No. 23-_____

In The
Supreme Court of the United States

RON RUTLEDGE,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS
OF JOHNSON COUNTY, KANSAS,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Employers accused of discrimination often invoke the court-created *honest belief* defense under the *McDonnell Douglas* test when seeking summary judgment. This defense allows an employer to obtain summary judgment by proffering a false reason for taking adverse action against an employee. In the Tenth Circuit, if the court finds the employer's view of the evidence is plausible, then summary judgment is granted, even if the reason proffered by the employer is genuinely disputed.

1. Does the *honest belief* defense violate the axiomatic law of summary judgment requiring the evidence and inferences to be viewed in favor of the non-moving party, without weighing the evidence or assessing credibility?

2. If this Court permits the defense to exist, then when an employer makes an *honest belief* argument in moving for summary judgment, must Courts view the evidence objectively in favor of the non-moving party, or may Courts view the evidence subjectively from the moving party's perspective?

3. Does the disarray in the Circuits over what the *honest belief* defense is, and how to apply it, require this Court to discard the defense thereby restoring the integrity of the *McDonnell Douglas* test and Rule 56?

PARTIES

Petitioner Ron Rutledge ("Rutledge") was the plaintiff and appellant in the proceedings below.

Respondent, the Board of County Commissioners of Johnson County, Kansas ("County") was the defendant and appellee in the proceedings below.

RELATED PROCEEDINGS

Rutledge v. Board of County Commissioners of Johnson County, Kansas, No. 20-cv-2012-DDC, 2022 WL 910724, District Court for the District of Kansas. Judgment entered March 29, 2022.

Rutledge v. Board of County Commissioners of Johnson County, Kansas, No. 22-3081, 2023 WL 4618335, United States Court of Appeals for the Tenth Circuit. Judgment entered July 19, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Ron Rutledge respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's *Order and Judgment* (App. 1-30) is available at 2023 WL 4618335. The district court's *Memorandum and Order* (App. 31-94) is available at 2022 WL 910724.

JURISDICTION

The Tenth Circuit entered its *Order and Judgment* on July 19, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions are Rule 56 of the Federal Rules of Civil Procedure, 42 U.S.C. § 12112, 42 U.S.C. § 12203, and 29 U.S.C. § 2615. Copies are included in the Appendix.

INTRODUCTION

When assessing summary judgment, Courts must view all evidence, all inferences, and all disputes in favor of the nonmoving party.[1] Courts cannot "weigh the evidence and determine the truth of the matter," or make "credibility determinations."[2] Yet in this case, the "*honest belief*" defense allowed the trial court to conclusively "determine the truth" of the County's explanation for firing Rutledge: "*The record reflects defendant held that belief in good faith*." (App. 82).

In employment cases, the summary judgment analysis often starts with the *McDonnell Douglas* burden-shifting paradigm.[3] Fifty years ago, this Court held that an employer accused of discrimination was not entitled to judgment as a matter of law, even though its explanation for not re-hiring the plaintiff was based on objectively true, undisputed facts: the employee was arrested for impeding traffic while protesting the employer. The trial court entered judgment for the employer. But this Court reversed, holding the factfinder must determine whether the proffered explanation truly motivated the decision. An explanation rooted in truth may nevertheless be "*a pretext*" for discrimination.

Since *McDonnell Douglas*, the pretext doctrine has been litigated in an array of employment cases filed in state and federal courts. In developing the

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[1] *Tolan v. Cotton*, 572 U.S. 650, 651 (2014).

[2] *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 255 (1986).

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

doctrine of pretext, this Court has held: (1) An employer is not entitled to judgment just because it has a legitimate, non-discriminatory reason for taking adverse action against the employee – the employee must be given the opportunity to establish the proffered reason is "a pretext" for discrimination;[4] (2) An employee can establish pretext by showing "that a discriminatory reason more likely motivated the employer or . . . by showing that the employer's proffered explanation is unworthy of credence;"[5] (3) If the factfinder rejects the employer's "proffered reason," then the factfinder may "infer the ultimate fact of intentional discrimination;"[6] and (4) An employee may show pretext with evidence that the employer's proffered reason is false.[7] These holdings are integral to the doctrine of pretext, but the *honest belief* defense undermines them all.

The Tenth Circuit holds that when the employer invokes the *honest belief* defense, the trial court must view the evidence from the employer's perspective.[8] To show pretext, the employee must show the factual basis for the proffered explanation is so thin that the explanation is "implausible, incoherent, or internally contradictory." (App. 82). Contrast this result with *McDonnell Douglas*, where the employer's explanation

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[4] *McDonnell Douglas*, 411 U.S. at 804.

[5] *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

[6] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993).

[7] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

[8] *DePaula v. Easter Seals*, 859 F.3d 957, 971 (CA10 2017).

was plausible, coherent, and consistent, and yet could still be "*a pretext*" for discrimination.

