No. 24-427

IN THE
Supreme Court of the United States

RONALD HITTLE,

Petitioner,

v.

CITY OF STOCKTON, CALIFORNIA; ROBERT DEIS; LAURIE MONTES,

Respondents.

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

INTRODUCTION

When the City terminated Chief Hittle, the first reason it gave was his "attend[ance] [at] a religious leadership event." Pet. App. 17a. The original court of appeals' opinion admitted that "the gravamen" of his termination "was the religious nature of the leadership event." *Id.* at 101a. How in the world, then, did the court conclude that there was not even *a fact issue* that religion was *a motivating factor* in his termination?

There is only one possible explanation: the *McDonnell Douglas* test. That test led the court of appeals to focus on *other* alleged reasons for Hittle's termination—"public perception or other forms of misconduct"—and hold that "Hittle has failed to persuasively argue that these non-

discriminatory reasons were pretextual." Pet. App. 35a. In other words, the court believed that so long as supposedly non-pretextual, nondiscriminatory reasons existed, Hittle must lose. This *McDonnell-Douglas*-driven approach conflicts with Title VII, *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), and the statute's motivating-factor test. When an employer acts for a discriminatory reason, it cannot automatically avoid liability just because lawful reasons also motivated it. *McDonnell Douglas*'s obsession with employer pretext distracts from whether the employee identified evidence of an unlawful motivation.

The Court should take this opportunity to overrule *McDonnell Douglas,* a framework that has "spawn[ed] enormous confusion and wast[ed] litigant and judicial resources." *Brady* v. *Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (Kavanaugh, J.). At minimum, the Court should clarify that *McDonnell Douglas*'s third step does not require disproving the employer's proffered reasons, aligning its third step more closely with *Bostock* and the statute.

ARGUMENT

I. THIS CASE TURNS ON *MCDONNELL DOUGLAS*

Rather than defend *McDonnell Douglas*'s merits, the City avers that "[t]his case does not turn on—and thus offers no occasion to revisit—the *McDonnell Douglas* framework." BIO 9. But the Ninth Circuit announced that "[w]e analyze employment discrimination claims under Title VII * * * using the *McDonnell Douglas* v. *Green* burden-shifting test," Pet. App. 21a, and proceeded to do just that. The court made no exception for motivating-factor cases, and its one-sentence discussion of Hittle's motivating-factor claim is woven into its *McDonnell-Douglas* analysis. *Id.* at 30a.

The City mistakenly claims that the Ninth Circuit does not require plaintiffs to proceed under *McDonnell Douglas*. BIO 11-12. The amended opinion below holds exactly the opposite. It says that a plaintiff "does not need to use the *McDonnell Douglas* framework *to establish a* prima facie *case*." Pet. App. 23a (emphasis added). The qualifier—"to establish a *prima facie* case"—did not appear in the original opinion. See *id.* at 92a. The amended opinion also added that paragraph's second half, which explains that "regardless of" how a plaintiff establishes a *prima facie* case, "once an employer articulates some legitimate, nondiscriminatory reason for the challenged action, the employee must show that the articulated reason is pretextual." *Id.* at 23a; see *id.* at 92a. The amended opinion therefore ensures that *McDonnell Douglas*'s second and third steps apply in the Ninth Circuit.

II. *McDonnell Douglas* Should Be Overruled

A. *McDonnell Douglas* is a "judge-created doctrine [that] has been widely criticized for its inefficiency and unfairness." *Nall* v. *BNSF Ry. Co.*, 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J., specially concurring). The City barely defends its merits. Although in the bench-trial era it may have been a "sensible, orderly way to evaluate the evidence," *Furnco Const. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (quoted at BIO 29), the test has now "lost [its] utility," *Coleman* v. *Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring). *McDonnell Douglas* "disregards the duly promulgated rules of summary-judgment procedure," "overrides the substance of Title VII," and "obscures the decisive question: Does the summary-judgment record reveal a genuine dispute of material fact about whether an employer discriminated against its employee 'because of' a protected characteristic?" *Tynes* v. *Fla. Dep't of Juv. Just.*, 88 F.4th 939, 954 (11th Cir. 2023) (Newsom, J., concurring). As then-Judge Gorsuch

observed, "more than a few keen legal minds have questioned whether the *McDonnell Douglas* game is worth the candle." *Walton* v. *Powell*, 821 F.3d 1204, 1210-1211 (10th Cir. 2016).

