reorganization (Torres and Oliver) also were removed from the temporary pay grade, and their compensation was reduced to the level of the positions they then occupied. JA181-82. Because they had not asked to be relieved of any of their job duties in the intervening two years, they simply retained the positions they accepted in the reorganization. See JA770-71; JA779-80; JA783-84; JA181-83.

When Petitioner was advised in March 2013 that she was being transferred to a Level 15 Product Manager position, she experienced anxiety and reported to the company doctor, who referred her to the

SIF. Pet. App. 4a. The SIF approved Petitioner's request for medical leave until July 10, 2013. *Id.* However, Abbott's Human Resources Department sent Petitioner a letter stating that if she did not contact them about returning to work, her employment would be terminated on April 9, 2013 "as provided by Law 45." JA722. Abbott sent this letter because the SIF determined that Petitioner's anxiety was a relapse of the illness that caused her to go on medical leave in December 2011, and Law 45 required Abbott to hold Petitioner's position open only for one year following an illness. JA75-77. After Petitioner received this letter, she returned to work. Pet. App. 4a.

7. *Poor Performance in 2013 and Age Discrimination Claim.* Petitioner's mid-year review documented that Petitioner continued to miss project deadlines when she returned to work. Pet. App. 4a; see also JA436-38; JA729. Petitioner nevertheless testified that she believed she was "on track" and achieving the expectations of her position. Pet. App. 4a.

Approximately a month after Petitioner's midyear review, her counsel advised Abbot that Petitioner would be filing a claim of age discrimination against Ms. Pérez and the company. Pet. App. 4a-5a. Petitioner testified that her relationship with Ms. Pérez worsened after she filed the discrimination claim. *Id.* at 5a.

8. *Petitioner Applies For Senior Product Manager Position But Withdraws Before Selection.* In August 2013—*before* Petitioner's counsel notified Abbott about her age discrimination claim—Abbott posted on LinkedIn a notice that the company was seeking a senior product manager to market nutrition products in the Caribbean. Pet. App. 5a. In November 2013, Petitioner discovered the LinkedIn posting and sent an email to Mr. Harris expressing interest in the po-

sition and alleging that the company failed to notify her of the posting in retaliation for her age discrimination claim. *Id.* Mr. Harris then posted the position on the internal Abbott job board, and Petitioner and two other Abbott employees applied. *Id.*

Meanwhile, the hiring committee—Mr. Harris, Ms. Pérez, and two members of the Human Resources department—met to discuss the selection process. Pet. App. 5a. They were, of course, aware of Petitioner's discrimination claim, and discussed it among themselves and with Abbot's counsel. *Id.* Petitioner and two outside candidates were selected as finalists for the position. *Id.* Mr. Harris and Ms. Pérez testified that it is "very typical for an internal person" to be considered for an open position JA555, and they decided that Petitioner should be allowed to compete with the outside candidates because she met the position's minimum requirements. JA453.

The selection committee decided to use a two-step process for evaluating the finalists: each would be interviewed; and, the following day, each would prepare and present a marketing presentation based on a case study provided by Abbott. Pet. App. 5a-6a. Human Resources advised Mr. Harris and Ms. Pérez that Abbott had successfully used the presentation requirement in recruiting in other offices, and Ms. Pérez thought it would allow evaluation of the "strategic thinking" of the candidates. JA540. Petitioner, however, had not heard of Abbott imposing such a requirement. Pet. App. 5a-6a.

Nevertheless, Petitioner prepared a presentation and returned the following day with the two external candidates. JA307. Petitioner testified that she "had decided to go first," but when she walked into the room and saw that the judges were Ms. Pérez, Mr. Harris, and people from Human Resources, she felt it

was "a circus" and thought she would not actually be considered because "they had been searching for people externally." JA308-09. She also felt "humiliated before the two other people who were there, who had no experience in the company," while she "had spent 30 years proving in different positions, demonstrating all [her] skills," and "fulfilling the company's expectations." JA310. Thus, "at that moment," Petitioner said she "decided to withdraw from the presentation process." *Id.*

The following afternoon, Petitioner emailed a member of the selection committee to indicate her continuing interest in the position, but was advised that Abbott had already selected another candidate for the position. Pet. App. 6a. That candidate was a woman who had done an effective presentation and had an MBA in marketing and 10 years of marketing experience, including healthcare professional marketing and consumer marketing with Nestle, and experience in the Caribbean market. JA154; JA458. Petitioner had not done the presentation, had no marketing degree, no experience in consumer or retail marketing, and no experience with distributors or retailers in the Caribbean. JA323-26.

