No. _____

In The Supreme Court of the United States

CAROLYN D. ROBINSON,

Petitioner,

v.

WALMART STORES EAST, L.P.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting test remain a part of the summary judgment analysis in employment discrimination cases, and in particular for claims involving section 42 U.S.C. § 1981?

2. Does placing the similarly situated analysis in the prima facie case rather than in the pre-text stage of the *McDonnell Douglas* test deprive alleged victims of discrimination their 7th amendment rights?

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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JURISDICTION

The Eleventh Circuit entered Judgment on December 13, 2021.

CONSTITUTIONAL, STATUTORY, FEDERAL RULES OF CIVIL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be reexamined in any Court of the United States, than according to the rules of the common law"

In relevant part 42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

> evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Federal Rule of Civil Procedure 56:

> **(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

§ 2000e-2. Unlawful employment practices

> a) Employer practices
> It shall be an unlawful employment practice for an employer--
> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

42 USCA § 2000e-3 Other unlawful employment practices,

> **(a)** Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-

> job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

1. Robinson, a Wal-Mart pharmacist for thirteen years, was terminated when she received a fourth and final write-up referred to internally as a "coaching" which required her termination.

2. Robinson is African American and fifty-one years old at the time of her termination. Robinson Dec.39-1, pg. 1

3. The termination decision was reviewed and affirmed by Billy Lawley, forty years old in 2020 and the market manager for that area. Doc. 35-1 Robinson Declaration; Doc. 32-2; Lawley Depo pg. 59:6-23, 95:3-5. Lawley was the market manager for Martin as well as Robinson.

4. In April 2016, Martin became the supervisor in the Homewood, Alabama Wal-Mart pharmacy. Martin Dec. 33-4, pg. 1, ¶4. Martin proceeded to issue Robinson a series of escalating

write-ups that resulted in her termination on April 5, 2018, for a "Teal" card violation as she was on Third Written Coaching all issued by him. Doc. 33-4, ¶85.

5. The Teal card violation itself is not a termination offense. Lawley Dep. Doc, 33-2, pg., 17 Dep. pg. 66:8-10. Yet, Robinson was advanced to termination because of the teal card violation.

6. Prior to the Teal card coaching, the disciplines that led to Robinson's termination were issued by Martin for the following events: 08/05/2016 Violation of GENCO policy regarding returns (Deposition Ex. 12 Doc. 33-1, pg. 140); 04/06/2017 Violation when a pharmacy tech employed by Sam's on loan to Wal-Mart pharmacy for the day bought her purse into the work area (Robinson Deposition Doc. 33-1, 38, 39 (Dep pg. 148-151) and Exhibit 14 Doc. 33-1, pg. 148); 11/27/2017 Violation of DUR documentation, checked "Doctor Approved" when Robinson should have checked "Other". Robinson Dep. Doc. 33-1, pg. 147 (Dep pg. 182-185), Exhibit 15 Doc. 33-1 pg. 149.

7. After receiving her first write-up from the newly hired Martin, Robinson requested a meeting with Billy Lawley, the market manager, to discuss and was informed that it would be removed Robinson Dec. 39-1 ¶8, 9. The first write up addressed how the pharmacy handles the return of expired medicine to the distributor, known as GENCO return. Robinson Dec. 39-1, pg. 2, ¶5-9.

Robinson contended her conduct did not warrant a formal discipline because she was unaware of a policy change. Id. Lawley informed Robinson that he would get with Martin about her write-up stemming from the updated GENCO policy, (… "I'll talk to Zack and tell him to take it off." It was never taken off) Robinson Deposition 33-1, pg. 32, Dep. pg. 125:20-23.

8. On April 6, 2017, Martin issued another formal coaching and advanced Robinson's in the disciplinary steps because he determined that she allowed a pharmaceutical technician who worked for the sister company, Sam's Club, to bring her plastic bag to work containing "…her wallet, a tin of gum and water bottle…" Doc. 33-1, pg. 148. The visiting Sam's technician was assigned a shift at the Wal-Mart pharmacy due to staffing shortage issues.

9. Martin explained in his discipline, "Impact of Associates Behavior: This is in violation of our policies on personal items of technicians and the rule is in place to prevent theft." Doc. 33-1, pg. 148. Robinson Coaching dated 04/06/2017

10. Robinson was unaware that the visiting technician brought her bag containing the water and gum into the pharmacy (which was allowed under Sam's pharmacy rules). Martin informed Robinson the event was recorded but refused to show her the film. Robinson Dec. 39-1, pg. 3, ¶13-14. Instead, Martin issued Robinson a write-up for not securing the pharmacy. Id.

11. Robinson requested an open-door meeting (allowed under Wal-Mart policy) to discuss these issues with Martin's supervisors Lawley and Chad Souers, Wal-Mart's Health and Wellness Director for the region.

