

No. 17-1197

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

JAGDISH C. LAUL,

Petitioner,

v.

LOS ALAMOS NATIONAL LABORATORIES,

Respondent.

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

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the district court's grant of summary judgment in favor of Respondent on Petitioner's causes of action alleging discrimination and retaliation under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the New Mexico Human Rights Act, where there was no genuine dispute of any material fact and Respondent was entitled to judgment as a matter of law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	1
1. Undisputed Material Facts.....	1
2. Procedural History	11
SUMMARY OF ARGUMENT	13
REASONS FOR DENYING THE PETITION	15
I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO PRESERVE HIS ARGUMENTS BELOW AND BECAUSE HE INVITED ANY CLAIMED ERROR BELOW	15
II. PETITIONER WAS NOT DENIED HIS SEVENTH AMENDMENT RIGHT TO A JURY	20
III. THE DISTRICT COURT APPROPRIATELY APPLIED THE <i>MCDONNELL DOUGLAS</i> BURDEN-SHIFTING FRAMEWORK.....	24
a. <i>McDonnell Douglas</i> was not overruled by <i>Desert Palace</i> in non-mixed-motive cases	24
b. Petitioner failed to assert or demonstrate that any animus based on a status pro- tected by Title VII was a “motivating factor” in any of the employment ac- tions at issue.....	28

TABLE OF CONTENTS – Continued

	Page
IV. THE OPINION UNDER REVIEW HAS MIN- IMAL PRECEDENTIAL VALUE	31
CONCLUSION	31

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adamson v. Multi Cmty. Diversified Servs., Inc.</i> , 514 F.3d 1136 (10th Cir. 2008).....	18
<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144 (1970)	15
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	22
<i>Ark. Game & Fish Comm’n v. United States</i> , 568 U.S. 23 (2012)	15
<i>Ash v. Tyson Foods, Inc.</i> , 546 U.S. 454 (2006).....	26
<i>Biegas v. Quickway Carriers, Inc.</i> , 573 F.3d 365 (6th Cir. 2009).....	20
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	13
<i>Calvi v. Knox Cty.</i> , 470 F.3d 422 (1st Cir. 2006)	20
<i>Camreta v. Greene</i> , 131 S. Ct. 2020 (2011).....	13
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	21
<i>City of Springfield v. Kibbe</i> , 480 U.S. 257 (1987)	15
<i>Cronquist v. City of Minneapolis</i> , 237 F.3d 920 (8th Cir. 2001).....	17, 28
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	15
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003)	<i>passim</i>
<i>Duignan v. United States</i> , 47 U.S. 195 (1927).....	15, 16
<i>Ellis v. Dixon</i> , 349 U.S. 458 (1955)	18
<i>Fid. & Deposit Co. v. United States</i> , 187 U.S. 315 (1902).....	20

TABLE OF AUTHORITIES – Continued

	Page
<i>Fox v. Wichita State Univ.</i> , 489 F. Supp. 2d 1216 (D. Kan. 2007).....	30
<i>Furaus v. Citadel Communications Corp.</i> , 168 Fed. Appx. 257 (10th Cir. 2006)	28
<i>Fye v. Oklahoma Corp. Comm’n</i> , 516 F.3d 1217 (10th Cir. 2008).....	24, 29
<i>Gross v. FBL Financial Servs., Inc.</i> , 557 U.S. 167 (2009).....	12
<i>Harris v. Interstate Brands Corp.</i> , 348 F.3d 761 (8th Cir. 2003).....	20, 22
<i>Hosick v. Chicago State Univ. Bd. of Trustees</i> , 924 F. Supp. 2d 956 (N.D. Ill. 2013).....	12
<i>Hudson v. Wylie</i> , 242 F.2d 435 (9th Cir. 1957)	19
<i>In re TMI Litig.</i> , 193 F.3d 613 (3d Cir. 1999)	20
<i>J.R. Simplot v. Chevron Pipeline Co.</i> , 563 F.3d 1102 (10th Cir. 2009).....	21
<i>Johnson v. California</i> , 545 U.S. 162 (2005)	26
<i>Luluc Councils 4433 & 4436 v. City of Galveston</i> , 979 F. Supp. 514 (S.D. Tex. 1997).....	13
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	<i>passim</i>
<i>Meyer v. Holley</i> , 537 U.S. 280 (2003)	15
<i>Minneapolis & St. L. R. Co. v. Winters</i> , 242 U.S. 353 (1917).....	19
<i>Pa. Dep’t of Corr. v. Yeskey</i> , 524 U.S. 206 (1998).....	15

TABLE OF AUTHORITIES – Continued

	Page
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979).....	20
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)....	<i>passim</i>
<i>Quigg v. Thomas County Sch. Dist.</i> , 814 F.3d 1227 (11th Cir. 2016).....	27
<i>Randall v. Smith’s Food & Drug Centers, Inc.</i> , No. 05-CV-139-J, 2006 WL 8433340 (D. Wyo. Mar. 20, 2006).....	26
<i>Raytheon Co. v. Hernandez</i> , 540 U.S. 44 (2003)	26
<i>Riggs v. AirTran Airways, Inc.</i> , 497 F.3d 1108 (10th Cir. 2007).....	22
<i>Semsroth v. City of Wichita</i> , 304 Fed. Appx. 707 (10th Cir. 2008).....	25
<i>Shannon v. Graves</i> , 257 F.3d 1164 (10th Cir. 2001)	20, 21
<i>Smith v. City of Jackson</i> , 544 U.S. 238 (2005).....	26
<i>St. Mary’s Honor Ctr. v. Hicks</i> , 509 U.S. 502 (1993).....	22
<i>Texas Dep’t of Housing & Cmty. Affairs v. Inclu- sive Communities Project, Inc.</i> , 135 S. Ct. 2507 (2015).....	26
<i>Thelwell v. City of New York</i> , No. 13 CV. 1260 JGK, 2015 WL 4545881 (S.D.N.Y. Jul. 28, 2015)	23
<i>Twigg v. Hawker Beechcraft Corp.</i> , 659 F.3d 987 (10th Cir. 2011).....	29, 30

