

No. 18-_____

IN THE
Supreme Court of the United States



JAGDISH C. LAUL,
Petitioner,

v.

LOS ALAMOS NATIONAL LABORATORIES,
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

I. Whether on summary judgment in an employment case utilizing the byzantine edifice of employment discrimination law that is the *McDonnell Douglas*¹ burden-shifting test, the court deprives a plaintiff of her Seventh Amendment right to make her case to a jury where the facts on every point of the legal test for intent are disputed and the court itself weighs conflicting inferences about the employer's intent?

II. Does the byzantine edifice of employment discrimination law that is the *McDonnell Douglas* framework even meaningfully apply after *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003), where each party espouses multiple motives? Here Plaintiff's theory of the case involves as least two unlawful reasons—national origin and age—and the defendant's theory involves at least two lawful reasons—performance and non-compliance with discipline. Under *Desert Palace*, is the *McDonnell Douglas* test as (reluctantly) used by the Tenth Circuit fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for an adverse action?

¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

LIST OF PARTIES

The Petitioner in this Court and the Appellant in the Tenth Circuit is Dr. Jagdish Laul, a former employee of Respondent. Dr. Laul was the Plaintiff below.

The Respondent in this Court and the Appellee in the Tenth Circuit is Los Alamos National Laboratory (LANL), the nation's flagship nuclear laboratory and a Federally Funded Research and Development Center, operated by Los Alamos National Security, LLC (LANS) under contract to the National Nuclear Security Administration. LANS comprises four U.S. organizations that partner to support delivery of our national security science mission. These entities are the University of California; Bechtel National, Inc.; The Babcock and Wilcox Company; and URS Corporation. LANL is the former employer of Petitioner and was the original defendant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dr. Jagdish C. Laul respectfully petitions for a writ of certiorari to the Tenth Circuit Court of Appeals in *Laul v. Los Alamos National Laboratories*, No. 16-2245, D. N.M. No. 1:15-CV-00749-JAP-KBM.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is unpublished from United States Court of Appeals for the Tenth Circuit, Case Number 16-2245 (filed October 23, 2017). The Order denying petition for rehearing and rehearing *en banc* was filed on November 20, 2017, as Doc. 01019904103. The decision of the District Court is at United States District Court for the District of New Mexico Case Number 1:15-cv-00749, Doc. 83 (filed 9/27/16).

JURISDICTION

The opinion of the Tenth Circuit Court of Appeals was entered on November 6, 2017, and Mr. Laul's timely Petition for Rehearing was denied on November 20, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Seventh Amendment to the United States Constitution provides in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

RELEVANT STATUTORY PROVISIONS

Title VII declares unlawful any “employment practice” that “discriminate[s] against any individual with respect to...compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

Under § 107, Title VII is violated if plaintiff proves that her protected class “was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (1991).

On a claim in which an individual proves a violation under section [2000e-2(m)] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [2000e-2(m)] of this title; and
- (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

The Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to take adverse action against an employee “because of such individual's age.” 29 U.S.C. § 623(a).

STATEMENT OF THE CASE

This case is an example of how the byzantine edifice of employment discrimination law, as wrestled-with at summary judgment stage in the Tenth and other Circuit Courts, has wrought two wrongs: (I) It has handed over to judges the power and traditional role of the jury too determine which of two (or more) disputed inferences to draw from competing evidence about the reason or reasons for firing an employee; and (II) It has excluded from trial the exact type of employee that the mixed-motive theory of discrimination is designed to protect.

Petitioner Dr. Jagdish Laul was a safety engineer at one of the nation's flagship nuclear laboratories in the New Mexico mountains. Dr. Laul was born in India, and became a naturalized United States Citizen in 1974. In October of 1999, at age 60, Dr. Laul began working at Los Alamos National Laboratory as a Principal Safety Engineer in the Environmental, Safety & Health Division.

Over the next decade Dr. Laul was promoted a number of times, received a number of professional awards, and received favorable evaluations. In context of his critical role as safety engineer in one of the world's foremost nuclear facilities, the occasional negative notes in his personnel file are all relatively minor soft-skills criticisms, about interpersonal-relations and "two way communications skills."