In his civil action, Rutledge claimed the County's decision to fire him was motivated by his disability, which was caused by workplace injuries and required accommodations. The County argued its decision was solely motivated by its belief that Rutledge sat in the breakroom one day, refusing to work while falsely claiming to have permission from a supervisor. The County argued that even if Rutledge did have permission from a supervisor, it *honestly believed* he did not. According to the County, its belief was so honestly held that no reasonable factfinder could find that the County used the break room incident as a cover-up for unlawful discrimination or retaliation.

The district court made its own factual finding: "*The record reflects defendant held that belief in good faith*." (App. 82). The Tenth Circuit affirmed, requiring "*evidence suggesting that the County did not honestly hold that belief*." (App. 16). The decisions below conflict with this Court's precedent holding that a truthful explanation may nevertheless be "*a pretext*" for discrimination.

The *honest belief* defense has been adopted to some extent in every Circuit[9] – though there is hopeless conflict as to how and when it applies. Should this defense exist? If yes, should it govern the entire pretext analysis, or is it limited to pretext arguments

[9] *See Filter Specialists, Inc. v. Brooks*, 879 N.E.2d 558, 572-73 (Ind. App. 2007), *vacated on other grounds*, 906 N.E.2d 835 (Ind.).

challenging the factual basis for the employer's explanation? When the defense is invoked, should Courts view the evidence objectively, drawing inferences in the employee's favor? Or can evidence be viewed subjectively, from the employer's perspective? These questions permeate the jurisprudence, and inconsistent answers abound.

When Justice Gorsuch sat in the Tenth Circuit, he offered that the *honest belief* defense would not result in summary judgment if the factfinder could believe that the facts undermining the employer's decision were "deliberately suppressed from the decision makers or ignored in order to further a discriminatory purpose."[10] Rutledge relied on *Young* in his appeal, but the Tenth Circuit ignored it. (App. 1-30). Instead, the Court applied the subjective, movant-friendly version of the defense, which prevails in the Tenth Circuit. Other Circuits allow the employee to "cast[] doubt on the *objective validity* of the employer's explanation,"[11] or to "challenge the employer's belief as *unreasonable*, and therefore pretextual."[12]

This Court has never squarely addressed the court-created, *honest belief* defense. This Court should decide whether the defense should exist, whether it

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[10] *Young v. Dillon Cos.*, 468 F.3d 1243, 1251-52 (CA10 2006).

[11] *Morris v. McCarthy*, 825 F.3d 658, 671 (D.C. Cir. 2016), *citing Reeves*, 530 U.S. at 143-46 (italics added).

[12] § 2:16., 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:16. "*Honest belief*" or objective truth in pretext analysis (Oct. 2023 Update) (citing cases from the First, Fourth, Sixth, and Eighth Circuits) (italics added).

can be invoked at summary judgment, and if so, how must it be applied to prevent violations of Rule 56 or of the doctrine of pretext.

STATEMENT OF THE CASE

Rutledge worked in the County's Wastewater Division from 2005 until December 6, 2018. He suffered several workplace injuries, which required surgery, medical leave, and accommodations. In 2008, he filed a workers' compensation claim, which is still pending. On November 13, 2018, Rutledge accused his supervisor of harassment and retaliation. In turn, the supervisor accused Rutledge of insubordination. Both employees lodged complaints with Human Resources. The County investigated, and discharged Rutledge.

In response, Rutledge filed a civil action in the District of Kansas. He alleged his discharge violated the Americans with Disabilities Act, 42 U.S.C. § 12112, § 12203, the Family and Medical Leave Act, 28 U.S.C. § 2615, and the common law of Kansas, which prohibits retaliatory discharge based on an employee exercising his workers' compensation rights.[13] At summary judgment, each claim is subject to *McDonnell Douglas* burden-shifting.[14]

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[13] *Gonzalez-Centeno v. N. Cent. Kansas Reg'l Juvenile Det. Facility*, 101 P.3d 1170, 1177 (Kan. 2004).

[14] *Doebele v. Sprint*, 342 F.3d 1117, 1135 (CA10 2003) (applying *McDonnell* to ADA, FMLA); *Foster v. AlliedSignal, Inc.*, 293 F.3d 1187, 1193 (CA10 2002) (recognizing Kansas uses *McDonnell* in retaliatory discharge claims).

The district court had jurisdiction over the federal claims under 28 U.S.C. § 1331, and supplemental jurisdiction over the state claim under 28 U.S.C. § 1367. All claims challenged Rutledge's discharge. Citing *honest belief*, the district court granted summary judgment on all claims. (App. 94). The Tenth Circuit affirmed. (App. 1-2).