The *McDonnell Douglas* doctrine, moreover, has spawned many other judge-made presumptions, including one now before the Court. See *Ames* v. *Ohio Dep't of Youth Servs.*, No. 23-1039; see also Sperino & Thomas, Unequal: How America's Courts Undermine Discrimination Law 67-87 (2017) (discussing others). The Court should strike the root of these judicially imagined rules by overruling *McDonnell Douglas*.

B. The City retreats to statutory *stare decisis*, but such considerations are weakened for "procedural device[s]" (BIO 28) like *McDonnell Douglas*. See *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are weakest in cases "involving procedural and evidentiary rules[.]"). That is because a "procedural rule" like *McDonnell Douglas* "does not serve as a guide to lawful behavior." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). And even for substantive precedents, statutory *stare decisis* does not require honoring an interpretation that "was not really statutory interpretation at all." *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 466 (2015) (Alito, J., dissenting).

While the City notes that Congress has not repudiated *McDonnell Douglas*, "Congress' failure to overturn a statutory precedent" is an insufficient "reason for this Court to adhere to it." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Plus, this Court has applied *stare decisis* "to civil rights statutes less rigorously than to other laws." *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672-673 (1987) (Scalia, J., dissenting). This is not a case where the Court should "place on the shoulders of Congress the burden of the Court's own error." *Monell* v.

Dep't of Soc. Servs., 436 U.S. 658, 695 (1978) (citation and internal quotation marks omitted).

C. Later decisions undermined *McDonnell Douglas*. The Court limited *McDonnell Douglas* to indirect-evidence cases, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), only to hold in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003), that direct and indirect evidence are treated alike under Title VII. Thus, "*Desert Palace* confirms the demise of the *McDonnell Douglas* framework." *Griffith* v. *City of Des Moines*, 387 F.3d 733, 746 (8th Cir. 2004) (Magnuson, J., concurring).

Price Waterhouse v. *Hopkins* undermined *McDonnell Douglas*'s pretext-based approach. "Where a decision was the product of a mixture of legitimate and illegitimate motives, * * * it simply makes no sense to ask whether the legitimate reason was 'the "true reason"' * * * for the decision." 490 U.S. 228, 247 (1989). *Bostock* further erodes *McDonnell Douglas* by recognizing that there can be "multiple but-for causes" of an employment action, meaning "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." 590 U.S. at 656. It is therefore improper to require plaintiffs to prove that the employer's proffered reason was pretextual.

D. *McDonnell Douglas* does not implicate "concrete reliance interests, like those that develop in cases involving property and contract rights." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 288 (2022) (citation and internal quotation marks omitted). The City argues that *courts* rely on *McDonnell Douglas,* invoking *CSX Transportation, Inc.* v. *McBride*, 564 U.S. 685, 698-699 (2011). But in *CSX*, "[c]ountless judges ha[d] instructed countless juries in language drawn from [the statutory precedent]." 564 U.S. at 699. The *opposite* is true here. Courts have stopped using *McDonnell Douglas* in jury

instructions because it misleads juries about the statutory elements. Pet. 13.

Even if the Court declines to formally overrule *McDonnell Douglas*, it could clarify that it never intended the three-step framework to be mandatory at the summary-judgment stage. Cf. *Groff* v. *DeJoy*, 600 U.S. 447, 471-472 (2023) ("clarifying" that the "more than de minimis" test applied by all circuits for 45 years misinterpreted Title VII). Plaintiffs should always remain free to satisfy Title VII and Rule 56 simply by identifying material evidence that the employer acted for a discriminatory reason.

III. COURTS ARE DIVIDED OVER HOW TO APPLY *MCDONNELL DOUGLAS*'S PRETEXT REQUIREMENT

If the Court does not overhaul *McDonnell Douglas*, it should at least hold that the framework's third step does not require disproving the employer's alleged nondiscriminatory reasons for its action. Rather, Title VII plaintiffs may satisfy the third step with any evidence that creates a material fact issue on discrimination.

A. But-for causation cases

1. Although the City disputes the third-step circuit split in but-for cases, the decision below is Exhibit A for the misguided approach that focuses on the employer's proffered reasons. Pet. App. 22a (holding plaintiff must show pretext "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" (emphasis added)). The City downplays this language as a "stray" or "incidental" remnant of "pre-*Bostock*" times (BIO 19), but it is indistinguishable from the test in *Opara* v. *Yellen*, 57 F.4th 709, 723 (9th Cir. 2023), that the City prefers. BIO 17-18. Both formulations improperly require plaintiffs to show that discrimination was "more likely" the cause of

termination than the employer's nondiscriminatory reasons.