By 2010 Dr. Laul was promoted to Safety Basis Analyst-4, and shortly thereafter he was transferred to a new group. He also turned 70. In late 2010 and 2011 the tone of his personnel feedback changed. Dr. Laul was not getting on well with his new group leader Dr. Pinsoy-Hjelvik. Still no substantive safety issues were noted, but Dr. Pinsoy-Hjelvik criticized Dr. Laul problems in honoring the chain of command,

professional mannerisms, and interactions with the customer. His short time under Dr. Pinsoy-Hjelvik culminated in (after the fact) written discipline, a negative evaluation, and a transfer to another work group. Petitioner immediately grieved these actions as being based in discriminatory against his national origin and age.

Apparently Employer's way to address the conflict was to transfer Petitioner to a new work group.

Petitioner's main work assignment was to analyze Unanswered Safety Questions (USQs). This is a process of analysis of any proposed change (in physical plant or procedure) in a certified nuclear facility to determine if the proposed change can be done within the specified safety envelope. An engineer must have specialized training and certification to be qualified to produce USQs and to review them for other engineers. Each USQ analysis report goes through iterations, edits, and review by another certified USQ analyst (called a Qualified Evaluator or QEV), then up to a Systems Engineer, to the scientist who is requesting the change, and finally to group leader and customer. In Petitioner's work group there was another certified QEV who was both a contractor and supervisor, another certified QEV analyst at Safety Analyst level 2 (Mr. Garcia), and the Group Leader Ron Selvege. Of the group, only Petitioner was of national origin from India, and only Petitioner was over 70, markedly older than any other group member.

Even though Petitioner and his group were responsible for safety issues for the nation's flagship nuclear laboratory, the negative evaluations about his work on which Employer relied are not substantially safety-related. Group Leader Selvege complained that Dr. Laul "takes too long" to complete analysis tasks. Later he noted that while Dr. Laul was meeting

workload expectations and deadlines, he was working harder and longer to do so than Selvege felt was right for his level. Selvege also noted Dr. Laul required re-writes and several iterations on documents, although there was also testimony that every USQ analysis by procedural structure goes through several iterations, edits, and reviews. Later, after subjecting Dr. Laul to intense scrutiny, Selvege noted Dr. Laul's raw written work had problems, particularly with grammar and use of cut-and-paste. Finally, Selvege complained that other safety engineers in the group complained that Dr. Laul asked too many questions, and too-frequently asked for their help or feedback.

Based on these stated reasons, in late 2012 Employer put Dr. Laul (now 72) on a Performance Action Track (PAT), a form of intense scrutiny and supervision that, by its written express terms, was to result in either Dr. Laul being evaluated satisfactory at the end of six months or his being terminated.

No other member of the work group received a negative evaluation or was put on a PAT.

But Dr. Laul thrived under scrutiny. From December 2012 until June of 2013, all of Dr. Laul's two-week PAT evaluations were "satisfactory." By the written terms of his PAT, he should have been released. No records from this period show anything but satisfactory progress on the goals of the PAT.

Instead of releasing Dr. Laul from the intense scrutiny of the PAT after six months of satisfactory performance, his Group Leader Selvege chose unilaterally to "extend" the PAT to keep Dr. Laul under intense scrutiny. Still Dr. Laul obtained several more evaluations of "satisfactory" and then, about the time his Group Leader decided unilaterally to expend the PAT a second time, began to get unfavorable ratings. Soon thereafter Dr. Laul was terminated.

Group Leader Selvege would later claim that he decided to extend Dr. Laul's time of scrutiny under the PAT based on group report that Dr. Laul was being assigned easier projects. Later that the Group Leader claimed he learned that the USQ documents he had been reviewing as part of Dr. Laul's intense supervision were versions after they had gone through the standard iterative, editing and review process, and not Dr. Laul's "raw" work. The Group Leader demanded to review Dr. Laul's drafts done in isolation, and claimed that once he began to review the "raw" work his evaluations of that work were negative. However much much later, it was revealed that Group Leader Selvege, solely responsible for scrutinizing Dr. Laul's USQ work, was not himself certified or qualified to do (or review) USQ work.