TABLE OF AUTHORITIES – Continued

	Page
<i>Tysinger v. Police Dep’t of City of Zanesville</i> , 463 F.3d 569 (6th Cir. 2006).....	30
<i>United States v. Edward J.</i> , 224 F.3d 1216 (10th Cir. 2000)	19
<i>United States v. Sharpe</i> , 996 F.2d 125 (6th Cir. 1993)	18
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004)	26
<i>Williams v. Aircraft Workers Worldwide, Inc.</i> , 832 F. Supp. 2d 1347 (S.D. Ala. 2011).....	12
<i>Winter v. Bank of America, N.A.</i> , No. Civ. A.3:02-CV-1591-L, 2003 WL 23200278 (N.D. Tex. Dec. 12, 2003)	26
<i>Wood v. Georgia</i> , 450 U.S. 261 (1981)	16, 17
<i>Young v. United Parcel Serv., Inc.</i> , 135 S. Ct. 1338 (2015).....	26
<i>Zivojinovich v. Barner</i> , 525 F.3d 1059 (11th Cir. 2008)	22
UNITED STATES CONSTITUTION	
U.S. Const. amend. VII	<i>passim</i>
STATUTES	
29 U.S.C. §§ 621-634	11, 12, 26
42 U.S.C. § 2000e	<i>passim</i>
N.M. Stat. Ann. §§ 28-1-1 to -15 (1969, as amended through 2007).....	11

TABLE OF AUTHORITIES – Continued

	Page
RULES	
Fed. R. Civ. P. 1.....	21
Fed. R. Civ. P. 56.....	21, 24
S. Ct. R. 10.....	13
Tenth Circuit Rule 32.1.....	31
OTHER AUTHORITIES	
Christopher L. Hedican, <i>et al.</i> , <i>McDonnell Douglas: Alive and Well</i> , 52 Drake L. Rev. 383 (2004).....	26
Robert L. Stern, <i>et al.</i> , <i>Supreme Court Practice</i> (8th ed. 2002).....	18

STATEMENT OF THE CASE

1. Undisputed Material Facts

Dr. Laul was hired to work at Los Alamos National Laboratory (“LANL”)¹ in October 1999 as a Staff Member in the Environment, Safety & Health Division. He was 60 years old at the time. In 2006, Los Alamos National Security (“LANS”) assumed managerial responsibility for LANL and maintained Dr. Laul as an employee. At that time, Dr. Laul was a Safety Analyst-2 (“SA-2”) and a Team Leader assigned to the Safety Basis Division-Tritium, Accelerator & Non-Nuclear Group under the supervision of Group Leader James Tingey.

As early as 2002, Dr. Laul’s performance evaluations reflected concerns about the quality of his work product and his interactions with supervisors and clients. Concerns regarding Dr. Laul’s work product included issues with his “lack of judgment and understanding performing safety analysis” and that his written work product “typically need[ed] significant rework for grammar, and in some cases standard format and acceptable content.”

In 2008, when he was 69 years old, Dr. Laul was promoted to Safety Basis Analyst-3 (“SA-3”). In his 2007-2008 performance evaluation, his supervisor recommended that Dr. Laul attend a writing course as “[h]e need[ed] to significantly improve his writing

¹ Although Los Alamos National Laboratories was the named defendant in Petitioner’s Complaint, the proper party name is Los Alamos National Security, LLC.

skills to reduce rework on the documents he prepares.” His supervisor also observed that Dr. Laul needed to improve his “communication skills . . . especially when he initially disagrees with the other party.”

Dr. Laul’s last fully satisfactory evaluation was for his work in the 2008-2009 period, from Ron Selvage, Dr. Laul’s then Safety Basis Division-Technical Services (“SBD-TS”) Group Leader. Mr. Selvage noted that Dr. Laul was meeting and/or exceeding expectations on certain competencies, but that “ . . . there are still issues with communications between customers and team members[.]”

In early 2010, when he was 70 years old, Dr. Laul was promoted to Safety Basis Analyst-4 (“SA-4”). As an SA-4, Dr. Laul was expected to work independently and to demonstrate a high level of knowledge in safety basis areas. In approximately July 2010, Dr. Laul was transferred to work under Group Leader, Dr. Lisa Pansoy-Hjelvik, who had taken over the SBD-TS Group. Dr. Laul’s performance reviews during the 16-month period he was supervised by Dr. Pansoy-Hjelvik were largely unsatisfactory and noted areas of needed improvement.

On September 22, 2010, in light of the numerous issues with Dr. Laul’s performance and conduct, Dr. Laul was given an informal Memorandum of Expectations (“MOE”) signed by then-Deputy Division Leader, Thomas Dunn. The MOE was aimed at making clear the performance and conduct expectations of Dr. Laul’s supervisory chain.