Factual Background

Six County employees were materially involved in Rutledge's discharge. Four in making the decision, and two in providing information to the County. The ultimate decision-maker was Kenneth Kellison, Director of Operations and Maintenance. Two employees investigated the dueling complaints: Jeannette Klamm, Assistant Director of Operations and Maintenance, and Leslie Fortney, Human Resources Partner. The decision was supervised by Tiffany Hentschel, Deputy Director of Human Resources. These four individuals lacked personal knowledge of the County's factual basis for discharging Rutledge, but they had prior dealings with him that were relevant to his pretext arguments.

The two other employees were George Cloud and Jeremy McCracken. Cloud was Superintendent of the wastewater treatment plant where Rutledge worked. McCracken was Assistant Superintendent, and Rutledge's direct supervisor. McCracken was the subject of Rutledge's complaint, and was the supervisor who accused Rutledge of insubordination.

Hentschel's dealings with Rutledge began in 2008, when Rutledge commenced a worker's compensation claim. Soon after, there was discussion about Rutledge playing the "*lawyer card*" and being a "*problem*" in relation to his claim. In 2011, Hentschel investigated Rutledge, and recommended the County exercise its "*maximum effort*" to settle his claim "*as quickly as possible*." The County did not achieve that result. Instead, it continued to incur expenses under its self-insured workers' compensation plan for several years.

Kellison and Fortney were informed of the issues related to Rutledge's claims. In 2014, the County was trying to settle Rutledge's claim while Fortney was trying to accommodate his latest restrictions. Hentschel kept Fortney and Kellison informed of the County's efforts. At one point, Hentschel disclosed that the County was hopeful that a settlement would occur in the next sixty days and that it would "*include employment*." Hentschel admitted that "*include employment*" meant Rutledge would resign. Again, the County did not achieve that goal.

In 2015, Rutledge told Kellison, in relation to a dispute, that Kellison would be put under oath. Kellison took that as a "*threat*." In 2018, while Fortney was engaging in the interactive process with Rutledge, she thought it was "*threatening*" for Rutledge to mention his lawyer.

In May 2018, McCracken was promoted, and became Rutledge's direct supervisor. When Rutledge learned of the promotion before it happened, he

contacted HR with concerns that McCracken would treat him unfairly if promoted. Previously, McCracken coined the nickname "*half-timer*" for Rutledge, and encouraged other employees to complain about Rutledge. McCracken was still promoted.

After McCracken's promotion, Rutledge reported two workplace injuries. One occurred in June 2018, when Rutledge fell out of a broken chair. This injury resulted in medical treatment, FMLA leave, and workers' compensation disability payments under the County's self-insured program.

In the months leading to Rutledge's discharge, McCracken and Cloud said things which Rutledge believed were attempts to prevent him from using FMLA leave. At times, McCracken ordered Rutledge not to use FMLA, said he could not use it, and said he needed to work "*all the time*." Cloud made similar comments. Rutledge continued using intermittent FMLA leave, up to mere days before his discharge.

Shortly before Rutledge's discharge, he and McCracken got into a dispute about a ladder that was purchased to accommodate Rutledge's permanent lifting restrictions. Rutledge complained to McCracken that the ladder was missing, and in response, McCracken said, "*tough shit*" and instructed Rutledge to use a different one. Six weeks before Rutledge's discharge, the Safety Department instructed McCracken to purchase a new ladder.

On November 9, 2018, McCracken and Cloud gave Rutledge his annual performance review. The ratings

were poor. The supervisors gave Rutledge the lowest annual raise allowed under County policy: 1%. Rutledge complained that he felt "*singled out*" and "*targeted*" by the low ratings and raise, and believed it was because of his injuries. County policy required Cloud and McCracken to notify the County about Rutledge's complaint. They did not.

After the review meeting, Rutledge and Cloud met alone. Rutledge said that due to his frustration over the poor evaluation and low raise, he wanted to come to work, clock-in, and then sit in the breakroom instead of getting right to work, like his co-workers routinely did. Rutledge testified that during this meeting, Cloud gave him permission to sit in the breakroom and mingle with his co-workers after clocking in. According to Rutledge, Cloud offered this as a way for Rutledge to improve his peer relationships, which was one of his low ratings.

On November 13, 2018, before the workday began, Rutledge called HR and left a voicemail explaining that he felt retaliated against by McCracken, and wanted to make a complaint. When Rutledge arrived at work, he clocked-in and sat in the breakroom with his co-workers. His co-workers moved into another room, leaving Rutledge sitting alone. McCracken saw Rutledge, and asked what he was doing. Rutledge explained, and said Cloud had given him permission. During this conversation, Rutledge told McCracken he felt bullied and harassed.

