

No. \_\_\_\_\_

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**In the**  
**Supreme Court of the United States**

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FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

*Petitioner,*

v.

LAWANNA TYNES,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the prima facie case and comparator analysis set forth in this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny remains the correct legal test in proving employment discrimination based on circumstantial evidence or may a court disregard *McDonnell Douglas*' prima facie case and comparator standard and travel under the less-rigorous "convincing mosaic" theory to prove discrimination based on circumstantial evidence.

## **LIST OF PROCEEDINGS**

U.S. Court of Appeals for the Eleventh Circuit  
No. 21-13245

Lawanna Tynes, *Plaintiff-Appellee*, v.  
Florida Department of Juvenile Justice,  
*Defendant-Appellant*.

Final Opinion: December 12, 2023

Rehearing Denial: February 21, 2024

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U.S. District Court, Southern District of Florida  
No. 18-CV-62891-WPD

Lawanna Tynes, *Plaintiff*, v.  
Florida Department of Juvenile Justice, *Defendant*.

Final Judgment: September 8, 2021

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Florida Department of Juvenile Justice, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in No. 21-13245.



## **OPINIONS BELOW**

The amended opinion of the Eleventh Circuit is published at 88 F.4th 939 and attached hereto at App.1a. The relevant order of the Southern District of Florida is unpublished and attached hereto at App.76a.



## **JURISDICTION**

The Eleventh Circuit issued its initial decision on December 12, 2023. (App.39a) The Eleventh Circuit issued an amended decision on December 27, 2023. (App.1a) The Eleventh Circuit recently issued a second amended decision on May 15, 2024.<sup>1</sup> The Eleventh Circuit denied the FDJJ's petition for rehearing and for rehearing *en banc* on February 21, 2024. (App.102a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

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<sup>1</sup> The second amended opinion contained no substantive changes to the Eleventh Circuit's amended opinion and was purely "cosmetic" in nature.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### United States Constitution Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . . to Controversies . . . between a State, or the Citizens thereof, . . .

### 28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.



## STATEMENT OF THE CASE

### I. Background

The core of this case is a warden's failure to do her job that led to a systemic failure at a juvenile institution that endangered the lives of youth and staff. (App.203a-204a) On November 15, 2015, at the Florida Department of Juvenile Justice ("FDJJ")'s Broward County Facility, an unprecedented *fifteen* codes were called, including 13 "code blues" (denoting physical altercations), a "code green" (denoting a possible escape), and a "code white cutdown" (denoting a possible suicide attempt). (App.204a-205a) A code is called when an officer needs assistance. (App.204a)

This Broward County Facility (the “Facility”) was under the care and control of the Plaintiff, Lawanna Tynes. (App.204a) As the superintendent of the Facility, Tynes was tasked with managing the Facility and ensuring the safety of the youth and staff. (App.204a)

Furthermore, when certain codes are called—*i.e.*, when youth and staff are put in peril—the FDJJ mandates that the Facility call the Central Communications Center (“CCC”). (App.206a-207a) Tynes admitted that on November 15, 2015, there were *several* different instances that required such a call to the CCC. (App.206a-207a) However, *no one* (including Tynes) called the CCC on November 15, 2015. (App.206a-207a) Tynes did not call the CCC. She did not call her Regional Director. (App.206a-207a) And she did not ensure that her staff called the CCC or the Regional Director about the *on-going* codes on November 15, 2015. (App.206a-207a)

The Facility’s November 15 systemic failures raised concerns. (App.207a) This led to FDJJ assembling a Tactical Assessment Team of FDJJ officers to investigate and ensure that the Facility was following proper procedures that safeguarded the safety and security of the Facility’s youth and staff. (App.207a-208a) The Team arrived at the Facility on November 30, 2015, and stayed until December 4, 2015. (App.208a)