Dr. Laul's performance and conduct issues did not improve as was made clear in his performance evaluation for the 2010-2011 review period. In the evaluation, his supervisor (Dr. Pansoy-Hjelvik) noted that Dr. Laul's "work behavior consistently impacts the ability to effectively achieve work milestones. The behavior challenges are compounded by deficiencies in [Dr. Laul's] application of safety basis fundamentals."

On March 7, 2011, Dr. Laul was issued a Notice of Corrective Action – Written Counseling ("Written Counseling"). The Written Counseling formally addressed the ongoing issues with Dr. Laul in SBD-TS. On April 4, 2011, Dr. Laul filed a complaint under LANS' Policy P791 ("Complaint Resolution Program") challenging the Written Counseling.

In approximately November 2011, Dr. Laul was transferred from SBD-TS back to the supervision of Group Leader, Ron Selvage, in the Environmental and Waste Management ("EWM") Group. Dr. Laul was transferred because he was unable to conform his conduct and improve his performance ratings under the supervision of Dr. Pansoy-Hjelvik.

Dr. Laul's 2010-2011 evaluation reflected his work in Dr. Pansoy-Hjelvik's group as well as his first few months of work in the EWM Group under Mr. Selvage. The evaluation indicated that "[Dr. Laul] has consistently failed to perform" the SA-4 work assigned to him. The evaluation rated Dr. Laul as "falls below expectations" in six out of nine competencies with an overall rating of "Unsatisfactory." On January 3, 2012, Dr.

Laul filed a P791 Complaint challenging his performance evaluation for 2010-2011.

On February 21, 2012, Dr. Laul was issued a formal Notice of Disciplinary Action – Written Reprimand signed by then-Safety Basis Division Deputy Director, Gilbert Torres, addressing management’s concerns regarding Dr. Laul’s continued inappropriate conduct, unprofessional behavior, and poor performance. Dr. Laul filed another P791 Complaint challenging the disciplinary notice.

LANS’ Employee Relations Division investigated each of the P791 Complaints filed by Dr. Laul. The investigations concluded that Dr. Laul had not been subjected to discrimination or retaliation on the basis of his age, race, or national origin.

Dr. Laul’s May 25, 2012 mid-year performance appraisal reflected Mr. Selvage’s concerns that Dr. Laul took far too long to complete assigned tasks and reiterated the now long-standing concern that Dr. Laul relied too much on his colleagues for assistance in completing his work.

In May 2012, Mr. Selvage assigned Dr. Laul the task of addressing the backlog of Unreviewed Safety Questions (“USQs”). The USQ process looks at proposed changes to procedures/activities at LANS facilities and compares those against the existing-approved Department of Energy (“DOE”) facility license to determine if LANS has the authority to make that change, or whether the contractor is required to obtain DOE approval. USQs can be authored by SA-2s, SA-3s, and

SA-4s. USQs are also typically reviewed and signed off on by Qualified Evaluators (“QEVs”) Systems Engineers (“SEs”), and each level of review is authorized to propose technical and editorial revisions and comments on the USQ preparer’s methodology and conclusion.

After making this USQ assignment to Dr. Laul in May 2012, Mr. Selvage received feedback on Dr. Laul’s performance, which included complaints that Dr. Laul constantly sought assistance in performing his duties from USQ Lead, Lance Platter. This information, as well as Mr. Selvage’s own concerns about Dr. Laul’s performance were detailed in Dr. Laul’s November 15, 2012 year-end performance appraisal which found that Dr. Laul “falls below expectations” in two out of six competencies. Dr. Laul received an overall rating of “needs improvement.”

In the fall of 2012, Mr. Selvage informed the Safety Basis Division Leader, James Miller, that he had significant performance problems with Dr. Laul, which included Dr. Laul’s demonstrated inability to perform at the level of an SA-4. Mr. Miller directed Mr. Selvage to place Dr. Laul on a Performance Action Track (“PAT”) so that Dr. Laul’s performance could be monitored and assessed formally through a Performance Improvement Plan (“PIP”) as part of the PAT. Due to various delays, the actual PAT notice to Dr. Laul, the transmittal of the PIP, and the commencement of the PAT, did not occur until March 7, 2013.

The PAT and its requirements are governed by LANS Policy P736 (“P736”). The employee’s then Division Leader, James Tingey, is the final authority in determining whether or not the employee has successfully completed the PAT and whether the employee’s performance is fully satisfactory.

Dr. Laul’s PIP set out specific deliverables and expectations for Dr. Laul to achieve during the PAT scheduled for a six-month period. Dr. Laul began having his bi-monthly PAT Assessment meetings with Mr. Selvage on May 2, 2013, at which meeting Mr. Selvage reviewed Dr. Laul’s performance for the previous two weeks.²

From May 2, 2013 through October 7, 2013, Dr. Laul and Mr. Selvage met to discuss Dr. Laul’s performance, generally every other week. Dr. Laul received satisfactory assessments for his first six PAT assessments. While Mr. Selvage gave Dr. Laul satisfactory ratings through July 23, 2013, Mr. Selvage did note

² Dr. Laul’s assertions below and on appeal that Mr. Selvage was not qualified to review Laul’s work are not supported by the factual record. Rather, the undisputed material facts below established that Mr. Selvage is a “subject matter expert” in USQ preparation and evaluation, which Dr. Laul expressly conceded below. Indeed, Mr. Selvage even taught in a four-day USQ course that Dr. Laul attended. Moreover, while Mr. Selvage may not have been a QEV in 2013 due to the fact that his position as EWM Group Leader in the Safety Basis Division as LANS did not require him to regularly prepare and review USQs, his expertise in evaluating Dr. Laul’s performance as a USQ preparer and evaluator was not disputed by Dr. Laul below.

certain repeated problems with Dr. Laul's work product in his assessments.