During the incident, Rutledge and Cloud spoke on the phone. Cloud instructed Rutledge to go to work, and he did. When Rutledge left, he told McCracken he was going to HR, but proceeded to work instead. After this exchange, McCracken emailed HR to notify them of Rutledge's complaint. McCracken also took the preemptive step of attaching a typed document to his email, which contained his complaints about Rutledge's behavior over the past month.

Later that afternoon, Cloud and Rutledge met again. Rutledge agreed not to sit in the break room anymore. Cloud offered Rutledge a transfer due to the "*unresolvable issues*" Rutledge had with McCracken. Rutledge worked the rest of the week without incident. The following week, the County placed Rutledge on administrative leave and assigned an investigator to each complaint: Klamm to McCracken's complaint, and Fortney to Rutledge's complaint.

During the investigation, Cloud emailed the decision-making team to notify them of his conversations with Rutledge the day of the breakroom incident. Cloud explained that Rutledge agreed to end his "strike" and that he offered Rutledge the transfer away from McCracken. The County's progressive disciplinary policy advises that employees generally should not be terminated unless lesser forms of discipline have been ineffective.

On November 28, 2018, Kellison internally announced the "*plan*" to discharge Rutledge. Kellison instructed Klamm to draft a Termination Notice. In the following days, Klamm, Fortney and Hentschel exchanged five

drafts of the Notice. In the drafts, the County's explanation for discharging Rutledge underwent substantive revisions. Initially, Klamm included incidents that occurred in previous years. Hentschel counseled against including those incidents, as well as others. The theme of Hentschel's advice was to "*keep this simple*" because the County's discharge decision would be "*subject to debate*."

On December 6, 2018, the County met with Rutledge. The County informed Rutledge of its decision, and let him respond. Shortly after the meeting, the County gave Rutledge his Termination Notice. The Termination Notice said Rutledge was being discharged for his conduct on November 9, 2018 (performance review), November 13, 2018 (breakroom incident), and December 6, 2018 (discharge).

Hentschel was the County's Rule 30(b)(6) representative designated to provide the "*exact reason*" for Rutledge's discharge. In that capacity, she testified that Rutledge was discharged for his behavior on November 13, 2018. Kellison signed a declaration for summary judgment, attesting that Rutledge was ultimately discharged for his conduct on December 6, 2018.

Summary Judgment Proceedings

When moving for summary judgment, the County proffered the following explanation for discharging Rutledge:

> [T]he County terminated his employment for a legitimate, nondiscriminatory, and

> nonretaliatory reason (Plaintiff's own behavior, as described in the Statement of Facts), and there is no evidence that any of its decisions were pretextual.

The County's *Statement of Facts* included 541 paragraphs. Among them was a section titled, "*The Incidents Ultimately Leading to Plaintiff's Termination*." Over 100 paragraphs later, the County cited Kellison's announcement of the decision to discharge Rutledge, but there it did not proffer an explanation.

Regarding the issue of pretext, the County invoked the *honest belief* defense. The County argued that the entire pretext analysis depended solely on whether it "honestly believed [its] reasons and acted in good faith upon [its] beliefs," and insisted that the court must view the evidence from the County's perspective.

Rutledge presented several pretext arguments to the district court. He challenged the factual basis for the County's explanation. Further, he argued that even if the County honestly believed its own explanation, there was still sufficient evidence for a factfinder to conclude the County's reliance on it was a pretext for discrimination. He argued: (i) the County's explanation had evolved; (ii) the County deviated from the recommendations of its disciplinary policy; (iii) the investigation was biased and unfair; (iv) the decision-influencers and the decision-makers had preexisting motives and biases related to Rutledge's protected classes, which was revealed by contemporaneous

comments and testimony; and (v) Rutledge's co-workers who regularly sat in the breakroom after clocking in were not disciplined. Rutledge argued that the *honest belief* defense does not encapsulate the entire pretext analysis. The district court disagreed.

The district court's entire analysis hinged on *honest belief*. (App. 73-75). The court applied the defense beyond the pretext argument challenging the factual basis for the County's explanation. From the district's court perspective, the entire pretext inquiry is limited to "whether the employer honestly believed its reasons and acted in good faith upon them." (App. 94). The district court factually determined that the County "*held [its] belief in good faith*." (App. 82). Based on that finding of fact, the court granted summary judgment.

Argument on Appeal

On appeal, Rutledge argued that the district court misapplied the *honest belief* defense and foreclosed the possibility that the County's belief – even if honestly held – was a pretext for discrimination. Citing *McDonnell Douglas*,[15] Rutledge argued that pretext does not require proof that the employer's explanation is false. Citing *Bostock*,[16] Rutledge argued that the employee can prove discrimination without dispelling every explanation proffered by the employer. Citing *Reeves*,[17] Rutledge argued that all the evidence and all the

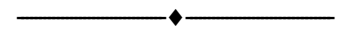
[15] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[16] *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1739-40 (2020).