On the *first* day the Team was at the facility, it was notified of an *on-going* incident involving five youth. (App.208a) These youth had barricaded themselves in a room for more than *twelve hours* and refused to come out. (App.208a) The Team found this was, in part, because of the staff’s failure to follow proper procedure. (App.208a) The Team itself had to

intervene and helped de-escalate the confrontation and coaxed the youth safely out of the room. (App.208a)

After that, the Team conducted their investigation and learned that the Facility did not routinely lock the youth's rooms at bedtime, the Facility allowed the youth to stay up past midnight and watch television, there was no set schedule during the day, and the Facility was not providing the youth with proper schooling. (App.208a) The Team also learned that the Facility did not lock down the youth during shift change. (App.208a) Lockdowns allow youth to rest and be secure in their rooms while staff changes. (App.208a) In addition, the Facility did not use confinement cells (contributing to the staff losing control), but instead, used such confinement cells for storage. (App.208a) This mismanagement of the Facility resulted in a spike of incidents involving staff laying hands on the youth. (App.208a)

The Team's investigation also revealed on-going failure to manage staffing. (App.208a) Tynes violated procedure by not having a Master Schedule. (App.208a) She had no system for providing coverage when a supervisor called out. (App.209a) The use of overtime doubled during her tenure. (App.209a) Staff satisfaction plummeted under the Plaintiff's watch from 4.0 before she arrived to 2.4 when she left in December. (App.209a)

Further, Tynes failed to have a system in place to track staff who were on alternate duty because of worker's compensation which contributed to the staffing issues. (App.209a) In December of 2015, the Facility had ten (10) staff who were on alternate duty. (App.209a) Tynes was not aware of their status because she did not properly track it. (App.209a) Once the Team arrived, they learned that two (2) of the staff had been cleared

by their doctor to return to full duty back in October (two months earlier) but Tynes failed to return them to full duty. (App.209a) The Team had to intervene again and immediately returned these two (2) staff members to full duty. (App.209a)

There were other indications that Tynes repeatedly failed to follow FDJJ procedures. (App.209a) For example, Tynes did not document facility inspections; there was no Master Key list; and when the Team arrived at the Facility in November it learned that five sets of keys were missing. (App.209a) The Team was able to locate two sets of keys in the maintenance office, but three sets were never found. (App.209a)

After the Team's stay at the Facility from November 30, 2015, through December 4, 2015, it generated a report. (App.209a) FDJJ thereafter terminated Tynes on December 11, 2015, for violation of numerous standards and codes. (App.209a)

## **II. Tynes' Discrimination Suit**

Notwithstanding the Facility's systemic failures of November 15, 2015, and beyond, Tynes, an African American female, filed a civil action against the FDJJ alleging race and sex discrimination under Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981. (App.241a)

In accordance with this Court's landmark decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Plaintiff alleged a *prima facie* case that similarly situated employees who were a different race and sex were treated more favorably, *i.e.*, the comparator theory.

(App.243a) In accord therewith, both parties prosecuted and tried this case under a comparator theory:

- In the Complaint, Tynes first raised the comparator argument.
- In defense of FDJJ's Motion for Summary Judgment below, Tynes asserted six comparators.
- Presentation of evidence during trial regarded the comparators, in which the lower court found as follows: "First, the circumstantial evidence regarding the two comparators was sufficient to establish the discrimination claims [DE-137, pp. 122, 125]. Credibility was for the jury to decide."
- During closing arguments, Tynes argued the comparator theory.
- In accordance with the Tynes' arguments during trial, in the post-trial Motion for Judgment as a Matter of Law, comparators were argued and relied on by FDJJ.