Near the end of July 2013, Mr. Selvage was advised by Lance Platter for the first time that Mr. Platter had stopped assigning the more difficult USQs to Dr. Laul due to Dr. Laul's continual questioning of Mr. Platter, coworkers, and SEs as to how these USQs were to be addressed. Mr. Selvage also learned that what he had generally been provided for review by Dr. Laul as part of his performance assessment were the final USQ documents revised and signed off on by multiple reviewers, and not Dr. Laul's raw work product.

In this same time period, Mr. Selvage was advised that Dr. Laul's raw work product frequently had to be extensively edited and/or re-written by Mr. Platter or others before the USQ could be signed off on by the QEVs and SEs. Mr. Selvage was also advised that Dr. Laul was excessively questioning coworkers and Mr. Platter on the fundamentals of the USQ process and seeking their help in completing his assignments.

After learning of Dr. Laul's performance issues, Mr. Selvage contacted David Rudolph in LANS' Human Resources Division-Employee Relations ("HR-ER") and the Safety Basis Division Leader, James Miller, about extending the time period for Dr. Laul's PAT in order to obtain a more accurate picture of Dr. Laul's PAT performance. Mr. Selvage received the necessary approvals and Dr. Laul's PAT was extended until

October 7, 2013.³ To more accurately assess Dr. Laul's work product, Mr. Selvage asked Mr. Platter to forward selections of Dr. Laul's original unedited work product to Mr. Selvage for review. Mr. Selvage also instructed Mr. Platter to include the more difficult USQ Determinations in the work assigned to Dr. Laul as was done with all other safety analysts.

Dr. Laul's unreviewed and unrevised work product was assessed by Mr. Selvage on August 6th, August 21st, September 3rd, September 17th, October 1st, and October 7th, 2013. While Mr. Selvage did give Dr. Laul a "satisfactory" rating for the September 3, 2013 assessment (with comments), the remaining five (5) assessments were rated as "unsatisfactory" or "needs improvement." The written assessments also detailed the reasons for the "unsatisfactory" and "needs improvement" ratings.

On September 14, 2013, Dr. Laul wrote a letter to Mr. Selvage complaining about certain criticisms of his work contained in the Selvage September 3rd PAT assessment. Dr. Laul did not mention any sort of

³ The district court properly rejected Dr. Laul's attempt to create a disputed issue of material fact as to the extension of his PAT. LANS' Policy P736 governs the PAT process. A PAT period may last two to six months but may be extended "in consultation with HR-ER" and "with approval from the division- or higher-level manager." There is no requirement in the policy that manager approval of a PAT extension be in writing. Below, LANS presented evidence that Mr. Selvage contacted HR-ER and his division leader (James Miller) about extending the time period for Dr. Laul's PAT and received the necessary approvals to extend the PAT until October 7, 2013.

discriminatory animus or assert that he was being retaliated against for any opposition to discrimination of any kind in his letter, but instead relayed his disagreement with Mr. Selvage's evaluation of his work performance.

Mr. Selvage's September 17, 2013 PAT assessment of Dr. Laul's product again generated an "Unsatisfactory" rating. In the assessment, Mr. Selvage noted that a cut-and-paste error like Dr. Laul had made on a particular USQ should not be made by an SA-4, that just such an error had previously been pointed out to Dr. Laul, and that Dr. Laul's inability to acknowledge that this was an error and his insistence that Mr. Selvage, not Dr. Laul, was in error, called "into question his understanding of the safety basis and controls[.]"

On October 1, 2013, Mr. Selvage noted in his assessment that "[t]he quality of [Dr. Laul's] documents has regressed." Specifically, Mr. Selvage noted that Dr. Laul was mischaracterizing some of the USQs and including too much description, irrelevant information, and generic, non-specific information in the USQs.

Mr. Selvage's last PAT assessment of Dr. Laul's work was completed on October 7, 2013. In mid-October 2013, Mr. Selvage decided to recommend that Dr. Laul's employment be terminated because he had not successfully completed the PAT.

Prior to making his determination on whether a Notice of Intent to Terminate should be issued to Dr. Laul, newly-appointed Deputy Division Director for the Safety Basis Division, James Tingey, reviewed Dr.

Laul's PIP, and the documents provided to him by Mr. Selvage on Dr. Laul's progress on the PAT. Mr. Tingey agreed with Mr. Selvage's conclusion that Dr. Laul had not successfully completed the PAT and that Dr. Laul's poor performance on the PAT, as well as his long history of poor performance, justified the termination of his employment. Dr. Laul was issued a Performance Action Track-Notice of Intent to Terminate ("Termination Notice") on November 26, 2013.

On December 5, 2013, after he received the Termination Notice, Dr. Laul filed a lengthy appeal as permitted by LANS' Policy P736. The next higher-level supervisor after Mr. Tingey, Acting Associate Director for Nuclear and High-Hazard Operations, William Bivens, concurred with Mr. Selvage and Mr. Tingey that the termination of Mr. Laul's employment was justified by the factual record.

The SA-4 position vacated by the termination of Dr. Laul's employment was not filled after his termination, which was effective December 6, 2013.

From August 2013 to July 2014, Dr. Laul applied for twelve jobs at LANS. Two of these job postings were cancelled. Four of the job postings were internal job postings that Dr. Laul was not eligible for as his employment had been terminated. Of the remaining six job postings, Petitioner was not hired for any of the postings because the hiring officials for each determined that he lacked the minimum qualifications for the position and/or had not performed satisfactorily in his prior employment at LANS.