Dr. Laul appealed his termination and filed with the New Mexico Human Rights Division that the stated reasons for placing him on PAT and his termination were merely coded ways of committing age and national origin discrimination. He pointed out he was treated differently than the non-elder, non-East Indian members of his safety engineering team, and that Employer had failed to follow its own written PAT procedure in six different ways. After the state administrative agency gatekeeper approved it, Dr. Laul filed suit for wrongful termination based on age and national origin discrimination.

At summary judgment stage in the district court and on appeal to the Tenth Circuit, Employer claimed that these performance issues were the real and legitimate reason for Dr. Laul's firing, while Dr. Laul maintained these were mere pretext for firing him based on age and national origin discrimination.

Strangely, the district court first held that Dr. Laul had not made a *prima facie* case for

discrimination,² but then went on to analyze the second step under the *McDonnell Douglas* test, pretext, anyway.

At the end of the day, citing *McDonnell Douglas*, a federal judge, without a jury, laid out all the inferences of motive urged by both parties. That federal judge weighed the inferences, and chose from among them. Despite Dr. Laul having literally pointed out a factual challenge to each of the Employer's stated motives, the district judge granted summary judgment to Employer. Dr. Laul appealed, and the Tenth Circuit Court of Appeals in an unpublished decision tracking the district court's analysis affirmed.

² In this conclusion it appears clear that the district court erred. The Tenth Circuit has stated that a plaintiff may establish a prima facie case of wrongful termination by showing that: (i) "she belongs to a protected class;" (ii) "she was qualified for her job;" (iii) "despite her qualifications, she was discharged;" and (iv) "the job was not eliminated after her discharge." *Perry v. Woodward*, 199 F.3d 1126, 1138 (10th Cir. 1999). The only issue in dispute in the lower courts was whether Dr. Laul was qualified as a Safety Analyst Level 4. The district court found that he was, given employer had in fact promoted him to that level and never asked him to be demoted. None of the other elements was in dispute in either lower court.

REASONS FOR GRANTING THE WRIT

This case presents important issues relating to employment discrimination law, specifically when and how *McDonnell-Douglas* burden-shifting is applied at summary judgment stage and whether this framework impinges on the Seventh Amendment right to jury trial.

A. THE *MCDONNELL DOUGLAS* FRAMEWORK

Employment discrimination cases are generally decided using the well-known but byzantine *McDonnell Douglas* framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Despite notable judicial misgivings³, in the Tenth Circuit, due to binding precedent from This Court and the “law of the circuit” precedent, most employment discrimination cases are shoehorned into *McDonnell Douglas*.

Under the *McDonnell Douglas* framework (specific to a wrongful termination case), a plaintiff must first prove a prima facie case of discrimination by showing that (1) she is a member of a protected class; (2) she met the qualifications for the position; (3) the

³ See, e.g., *Paup v. Gear Prods., Inc.*, 327 F. App’x 100, 113 (10th Cir. 2009) (Gorsuch, J.) (“[S]ome have criticized *McDonnell Douglas* as improperly diverting attention away from the real question posed by the ADEA—whether age discrimination actually took place—and substituting in its stead a proxy that only imperfectly tracks that inquiry. But *McDonnell Douglas* of course remains binding on us.” (citations omitted)); see also *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n. 12 (10th Cir. 2008) (noting the Court will apply the test “so long as *McDonnell Douglas* remains the law governing our summary judgment analysis”). See, e.g., *Wells v. Colo. Dep’t of Transp.*, 325 F.3d 1205, 1224-28 (10th Cir. 2003) (Hartz, J., writing separately (from his own Opinion)); Timothy M. Tymkovich, *The Problem with Pretext*, 85 *Denv. U.L.Rev.* 503, 528-29 (2008).

employer fired her; and (4) the employer did not remove the position or did not fire someone from a nonprotected class. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (citing *McDonnell Douglas*, 411 U.S. at 802).

If the plaintiff satisfies her burden of demonstrating a prima facie case, a rebuttable presumption of discrimination arises. *Id.* at 254 & n.7. It is then incumbent upon the defendant to produce evidence of a legitimate, nondiscriminatory reason for the adverse action. *McDonnell Douglas*, 411 U.S. at 802. Once the defendant produces evidence of a legitimate, nondiscriminatory reason for the employment action, the presumption of discrimination created by the prima facie case evaporates. *Burdine*, 450 U.S. at 255 n.10.

