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

PETITIONER'S REPLY

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
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

September 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITIONER'S REPLY

This case presents important questions that frequently arise in discrimination cases that rest on indirect evidence—questions as to which the lower courts disagree. In their brief in opposition, respondents Abbott Laboratories P.R., Inc. and Kim Pérez (hereafter Abbott) argue that this Court's review is not warranted because the various tests used by the courts of appeals to determine whether comparators are "similarly situated" do not result in different outcomes. Abbott also argues that the courts of appeals have been faithful to this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and consistent in determining the circumstances under which rejection of an employer's explanation is not sufficient to permit an inference of discrimination. Both of these arguments are incorrect, and, accordingly, this Court should grant the petition to resolve the important issues presented here.

I. The circuit courts are divided on the standard for determining whether comparator evidence supports an inference of intentional discrimination.

A. The circuit split is widely recognized.

As the petition explains, the courts of appeals disagree on the proper test for determining whether comparator evidence supports an inference of intentional discrimination. Pet. 14–18. The courts apply three different tests, and the First Circuit chose the most demanding of them. *Id.* at 14. Abbott, however, contends that the differences in the tests are merely semantic and do not result in different outcomes. Opp. 14. That contention is belied by the

case law and ignores completely the authorities that have explicitly acknowledged the conflict.

The existence of the different tests is illustrated by the Eleventh Circuit's opinion in *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (*en banc*). There, the court sat *en banc* to resolve an intra-circuit conflict regarding "the proper standard for comparator evidence in intentional-discrimination cases." *Id.* at 1220. Before settling on a test, the Eleventh Circuit considered the Seventh Circuit's standard under which "the 'similarly situated' requirement is satisfied so long as the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless." *Id.* at 1224 (cleaned up, citing *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012)). The court also considered the Fifth Circuit's standard under which the plaintiff and the proposed comparators must be "nearly identical." *Id.* at 1226; *see, e.g.*, *Rogers v. Pearland Independent School District*, 827 F.3d 403, 410 (5th Cir. 2016).

The Eleventh Circuit noted that it had "bounc[ed] back and forth (and back and forth) between two standards—'nearly identical' and 'same or similar.'" *Id.* at 1224 (citations omitted). The *en banc* court rejected the former (the Fifth Circuit standard) as "too strict." 918 F.3d at 1226. And it rejected the latter (the Seventh Circuit standard) as "too lax." *Id.* Instead, the court adopted a third standard: A plaintiff and her comparators must be similarly situated in all material respects, *id.*, meaning that they are "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)).

Thus, as *Lewis* demonstrates, the courts of appeals have adopted three different standards for determining whether comparator evidence supports an inference of intentional discrimination. Numerous commentators have recognized the split among the Circuits and have called for this Court's review. Pet. 17–18. And as the petition explains, the different tests have resulted in wide variation in outcomes. Pet. 15–16.

B. This case is a good vehicle for resolving the conflict.

Abbott asserts that this case is a poor vehicle for resolving the conflict and deciding the proper test because the case would have been decided against Ms. González no matter which standard was applied. That assertion, however, is based on the erroneous claim that Ms. González not only failed to show that she and the comparators had the same positions, duties, and supervisors, but that she "presented no other evidence of similarity." Opp. 19. In fact, Ms. González demonstrated that only three employees were affected by the reorganization, that all three were reassigned to lower-level positions for an interim period, and that all three received positive performance evaluations for the calendar year preceding the expiration of the interim period. Yet only Ms. González—who was significantly older than her two comparators—was demoted following the transition period.[1] The other

[1] In its brief in opposition, Abbott characterizes its demotion of Ms. González as a "reassignment," "designat[ion]," or "transfer[]." Opp. 5. The district court rejected such characterizations, finding that "defendants' relentless denials that González was 'demoted' despite evidence to the contrary support the premise that they had something to hide." App. 93a–94a; *see*

(*Footnote continued*)

two employees affected by the reorganization, both of whom Ms. González had previously supervised, were moved to Level 16 positions, while Ms. González was demoted to a Level 15 position. Indeed, Abbott filled every position sought by Ms. González following the reorganization with someone younger.