(App.243a)

During trial, Tynes presented no direct evidence of racial or sex discrimination. (App.210a) Tynes offered no evidence of discriminatory statements by FDJJ officials. (App.210a)

Tynes comparator evidence was based solely on two comparators: a white male and a white female. (App.210a) Tynes did not offer any evidence that either comparator, both Superintendents, experienced multiple codes in a single day. (App.211a) Rather, Tynes'

comparator evidence was limited to offering evidence of isolated incidents with the comparators. (App.211a)

There was no suspicious timing evidence. (App. 210a-213a) There was no impeachment evidence. (App. 210a-213a) The only evidence of discrimination presented was that Tynes and her supervisor did not like the decisionmaker, and Tynes believed that the decisionmaker acted with discriminatory intent when she was fired. (App.210a-213a)

However, what was presented without dispute were the details of November 15, 2015, and that fifteen codes were called that day, including 13 “code blues” (denoting physical altercations), a “code green” (denoting a possible escape), and a “code white cutdown” (denoting a possible suicide attempt). (App.205a) Tynes admitted at trial that November 15 was a “very off day” and “it was not a good day.” (App.206a) This systemic failure—plus the additional systemic failures noted by the Team in its report—was a legitimate basis for termination within the sound discretion of the FDJJ. (App.209a)

Further, at no point in time before the FDJJ’s appeal to the Eleventh Circuit did Tynes rely on the so-called “convincing mosaic” theory. (App.244a) Rather, Tynes prosecuted this matter below as a comparator case for which the FDJJ launched its best defense. (App.244a) In fact, a close review of the record reveals that the phrase “convincing mosaic” was not referenced in Tynes’s opening statement, in her closing argument, or at any other point during trial or in post-trial motions or responses. (App.244a) The only minuscule references to that phrase during the entirety of the case were in Tynes’ Response in Opposition to Defendant’s Motion for Summary Judgment and in the Joint Pre-Trial

Stipulation. (App.244a) However, these were simply one-sentence references. (App.244a) Thus, Tynes never actually argued or pursued the “convincing mosaic” theory at any stage of the case prior to appeal. (App. 244a)

However, on direct appeal, the U.S. Court of Appeals for the Eleventh Circuit ultimately held that in a disparate treatment case, the plaintiff may rely on a “convincing mosaic” instead of the *prima facie* case with the similarly situated comparators to satisfy *McDonnell Douglas*. (App.1a-17a) The Eleventh Circuit concluded that the *McDonnell Douglas* standard is nothing but a procedural framework that has little to no importance when evaluating the sufficiency of the evidence. (App.1a-17a) Instead, the Eleventh Circuit applied the “convincing mosaic” standard which seems to have no standards at all. (App.1a-17a) It essentially receded from *McDonnell Douglas*, ultimately holding that in deciding summary judgments or judgments as a matter of law (*i.e.*, what needs to be proved at trial), a court can employ the “convincing mosaic” standard. (App.1a-17a)

### **III. The *McDonnell Douglas* Standard in Title VII Discrimination Cases**

“With the goal of progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination,” *Texas Dept. of Cnty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981), this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) “established an allocation of the burden of production and an order of presentation of proof in Title VII discriminatory-treatment cases,” *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). “The plaintiff in such a case,

[this Court said], must first establish, *by a preponderance of the evidence*, a ‘prima facie’ case of racial discrimination.” *Id.* (emphasis added).

The “minimal requirements of such a prima facie case,” *id.*, are that the plaintiff must show that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably. *See McDonnell Douglas*, 411 U.S. at 802. The burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. *Id.* If the employer does so, the plaintiff must show that the articulated reason is pretextual “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 256.

“It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *St. Mary’s*, 509 U.S. at 507 (alteration in original) (quoting *Burdine*, 450 U.S. at 253).

Once the defendant satisfies its burden of *production* of nondiscriminatory evidence, “the prima facie case [of discrimination] is rebutted” and “drops from the case.” *Id.* The plaintiff then has “the full and fair opportunity to demonstrate,” through presentation of his own case and through cross-examination of the defendant’s witnesses, “that the proffered reason was

not the true reason for the employment decision” and that “race was.” *Id.* at 507-08. The Plaintiff, therefore, “retains that ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.” *Id.* at 508 (alterations in original) (internal quotation marks omitted).