Dr. Laul filed a Charge of Discrimination on September 11, 2014 with the New Mexico Human Rights Bureau alleging discrimination and retaliation based on national origin, race, and age. He filed a second Charge of Discrimination on October 31, 2014. On August 25, 2015, Dr. Laul filed a Complaint for Employment Discrimination and Retaliation in the United States District Court for the District of New Mexico.⁴

2. Procedural History

LANS moved for summary judgment on Petitioner's ADEA, Title VII and NMHRA causes of action on July 25, 2016. Both Petitioner and Respondent applied the *McDonnell Douglas* burden-shifting analysis in their respective briefing before the district court. The district court analyzed LANS' motion and Petitioner's response applying the analytical framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for evaluating circumstantial evidence of unlawful discrimination.⁵

⁴ In his Complaint, Laul alleged age and national origin discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), and the New Mexico Human Rights Act, N.M. Stat. Ann. §§ 28-1-1 to -15 (1969, as amended through 2007) ("NMHRA"). He also alleged retaliation under Title VII and the NMHRA.

⁵ Petitioner does not appear to challenge the district court's grant of summary judgment on his Title VII and NMHRA retaliation claims (Dr. Laul did not allege retaliation under the ADEA).

Petitioner did not assert any sort of mixed-motive theory⁶ in his Complaint, his discovery responses, or his briefing before the district court, or otherwise request that the district court apply the Title VII mixed-motive analyses outlined in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), to any of his claims. Nor did Petitioner raise any Seventh Amendment or other objections to application of the *McDonnell Douglas* framework in the district court.

The district court granted summary judgment on all of Petitioner’s claims. In so doing, the court concluded that Dr. Laul failed to demonstrate a prima facie case of age or national origin discrimination and, alternatively, that even if Laul was able to demonstrate a prima facie case, he failed to raise a disputed issue of material fact as to whether LANS’ legitimate, nondiscriminatory reasons for its actions were pretext for unlawful discrimination.⁷

⁶ The ADEA does not permit litigants to proceed under a mixed-motive theory. *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 173-78 (2009). Accordingly, Petitioner can claim no error associated with the District Court’s application of the *McDonnell Douglas* framework to his ADEA cause of action.

⁷ While Petitioner characterizes the district court’s analysis of pretext as “strange” because the court had already determined that his prima facie case was insufficient to avoid summary judgment on all claims, this sort of two-fold analysis by the court is typical at the summary judgment stage in employment discrimination actions. *See, e.g., Williams v. Aircraft Workers Worldwide, Inc.*, 832 F. Supp. 2d 1347, 1355-57 (S.D. Ala. 2011) (analyzing prima facie case and also pretext as alternative bases for granting summary judgment); accord *Hosick v. Chicago State Univ. Bd. of*

The Tenth Circuit affirmed the district court's order and denied Petitioner's subsequent Motion for Rehearing. Petitioner did not raise any Seventh Amendment arguments concerning application of the *McDonnell Douglas* burden-shifting analysis in his briefing before the Tenth Circuit. Nor did Petitioner argue that the *McDonnell Douglas* framework should not have been applied by the district court or that a mixed-motive analysis should have been applied to any of his discrimination claims.

◆

SUMMARY OF ARGUMENT

This case does not present issues of significant importance warranting review by this Court. “A writ of certiorari is not a matter of right but of judicial discretion . . . [and] will be granted only for compelling reasons.” S. Ct. R. 10. Indeed, this Court grants certiorari review “only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict in the lower courts, or some matter affecting the interest of this nation demand such exercise.” *Camreta v. Greene*, 131 S. Ct. 2020, 2033 (2011); see also *Braxton v. United States*, 500 U.S. 344 (1991) (“A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state

Trustees, 924 F. Supp. 2d 956, 966, 970-71 (N.D. Ill. 2013); *Luluc Councils 4433 & 4436 v. City of Galveston*, 979 F. Supp. 514, 517-21 (S.D. Tex. 1997).

courts concerning the meaning of provisions of federal law.”). No such conflicts are asserted by Petitioner herein.

Dr. Laul presents two questions for review by this Court. First, Laul argues, for the first time, that application of the *McDonnell Douglas* burden-shifting test by the District Court deprived him of his Seventh Amendment right to a jury. Second, Laul argues that the district court should not have applied the *McDonnell Douglas* framework because he had properly asserted a mixed-motive theory of recovery.⁸ However, neither the Tenth Circuit nor the District Court had the opportunity to consider the mixed-motive or jury-right theories as neither was ever mentioned or preserved by Petitioner prior to the Petition filed herein. Moreover, even if Dr. Laul had properly preserved either ground for his Petition below, he has nonetheless failed to identify any authority or argument supporting the issuance of a writ of certiorari.



⁸ Petitioner does not, however, identify when and where he raised a mixed-motive theory below. Indeed, he did not.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO PRESERVE HIS ARGUMENTS BELOW AND BECAUSE HE INVITED ANY CLAIMED ERROR BELOW.