12. Martin raised her concerns that she was being treated differently than Martin particularly with respect to discipline issues. Souers recorded Robinson's issues "Expressed concerns that Zac wasn't coached for the same things she was….". Doc. 33-3, pg. 31; Robinson also raised that, "Zac was seen by associates laying on the floor and they took a picture of him. He allegedly told them to wake up him if a customer came by. This has allegedly happened more than once." Email Summary from Chad Souers Re: Open Door Doc. 33-3, pg. 31; Wal-Mart Interrogatory Response #8 (Doc. 39-2, pg. 5).

13. The picture reflected:

14. No coaching or written discipline was issued to Mr. Martin stemming from the picture for sleeping or lying down or not securing the pharmacy. Doc. 39-3(Email from Lawley to Jamey Miller); Wal-Mart Interrogatory Responses Doc. 39-2, pg. 6, #8, pg. 7 #10, Lawley Deposition Doc. 33-2, pg. 26, Dep. pg. 102.

15. Mr. Lawley choose to not to hold Mr. Martin accountable for laying on the floor, as Martin was being disciplined for something at the same period and did not want to issue two coaching write-ups which would have advanced him in the disciplinary process. Doc. 39-3 Lawley Response to Miller Questions; Lawley Deposition Doc. 33-2, pg. 46, Dep. Pg. 102; 103.

16. Lawley explained why he did not discipline Martin, "Zach was held accountable for another opportunity presented during the open door so I addressed it through discussion as not to complete 2 levels of discipline in a day." Doc. 39-3, pg. 1

17. In deposition Mr. Lawley testified Martin was engaged in the same type of behavior, "Sure. It's my process and my process and belief that accountability or coaching is for improvement and not be punitive. So, what was brought to me that day, it was write-up, with that same type of behavior, so I held him, accountable for the behavior and I didn't go two levels…." Lawley Dep. Doc. 32-2, pg. 26, (dep. pg. 102).

18. Mr. Martin's discipline file does not reflect any discipline for the same type of behavior of sleeping or laying on the floor nor any discipline whatsoever stemming from the picture. Doc. 33-31 Martin Discipline History filed under seal.

19. Rather Mr. Martin's explanation was accepted that "in lieu of closing the pharmacy", Mr. Martin was credited with working through his illness and keeping the pharmacy open. Doc. 33-3, pg. 7 (Souers Dep, pg. 26:14-21). Nevertheless, it is stretch to say the pharmacy is secure if the pharmacist is asleep on the floor.

20. Ms. Robinson alleged that Mr. Martin slept more than once, however, Mr. Souers only had the one picture. Doc. 33-3, pg. 27; 22-25.

21. Mr. Lawley choose not to speak with <u>any</u> techs who worked with Martin about the picture or whether they observed this behavior on any other occasions. "The picture spoke for itself, sir." Lawley Dep. Doc. 33-2, pg. 14 (dep. pg. 56:14-19).

22. Mr. Martin's inability to complete assigned tasks left more for herself as she completed his undone tasks from the day before. Doc. 33-3, pg. 31 Chad Souers Email to Billy Lawley Re: Open door meeting.

23. Following reporting Mr. Martin for sleeping, he issued Robinson two more write-ups, the last one advancing her to termination. In November 2017, Robinson checked the wrong box on a form where that documents patient was advised about

medication interaction. The doctor wrote the prescription, and Robinson checked "doctor approved" box. There was another tab that said "other" to reflect that Robinson consulted with the patient which she did. Robinson checked the wrong box and Martin issued the written discipline. Robinson Dec. 39-1, pg. 5, ¶'s 24-27.

24. On April 05, two days before the April 07, 2017, coaching would expire, Martin terminated Robinson's employment. Doc. 33-1 pg. 166. The reason was that she did not reminder enough reminder slips for patients to refill prescriptions otherwise known as "teal" cards. Martin Declaration Doc. 33-4, pg., 26, ¶85.

25. Pharmacists can tell when a patient has not been taking (or at least refilling a prescription) regularly. Teal cards are one way to remind the patients to be complaint with medication. Mr. Martin also had responsibility for teal cards and being graded on whether customers were overall adhering to the medication schedules. Robinson Dec. 39-1, pgs. 6-7.

26. Failure to place a Teal card in the patient's prescriptions is not considered a "gross misconduct" requiring termination. Souers Dep. Doc. 33-3, pg. 10 (Depo pg. 40:1-7).

27. Robinson texted Lawley and asked if he was aware of the termination. Doc. 33-1, pg. 166. He confirmed that he was. Id.

28. Lawley was aware of the termination, had the power to reverse the decision and supported the termination. Id. and Doc. 33-2, pg. 15 (Lawley dep. pg. 59:6-23)

29. If the earlier write-up had been removed as Robinson was informed, she would have been at a lower level of discipline. Doc. 33-1, pg. 140.