Moreover, although the presumption of discrimination “drops out of the picture” once the defendant meets its burden of production, *id.* at 511, “the trier of fact may still consider the evidence establishing the plaintiff’s prima facie case ‘and inferences properly drawn therefrom . . . on the issue of whether the defendant’s explanation is pretextual,’” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 255, n. 10). “Thus, 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.” *Id.* at 148 (emphasis added).

#### **IV. The *Tynes* Opinion Summarized**

In *Tynes*, the Eleventh Circuit begins by stating the long-standing principle that to prove an employment discrimination claim, “a plaintiff can use direct evidence, circumstantial evidence, or both.” (App.6a-7a) It then notes that it is difficult and “evasive” to prove discrimination with circumstantial evidence alone because an employer “can generally fire or discipline an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all so long as that action is not for a discriminatory reason.” (App.7a) (internal quotation marks omitted). To deal with these difficulties, the Eleventh Circuit states that this Court in *McDonnell Douglas* set forth the

“the burden shifting framework” discussed in the previous section of this Writ, which was “designed to draw out the necessary evidence in employment discrimination cases” and constitutes a “*prima facie*” showing of discrimination—including evidence of comparators. (App.7a-8a)

The Eleventh Circuit then goes on to describe the *McDonnell Douglas* standard as a mere “evidentiary tool that functions as a procedural device, designed only to establish an order of proof and production” and *not* “an independent standard of liability.” (App.8a) The Eleventh Circuit provides that the *McDonnell Douglas* framework for a *prima facie* case was never intended to be the “*sine qua non*” for a plaintiff to survive a summary judgment motion. (App.8a) The Eleventh Circuit then avers that: “Often, however, parties (and sometimes courts) miss this fundamental point and wrongly treat the *prima facie* case as a substantive standard of liability.” (App.8a)

The Eleventh Circuit goes on to state that “once the *prima facie* case has fulfilled its role of forcing the defendant to come forward with some response, it no longer has any work to do.” (App.10a) (internal quotation marks omitted). The court then deems the *prima facie* case as “no longer relevant” because “the district court has before it all evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.” (App.10a) (internal quotation marks omitted). The Court thereafter states that once the defendant employer offers evidence of non-discrimination, the presumption of discrimination created by the *prima facie* case “simply drops out of the picture.” (App.10a)

The Eleventh Circuit subsequently concludes that the “components of a *prima facie* case are *not* necessarily coextensive with the evidence needed to prove an employment discrimination claim.” (App.11a) The court then goes on to hold that this is why “the plaintiff’s failure to produce a comparator does not necessarily doom the plaintiff’s case.” (App.11a) (internal quotation marks omitted). The court held that this is because *McDonnell Douglas* is “only *one method* by which the plaintiff can prove discrimination by circumstantial evidence.” (App.11a) (emphasis added).

Critically, the Eleventh Circuit then disregards the *McDonnell Douglas* framework for a *prima facie* case, stating that it need not be satisfied so long as a plaintiff can show a “convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.” (App.11a-12a) (internal quotation marks omitted). It subsequently holds that: “A ‘convincing mosaic’ of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action—the ultimate inquiry in a discrimination lawsuit.” (App.12a)

The Eleventh Circuit then summarizes its position, holding that when deciding employment-discrimination cases on summary judgment the *prima facie* case and comparator theory under *McDonnell Douglas* is no longer relevant because “we use what we have called the convincing mosaic standard, we look beyond the *prima facie* case to consider all relevant evidence in the record to decide the ultimate question of intentional discrimination.” (App.13a) The court continues to discount the requirements of the *prima facie* case, stating: “Under *McDonnell Douglas*, the failure to

establish a *prima facie* case is fatal only where it reflects a failure to put forward enough evidence for a jury to find for the plaintiff on the ultimate question of discrimination.” (App.13a)

It should be noted that the *Tynes* decision lacks any meaningful detailed discussion of the facts. (App.1a-17a) There is no explanation as to what facts constituted the “convincing mosaic” in the *Tynes* trial. (App.1a-17a) Instead, the opinion only provides a cursory review and then simply concludes that the jury’s verdict found discrimination and the appellate court cannot reverse because “we should not revisit whether the plaintiff established a *prima facie* case.” (App.13a) (internal quotation marks omitted).