This Court is “a court of review, not of first view.” *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 37-38 (2012) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). It is well-established that the Court reviews the actions of the lower federal courts and will only rarely consider issues that the Petitioner failed to raise in the District Court and Court of Appeals. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”); *accord Meyer v. Holley*, 537 U.S. 280, 292 (2003) (“But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it.”); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (“We ordinarily will not decide questions not raised or litigated in the lower courts.”). This longstanding principle precludes review of issues – constitutional or otherwise – that a petitioner attempts to raise for the first time before this Court. *See Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (declining to review whether application of the Americans with Disabilities Act to state prisons is a constitutional exercise of Congress’s power when the issue was not raised in the District Court or Court of Appeals); *Duignan v. United States*, 47 U.S. 195, 200 (1927)

(declining to review constitutional issue that was not raised below).⁹

In this case, neither issue now advanced by the Petition was raised before the District Court or the Court of Appeals. Rather, the District Court’s exhaustive, 60-page Memorandum and Judgment demonstrates that Petitioner unsuccessfully attempted to meet his acknowledged burden on his *prima facie* case and on pretext by raising fact issues in the manner required by the *McDonnell Douglas* analysis. It is patently obvious that Petitioner never claimed and the District Court had no opportunity to address, any argument that application of this analysis violated his constitutional right to a jury trial or that the analysis was “obsolete” or somehow inappropriate because he intended to plead and argue a Title VII mixed-motive theory of liability. In fact, the District Court’s decision as well as Plaintiff’s briefing below demonstrates that Petitioner failed to assert *any* legal arguments in opposition to the summary judgment sought by LANS.

In the Tenth Circuit Court of Appeals, Dr. Laul elected to focus on the same factual arguments that he raised, unsuccessfully, before the District Court. In affirming the District Court, the Tenth Circuit engaged

⁹ Although the Court may consider arguments not raised below in extraordinary circumstances that result in injustice, *Duignan*, 47 U.S. at 200, that exception is narrowly drawn and rarely applied. For example, in *Wood v. Georgia*, 450 U.S. 261, 265 (1981), the Court vacated and remanded a criminal judgment based on a constitutional argument that was not previously raised due to an attorney’s apparent conflict of interest.

in a detailed discussion of Petitioner’s factual arguments regarding each count on which summary judgment was granted. The Tenth Circuit’s decision is devoid of any reference to legal arguments regarding the application of the *McDonnell Douglas* analysis, as no such arguments were made.

As explained above, well-established precedent precludes Petitioner from making an end run around the District Court and Court of Appeals by raising wholly new legal arguments for the first time in his Petition. Moreover, Petitioner offers no reason or authority for this Court to diverge from its long-standing practice of declining to review unpreserved issues. Petitioner’s failure to raise his arguments below deprived the District Court and Court of Appeals of the opportunity to consider them and deprives this Court of a record on which to base any additional review.

Nothing comparable to the conflict of interest problem that prompted this Court to consider an issue not raised or preserved below in *Wood v. Georgia* applies here. Petitioner’s decision to focus on meeting his factual burden under the *McDonnell Douglas* framework in the lower courts in no way constitutes an exceptional circumstance that would warrant the exercise of this Court’s jurisdiction. *See, e.g., Cronquist v. City of Minneapolis*, 237 F.3d 920, 925 (8th Cir. 2001) (holding where plaintiff “failed to raise the mixed-motive theory in her complaint, in her statement of the case, during oral argument on the summary judgment motion, or in any written or oral submission,” the court “reasonably assumed that . . . the sequence and

allocation of proof for each claim should be governed by the Supreme Court decision in *McDonnell Douglas Corp.*” (internal quotation marks omitted)).

Petitioner’s dual failure to present his arguments to the District Court and Court of Appeals is fatal to his Petition, and the Petition must be denied. *See, e.g., Ellis v. Dixon*, 349 U.S. 458, 460 (1955) (stating that the petitioner’s arguments regarding whether certain regulations were unconstitutionally vague was not raised below and therefore not open for review before the Supreme Court); Robert L. Stern *et al.*, *Supreme Court Practice* 459-60 (8th ed. 2002) (“In a surprisingly large number of cases every year, the petition raises questions that were not decided by the court below because they were not raised, or seriously mischaracterizes the holding of the court. Demonstration of such a defect is ordinarily fatal to the petition.”).

Additionally, this Court should deny certiorari because Dr. Laul invited the “errors”¹⁰ that he only now complains require reversal of summary judgment. As a general rule, “a party may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit.” *United States v. Sharpe*, 996 F.2d

¹⁰ Neither the District Court nor the Tenth Circuit committed error in analyzing the Petitioner’s actual claims under the *McDonnell Douglas* rubric where the evidence adduced by Petitioner under his single-motive theory was purely circumstantial. *See, e.g., Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008) (stating that in the absence of direct evidence of discrimination, an employee’s discrimination claims are properly examined through the *McDonnell Douglas* burden-shifting analysis).

125, 129 (6th Cir. 1993) (internal quotation marks and citation omitted); *see also Hudson v. Wylie*, 242 F.2d 435, 448 (9th Cir. 1957) (“One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.”).

In his briefing in opposition to LANS’ Motion for Summary Judgment, Dr. Laul applied the *McDonnell Douglas* framework to his causes of action to argue that there were disputed issues of material fact as to whether he was able to establish a prima facie case of discrimination and whether LANS’ legitimate and non-discriminatory reasons for the adverse actions complained of were a pretext for unlawful discrimination. Likewise, Dr. Laul argued before the Tenth Circuit that application of the *McDonnell Douglas* framework precluded the granting of summary judgment in LANS’ favor. Having invoked and relied on the *McDonnell Douglas* burden-shifting framework, Dr. Laul cannot now complain that the district court erred by analyzing his causes of action under the *McDonnell Douglas* rubric he himself continually relied upon in the lower courts. *See, e.g., Minneapolis & St. L. R. Co. v. Winters*, 242 U.S. 353, 355-56 (1917) (holding that any error in basing recovery upon a federal statute was invited where defendant “invoked and relied upon that statute” because a party “cannot complain of a course to which it assented below”); *see also United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000) (“The invited error doctrine prevents a party from inducing

action by a court and later seeking reversal on the ground that the requested action was error.”).