[17] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

inferences must be viewed in his favor – not the County's. Citing *Young*,[18] Rutledge argued the County's *honest belief* defense failed, because the fact-finder could conclude the County "deliberately suppressed . . . or ignored" the facts undermining its belief. The Tenth Circuit affirmed without addressing these legal arguments.

The Tenth Circuit's opinion was guided by its precedent on the *honest belief* defense. The Court viewed all the evidence from the County's perspective. (App. 14). In rejecting Rutledge's pretext arguments, the Court's common refrain was to explain that Rutledge's arguments did not directly undermine the factual basis for the County's belief. (App. 14-30). Like the district court, the Tenth Circuit foreclosed the possibility that the County's belief – even if honestly held – could be seen as a pretext for discrimination.



REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's version of the *honest belief* defense conflicts with this Court's precedent on pretext.

This Court's opinion in *McDonnell Douglas* birthed the doctrine of pretext for employment discrimination cases. There, the plaintiff was included in a temporary layoff. In protest, he intentionally blocked the roads leading to his employer's business. He was arrested, and pleaded guilty to a criminal charge. *Id.*,

[18] *Young v. Dillon Cos.*, 468 F.3d at 1251 (10th Cir. 2006).

at 794-95. Three weeks after his protest, he applied for a job with the employer, who refused to hire him. He pursued civil action under Title VII for race discrimination. *Id.*, at 796. In its defense, the employer argued it refused to rehire the plaintiff because of his protest. The trial court accepted that explanation and entered judgment for the employer. *Id.*, at 797. This Court reversed.

There was, of course, no dispute that the employer *honestly believed* the employee was involved in the protest. But that was not dispositive. This Court held that Title VII prohibits an employer from asserting an otherwise legitimate reason for taking adverse action against an employee "as a pretext" for discrimination. *Id.*, at 804. The proffered explanation might be a "coverup" for discrimination – even if it has a factual basis. *Id.*, at 805.

McDonnell Douglas "set forth the basic allocation of burdens and order of presentation of proof" for discrimination claims. *See Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The *McDonnell Douglas* analysis has three stages.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an

> opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id., at 252-53.[19]

At the third stage, the employee can demonstrate pretext "directly" or "indirectly." *Id.*, at 256.[20] Pretext is "directly" shown with evidence "that a discriminatory reason more likely motivated the employer." *Id.* Pretext is "indirectly" shown with evidence "that the employer's proffered explanation is unworthy of credence." *Id.* Either approach satisfies the pretext stage.

Twenty years after *McDonnell Douglas*, this Court held that the factfinder is permitted to infer the ultimate fact of discrimination from merely rejecting the employer's "proffered reasons." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). If the factfinder rejects the proffered reasons, then "no additional proof of discrimination is required." *Id.* Despite this holding, several Circuits later adopted what became known as the "*pretext plus*" standard, which required the employee

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[19] Lower courts routinely treat this rubric as mandatory, but this Court cautions that it is "meant only to aid courts and litigants in arranging the presentation of evidence." *See*, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988).

[20] *Burdine*'s use of "directly" and "indirectly" should not be conflated with the concepts of "direct" and "indirect" evidence. *McDonnell Douglas* only applies in the absence of direct evidence.

to offer additional proof of discrimination beyond proving pretext.[21] This Court corrected that error in *Reeves*.

This Court granted certiorari in *Reeves* to decide again whether the employer's prima facie case, combined with evidence of pretext, was sufficient to prove the ultimate fact of discrimination. *Reeves*, 530 U.S. 133, 140. Answering that question required a review of *Hicks*, and resulted in the reaffirmation of the holding in *Hicks*. *See id.*, at 146-48.

In *Reeves*, this Court unanimously held that the factfinder may infer discrimination if it believes the employer's explanation is false. *Id.*, at 147-48. The Court held that such falsity evidence "*may permit*" an inference of discrimination in "*appropriate circumstances*." *Id.* (emphases added). Transforming these phrases into escape hatches, the Tenth Circuit has justified the continued use of "pretext plus" standard under the guise of the "*honest belief*" defense. The Tenth Circuit describes this as an "exception to the general rule against pretext plus." *See Swackhammer v. Sprint/Utd. Mgmt. Co.*, 493 F.3d 1160, 1168 (CA10 2007). In the Tenth Circuit, this "exception" has become the rule.

When the *honest belief* defense is invoked in the Tenth Circuit, the focus wrongly shifts away from what the factfinder could believe, to what the employer says it believed – and the court defers to the employer's

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[21] *See* Vantrease, R., The Aftermath of *St. Mary's Honor Center v. Hicks* and *Reeves v. Sanderson Plumbing Products, Inc.*, an Attempt at Clarification, 39 Brand L.J. 747, 751 (2001).

perspective. *See Watts v. City of Norman*, 270 F.3d 1288, 1295 (CA10 2001) ("In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear to the person making the decision."); *Swackhammer*, 493 F.3d at 1170 ("The relevant inquiry is . . . whether it honestly believed those reasons and acted in good faith upon those beliefs."); *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 971 (CA10 2017) ("In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*, and do not look to the plaintiff's subjective evaluation of the situation.").