9. *Petitioner's Continued Performance Problems in 2013 Preclude Promotion in 2014.* In early 2014, Petitioner received her 2013 performance evaluation, with an overall rating of "Partially achieved" expectations. JA315-16. The evaluation explained that although Petitioner had "a good understanding of the business" and a "good relationship with [healthcare practitioner] Associations," she was not "consistent with meeting the expected deadlines" and waited for specific direction from Ms. Pérez or the marketing team, instead of anticipating sales force needs. JA889. As a result, "implementation of programs

[was] delayed." JA890; see also JA890-92; JA441-42; JA446-48 (citing specific instances of missed deadlines).

In addition, the evaluation described Petitioner's inappropriate response to a marketing colleague who sent an email to Mr. Harris complaining that Petitioner's missed deadlines were putting a marketing project at risk. When Mr. Harris scheduled a meeting to discuss the issue, Petitioner lost her temper and yelled at the marketing colleague who had sent the email. JA443; JA891; JA914.

Petitioner disagreed with the overall rating of "partially achieved" and asked Human Resources to conduct an independent review.[1] Pet. App. 6a. But Petitioner did not dispute the specific incidents described in the evaluation. *Id.* In fact, she admitted at trial that "at some time it could be that I did not comply with or meet a deadline," JA341, and that she "los[t] [her] composure" and "raised [her] voice" at the marketing colleague who complained about her missed deadlines. JA347-48.

In early 2014, Petitioner applied to be Abbott's regional sales manager, a level 18 position, but was not interviewed because her "partially achieved" expectations rating for 2013 rendered her ineligible for promotion in 2014 under Abbott's promotion policy. Pet. App. 6a; see also JA163; JA535; JA780-81 (another Abbott employee who applied also was not interviewed, because he, too, had a "partially achieves expectation" rating for 2013).

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[1] Petitioner also asked to have her emails from 2013 reinstated, but was informed that they had already been deleted. Hearing this, Petitioner filed an administration claim for retaliation. Pet. App. 6a-7a.

On March 11, 2014, Petitioner emailed Mr. Harris claiming that she was denied the regional sales manager position in retaliation for filing the earlier complaint of age discrimination. JA750. Petitioner also asked to be considered for the senior district manager position vacated by the woman chosen for the regional sales manager position. Pet. App. 7a. Mr. Harris replied that there was no retaliation and Petitioner not qualified for the regional sales manager position because she had failed to meet Abbott's minimum expectations in several areas. *Id.*; see also JA752 (describing deficiencies).

As for the senior district manager position, that was filled by another employee chosen without a competitive selection process. Pet. App. 7a. Ms. Pérez played no role in filling any of these positions, because she was the director of marketing and these positions were in sales. JA504. In making these hiring decisions, Mr. Harris relied on the recommendations of Carlos Martinez, the national sales director who was in his mid-50s. JA501-04.

In April 2014, the Human Resources department finalized a "Talent Management Review" document, which listed developmental actions and future potential promotions for some Abbott employees, but not Petitioner. Pet. App. 7a. Nevertheless, Petitioner had a new supervisor in 2014 and 2015 and received a positive performance evaluation for each year. *Id.*

B. Proceedings Below

1. *Jury Verdict.* Following a trial in October 2016, the jury found that Abbott and Ms. Pérez discriminated against Petitioner because of her age and that Abbott retaliated against her for complaining about discrimination. Pet. App. 26a. It awarded Petitioner $250,000 in back pay, $250,000 in liquidated damag-

es, and $3 million in compensatory damages for emotional distress against Abbott, and $1 million in compensatory damages for emotional distress against Ms. Pérez individually. *Id.* After doubling the back pay and compensatory damages award under Puerto Rico law, the district court entered judgment for $6.75 million against Abbott and $2 million against Pérez individually.

2. *Post-trial motions.* Abbott and Ms. Perez filed a motion for judgment as a matter of law, which the district court denied. The court first found that the jury could have inferred that age discrimination was the reason Petitioner was demoted to a Level 15 position two years after the reorganization because (1) two younger employees affected by the reorganization were not downgraded to lower positions, Pet. App. 90a-91a; see also *id.* at 93a; and (2) Ms. Pérez and the head of the Human Resources department were "evasive and haughty" about whether Petitioner was demoted or transferred. *Id.* at 94a-95a. The court justified Petitioner's inability to perform all of the responsibilities of her Level 17 position, speculating that Ms. Pérez "set [Petitioner] up for failure" by giving her insufficient staff support. *Id.* at 92a.