The district court held 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 employment and were all offered—and accepted—the same conditions at the time of the reorganization. Pet. App. 89a–91a. The First Circuit, however, held that differences in the job duties of the other comparator employees precluded an inference of age discrimination.

In contrast, had the decision been reviewed in the Seventh Circuit—where comparator evidence need only meet the standard for relevance under Federal Rule of Evidence 401—the comparator evidence would have been found sufficient as a matter of law to allow the factfinder to consider it in deciding the ultimate question of discrimination. *See Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018) ("In the employment discrimination context, the requirement to find a similarly situated comparator is really just the same requirement that any case demands—the requirement to submit relevant evidence."). In the Seventh Circuit, evidence of what happened to other employees is relevant so long as

---

id. at 94a–95a (finding that Abbott's witnesses' denials that Ms. González was demoted were contradicted by the testimony of their co-worker and the documentary evidence).

they were, as here, "in the same boat as the plaintiff." *Id.*

Similarly, this case would have been resolved differently in the Sixth Circuit, where a comparator must be similarly situated to the plaintiff in relevant respects, which will vary depending on the circumstances of the case. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352–53 (6th Cir. 1998). In *Ercegovich*, the court of appeals rejected the district court's conclusion that comparators must have the same position and duties as the plaintiff and held that in the context of a reorganization in which some affected employees are offered transfers and some are not, "differences in the job activities previously performed by transferred and nontransferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees." *Id.* at 353. In contrast, the First Circuit in this case held that such differences precluded an inference of age discrimination based on Abbott's more favorable treatment of the younger employees affected by the reorganization.

Because Ms. González's comparator evidence would have been treated as relevant in at least the Sixth and Seventh Circuits, this case is a good vehicle for the Court to resolve the conflict regarding the appropriate standard for determining the probative value of comparator evidence.

II. The Court should grant certiorari to clarify the circumstances in which disbelief of an employer's proffered reason for an adverse employment action is insufficient to permit the trier of fact to infer that the employer engaged in unlawful discrimination.

As the petition explains, some courts of appeals, including the First Circuit here, have strayed from this Court's holding in *Reeves*, 530 U.S. at 147–48, that disbelief of an employer's asserted nondiscriminatory or nonretaliatory reason for an adverse employment action may permit—but does not require—the trier of fact to infer that the employer engaged in unlawful discrimination or retaliation. The differing approaches to *Reeves* have created a conflict among the courts of appeals that requires this Court's intervention. *See* Pet. 22–25 (contrasting decisions in the First, Sixth, and Seventh Circuits with those of the Second and Fifth Circuits).

Abbott's suggestion that there can be no conflict because each of the decisions purport to apply *Reeves*, Opp. 28–29, misses the point. The courts apply *Reeves* inconsistently. As Judge Barron has observed, the treatment of *Reeves* is such that "*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). Abbott dismisses this observation as limited to a single fact-dependent ruling because Judge Barron did not cite all the other cases that demonstrate the move away from *Reeves*. Opp. 27. The lack of a string cite, however, hardly undermines the fact that some courts, in the guise of applying *Reeves*, have reverted to a standard that requires more than rejection of the employer's nondiscriminatory explanation to sustain a jury's

finding of discrimination. Indeed, even at the time this Court decided *Reeves*, Justice Ginsburg anticipated that it would "be 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 which establishes a prima facie case and pretext] in order to survive a motion for judgment as a matter of law." *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring).