Finally, if these first two steps are satisfied, which they usually are, the plaintiff must prove that the defendant's proffered reason is merely a pretext for discrimination. *Id.* at 255–56. Generally, a plaintiff establishes pretext by showing that the employer's legitimate, nondiscriminatory reason for the action is not credible. *Id.* at 256. At the end of the day, pretext is usually the determining factor as to whether a Title VII claim succeeds. Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 326 (2010).

The application of the *McDonnell Douglas* framework, dependent as it is on inferences drawn from circumstantial evidence, is problematic to the Seventh Amendment right to a jury determination of facts (and specifically, inferences) when ground through the procedural machine of summary judgment.

B. SUMMARY JUDGMENT

A court must grant a motion for 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). In determining whether a genuine dispute as to a material fact exists, courts are instructed not to make credibility determinations and to draw all reasonable inferences in favor of the nonmovant. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000) (“[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.”).

But even our foundational summary judgment case cautions that: “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus summary judgment is necessarily circumscribed by the Seventh Amendment. It serves to determine “whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Liberty Lobby*, 477 U.S. at 250.

C. SEVENTH AMENDMENT

This Court has long proclaimed plaintiffs’ Seventh Amendment right to trial by jury to be a “fundamental guarantee of the rights and liberties of the people.” *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), *overruled on other grounds*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). This Court has deem the right “justly dear.” *Id.* And, as “an object of deep interest and solicitude,” for which this Court has consistently warned that “every encroachment upon it has been watched with great jealousy.” *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 378 (1913). Every restriction on the right to trial by jury “should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). As Justice Rehnquist

reminded us in his dissent in *Parklane Hosiery*, our founders literally fought the revolutionary war to secure the right to try questions of inference to a jury: The right's "deprivation at the hands of the English was one of the important grievances leading to the break with England." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

A century ago, the Supreme Court confirmed "that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence." *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. at 387 (emphasis added). Alexander Hamilton noted that the right to a jury trial was one of the few areas of consensus among the Framers. THE FEDERALIST NO. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting that the Framers "concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

At the start of every jury trial in every state of the union the jury is instructed that it is the judge's job to answer questions of law, and the jury's job to determine questions of fact. See *Baylis v. Travellers' Ins. Co.*, 113 U.S. 316, 320–21 (1885) (disputed questions of fact must be submitted to the jury). Our system uses juries to find facts, which is what makes the judicial branch at all democratic: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); see also *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the

democratic process.”).

REASON 1:

IT IS THE PROVINCE OF THE JURY TO CHOOSE FROM COMPETING INFERENCES

The sacredness of a jury is not mere constitutional nostalgia—it is rooted in the very practical idea that the core competencies of a citizen panel are very different from the core competencies of a career judicial officer, and that some decisions—fact decisions generally and inferences from circumstantial evidence particularly—are far better when made by juries.

It is the jury’s historic prerogative to select from among competing inferences. In 1944, in *Tennant v. Peoria & Pekin Union Railway*, the Supreme Court explained that “select[ing] from among conflicting inferences” was “[t]he very essence of [the jury’s] function.” *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 35 (1944). The Court admonished courts not to substitute their own inferences for those drawn by the jury. *Id.* (“Courts are not free to reweigh the evidence...merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.”). Choosing from conflicting inferences is THE core competency of a jury over a judge. See *Standard Oil Co. v. Van Etten*, 107 U.S. 325, 334 (1882) (“The very spirit of trial by jury is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties.”).

A companion foundational principle of the jury system is that when parties disagree about a question of intent, “the jury is the lie detector.” *United States v. Scheffer*, 523 U.S. 303, 313 (1997) (internal quotation

marks omitted). It is uniquely the skill set of a jury to determine intent from circumstantial evidence.

In fact, the very way we talk about “inferences” and “circumstantial evidence” highlights the jury’s role. Inferences are conclusions that “common experience” permits us to draw from circumstantial evidence. *See, e.g., Paulino v. Harrison*, 542 F.3d 692, 700 n.6 (9th Cir. 2008) (citing *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950)); *United States v. Scruggs*, 549 F.2d 1097, 1104 (6th Cir. 1977). To evaluate circumstantial evidence, a factfinder must draw an “inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present.” *Radomsky v. United States*, 180 F.2d at 783. Preserving the power to draw inferences is crucial to maintaining a significant right to a jury trial. William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1699 (2001).