Second, the court thought the jury could have found that Petitioner was denied the Senior Product Manager position in 2013 in retaliation for filing the age claim because Abbott posted the position on LinkedIn without telling her, the hiring committee discussed her age discrimination claim among themselves and with lawyers, and the jury could have disbelieved Mr. Harris and Ms. Pérez's denials of retaliation. Pet. App. 113a-115a.

Third, the court held that the jury could have found that Petitioner was denied the Regional Sales Manager and Senior District Manager positions in 2014 in

retaliation for filing the age claim because the jury could have rejected the argument that Petitioner was not qualified due to her poor performance evaluation. Pet. App. 122a-124a.

Fourth, the court held that Defendants were "procedurally barred" from challenging the jury's finding that they retaliated against Petitioner by threatening to discharge her if she did not return from her second SIF leave, because they did not raise it in their Rule 50(a) motion at the close of Petitioner's case in chief. Pet. App. 133a.

Finally, the court granted in part Defendants' motions to amend the judgment or for a new trial. It reduced the backpay award to $95,620.83, Pet. App. 68a, and remitted the compensatory damages to $400,000 against Abbott and $50,000 against Ms. Pérez, *id.* at 77a. The court then doubled the compensatory damages under Puerto Rico law to $800,000 against Abbott and $100,000 against Ms. Pérez and entered final judgment. *Id.*

3. *Court of Appeals.* The First Circuit reversed and entered judgment as a matter of law for Defendants on all claims except the SIF retaliation claim, which was remanded for a new trial.

The court first held that Defendants were entitled to judgment on the age discrimination claim because there was no evidence that Petitioner was demoted two years following the reorganization because of her age. Pet. App. 9a. A discriminatory motive cannot be inferred from the fact that the other employees affected by the reorganization were not demoted because those employees were "not similarly situated to [Petitioner] in several important respects." *Id.* They worked in different positions, for different supervisors, and performed different job duties, and there

was *no* evidence of their job performance, which would be necessary to infer that "Abbott discriminated against [Petitioner] by demoting her without also demoting" them. *Id.* There is "no evidence" to support the district court's "rather remarkable speculation" that Ms. Pérez had designed the Level 17 position "to be so difficult that [Petitioner] would fail." *Id.* at 10a. And Ms. Pérez's insistence that Petitioner was "transfer[red]," not "demot[ed]" cannot support an inference of age discrimination in light of undisputed evidence that Petitioner and Ms. Pérez "had a difficult professional relationship from the get-go," with Petitioner filing "an unsubstantiated harassment claim" against Ms. Pérez that was not based on age. *Id.* at 11a.

Second, the court held that Defendants are entitled to judgment on the allegedly retaliatory denial of the Senior Product Manager position because Petitioner "refused to participate in the mock-presentation component of the application process" and thus "voluntarily forfeited her eligibility" for the position. Pet. App. 15a. The mock presentation "was plainly job-related, and it was required equally of all the finalists who were selected to interview for the position." *Id.* at 16a. The jury could not excuse Petitioner's failure to complete the process on the theory that Abbott should have given her "the position outright" instead of looking outside the company, because Abbott "began soliciting external candidates" for the position "well before [Petitioner] engaged in protected activity by filing her age discrimination complaint against [Ms.] Pérez." *Id.*

Finally, the court disagreed with the district court's assertion that the jury could have found that Abbott retaliated against Petitioner by "giving her a 'partially achieved' performance evaluation for 2013 and then denying her two promotions in early 2014." Pet.

App. 17a. Although Petitioner testified that she received a favorable evaluation at her 2013 mid-year review before she filed her age discrimination claim, the jury could not reasonably infer that her final unfavorable review was due to retaliation, because the "undisputed evidence" shows that Petitioner's "performance worsened after her mid-year evaluation had been completed." *Id.* at 18a. The "partially achieved" performance rating left no rational basis for finding that the denial of a promotion in 2014 was retaliatory because Abbott had a policy of not promoting employees who had received a "partially achieved" rating the preceding year. *Id.* at 21a.

ARGUMENT

This interlocutory appeal of a court of appeals decision taking a mainstream approach to review of the sufficiency of the evidence in an age discrimination case presents no issue worthy of this Court's review.

I. THE COURTS OF APPEALS EVALUATE COMPARATOR EVIDENCE SIMILARLY; THIS CASE WOULD HAVE COME OUT THE SAME WAY IN ALL CIRCUITS.