## REASONS FOR GRANTING THE PETITION

### I. The Eleventh Circuits’ Opinion in *Tynes* Conflicts with the Seventh Circuit on the Application of the “Convincing Mosaic” Standard.

As stated above, in *Tynes*, the Eleventh Circuit ultimately held that in a disparate treatment case, the plaintiff may rely on a “convincing mosaic” theory instead of the *prima facie* case and comparator standard discussed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), departing therefrom. In this vein, the *Tynes* court held:

It is also why the plaintiff’s failure to produce a comparator does not necessarily doom the plaintiff’s case. Indeed, the plaintiff will always survive summary judgment if he presents

circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. That is because *McDonnell Douglas* is only one method by which the plaintiff can prove discrimination by circumstantial evidence. *A plaintiff who cannot satisfy this framework may still be able to prove her case with what we have sometimes called a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.*

(App.11a-12a) (emphasis added) (citations omitted) (internal quotation marks omitted).

The “convincing mosaic” theory has been expressly rejected by the U.S. Court of Appeals for the Seventh Circuit as “legal kudzu,” providing a basis for certiorari relief to this Court. *See* Rule 10 of the U.S. Supreme Court Rules (stating that certiorari relief may lie when: “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”). In particular, based on undersigned’s research and belief, no other Circuit Court aside from the Eleventh Circuit has adopted the “convincing mosaic” theory as such a legal test.

Instead, the only other Circuit Court to mention the convincing mosaic standard as a legal test to prove discrimination is, again, the Seventh Circuit. There, the plaintiff, a freight broker, sued his former employer, alleging that he was terminated because of his Mexican ethnicity in violation of 42 U.S.C. § 1981 and the Illinois Human Rights Act. The United States District Court for the Northern District of Illinois granted employer’s motion for summary judgment and the

plaintiff appealed. On appeal, the Seventh Circuit directly addressed the viability of the “convincing mosaic” theory as a legal test. It stated that it was only “designed as a *metaphor* to illustrate why courts should not try to differentiate between direct and indirect evidence,” and that it “*is not a legal test of any kind*” even though “it has continued to be misused as one.” *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 764 (7th Cir. 2016) (emphasis added)

Then, in conflict with *Tynes*,<sup>2</sup> the Seventh Circuit *categorically rejected* the “convincing mosaic” “metaphor” as a legal test (*i.e.*, as “*legal kudzu*”), explicitly holding:

***To make matters worse, this court has itself occasionally treated “convincing mosaic” as a legal requirement, even while cautioning in other opinions that it must not be so understood. Instead of simplifying analysis, the “mosaic” metaphor has produced a form of legal kudzu.***

***Today we reiterate that “convincing mosaic” is not a legal test. . . .*** From now on, any decision of a district court that treats this phrase as a legal requirement in an employment-discrimination case is subject to summary reversal, so that the district court

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<sup>2</sup> For this Court to fully appreciate the Eleventh Circuits’ full embrace of the “convincing mosaic” standard and complete departure from the *McDonnell Douglas* framework, it should read Judge Newsom’s concurring opinion in *Tynes*, as it explicitly states that “*McDonnell Douglas* is the wrong framework” and the “convincing mosaic” theory “is the right one.” (App.229a)

can evaluate the evidence under the correct standard.

*Id.* at 764-65 (emphasis added) (citations omitted).