In our justice system juries are uniquely qualified to draw factual inferences. Nowhere is this more true than in a legal test for whether a party’s given reason is pretext. *See, e.g., Dyer v. MacDougall*, 201 F.2d 265, 268–69 (2d Cir. 1952) (reasoning that it is logical to assume the opposite of the defendant’s testimony if it appears to be fabricated).

Modern procedural modifications to the jury trial are permissible so long as they leave intact the substance of the English common law trial. *Parklane*, 439 U.S. at 346 (“[T]o sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.” (citing *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967))). Relevant here, the Rule 56 procedure of summary judgment is consistent with

the Seventh Amendment *by and through* and, it is argued, only complete with, its restriction to cases where *there are no disputed fact* issues for the jury to resolve. See *Fid. & Deposit Co. v. United States*, 187 U.S. 315 (1902) (holding that summary judgment is consistent with the Seventh Amendment where material facts are undisputed).

REASON 2:

PRETEXT IS NECESSARILY A FACTUAL FINDING BASED ON COMPETING INFERENCES

The ordinary meaning of pretext is: A reason that you give to hide your real reason for doing something. Pretext, Merriam-Webster Dictionary (2016); see also Pretext, Black’s Law Dictionary (7th ed. 1999) (“[a] false or weak reason or motive advanced to hide the actual or strong reason or motive”); John Bouvier, *Pretext, A Law Dictionary, Adapted to the Constitution and Laws of the United States* (1856) (“[t]he reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation; or which if true are not the true reasons for such act”).

Pretext evidence is any evidence tending to show that a stated reason is not the real reason. See Fed. R. Civ. Evid. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”)

Key here is the logical necessity that by putting forth evidence from which the fact-finder could conclude the employer’s stated reasons are pretext, an employee necessarily provides facts to support (or goes

a long way to proving⁴) a discriminatory motive. The pretextual reason would not be used or needed but for the discrimination. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. at 143 (reiterating that claimants must be afforded an opportunity to establish that “the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination” and that claimants may do so “by showing that the employer’s proffered explanation is unworthy of credence”).

Put plainly: In every conceivable case posing a *McDonnell Douglas* pretext issue, there are *at least two competing inferences* the parties contend can be drawn from circumstantial evidence of motive. In most cases, there are probably more than two. Since *Desert Palace* has said that Plaintiffs can partially prevail (or the defense can partially defend) on evidence that discrimination is “a motive” rather than “the motive” or even “the main motive,” it is extremely likely that one or both parties will be contending that multiple inferences supporting multiple motives exist in any given discrimination case.

Take this case: Dr. Laul’s theory of the case is that either or both age and national origin discrimination were among the motives for his firing. His Employer responded with circumstantial evidence tending to show his slow performance, professional neediness, and language issues were the real motives for his firing. Dr. Laul rebuts that the too slow/poor language/asks-too-many-questions reasons are mere code for the fact his team found him too old, too

⁴ As Justice Alito explained in a concurrence just two terms ago: “Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder may infer that the employer’s asserted reason for its action is a pretext for unlawful discrimination.” *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1356 (2015) (Alito, J., concurring).

earnest, and foreign-born.

At the end of the day, citing *McDonnell Douglas*, a federal judge, without a jury, laid out all the inferences urged by both parties and that judge weighed them and chose from among them.

REASON 3:

DATA CONFIRMS FRAMEWORK BROKEN

How incompatible is the *McDonnell Douglas* framework on summary judgment (which has judges weighing competing inferences from circumstantial evidence) with the right to a jury? Beyond the analytical incompatibility with the kind of decisions that must be made, we can look to court data. The Federal Judicial Center has noted that “[s]ummary judgment motions by defendants are more common in [employment discrimination] cases, are more likely to be granted, and more likely to terminate the litigation.” *Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson*, 3 (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf) (“[T]he prominent role of summary judgment in such cases is striking.”).⁵

⁵ The disparate impact of summary judgment on employment cases has been alarming to numerous scholars. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol’y Rev. 103 (2009); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. Rev. 81 (2009); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 Mo. L. Rev. 423 (2010); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 Notre Dame L. Rev. 109 (2007); Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 315 (2010) (“Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias.”); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo. L. Rev. 481, 482 (2008) (“These are rough times for employment discrimination plaintiffs in federal court.”); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 St. Louis U. L.J. 111 (2011).