The petition first argues that there is a conflict among the courts of appeals about the standard for determining whether a plaintiff claiming discrimination has shown that she was treated differently from "similarly situated" employees and that this case is a good vehicle for resolving that conflict. In fact, while the Circuits use slightly different formulations of the test for "similarly situated," all are similar and in practical application reach the same results. In any event, Petitioner did not show that she was treated differently from similarly situated employees under *any* Circuit's test.

As the First Circuit explained in its unanimous opinion:

> No matter how generously one views the trial record, it is apparent that Oliver and Torres were not similarly situated to Gonzalez in several important respects. Although Oliver and Torres, like Gonzalez, saw their positions eliminated as a result of Abbott's reorganization three years earlier in 2010, this at most shows that they were similarly situated to Gonzalez *in one respect in 2010*. For the next three years, Oliver and Torres occupied lower positions, performed different duties, and reported to different supervisors than did Gonzalez. Moreover, there is *no evidence* in the record regarding Oliver and Torres's job performance between 2010 and 2013, which would be necessary for Gonzalez to establish that Abbott discriminated against her by demoting her without also demoting Oliver and Torres. In sum, if Oliver and Torres were apples in 2013, Gonzalez was not even a fruit. Pet. App. 9a (emphases supplied) (citations omitted).

The petition does not fairly address this aspect of the First Circuit's decision. Nor does it demonstrate that Petitioner would have prevailed in any circuit given her failure to provide evidence about her proposed comparators' performance, evaluations or disciplinary records, much less any evidence that they asked to have their job duties reduced, as Petitioner did. Further, the proposed comparators worked at different jobs, with wholly different responsibilities and for different supervisors. This case, accordingly, would not allow the Court meaningfully to confront any alleged circuit split on the standard for determining whether comparators are similarly situated.

In any event, the petition significantly overstates the differences among the courts of appeals' standards and ignores that, in practical application, the tests produce generally consistent results.

The formulations themselves are similar:

First Circuit: "[A] claim of disparate treatment 'must rest on proof that the proposed analogue is similarly situated in material respects.'" *Velez* v. *Thermo King de P.R. Inc.*, 585 F.3d 441, 451 (1st Cir. 2009) (quoting *Perkins* v. *Brigham & Women's Hosp.*, 78 F.3d 747, 752 (1st Cir. 1996)).

Second Circuit: Comparators must be "similarly situated in all material respects." *Shumway* v. *UPS, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997)

Fifth Circuit: A plaintiff must show that she was "treated less favorably than others 'under nearly identical circumstances.'" *Morris* v. *Town of Independence*, 827 F.3d 396, 401 (5th Cir. 2016) (quoting *Lee* v. *Kansas City S. Ry.*, 574 F.3d 253, 259 (5th Cir. 2009)). The "court considers a number of factors in determining whether employees are similarly situated," including whether "the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." *Id.*

Sixth Circuit: "[T]he plaintiff must show that the 'comparables' are similarly-situated in all respects." *Ercegovich* v. *Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (quoting *Mitchell* v. *Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)). "Although this statement appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment, *Mitchell* has not been so narrowly construed.

In *Pierce* v. *Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994), the court explained that the plaintiff was simply "required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation." *Id.* at 802 (emphasis supplied).

Seventh Circuit: "Similarly situated employees 'must be directly comparable' to the plaintiff 'in all material respects,' but they need not be identical in every conceivable way." *Coleman* v. *Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (quoting *Patterson* v. *Ind. Newspapers, Inc.*, 589 F.3d 357, 365-66 (7th Cir. 2009)).

Eighth Circuit: Plaintiffs have the burden to show that "they and the top applicants were 'similarly situated in all relevant respects.'" *Torgerson* v. *City of Rochester*, 643 F.3d 1031, 1051 (8th Cir. 2011) (en banc).

Ninth Circuit: Plaintiffs must be "similarly situated to those employees [used as comparators] in all material respects." *Moran* v. *Selig*, 447 F.3d 748, 755 (9th Cir. 2006).

Tenth Circuit: Plaintiffs must be similarly situated to their comparators in all respects relevant to the employer's decision. *Magruder* v. *Runyon*, 844 F. Supp. 696, 702 (D. Kan. 1994), *aff'd*, 544 F.3d 787 (10th Cir. 1995).

Eleventh Circuit: The plaintiff must show that she is "similarly situated in all material respects." *Lewis* v. *Union City*, 918 F.3d 1213, 1231 (11th Cir. 2019) (en banc).