30. Robinson was replaced by a 39-year-old African American. Wal-Mart's Interrogatory Responses, Doc, 39-2, Question 1, pg. 2, 3.

REASONS TO GRANT THE WRIT

This petition seeks the Court's intervention on the continued use of the *McDonnell Douglas* test and/or in what form it is used to be consistent with the 7th Amendment jury trial right that appears in the text of the United States Constitution.

Carolyn Robinson, a 13-year African American pharmacist, was advanced within a progressive discipline system through a series of write-ups by her recently hired fellow pharmacist and terminated. By contrast, that much younger white pharmacist supervisor was spared discipline when violating work rules. Robinson contended unsuccessfully that she was subjected to different terms and conditions. But for her race/age, Robinson contended she would not have been terminated. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004) (To prevail a plaintiff need only produce sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer, which *permits*, but does not compel the trier of fact to find illegal discrimination.).

Applying the familiar *McDonnell Douglas* analysis, the Court held no prima facie case existed.

"To establish a prima facie case of discrimination under the McDonnell Douglas framework, a plaintiff bears the burden of showing, among other things, that her employer treated "similarly situated" employees outside her class more favorably. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220-21 (11th Cir. 2019) (en banc) (quotations omitted). An employee is "similarly situated" to the plaintiff when he is "similarly situated in all material respects." Id. at 1226

(quotations omitted). Ordinarily, this means that a similarly situated employee will: (1) have engaged in the same basic misconduct as the plaintiff; (2) have been subject to the same employment policy, guideline, or rule as the plaintiff; (3) have had the same supervisor as the plaintiff; and (4) will share the plaintiff's employment or disciplinary history. Id. at 1226-27." A4.

Using a strict application of the *McDonnell Douglas* test, the lower courts rejected Robinson's contention that she was held to a different discipline standard of employment than her fellow pharmacist of another race. He received no discipline arising out of the picture because it would be punitive whereas Robinson lost her job without consideration of whether terminating her for a rule violation (not considered a terminable offense) was also punitive.

Robinson's citation of her fellow pharmacist in repose who suffered no disciplinary consequence failed to raise any question for trial that she experienced discrimination in the application of workplace rules.

"However, Martin was not an adequate comparator because he held a different position with different responsibilities, and he also had a different supervisor than Robinson." A5.

Robinson and her much younger white male alleged comparator were pharmacists in the same location. They were the only pharmacists in this Wal-Mart store. The different responsibilities reflect the additional duties as pharmacy manager, in addition to being one of the two in store pharmacists. Rather than hold him to a higher managerial standard of not securing the pharmacy, he was given a pass. The reason: the market manager (who was

in the same chain of command as Robinson) did not want to advance Martin in the disciplinary system for two infractions as he was already in jeopardy for another violation.

In *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1232 (C.A.11 (Ga.), 2019) an en banc decision reviewing the similarly situated prong of the *McDonnell Douglas* test, the dissent presciently predicts what would occur in the Robinson decisions.

"How the "similarly situated" inquiry is implemented matters: if it is turned up too high at the prima facie stage, it sweeps in the employer's nondiscriminatory reasons. And considering the employer's nondiscriminatory reasons at the prima facie stage flouts Supreme Court precedent. It also affects whether the employee ever has a chance to demonstrate that the employer's reasons were pretextual or whether the court must instead blindly accept the employer's untested assertions as a non-discriminatory basis for the employer's decision. So by locating a rigorous "similarly situated" requirement at the prima facie stage of the *McDonnell Douglas* framework, the Majority Opinion shrinks the number of potentially discriminated-against plaintiffs who will have an opportunity to see trial—or even to challenge their employers' proffered reasons for taking action against them.

And the errors do not end there. In applying the "similarly situated" standard to Lewis's facts, the Majority Opinion overly broadly construes the term "material" in that standard. As a result, it requires comparators to be similarly situated in immaterial ways. The Majority Opinion also omits key facts showing that Lewis and her two chosen comparators

were "similarly situated" in all material ways, while violating an elementary principle of summary-judgment review by assuming facts in favor of the Department that are not supported by the record." *Id.*

As described above, Robinson fell victim to that dilemma when the 11th circuit panel affirmed the District Court's decision confirming that her failure to satisfy the prima facie case under *McDonnell Douglas* analysis ended her case. Robinson's career as Wal-Mart pharmacist also ended after questioning why her fellow younger white pharmacist and manager was escaping discipline that she was receiving. As it stands, a jury will never hear her claims.

Rather, as Federal Rule of Civil Procedure 56 prescribes and in analyzing employment discrimination cases the more appropriate standard consistent with 7th Amendment to the United States Constitution: are there genuine dispute of material facts that require a trial.