Two Cornell University professors have demonstrated this particular hostility by analyzing data on employment discrimination cases in federal district and circuit courts. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol’y Rev. 103 (2009). According to Clermont and Schwab, “[j]obs cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts.” *Id.* at 104.

While federal plaintiffs bringing non-employment discrimination cases succeed in approximately fifty percent of cases, employment discrimination plaintiffs succeed in only fifteen percent of cases. *Id.* at 127. Further, even when a plaintiff is successful on an employment discrimination claim, a court of appeal is more likely to reverse a judgment for the plaintiff than a judgment for the defendant. *Id.* at 111. Thus employment plaintiffs are far less likely to get their case before a jury than other types of plaintiffs, even though the legal framework of almost every employment case will be the quintessential jury question of what were the real motives of the employer.

II. THE BYZANTINE EDIFICE OF THE MCDONNELL DOUGLAS FRAMEWORK CANNOT MEANINGFULLY APPLY AFTER *DESERT PALACE* IN MOST CASES, LIKE THIS ONE, WHERE EACH PARTY ESPOUSES MULTIPLE INFERRED MOTIVES.

This case is the kind of mess that the Tenth circuit faced the Tenth Circuit 7-7 *en banc* split that resulted from review of the panel opinion in *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106 (10th Cir. 2006)

vacated on review en banc by 478 F.3d 1160 (10th Cir. 2007). The fourteen judges on the Tenth Circuit diverged on fact-bound summary judgment issues in an employment discrimination case.

Judge Hartz, concurring in the *en banc* decision, wrote specifically to state that “I continue to believe that we should not apply the framework of *McDonnell Douglas*....” “Applying that framework is inconsistent with Supreme Court authority, adds unnecessary complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on ‘the ultimate question of discrimination *vel non*.’” *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (*en banc*) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)).

An issue appellate courts are currently wrestling with is whether and to what extent *Desert Palace* alters or eliminates the *McDonnell Douglas* framework for proving unlawful employment discrimination with circumstantial evidence.

The United States District Courts are divided on this issue, and the Circuit Courts of Appeals are currently split. The current minority view is the correct one: Because *Desert Palace* reworks the burdens of proof in Title VII cases, and most discrimination cases will come with two or more interracial motives, is no longer a useful tool for proving unlawful Title VII discrimination, and it should be discarded.

REASON 4:

MOST CIRCUIT COURTS OF APPEAL HAVE ALREADY HELD THE *MCDONNELL DOUGLAS* FRAMEWORK CANNOT APPLY TO MIXED- MOTIVE CASES AFTER STRUGGLING WITH ITS FLAWS FOR THESE SAME REASONS

This Court in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003) ruled that direct evidence is not required for a plaintiff to prove that discrimination was a motivating factor in a “mixed-motive” case, i.e., a case in which an employer had both legitimate and illegitimate reasons for making an employment decision. The side effect of *Desert Palace* is that in almost any cases where the parties are arguing that the circumstantial evidence supports the inferences of two or more motives, the *McDonnell Douglas* test breaks down and fails to work.

As the Eleventh Circuit recently ruled in *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1238 (11th Cir. 2016), McDonnell Douglas framework is unhelpful and inappropriate for analyzing mixed-motives claims. The Eleventh Circuit concluded that “*McDonnell Douglas* is not [the] appropriate [framework] for examining mixed-motive claims at summary judgment.” *Quigg*, 814 F.3d at 1239. The court reasoned first that a plaintiff “can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, ‘was a motivating factor for’ an adverse employment action, ‘even though other factors also motivated’ the action.” *Id.* at 1235 (emphasis added) (quoting 42 U.S.C. § 2000e-2(m)). Second and conflicting with this, under *McDonnell Douglas*, “if an employee cannot rebut her employer’s proffered reasons for an adverse action but offers evidence demonstrating that the employer also relied on a

forbidden consideration, she will not meet her burden.” *Id.* at 1238. “Yet, this is the exact type of employee that the mixed-motive theory of discrimination is designed to protect.” *Id.* Accordingly, the Eleventh Circuit held that the *McDonnell Douglas* framework is too demanding and inapplicable in a Title VII discrimination case where the plaintiff brings (or defense raises) a mixed-motive claim and is trying to survive summary judgment.