In *Reeves*, this Court held that in the second stage of the burden-shifting analysis, the court must accept the employer's explanation without questioning its "credibility." *Reeves*, 530 U.S. at 142. When the employer meets its burden of production, the presumption of discrimination created by the prima facie case disappears. *Id.* The employer's explanation is not supposed to create a presumption of nondiscrimination in favor of the employer, but that is what the *honest belief* defense does. In effect, the *honest belief* defense creates a presumption that the employer is entitled to summary judgment unless the employee can prove the employer did not "honestly believe" the facts supporting its proffered explanation.

This approach to *honest belief* undermines the doctrine of pretext as established by this Court. It is a reversion to the pre-*McDonnell Douglas* decision rendered by the trial court in that case. Moreover, the

court cannot evaluate the employer's honesty without weighing the evidence, assessing credibility, and drawing inferences, which are jury functions.

In *Hicks*, this Court recognized that the factfinder could disbelieve the employer's proffered explanation without finding the employer was acting with "mendacity." "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. There is a distinction between "falsity"[22] and a "suspicion of mendacity." 509 U.S. at 511. "Mendacity" means dishonesty. The phrase "*particularly if disbelief is accompanied by a suspicion of mendacity*" means that the presence of evidence proving "dishonesty" is a *bonus* – it is not necessary to withstand summary judgment. So long as the jury can infer that Defendant's proffered reason for termination was incorrect, there is a genuinely disputed jury question. *See id*. The *honest belief* defense wrongly requires the employee to create substantial "*suspicion of mendacity*."

As it stands, the *honest belief* defense in the Tenth Circuit undermines this Court's precedent on the doctrine of pretext. This Court should grant certiorari to correct this pervasive error.

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[22] *See Reeves*, 530 U.S. at 147 ("it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.").

II. The Tenth Circuit's version of the *honest belief* defense conflicts with this Court's precedent on summary judgment.

Under Rule 56, "[t]he 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." Fed.R.Civ.P. 56(a).

When applying this Rule, courts must "adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014). When a court fails to credit the nonmovant's evidence on key factual issues, it is improperly weighing the evidence and resolving disputes in favor of the moving party. *Id.*, at 657. A court commits reversible error when it "credit[s] the evidence of the party seeking summary judgment and fail[s] properly to acknowledge key evidence offered by the party opposing that motion." *Id.*, at 599. Yet that is precisely how the Tenth Circuit applies the *honest belief* defense.

"In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*, and do not look to the plaintiff's subjective evaluation of the situation." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 971 (CA10 2017) (emphasis in original). This approach violates the summary judgment precedent established in *Tolan v. Cotton*.

The defendant in *Tolan* was a police officer accused of violating the Fourth Amendment by shooting an unarmed citizen who was standing on his parents' front porch. *Tolan*, 572 U.S. at 651. The Fifth Circuit affirmed summary judgment based on the officer's perspective of the situation that led to the shooting. *Id.*, at 654-55. The officer believed the porch was dimly lit, the situation was loud, and Tolan had verbally threatened the officer. *Id.* However, summary judgment was reversed based on conflicting testimony from other witnesses. *Id.*, at 657-59.

If the Tenth Circuit's version of the *honest belief* defense was applied, summary judgment would have been affirmed. As explained by the Tenth Circuit, "[p]erhaps a reasonable factfinder could observe all the witnesses and believe Plaintiff's version of the events . . . however, that is not the issue." *Rivera v. City and Cnty. of Denver*, 365 F.3d 912, 925 (CA10 2004) (affirming summary judgment on *honest belief*). According to *Tolan v. Cotton* – that is precisely the issue. Presumably, the police officer in *Tolan* honestly believed the facts as he saw them. But by accepting his perspective instead of considering that the factfinder could "*believe Plaintiff's version of events*," the lower court had improperly weighed the evidence and thus committed reversible error.

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). If reasonable

minds could view the evidence and come to different conclusions, summary judgment must be denied. *Id.*, at 250-51. "Credibility determinations," and "weighing" evidence are jury functions that may not be performed at summary judgment. *Id.*, at 255. Yet, the *honest belief* defense does not just wrongly allow, but requires the trial court to exercise these jury functions.

This Court has eloquently explained why these functions are reserved solely for the jury.

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Tolan, 572 U.S. at 660.