For these reasons, this case is an unsuitable vehicle for considering either question raised by Dr. Laul in his Petition. Moreover, even if this Court were to consider Dr. Laul’s newly-raised arguments, both lack merit as demonstrated below.

II. PETITIONER WAS NOT DENIED HIS SEVENTH AMENDMENT RIGHT TO A JURY.

Dr. Laul asserts for the first time in this Court that application of the burden-shifting methodology employed in the vast majority of discrimination cases deprived him of his Seventh Amendment right to a jury trial. Notwithstanding that Laul failed to preserve that claim, his argument is without merit.

It is settled law that summary judgment plays a vital role in American jurisprudence and does not violate a party’s Seventh Amendment right to a jury trial. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (citing *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902)); *accord Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 n.3 (6th Cir. 2009); *Calvi v. Knox Cty.*, 470 F.3d 422, 427 (1st Cir. 2006); *Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003); *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001); *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999).

For approximately 80 years, the Federal Rules of Civil Procedure have “authorized motions for summary judgment upon proper showings of the lack of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is “regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Id.* (quoting Fed. R. Civ. P. 1)).

District courts are empowered to grant summary judgment on some or all of a litigant’s causes of action without running afoul of the Seventh Amendment where there are no genuine issues of material fact and the moving party is entitled to judgment under the governing law. *See J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1117 (10th Cir. 2009); *see generally* Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”). “The Seventh Amendment is not violated by proper entry of summary judgment, because such a ruling means that no triable issue exists to be submitted to a jury.” *Shannon*, 257 F.3d at 1167.

Dr. Laul confusingly argues that “pretext evidence” is a “factual finding based on competing inferences,” and accordingly, that the court must necessarily make a factual determination regarding pretext at the summary judgment stage which violates the Seventh Amendment. There is no legal or logical support proffered for

this theory of necessary fact determination when courts review a pretext proffer under the *McDonnell Douglas* framework. As outlined above, where the material facts are undisputed, a litigant’s right to a jury under the Seventh Amendment is not violated when a court grants summary judgment. *See, e.g., Zivojinovich v. Barner*, 525 F.3d 1059, 1066 (11th Cir. 2008) (concluding that no Seventh Amendment violation occurs when summary judgment is appropriate); *Harris*, 348 F.3d at 762 (“A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. *This right exists only with respect to disputed issues of fact.*” (emphasis added)). Summary judgment jurisprudence in a case alleging employment discrimination “is no different from a motion for summary judgment in any other civil action: the court acts as a gatekeeper, granting judgment as a matter of law unless the plaintiff has adduced relevant and probative evidence sufficient to support a jury verdict in his or her favor.” *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007); *see also St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (stating that courts should not “treat discrimination differently from other ultimate questions of fact”). “This does not require a factual finding, nor does it abridge the Seventh Amendment jury trial right.” *Riggs*, 497 F.3d at 1117 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

Here, Dr. Laul does not identify any disputed issues of material fact that he believes the district court ignored or misapplied to demonstrate that summary judgment was improperly granted. He does not identify

what evidence he believes the lower courts used to make an inappropriate factual determination on pretext. Moreover, while he asserts that there were competing inferences from certain “facts,” he fails to identify what those facts or the claimed inferences were (other than baldly asserting that the unidentified actions of multiple LANS’ employees with regard to Laul’s employment must have been taken for “discriminatory” reasons).¹¹

Indeed, the district court specifically found, and the Tenth Circuit affirmed, that Laul raised no inference of discrimination sufficient to meet even his prima facie case burden, either on the termination of his employment or LANS’ “failure to hire” him thereafter. Similarly, these courts concluded that Petitioner failed to raise any disputed facts from which a court could infer that LANS’ legitimate, nondiscriminatory reasons for the claimed adverse employment actions were pretextual. Dr. Laul’s failure to demonstrate that

¹¹ Dr. Laul asserts for the first time in his Petition that LANS’ legitimate, nondiscriminatory reasons for the actions taken with regard to his employment raised an inference of discrimination. Laul’s basis for this assertion, *i.e.*, that the work performance deficiencies identified by LANS as legitimate, nondiscriminatory reasons for the claimed adverse employment actions were simply “code words” for age and national origin animus is wholly unsupported. Apart from the fact that such an argument was not raised and preserved below, Dr. Laul cites no authority in support of this bald assertion. *See, e.g., Thelwell v. City of New York*, No. 13 CV. 1260 JGK, 2015 WL 4545881, at *11 (S.D.N.Y. Jul. 28, 2015) (holding that a plaintiff’s “subjective interpretation” of “facially non-discriminatory terms does not, itself, reveal discriminatory animus” (internal quotation marks and citation omitted)).

the district court misapplied Rule 56 of the Federal Rules of Civil Procedure and that summary judgment was not properly granted, is fatal to his Seventh Amendment violation theory.

III. THE DISTRICT COURT APPROPRIATELY APPLIED THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK.

a. *McDonnell Douglas* was not overruled by *Desert Palace* in non-mixed-motive cases.