The opinion's reasoning confirms this mistaken rubric. The court of appeals repeatedly emphasized that the City's action must *either* be based on religion *or* nondiscriminatory reasons. Pet. App. 31a (Hittle failed to show that "the real reason" was anti-religious animus); *id.* at 32a ("There is no genuine issue of material fact that [defendants] were motivated by discriminatory animus toward religion, *as opposed to* concern about the perception of others." (emphasis added)). Thus, when the City proffered concerns about "public perception or other forms of misconduct," Hittle lost because he "failed to persuasively argue that these non-discriminatory reasons were pretextual." *Id.* at 35a.

This rationale conflicts with *Bostock* (and the statute's motivating-factor test), which allows liability even when a nondiscriminatory reason "might also be at work, or even play a more important role in the employer's decision." 590 U.S. at 665. To take an obvious example, the City can worry about "public perception" and *also* discriminate against Christians. Or the City can believe that church-sponsored leadership training is "an activity that does not benefit the employer" and *also* fire an attendee because of religion. Indeed, these motivations are difficult to disentangle where evidence shows that the training's religious nature—rather than its leadership content—motivated the City's actions. Pet. App. 14a, 16a-17a.

The City, for its part, recounts Hittle's alleged misdeeds in the light most favorable *to the City*, inadvertently highlighting *McDonnell Douglas*'s distorting effect. It then pretends that the Ninth Circuit applied *Bostock*'s but-for causation standard, claiming that "removing any ground involving religion from the equation, the City had plenty of reasons to terminate" Hittle. BIO 30. But that

completely rewrites the Ninth Circuit's reasoning. The court never cited *Bostock* or meaningfully analyzed whether Hittle's religion was at least one but-for reason the City decided to discharge him. Rather, when the court examined Hittle's alleged misconduct, it did not conclude that those reasons motivated his firing to the exclusion of religious bias. Pet. App. 31a-34a. It held only that Hittle failed to "cast the findings of misconduct in the Largent Report as mere pretext for discriminatory termination." *Id.* at 33a; see *id.* at 31a, 32a, 34a. By framing its analysis this way, the court of appeals "privileg[ed] the City's 'other nondiscriminatory reasons' that supposedly justified Hittle's firing, * * * flout[ing] *Bostock*'s explanation of the but-for causation standard." *Id.* at 67a (VanDyke, J., dissenting).

2. The Ninth Circuit's approach sufficiently demonstrates the need for certiorari. As for other circuits, the City snips favored (often vague) language but cannot dispute that several circuits frame *McDonnell Douglas*'s third step around the veracity of the employer's proffered reasons. Pet. 17-20; *Chen* v. *Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009) (posing pretext question as, "[D]id the employer fire the employee for the stated reason or not?"); *Lashley* v. *Spartanburg Methodist Coll.*, 66 F.4th 168, 176 (4th Cir. 2023) (the "employee must prove that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext" (cleaned up)).

A circuit's allowance of comparator evidence to show pretext does not change the fact that it countenances summary judgment where the plaintiff fails to disprove the employer's reasons. See, *e.g.*, *Fincher* v. *Town of Brookline*, 26 F.4th 479, 489 (1st Cir. 2022) (affirming summary judgment because plaintiff failed to present evidence that employer's "explanation is false, much less a pretextual mask for discrimination"). The correct test, after all, does

not limit how a plaintiff might create fact issues regarding discrimination or focus myopically on disproving the employer's reasons. See *Bart* v. *Golub Corp.*, 96 F.4th 566, 576 (2d Cir. 2024) (to satisfy third step, "a plaintiff may, but need not, show that the employer's stated reason was false, and merely a pretext for discrimination; a plaintiff may also satisfy this burden by producing other evidence indicating that the employer's adverse action was motivated at least in part by the plaintiff's membership in a protected class"); *Markley* v. *U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1081-1082 (10th Cir. 2023) ("A plaintiff may show pretext by demonstrating the proffered reason is factually false, or that discrimination was a primary factor in the employer's decision." (citation omitted)).