As this list makes clear, the predominant formulation requires that a plaintiff show that comparators were "similarly situated in all material respects," as

the First Circuit required here. No court requires that the comparators be identically situated; and all require similarity only in relevant respects. Even the Fifth Circuit—whose formulation requires that comparators be in "nearly identical[ly]" situated—in fact performs an inquiry focused on the key facts that would make comparison of the plaintiff's and other employees' situations appropriate. Many cases fail because, as here, the plaintiff fails to provide sufficient record evidence to show that her proposed comparators are similarly situated. Outcomes in other cases differ depending on whether the record reveals sufficient comparability to support a claim of discrimination.

None of the petition's contrary arguments withstands scrutiny. The petition first argues that the First Circuit "requir[ed] comparators' positions, duties, and supervisors to be identical to those of the plaintiff before comparator evidence can be used to prove discrimination." Pet. 14. As is clear from the passage quoted above, this statement badly distorts the opinion, which relied on the facts that her two comparators "occupied lower positions, performed different duties, and reported to different supervisors than did Gonzalez," *and* that "there is *no evidence* in the record regarding Oliver and Torres's job performance between 2010 and 2013, which would be necessary for Gonzalez to establish that Abbott discriminated against her by demoting her without also demoting Oliver and Torres." Pet. App. 9a (emphasis supplied). The First Circuit made no rule requiring identity of comparators' positions, duties and supervisors. Its approach to analyzing comparator evidence lies in the mainstream.

The petition's further claim that this case would have come out differently in different circuits, Pet.

18, is based on its distortion of the holding. In fact, fairly read, the court's holding is that Petitioner failed to show similarity in any of the respects enumerated and presented no other evidence of similarity. Pet. App. 9a.

Second, the petition argues that the Seventh Circuit applies a "far less rigid standard" than the First Circuit and others. Pet. 14. In fact, as noted above, it, like the First Circuit, requires that "[s]imilarly situated employees 'must be directly comparable' to the plaintiff 'in all material respects,' [although] they need not be identical in every conceivable way." *Coleman*, 667 F.3d at 846 (quoting *Patterson*, 589 F.3d at 365-66). In fact, in *Coleman* itself—which the petition cites (at 14) for the proposition that the Seventh Circuit is "far less rigid" than others—the court stated that "[i]n the usual case a plaintiff must at least show that the comparators (1) 'dealt with the same supervisor,' (2) 'were subject to the same standards,' and (3) 'engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." 667 F.3d at 847 (quoting *Gates* v. *Caterpillar, Inc.*, 513 F.3d 680, 690 (7th Cir. 2008)). And *Coleman* explained that the purpose of requiring similarly situated comparators was "to eliminate other possible explanatory variables, 'such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable'—discriminatory animus." *Id.* at 846 (quoting *Humphries* v. *CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007)).

And, even in the Seventh Circuit, whose approach the petition lauds, the court has held comparator evidence inadequate if the record fails to support a comparison. In *Johnson* v. *Advocate Health & Hospitals*

Corp., 892 F.3d 887 (7th Cir. 2018), for example, the court observed that the plaintiff said that two employees, Kelly and Diane, had higher salaries, but "submitted no pay records, nothing about their qualifications or experience, … who supervised Kelly and Diane, how long they had worked for the hospital, what types of reviews they received, and if they had been subject to any discipline." *Id.* at 896. See *id.* at 897 (plaintiff "did not submit affidavits from white EVS technicians who were paid for their work, records of assignments, pay, or any other scintilla of evidence of how similarly situated white employees were treated"); *id.* at 898 ("plaintiffs offer no evidence about who [the comparator] was, what her position was, who supervised her, why she refused to work in her assigned area, and whether she had a similar disciplinary record and similar performance reviews"). See also *Purtue* v. *Wis. Dep't of Corr.*, 963 F.3d 598, 603 (7th Cir. 2020) (stating that the record did "not reveal why any [comparator] employee in the study was fired—which makes it impossible to determine how many of the fired employees were comparable to Purtue in the respect that matters most"); (observing that she identified comparators who worked at different facilities and whose discipline fell to different decisionmakers).