The *Quigg* panel held that the *McDonnell Douglas* test “is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, ‘true reason’ for an adverse action.” *Id.* at 1237 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). The “pretext” framework requires an employee to prove that the “true reason” for an adverse action was illegal. “In other words, an employee can only meet her burden under *McDonnell Douglas* by showing the employer’s purported legitimate reasons ‘never motivated the employer in its employment decisions or because [the reasons] did not do so in a particular case.’” *Id.* at 1237-38 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) (O’Connor, J., concurring)). The *Quigg* court noted that under *McDonnell Douglas*, if an employee cannot rebut an employer’s proffered reasons for an adverse action, despite having evidence that the employer relied on a forbidden consideration, she fails her burden. This is contrary to the mixed-motive framework applicable to Title VII and § 1983. “In light of this clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims, it is improper to use that framework to evaluate such claims at summary judgment.” *Id.* at 1238.

Quigg adopted, as its model, the Sixth Circuit’s

decision in *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008). Under the framework set adopted in *White*, “Title VII plaintiff asserting a mixed- motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) ‘race, color, religion, sex, or national origin was a motivating factor’ for the defendant’s adverse employment action” *Id.*

The Fifth Circuit has likewise adopted formal, modified standards to evaluate mixed-motive cases that strains, but deviates from, the *McDonnell Douglas* framework. In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004), that Circuit Court adopted a “modified *McDonnell Douglas* approach” for mixed-motive cases, where in the third step “the plaintiff must then offer sufficient evidence to create a genuine issue of material fact ‘either (1) that the defendant’s reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff’s protected characteristic (mixed-motive[s] alternative)’.” (quotations omitted). *Accord EEOC v. LHC Group, Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (quoting *Rachid*).

Other Circuits, while declaring generally that plaintiffs need not establish pretext under the *McDonnell Douglas* framework in a mixed-motive case, have not formalized an alternative test. *See Burns v. Johnson*, 829 F.3d 1, 11 n.10 (1st Cir. 2016) (“this circuit has not required a plaintiff to use *McDonnell Douglas* with the mixed-motives theory”); *Holcomb v. Iona Coll.*, 521 F.3d 130, 141–42 (2d Cir. 2008) (“a plaintiff who, like Holcomb, claims that the employer acted with mixed motives is not required to prove that the

employer's stated reason was a pretext"); *Connelly v. Lane Const. Corp.*, 809 F.3d 780 (3d Cir. 2016) ("in a 'mixed-motive' case, the plaintiff must ultimately prove that her protected status was a 'motivating' factor, whereas in a non-mixed-motive or 'pretext' case, the plaintiff must ultimately prove that her status was a 'determinative' factor"); *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) ("A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision") (citing *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en banc)); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir. 2007) (recognizing two separate theories) (*but see Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) (suggesting just one standard for causation: "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action")); *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1225 (10th Cir. 2008) (plaintiff may either "establish that retaliation played a motivating part in the employment decision at issue," or else "rely on the familiar three- part *McDonnell Douglas* framework to prove that the employer's proffered reason for its decision is a pretext for retaliation"); *Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2007) (recognizing two separate theories). The Ninth Circuit primarily treats "mixed-motives" as a defense rather than a standard of causation and thus has not declared a separate causation standard in a published opinion. *Metoyer v. Chassman*, 504 F.3d 919, 932-34 (9th Cir. 2007).

The Eighth Circuit and the panel of the Tenth Circuit in this case alone hold that the *McDonnell Douglas* approach applies regardless of the nature of the claim. See *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004); but see *id.* at 739–48 (Magnuson, J., concurring specially) (disagreeing with majority that the “*McDonnell Douglas* paradigm” is appropriate for evaluating mixed-motive claims).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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