It is impossible to view the evidence in a light most favorable to the nonmoving party while also viewing the evidence solely from the perspective of the party moving for summary judgment. This defense tasks the trial court with assessing credibility – *i.e.*, "honesty" – which requires weighing evidence to draw a conclusion. That is precisely what happened here, where the trial court concluded that "*[t]he record reflects defendant held that belief in good faith*." (App. 82). When the

trial court only considers the employer's evidence, it cannot draw every inference in favor of the nonmoving party. This application of the *honest belief* defense violates Rule 56 and this Court's precedent on summary judgment.

III. The Circuits are in disarray about what the *honest belief* defense consists of and how to apply it, such that the split can only be resolved by discarding the *honest belief* defense and thereby restoring the integrity of the *McDonnell Douglas* test and Rule 56.

Certiorari should be granted to resolve the Circuit split regarding the scope and application of the defense.

A. The Circuits disagree on the breadth of the defense's application to pretext.

When an employer in the Tenth Circuit invokes "*honest belief*" at summary judgment, the employer's perspective consumes the entire pretext analysis. *See*, *e.g.*, *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (CA10 2007). The traditional pretext analysis is replaced with one inquiry – *i.e.*, whether the employer "honestly believed" its reasons. *See id.* Contrast the Sixth Circuit, which expressly holds that *honest belief* is only applicable to certain pretext arguments. *See Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 515 (CA6 2021).

> Plaintiffs ordinarily show pretext by showing that the proffered reason (1) had no basis in fact; (2) was insufficient motivation for the employment action; or (3) did not actually motivate the adverse employment action. Under the *honest belief* rule, a pretext argument falling into the first category – asserting that the reason given by the employer has no basis in fact – may be defeated by conclusive evidence that the defendant "honestly believed" its proffered reason, and that the belief was reasonably based on particularized facts that were before it at the time the decision was made.

Id. (internal citations/quotations omitted).

The Fifth Circuit rejects the notion of the "*honest belief* defense" and refuses to "spinoff honesty as a standalone doctrinal issue," because it recognizes that the pretext analysis established under *McDonnell Douglas* is sufficient. *See Owens v. Circassia Pharmaceuticals, Inc.*, 33 F.4th 814, 827, n.8 (CA5 2022). The Fifth Circuit's approach allows the employee to establish pretext by undermining the "reasonableness" of the proffered explanation. *See id.*, at 827.

B. The Circuits disagree on whether the defense should be assessed objectively or subjectively.

"Most circuits hold that under the pretext method of proof, that it is the employer's "*honest belief*" that weighs in the analysis, rather than the objective truth

of its avowed reasons for taking adverse action against an employee." 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:16: "*Honest belief" or objective truth in pretext analysis* (Oct. 2023). "The Ninth, Tenth, and Eleventh Circuits utilize this standard." *Id.* "The First, Fourth, Sixth, and Eighth Circuits allow employees to challenge the employer's belief as unreasonable, and therefore pretextual." *Id.*

i. Objective.

The D.C., Second, and Sixth Circuits hold that the application of the defense should be viewed objectively.

In the D.C. Circuit, the employee may defeat the *honest belief* defense "by casting doubt on the objective validity of the employer's explanation." *Morris v. McCarthy*, 825 F.3d 658, 671 (D.C. Cir. 2016).

In the Second Circuit, *honest belief* is considered in light of the evidentiary record on summary judgment. *Meiri v. Dacon*, 759 F.2d 989, 997 (CA2 1985).

In the Sixth Circuit, if the nonmoving party shows pretext by proving the proffered reason for the adverse action had "no basis in fact" the employer may rebut this proof by showing that it has "conclusive evidence that the moving party honestly believed its proffered reason and that the belief was reasonably based on particularized facts that it had in hand before the decision to take an adverse act was made." *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 515 (CA6 2021).

The Seventh, Eighth, and Tenth Circuits expressly reject the Sixth Circuit's approach. *See Little v. Illinois Dept. of Revenue*, 369 F.3d 1007, n.3 (CA7 2004); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002-03 (CA8 2012); *DeWitt v. Southwestern Bell Tel. Co.*, 845 F.3d 1299, 1312-13 (CA10 2017).

Compounding the split, the Circuits cannot even agree on how to interpret a sister Circuit's opinions.[23]

ii. Subjective.

By contrast, the Fourth, Seventh, Eighth, Ninth, and Tenth Circuits hold that the *honest belief* defense should be applied subjectively from the viewpoint of the decision-maker.

The Fourth Circuit holds that if the employer "sincerely believed" its reasons, then the employer's decision "cannot by definition be the basis for the imposition of . . . liability." *Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168, 177 (CA4 2023). When evaluating an employee's challenge to the employer's sincerity, the court views the evidence based on the "perception of the decisionmaker." *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 217 (CA4 2007).