The petition characterizes the Sixth, Second and Ninth Circuits' approaches favorably and as akin to the Seventh Circuit's, "us[ing] relevancy as the touchstone." Pet. 15. Their tests are the same as the First Circuit's and the petition does not attempt to show that there are cases akin to this one that would have come out differently in the First Circuit. They would not. Compare, *e.g.*, *Shumway*, 118 F.3d at 64 (rejecting claims that males who violated no fraternization policy were similarly situated when they did

not have the same supervisors or engage in comparable stalking or harassing conduct); *Moran*, 447 F.3d at 752 (plaintiffs were not similarly situated to former Negro League players because they were never prevented from playing for MLB teams due to race) *with Ercegovich*, 154 F.3d at 353 (plaintiff was similarly situated to others in "related human resources positions" which were eliminated in a reorganization); *Brown* v. *Daikin Am., Inc.*, 756 F.3d 219, 230 (2d Cir. 2014) (plaintiffs were similarly situated to comparators who "worked in the New Business Development Group" and two "reported to the same supervisor as he did" and was subject to the "same performance evaluation and disciplinary standards").

The petition also characterizes the Eighth, Fifth and Eleventh Circuits as having more rigid or restrictive approaches, but fails to show any significant practical difference among the approaches. As the petition recognizes, the Eighth and Eleventh Circuits use the same formulation as the First and most other Circuits. The petition's characterization of the Eighth Circuit's approach as more rigorous is based on that court's description of the standard as rigorous rather than any practical difference between that court's approach and others. See *Torgerson*, 643 F.3d at 1051 (finding no discrimination in firefighter hiring process where plaintiffs were far lower on the eligibility list based on testing than those hired). Likewise, the Eleventh Circuit's analysis follows the same path as that in other "relevancy" circuits. See *Lewis*, 918 F.3d at 1226 (explaining that similarly situated employees generally will have engaged in the same basic conduct (or misconduct) as the plaintiff, will have been subject to the same employment policy, guideline, or rule as the plaintiff, will have been under the juris-

diction of the same supervisor, and will share the plaintiff's employment or disciplinary history).

As for the Fifth Circuit, it, like Petitioner's favored Sixth Circuit, uses a relevancy test, which it frames as requiring that a plaintiff show that she was "treated less favorably than others 'under nearly identical circumstances.'" *Morris*, 827 F.3d at 401. Compare *Ercegovich*, 154 F.3d at 352 ("In *Pierce* v. *Commonwealth Life Ins.*, 40 F.3d 796 (6th Cir. 1994), this court explained that the plaintiff was simply 'required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation. *Id.* at 802.") (emphasis supplied). Like all courts, the Fifth Circuit considers whether comparators had "different work responsibilities," worked for "different supervisors" or in "different divisions" and whether they engaged in "dissimilar violations" or "were the subject of adverse employment actions too remote in time from that taken against the plaintiff." *Morris*, 827 F.3d at 401. That court, too, has been clear that similar does not mean "identical." *Id.* And, contrary to the insinuation in the petition (at 16), in *Morris*, the court "express[ed] no opinion" about whether the Sixth Circuit's approach "differs from the law in this Circuit." *Id.* at 402.

In sum, Petitioner failed to show similarly situated comparators under the law of any Circuit. And the courts of appeals themselves use similar formulations and consider similar factors, with differences in outcomes resulting from differences in the evidence plaintiffs introduce.

II. THE DECISION BELOW IS FULLY COMPLIANT WITH *REEVES*.

The courts of appeals routinely cite and comply with the instructions in *Reeves* v. *Sanderson* 530 U.S. at 147-48, that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* added, however, that

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the [employer's] action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. *Id.*

Thus, this Court instructed that "a number of factors" must be considered in determining whether a showing of pretext, in combination with a prima facie case of discrimination, raise a jury question of discriminatory intent. *Id.* at 148-49.

That is the path the First Circuit followed here. It found that no rational factfinder could conclude that Petitioner was demoted based on her age or retaliated against for complaining about discrimination. With respect to the demotion, the court stated that

"[w]ithout this unsuitable comparator evidence [addressed above]," Petitioner had no evidence that in any way suggests that she was demoted in March 2013 because of age discrimination. Pet. App. 9a. At oral argument, counsel could cite none." *Id.* Further, the court stated, there is no "evidence showing that Abbott told any material lies that might in context have been viewed as attempts to conceal a discriminatory motive." *Id.* at 10a. Indeed, the record was replete with "evidence that [Petitioner] and [her supervisor] had a difficult professional relationship from the get-go, leading [Petitioner] to file an unsubstantiated harassment claim against [the supervisor] back in 2011." *Id.* at 11a. See *id.* at 13a (citing a "total absence of evidence that [Abbott's] actions were motivated by [Petitioner's] age").