Abbott maintains that the First Circuit did not defy *Reeves* by requiring evidence beyond that which is ordinarily sufficient because—according to Abbot—Ms. González "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 [or retaliation] had occurred." Opp. 23 (quoting *Reeves*, 530 U.S. at 148). Thus, Abbott argues that this case fits within one of the potential exceptions to the general rule announced in *Reeves*. Although Ms. González disagrees with Abbott's characterization of the evidence, Abbott's invocation of a possible exception to *Reeves*' general rule belies Abbott's assertion that this case is a poor vehicle for the Court to clarify the circumstances in which a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, is insufficient as a matter of law to sustain a jury's finding of discrimination or retaliation.

The dispute is stark. The district court explained that the jury rejected Abbott's assertion that deficient performance was the cause of Ms. González's demotion because she initially was given unattainable goals without the proper supporting staff; she received a positive performance evaluation after some of her

duties were reassigned but before she was demoted; and the testimonies of Abbott's decisionmakers were riddled with inconsistencies and contradictions and their demeanor suggested that "they had something to hide." Pet. App. 91a–94a. Similarly, the district court found that the evidence of retaliation was "overwhelming" because of "irregularities in the promotional processes, deviations from established policies, shifting explanations, stealthy personnel moves, contradictions and inconsistencies." *Id.* at 124a–25a. As Abbott explains, *see* Opp. 23–26, the First Circuit concluded that the same evidence was insufficient as a matter of law to sustain the jury's verdict. But Abbott is wrong to characterize the dispute as a "fact-bound disagreement." *Id.* at 24. The issue is a question of law: whether the evidence presented fits within an exception to the *Reeves* standard for circumstances where a plaintiff's pretext evidence is weak and there is ample independent evidence that no discrimination or retaliation occurred.

The courts of appeals are divided on the proper application of the *Reeves* exception. For example, in *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273 (10th Cir. 2010), the plaintiff established a prima facie case of age discrimination and demonstrated that the defendant's proffered reasons for her demotion were pretextual, but the district court granted summary judgment for the defendant based on the *Reeves* exception. *Id.* at 1280. The Tenth Circuit reversed, holding that "the rare conditions necessary to establish the *Reeves* exception" were not present, and the district court's decision amounted to a return to the pretext-plus standard rejected in *Reeves*. *Id.* The court held that the *Reeves* exception did not apply both

because the pretext evidence, viewed in the light most favorable to plaintiff, was not weak, and because "the corollary 'abundant and uncontroverted independent evidence that no discrimination had occurred' did not exist." *Id.* at 1282 (quoting *Reeves,* 530 U.S. at 148). The Fourth and Seventh Circuits also construe the *Reeves* exception narrowly. *See Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 649 (4th Cir. 2002) (denying defendant's motion for judgment as a matter of law where the defendant argued for the *Reeves* exception but produced "less than 'abundant' and 'uncontroverted' evidence that discrimination did not occur in combination with a weak showing of pretext by [the plaintiff]"); *Davis v. Wisconsin Dept. of Corrections*, 445 F.3d 971, 977 (7th Cir. 2006) (denying defendant's motion for judgment as a matter of law under the *Reeves* exception because there was not "abundant and uncontroverted independent evidence" that no discrimination occurred).

In contrast, the First Circuit in this case held that Ms. González had not produced sufficient evidence to sustain the jury's verdict despite a complete absence of independent evidence that no discrimination or retaliation occurred. Other courts of appeals also construe the *Reeves* exception broadly. *See Mathes v. Furniture Brands Intern., Inc.*, 266 F.3d 884, 887–88 (8th Cir. 2001) (affirming district court's grant of summary judgment for defendant based on a weak showing of pretext without addressing the "abundant and uncontroverted independent evidence" prong of the *Reeves* exception); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 381–82 (2d Cir. 2001) (comparing different approaches to the *Reeves* exception and describing the approach in the Second

Circuit as broader than that of the Fifth and Fourth Circuits).

The Court should grant certiorari and decide this legal issue to provide needed guidance on the circumstances that justify a departure from *Reeves*'s general rule that disbelief of an employer's proffered reason for an adverse employment action can alone support an inference of discrimination or retaliation.

CONCLUSION

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
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

September 2021