Hence, this Court should grant certiorari review of this matter because there is a clear conflict between Seventh Circuit precedent (*i.e.*, *Ortiz*) and the Eleventh Circuit on the applicability of the convincing mosaic theory as a legal test in an employment discrimination case.

## **II. The Effect of the *Tynes* Decision and its Conflict with the Principles Set Forth by *McDonnell Douglas*.**

*McDonnell Douglas* clarified that even if an employee lacks direct evidence of intentional discrimination (like an admission from a supervisor that the employee was fired because of her race), the employee can still prevail on a claim of intentional discrimination by presenting only indirect or circumstantial evidence that supports an inference of her employer's discriminatory intent. *McDonnell Douglas*'s order of presenting proof and shifting burdens helps courts analyze discrimination claims that turn on purely indirect or circumstantial evidence. *See Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49-50 & n3 (2003)) (stating that "discrimination may be proven through direct and indirect evidence or through the *McDonnell Douglas* burden-shifting framework").

The *McDonnell Douglas* framework turns on circumstantial evidence and inference, having the employee demonstrate the employer's proffered non-discriminatory reason for termination is "unworthy of

credence.” *Burdine*, 450 U.S. at 256. “The Supreme Court constructed the elements of the [*McDonnell Douglas*] prima facie case to give plaintiffs who lack direct evidence a method for raising an inference of discrimination.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (citing *Burdine*, 450 U.S. at 253-54 and *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002), *aff’d*, 539 U.S. 90 (2003)). To prevail in an employment-discrimination suit based on circumstantial evidence, a plaintiff must satisfy the prima facie evidentiary framework of *McDonnell Douglas*. This comparator analysis balanced the desire to allow a plaintiff to proceed on circumstantial evidence against the interest of the employer.

However, the Eleventh Circuit’s decision in *Tynes* eliminated the burden-shifting framework of *McDonnell Douglas* and its comparator theory by introducing the “convincing mosaic” theory as a mechanism to prove employment discrimination based solely on circumstantial evidence. Specifically, the Eleventh Circuit held that a “plaintiff’s failure to produce a comparator does not necessarily doom the plaintiff’s case.” (App.11a) In so finding, the court noted that *McDonnell Douglas* has been largely misunderstood as a strict elemental framework that must be established in every discrimination case, where, under the Eleventh Circuit’s view, *McDonnell Douglas* is merely an “evidentiary tool that functions as a procedural device, designed only to establish an order of proof and production[;]” it is not an “independent standard of liability.” (App.8a)

Thus, under the Eleventh Circuit’s decision, a plaintiff who cannot satisfy the *McDonnell Douglas* framework can still prove her case by presenting a “convincing mosaic of circumstantial evidence that

would allow a jury to infer intentional discrimination by the decisionmaker.” (App.11a-12a) This strikes against the very purpose of the *McDonnell Douglas* framework, which, as the Eleventh Circuit has admitted, was designed to require evidence of a comparator in circumstantial evidence cases to protect the interest of the employer as well as the employee. *See, e.g., Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1225 (11th Cir. 2019) (“In applying *McDonnell Douglas*, the Supreme Court has stressed the importance of striking an appropriate balance between employee protection and employer discretion.”).

### **III. Courts Should Not Be Super-Personnel Departments**

It is a fundamental principle that “employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.” *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). Courts, like the Eleventh Circuit, have gone to great lengths over the past two decades to adhere to this principle by explaining the strict standards for cases that present a comparator theory such as the instant case, thereby protecting the employer’s interest. *See Ward v. Troup County School District*, 856 Fed. Appx. 225, 227 (11th Cir. 2021) (stating that “an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason”); *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (stating that

“federal courts do not sit as a super-personnel department that reexamines an entity’s business decision”).