Petitioner disagrees with the court's conclusions, but it cites no evidence supporting the verdict that the court ignored, and its fact-bound disagreement with the court's conclusion is not a basis for this Court's review. The petition asserts that the court wrongly substituted its judgment for the jury, which could have found that "some of Abbott's witnesses falsely denied the fact that [Petitioner] had even been demoted." Pet. 26. But the witnesses readily admitted that Petitioner was transferred to a lower position, and the petition nowhere explains how incorrectly calling the demotion a "transfer" can be viewed as an "attempt[] to conceal a discriminatory motive." Pet. App. 10a-11a. The petition also repeats the district court's assertion that the jury could have concluded that Petitioner "had been set up to fail" in the position, Pet. 27, but, as the court of appeals explained, "there is no evidence to support this rather remarkable speculation," Pet. App. 10a.

Petitioner's disagreement with the court's assessment of the undisputed record facts about the reasons she was denied a promotion does not demonstrate that the First Circuit somehow defied *Reeves*. With respect to the Senior Product Manager promotion, the court found that "[t]he undisputed evidence in the record shows that [Petitioner] refused to participate in the mock-presentation component of the application process," and thus "voluntarily forfeited her eligibility for promotion." Pet. App. 15a (citing cases). Addressing Petitioner's futility argument, the court explained that this was *not* a case where the "employer unlawfully made it impossible or dangerous for a person to complete the application process," and that "it is not for the plaintiff to predict the employer's hiring decision and then claim to be the victim of that predicted decision." *Id.* at 15a-16a (citing cases). The court thus concluded, as a matter of law, that Petitioner was not eligible for the promotion she sought. The court also rejected Petitioner's claim that Abbott's requirement that she apply for the position was retaliatory because "the undisputed evidence in the record shows that Abbott began soliciting external candidates for the [position] in August 2013, well before [Petitioner] engaged in protected activity." *Id.* at 16a. The petition cites no decision in any circuit holding that *Reeves* requires a court to uphold a jury verdict of retaliation on similar facts.

Finally, the court properly rejected Petitioner's arguments that she presented sufficient evidence that she was given a low performance evaluation that resulted in the denial of two promotions in retaliation for complaining about her demotion. Pet App. 17a. Again, the court noted that the record "contains undisputed evidence that [Petitioner's] performance worsened after her mid-year evaluation," including

three missed deadlines, and one failure to complete a late project. *Id.* at 18a. The court noted that Petitioner did not dispute these facts. And the court considered and rejected Petitioner's remaining arguments based on undisputed record evidence. *Id.* at 19a-22a. Again, Petitioner cites no evidence supporting the verdict that the court overlooked, and disagreement with the court's conclusion is not proof that the court defied *Reeves*.

The petition also makes the more theoretical argument that *Reeves* stands for the proposition that a factfinder's "disbelief of an employer's proffered explanation for its decision can alone support an inference of discrimination." Pet. 24. That is an incomplete statement of *Reeves*' holding. As set forth above, a plaintiff's claim of discrimination cannot reach the jury if, *inter alia*, the evidence of pretext is weak, or "no rational factfinder could conclude that the [employer's] action was discriminatory," 530 U.S. at 148, as was the case here. Petitioner did not believe that she was demoted because she requested to be relieved of some of the duties of her position or that she was not promoted because she was unqualified for the positions (by virtue of her failure to complete the application process or of her low performance evaluations). But she admitted numerous facts that rendered her pretext evidence weak. See *supra* at 4-6, 9. A prima face case of discrimination accompanied by a plaintiff's subjective disbelief in the employer's explanation is not sufficient to take a discrimination case to the jury under *Reeves*; if it were, an employer could never receive summary judgment.

The petition further suggests that the courts of appeals are not faithfully applying *Reeves*. In support of its claim that the First Circuit is not doing so, it cites only a partial concurrence and dissent by Judge Bar-

ron in *Henderson* v. *Massachusetts Bay Transportation Authority*, 977 F.3d 20 (1st Cir. 2020). In that case, the First Circuit cited the framework established in *Reeves*, *id.* at 32, and assessed the record in detail before concluding that the plaintiff had not presented sufficient evidence of pretext or discrimination to get to a jury, *id.*