3. The City's claim that courts of appeals are all faithfully applying a proper, *Bostock*-compliant pretext analysis blinks reality. As one scholar recently observed, "[j]udges often forget that the plaintiff is not required to rebut the defendant's articulated reason to survive a summary judgment motion." Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 483 (2024). If *McDonnell Douglas* remains the law, courts need guidance on how to square its third step with *Bostock* and Rule 56.

B. Motivating-factor cases

The City does not deny that there is a clear circuit split with respect to how courts of appeals approach motivating-factor cases, with three courts jettisoning *McDonnell Douglas* altogether, Pet. 23, and eight applying some form of *McDonnell Douglas*, *id.* at 24-25. That split alone warrants review.

The City disagrees that there is a 3–5 split among courts of appeals that apply *McDonnell Douglas* to mixed-motive cases. But the City misunderstands the nature of

that split. The difference is not whether those circuits require disproof of an employer's reasons; it is whether they modify step three such that any proof of "pretext" is unnecessary. See Sperino, *Beyond* McDonnell Douglas, 34 Berkeley J. Emp. & Lab. L. 257, 269 (2013) ("[c]ircuit splits still exist" regarding how *McDonnell Douglas* applies in mixed-motive cases). The courts that modify the third step recognize it is inappropriate to center the ultimate inquiry on pretext when discrimination need not even be a but-for cause. Pet. 19-20.

It is not enough to note that all circuits, "no matter how they get there," recognize that a motivating-factor claim exists under the statute. BIO 14. *How* courts apply the motivating-factor analysis is hardly a "distinction without a difference." *Ibid.* The pretext step of *McDonnell Douglas* cannot coexist with motivating-factor causation because discrimination can be a motivating factor in an employee's termination even if the employer's stated reasons were non-pretextual.

The Ninth Circuit addressed motivating factor in a single sentence that mentioned only Montes's and Deis's "remarks." Pet. App. 30a. It minimized those remarks because they "focused on the Summit's lack of benefit to the City and other evidence of Hittle's misconduct." *Ibid.* Only by ignoring the Largent Report and the Removal Notice's religion-based explanation in favor of the City's proffered reasons could the Ninth Circuit hold that religious discrimination was not even a motivating factor in Hittle's termination. The court erroneously grafted *McDonnell Douglas*'s step-three pretext requirement onto the motivating-factor analysis.

IV. THE DECISION BELOW WAS WRONG

Besides its borderline-frivolous claim that this case does not implicate *McDonnell Douglas* at all, the City raises no vehicle issues that prevent the Court from

resolving the questions presented. Indeed, this is an ideal case to resolve the tension that *McDonnell Douglas* creates between an unlawful but-for cause under *Bostock* and other potential causes offered by the employer. See Samaritan's Purse *Amicus* Br. 10-11.

The City asserts that the decision below was correct. But there is no way around the fact that decisionmakers derided Hittle as part of a "Christian coalition" and "church clique" before investigating and terminating him for "attend[ing] a religious leadership event." Pet. App. 12a, 15a, 17a. The City attempts to negate those admissions by suggesting that Montes had directed Hittle to obtain a specific type of leadership training, which the Summit did not satisfy. But the City raised that argument for the first time in the Ninth Circuit, and Hittle responded in three pages of his reply brief. C.A. Reply Br. 3-5. In truth, Montes admitted she never told Hittle that she would accept only a certain type of training, C.A. App. 2-ER-40-41, and Hittle explained that the only available fire-department-specific training was out-of-state and "extremely costly." C.A. App. 5-ER-1077.

Most damningly, the City deemed the Summit "of no benefit" precisely because of its religious nature. Pet. App. 27a. Its investigation never examined the Summit's content to determine whether it complied with Montes's alleged directive; it concluded that the Summit's religious aspect made its training valueless. *Id.* at 14a. This "logic is per se discriminatory." *Id.* at 64a (VanDyke, J., dissenting). Because *McDonnell Douglas*, as applied below, allowed the City to launder religious bias through neutral-sounding reasons like "public perception" and "engaging

in activity that does not benefit the employer," *id.* at 35a, the court of appeals' judgment should be reversed.*

Respectfully submitted.

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December 2024

* Contrary to the City's new claims, Hittle admitted only that he did not submit forms relating to no-cost travel. C.A. App. 2-ER-265-269; cf. BIO 33. The City never before alleged that Hittle failed to submit a required memorandum describing the Summit's benefits, and the requirement the City now cites applies only to "cost travels," which the Summit was not. C.A. App. 4-ER-726-727, 729-739; cf. BIO 33.