Yet, while embracing the convincing mosaic theory, the *Tynes* court makes no mention of the concerns for protecting these interests of the employer. There is no caution against becoming a super-personnel department. Such concerns should be considered especially in a case like this where the proffered reason was serious and legitimate. *See McDonnell Douglas Corp.*, 411 U.S. at 803 (“Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.”).

More specifically, *Tynes* was the superintendent of the second largest juvenile detention facility in Florida. As discussed in the Statement of the Case, the FDJJ terminated her after her Facility experienced fifteen codes in a single day reflecting a lack of institutional control that was unprecedented and could not be ignored by the FDJJ. When the reason is legitimate, a review of comparator evidence is critical, especially if the proffered reason is a fireable offense, as a plaintiff needs to show that other employees outside the class who committed a similar offense were not fired. *See McDonnell Douglas* at 803-04. By requiring a review of comparator evidence in situations such as this, courts avoid allowing employment-discrimination laws from serving as a mechanism to permit juries and courts to impermissibly sit as a super-personnel department.

Thus, the *prima facie* case and the comparator evidence should have been the focus of the Eleventh Circuit’s decision and not disregarded. The Eleventh Circuit impermissibly replaced the *prima facie* case with the “convincing mosaic” theory. The reasoning of

the Eleventh Circuit in replacing the *prima facie* case and comparator standard with the water-downed “convincing mosaic” theory was because the *prima facie* case and comparator theory was, as the Eleventh Circuit labeled it, “a high bar to meet.” (App.14a) By disregarding the *prima facie* case and comparator standard and replacing it with the water-downed “convincing mosaic” theory, the Eleventh Circuit skipped over the *prima facie* requirement of *McDonnell Douglas*, essentially receding from the framework altogether. This holding guts the *McDonnell Douglas* precedent and leaves employers with little protection from juries and courts second guessing their decisions.

#### **IV. The *Tynes* Opinion Fails to Articulate Any Standard for “Convincing Mosaic” and Allows Courts to Sit as a Super Personnel Department, Offending the Principles Enunciated by This Court in *McDonnell Douglas* and the Seventh Circuit and Eighth Circuit.**

As previously stated, “employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.” *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

The Seventh Circuit has also adhered to this standard and, unlike the Eleventh Circuit, has not departed from it for the evasive “convincing mosaic” theory. *See Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (“[A] court’s role [is] not to act as a ‘super personnel department’ that second-guesses employer’s business judgments.”); *Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 464 (7th Cir. 2014) (“This court has repeatedly

stated that it is not a super-personnel department that second-guesses employer policies that are facially legitimate. . . . A court cannot interfere because an employer’s decision is unwise or unfair.”).

These standards for comparator evidence prevents “second guessing.” The *Tynes* opinion does not hold the “convincing mosaic” theory to a similar standard. While embracing the convincing mosaic theory, the Eleventh Circuit fails to provide any standards by which a court will measure whether the mosaic is, in fact, “convincing.” With no articulated standard for a “convincing” mosaic, the *Tynes* opinion conflicts with principles enunciated by this Court in *McDonnell Douglas*—and the Seventh and Eighth Circuit—that cautions against “second guessing” and becoming a super-personal department. *See id.*; *see also McDonnell Douglas Corp.*, 411 U.S. at 802-03 (“*We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire.* Here petitioner has assigned respondent’s participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner’s burden of proof at this stage and to meet respondent’s *prima facie* case of discrimination.” (emphasis added)).

Thus, the Eleventh Circuit, by disregarding the comparator analysis because it is “a high bar to meet,” and invoking the watered down “convincing mosaic” theory and not holding it to the same standard as a comparator analysis, inappropriately sat as a super personnel department and second guessed the FDJJ’s decision to terminate the superintendent after her facility had system-wide failures. This was an inappropriate exercise of judicial authority, and this Court

will likely correct the same on certiorari review because, again, it violates the long-standing principles enunciated by this Court in *McDonnell Douglas*, and by other courts, including the Seventh Circuit and Eighth Circuit.



## CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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