> Fidelity to *the McDonnell Douglas* prism elevates the judicially created test ahead of the ultimate question of whether the challenged decision was stained by discrimination.
>
> Continuing reliance on the *McDonnell Douglas* burden shifting analysis to assess whether discrimination claims using indirect evidence can proceed to trial has been questioned for some time. See Sandra F. Sperino, Flying Without a Statutory Basis: Why *McDonnell Douglas* Is Not Justified by Any Statutory Construction Methodology, 43 HOUS. L. REV. 743, 762 (2006). Since the 1973 opinion there has been a sea change in summary judgment grants for employment discrimination

cases, what was once rare is now commonplace. See Mark W. Bennett *Essay: From the "No Spittin', No Cussin' and No Summary Judgment to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judges Four-Decade Perspective.* 56 N.Y.L. Sch. L. Rev 685 (2012-2013). While originally helpful to plaintiffs in discrimination cases, "it is no longer helpful to anyone". Hon. Denny Chin *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective.* 57 N.Y.L. Sch. L. Rev. 671, 681 (2012-2013).

Or consider that,

> "The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational. The *992 Court does not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court's ruling in *Desert Palace.* When possible, this Court seeks to avoid those machinations of jurisprudence that do not comport with common sense and basic understandings of human interaction." *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 991–92 (D.Minn. 2003)

Prompted by the admonishment in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (C.A.7(Ill.), 2016) that courts within the 7th Circuit stop sifting discrimination evidence into "direct" and "indirect" categories, "Accordingly, we hold that district courts must stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards.", a district court summed up the dilemma:

> "Though the *Ortiz* court noted that its decision did "not concern *McDonnell Douglas* or any other burden-shifting framework," ……. We struggle to reconcile the Seventh Circuit's clear preference for a single, simplified approach in analyzing claims of discrimination with the continued existence and applicability of the Supreme Court's directives in *McDonnell Douglas*." *Reymore v. Marian University*, 2017 WL 4340352, at *8 (S.D. Ind., 2017)

In the original *McDonnell Douglas* case, there was a four-day non-jury trial (at that time jury trials were not permitted in Title VII cases), where this Court explained, "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. "*McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1823, 411 U.S. 792, 800 (U.S.Mo. 1973).

The context was post-trial appellate review and originally did not address the predicate question of whether there are disputed material facts for trial or Federal Rule 56(a)'s requirement, "The court shall

grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Robinson's complaint contained a 42 U.S.C. § 1981 claim. Doc 1, pg. 6. The Court of Appeals determined Robinson waived application of a "but for" standard by not addressing that argument in the district court. A4 fn. 2. At least for § 1981 claims, "but for" is how the claims are to be proved during the lawsuit.

In the harmonious opinion issued in *Comcast Corporation v. National Association of African American-Owned Media*, 140 S.Ct. 1009, 1019 (U.S., 2020), this Court itself questioned, "Whether or not *McDonnell Douglas* has some useful role to play in 1981 cases, it does not mention the motivating factor test, let alone endorse its use only at the pleadings stage. Nor can this come as a surprise: This Court didn't introduce the motivating factor test into Title VII practice until years *after McDonnell Douglas*."

Now with the benefit of the *Comcast* decision separating § 1981 "but for" analysis from Title VII's "motivating factor" following the 1991 amendments to the Civil Rights Act, *McDonnell Douglas* adds unnecessary layer of complexity.

In *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1739 (U.S., 2020) explained there can be multiple "but for" factors that impact liability, if any.

The traditional "but for" analysis is more direct without a quixotic quest to prove a "prima facie" case much less "pretext".

"Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because

the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid*.; *Nassar*, 570 U.S. at 350, 133 S.Ct. 2517."*Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1739 (U.S., 2020)

The *McDonnell Douglas* paradigm is not used at trial, thus applying the burden shifting back and forth like a tennis game at the summary judgment stage, a trial in paper form no longer makes sense. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, (1983); "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," *Burdine, supra,* at 252, 101 S.Ct., at 1093, in deciding this ultimate question." See also *Reeves v. Sanderson Plumbing Products, Inc*., 120 S.Ct. 2097, 2106, 530 U.S. 133, 142–43 (U.S.,2000)

"Accordingly, "the *McDonnell Douglas* framework—with *143 its presumptions and burdens"—disappeared, *St. Mary's Honor Center, supra,* at 510, 113 S.Ct. 2742, and the sole remaining issue was "discrimination *vel non,*" *Aikens, supra,* at 714, 103 S.Ct. 1478."

CONCLUSION

If adherence to the text of the discrimination statutes is the goal then the *McDonnell Douglas* test should be retired in favor of a summary judgment approach consistent with Federal Rule of Civil Procedure 56 and the 7th Amendment to the United States Constitution.

Respectfully submitted,

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