Judge Barron disagreed with the court's opinion that, in context, the plaintiff's evidence of pretext was too weak to support an inference of discriminatory intent. *Id.* at 46. Specifically, he thought that the employee had sufficiently shown pretext based on the employer's "assessment of an answer [to an interview question] that invites objective assessment when the record supportably showed that the employer's actual assessment of that answer is, objectively, indefensible." *Id.* See *id.* at 47 (it is not "necessarily unreasonable for a juror to infer that the evaluative process was tainted generally when the evidence of the employer's problematic evaluation of a specific, important question is clear enough"). Judge Barron's dissent painstakingly walked through the evidence and explained his disagreement with the court's decision that the evidence of pretext was weak, *id.* at 47-49, and that plaintiff failed to show the employer's stated reasons was "a pretext for race-based discrimination." *Id.* at 50. It was in this context that he stated that *Reeves* was being undermined by individual, fact dependent rulings. *Id.* at 54. Notably, Judge Barron cited no other cases in which he thought the circuit strayed from *Reeves*. *Id.* And the differing assessments of the proper application of *Reeves* to a complex set of facts at issue in *Henderson* do not show that the First Circuit is "drift[ing] away from *Reeves*." Pet. 22.

The petition likewise accuses the Sixth Circuit of "stray[ing]," Pet. 23, in *Brown* v. *Packaging Corp. of America*, 338 F.3d 586 (6th Cir. 2003). But the Sixth Circuit explained that it approved the jury instruction in question because it was *consistent* with *Reeves*, quoting that decision, *id.* at 593 (quoting *Reeves*, 530 U.S. at 146-47 ("it is not enough … to *dis*believe the employer, the factfinder must *believe* the plaintiff's explanation of intentional discrimination") (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524, 519 (1993))).

The petition also criticizes the Seventh Circuit—its preferred circuit with respect to the "similarly situated" standard—as "shirk[ing] *Reeves*." Pet. 23. But in *Waite* v. *Board of Trustees of Illinois Community College District Number 508*, 408 F.3d 339, 344 (7th Cir. 2005), the court recited *Reeves*' instruction that the court should consider "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly be considered on a motion for judgment as a matter of law." *Id.* at 343 (quoting *Reeves*, 530 U.S. at 148-49). After evaluating the full record, the court concluded that the record was sufficient to support an inference of discriminatory intent, and it upheld the jury verdict for the plaintiff. This analysis is fully consistent with *Reeves*.

Finally, the petition claims that other circuits—the Second and Fifth—support its view that a factfinder's "disbelief of an employer's proffered explanation for its decision can alone support an inference of discrimination." Pet. 24. Again, this incomplete statement of *Reeves* is misleading. These Circuits, like all others, understand that *Reeves* explains that such evidence

can be sufficient, but can also be insufficient depending on the record in its entirety.

In *Cross* v. *New York City Transit Authority*, 417 F.3d 241 (2d Cir. 2005), the Second Circuit quoted *Reeves*' conclusion that "sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated," *id.* at 249 (emphasis supplied), and observed that *Reeves* cautioned that in some instances where "the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation," nonetheless, "no rational factfinder could conclude that the action was discriminatory." *Id.* (quoting *Reeves*, 530 U.S. at 148). And in *Russell* v. *McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), too, the Fifth Circuit simply recited the *Reeves* approach, *id.* at 223, including that there may be instances "where a showing of pretext would not be sufficient to infer discrimination," *id.*, and it analyzed the evidence in *Russell* with that framework in mind. See also *Ratliff* v. *City of Gainesville*, 256 F.3d 355, 360 (5th Cir. 2001) (applying the *Reeves* approach).

The courts of appeals all apply *Reeves*. Although circuit judges sometimes have differing views about whether record evidence fulfills the *Reeves* standard in particular instances, there is no pervasive undermining of *Reeves*. Nor, if there were, would this be an appropriate case to take up that question. As the First Circuit concluded, Petitioner failed to present sufficient evidence that Abbott's reasons for demoting and not promoting her were pretextual, or that that Abbott was concealing a true motive of age discrimination.

III. THE FIRST CIRCUIT DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE JURY.

The petition's final argument is that the First Circuit misapplied applicable law in evaluating the record in this case and substituted its judgment for the jury's. That argument raises an issue that is not appropriate for this Court's review. See Sup. Ct. R. 10. It is also incorrect.

As shown above, with respect to each claim, the court considered whether Petitioner had presented sufficient evidence to allow a factfinder to conclude that Abbott demoted or declined to promote her based on her age, and concluded that the record lacked such evidence. That decision, accordingly, did not second-guess the jury, but rather concluded that Petitioner's claims had failed as a matter of law and that she had not presented sufficient evidence of age discrimination to place her claims before the fact-finder.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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