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[23] The Seventh Circuit interpreted a case relied on in the *Briggs* opinion, *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (CA6 1998), as the Sixth Circuit abandoning the *honest belief* defense or rule. *See Little v. Illinois Dept. of Revenue*, 369 F.3d 1007, 1012-13, n.3 (CA7 2004).

In the Eighth Circuit, even if the business decision was ill-considered or unreasonable, if the decision-maker honestly believed the nondiscriminatory reason he gave for the action, pretext does not exist. *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002-03 (CA8 2012).

In the Ninth Circuit, the plaintiff cannot establish pretext by showing the defendant made the wrong decision when the defendant took the adverse action. It is the employer's *honest belief* in the stated reasons for the adverse action and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case. *Fragada v. United Airlines, Inc.*, No. 17-55900, 747 Fed. Appx. 641, 642 (CA9 2019)

In the Tenth Circuit – in addition to the case that is presented in this Petition – courts only "consider the facts as they appeared to the person making the decision. . . ." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (CA10 2007).

iii. Other Standards.

In the First Circuit, "We agree that the employer might believe its stated reason for its action and honestly believe that the reason was nondiscriminatory, while the jury might find that the same reason was honestly held but conclude that it constituted discrimination (e.g. stereotyping). To that extent, the employer's good faith belief is not automatically

conclusive; but this refinement on *Mesnick*[24] is likely to be rare and is in any event irrelevant here." *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 45-46 (CA1 2002). Under this standard *honest belief* does not add any substance to the moving party's case, even though the moving party is permitted to argue it.

In the Third Circuit, the *honest belief* "rule" was inapt because the record does not indicate that AMETEK was simply wrong in deciding not to promote Brow, rather it suggests that AMETEK's proffered reasons for its decision were pretext. *Brown v. AMETEK, Inc.*, 22-1497, 2022 WL 17484330 at *3 (CA3 Dec. 7, 2022). This standard appears to be the same as the standard in the First Circuit, that is, the moving party may claim that it had an *honest belief* but that contention is subject to review of the summary judgment record.

In the Eleventh Circuit, contradicting the employer's asserted reason alone, though doing so is highly suggestive of pretext, no longer supports an inference of unlawful discrimination. However, a contradiction of the employer's proffered reason for the termination of an employee is sometimes enough, *when combined with other evidence*, to allow a jury to find that the firing was the result of unlawful discrimination. *Flowers v. Troup Cnty., Ga. Sch. Dist.*, 803 F.3d 1327, 1339 (CA11 2015). Thus, the Eleventh Circuit is using *honest belief* in a way that is reminiscent to the

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[24] *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816 (CA1 1991).

pretext-plus requirement, which was rejected by this Court in *Reeves*.

C. The Fifth Circuit holds the *honest belief* defense is not valid.

The Fifth Circuit rejects the "so-called *honest belief* defense." *Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 827, n.8 (CA5 2022). "*Honest belief* is the same thing as absence of pretext because giving a false reason or an action to obscure the real reason – *i.e.*, dishonesty – is the very definition of pretext . . . Because pretext is already front-and-center in the *McDonnell Doulgas* inquiry, we see little basis to spin off honesty as a standalone doctrinal issue." *Id.* (internal citation omitted).

D. The Seventh Circuit has an intra-Circuit Split.

In the Seventh Circuit, the cases are in such disarray that there is an intra-Circuit split.

One source traces the origination of the *honest belief* defense to *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (CA7 1987) (Easterbrook, J.).[25] "A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." *Id.*, at 559.

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[25] Kearney, R., Death of a Rule 16 U.C. Davis Business L.J. 1 (2016).

The same source suggested that the *honest belief* defense met its demise in *Hutchens v. Chicago Board of Education*, 781 F.3d 366 (CA7 2015) (Posner, J.). In a teacher selection case, it was unclear whether the decision was based on the honest beliefs of an evaluator or on dishonest beliefs, and whether the deposition testimony had any significant truth value. *Id*., at 373. The district court judge emphasized his belief that the school board's witnesses had been honest, but implied correctly that if they were liars a reasonable jury could conclude that the plaintiff was not selected because of her race. These were factual issues for the jury to resolve. *Id.*, at 374.

However, after *Hutchens*, cases in the Seventh Circuit applied the *honest belief* defense without discussing *Hutchens*. *See Armstrong v. BNSF Ry. Company*, 880 F.3d 377, 382 (CA7 2018) (If BNSF fired the plaintiff because it honestly believed that the plaintiff was lying about his complaint, then it necessarily follows that it did not retaliate against the plaintiff.); *De Lima Silva v. Wisconsin Dept. of Corrections*, 917 F.3d 546, 561 (CA7 2019) (A plaintiff would not succeed on a discrimination claim if the employer honestly believed its stated rationale for its adverse action, even if the *honest belief* was foolish, trivial or baseless.).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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