Petitioner asserts for the first time in his Petition that *Desert Palace* “alters or eliminates the *McDonnell Douglas* framework for proving unlawful employment discrimination with circumstantial evidence.” Pet. at 18. However, unlike the present case (which proceeded solely on a single-motive theory), *Desert Palace* was a mixed-motive Title VII case.¹² 539 U.S. at 101-02.

¹² In a mixed-motive case, a plaintiff must prove that discriminatory or retaliatory animus was a “motivating factor” in the adverse employment action at issue. *Fye v. Oklahoma Corp. Comm’n*, 516 F.3d 1217, 1225 (10th Cir. 2008). If the plaintiff makes such a showing, “the burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the [discriminatory or] retaliatory motive.” *Id.* If the plaintiff is unable to “directly establish” that discrimination or retaliation played a “motivating part” in the employment decision, he or she “may 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 [or discrimination].” *Id.*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),¹³ this Court recognized a mixed-motive theory of actionable discrimination *under Title VII*. In a concurring opinion, Justice O'Connor agreed that Title VII allowed a mixed-motive theory to be pled and proven under certain circumstances but that mixed-motive claims must be supported by direct not merely circumstantial evidence of gender discrimination. *Id.* at 276 (O'Connor, J., concurring). In *Desert Palace*, this Court rejected the "direct evidence" requirement in Justice O'Connor's *Price Waterhouse* concurrence and held that an employee may prove his or her mixed-motive case with direct or circumstantial evidence of discrimination, as in single-motive cases. *Desert Palace*, 539 U.S. at 101-02.

This Court's opinion in *Desert Palace* does not mention the *McDonnell Douglas* analysis and does not anywhere suggest that it was altering the longstanding *McDonnell Douglas* framework in single-motive discrimination cases, such as this one. *See Desert Palace*, 539 U.S. at 91 n.1 ("This case does not require us to decide when, if ever, § 107 [of the 1991 amendments to the Civil Rights Act of 1964, setting forth standards applicable in mixed-motive cases] applies outside of the mixed-motive context."); *see also Semsroth v. City of Wichita*, 304 Fed. Appx. 707, 718-19 and n.11 (10th Cir. 2008) (unpublished) ("We doubt that the [*Desert*

¹³ *Price Waterhouse* was superseded by statute when Congress passed 42 U.S.C. § 2000e-2(m) in 1991, which "responded to *Price Waterhouse* by setting forth standards applicable in mixed-motive cases." *Desert Palace*, 539 U.S. at 94.

Palace] Court modified [the *McDonnell Douglas*] framework because the Court did not address or even cite *McDonnell Douglas* in that opinion.”); *Winter v. Bank of America, N.A.*, No. Civ. A.3:02-CV-1591-L, 2003 WL 23200278, at *3 (N.D. Tex. Dec. 12, 2003) (“If the Supreme Court were going to make a draconian departure from 30 years of well-established employment discrimination precedent, it would have done so with unmistakable clarity. In *Desert Palace*, the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas*.”).

Indeed, in the years following *Desert Palace*, this Court has continued to recognize the applicability of the *McDonnell Douglas* framework in analyzing single-motive Title VII and all ADEA discrimination claims. See, e.g., *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2541 n.7 (2015); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353-54 (2015); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 455 (2006); *Johnson v. California*, 545 U.S. 162, 171 n.7 (2005); *Smith v. City of Jackson*, 544 U.S. 238, 252 (2005); *Vieth v. Jubelirer*, 541 U.S. 267, 295 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49-54 (2003).¹⁴

¹⁴ At least one court has observed that “rumors of *McDonnell Douglas*’s death were suffocated by the Supreme Court decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), wherein the high Court applied the *McDonnell Douglas* framework with nary a reference to *Desert Palace*.” *Randall v. Smith’s Food & Drug Centers, Inc.*, No. 05-CV-139-J, 2006 WL 8433340, at 6 n.10 (D. Wyo. Mar. 20, 2006); see also Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 Drake L. Rev. 383, 401 (2004) (“If the Court

As demonstrated above, Petitioner asserted a single-motive/pretext claim below, at all times agreed that the *McDonnell Douglas* framework applied, and never suggested that his national origin was a “motivating factor” for the adverse actions asserted. Thus, even if the opinion in *Desert Palace* raised questions in some quarters about the proper summary judgment framework to be applied in *mixed-motive* cases, the Title VII and ADEA claims before this Court have always proceeded under a single-motive theory of discrimination and the *McDonnell Douglas* framework unquestionably continues to apply at the summary judgment stage and beyond. *See generally Quigg v. Thomas County Sch. Dist.*, 814 F.3d 1227, 1237-40 (11th Cir. 2016) (collecting cases and holding that *McDonnell Douglas* does not apply in mixed-motive cases but continues to apply where an employer pursues his or her claims under a single-motive theory).¹⁵

Under such circumstances, *Desert Palace* is simply not applicable and Dr. Laul’s academic arguments about how summary judgment should or should not

– and in particular Justice Thomas – had opined that *Costa* overruled *McDonnell Douglas*, then *Raytheon* presented an excellent opportunity for the Court to say so.”).

¹⁵ While the question of whether *McDonnell Douglas* may be applied to analyze mixed-motive cases is an issue that the circuit courts are currently grappling with, *see, e.g., Quigg*, 814 F.3d at 1236-39, any claimed “circuit split” on that issue is not squarely before this Court because (1) the issue was not preserved below, *see* Section I, *supra*; and (2) the case was unquestionably pursued by Petitioner as a single-motive case and the parties and courts agreed as to the applicability of the *McDonnell Douglas* approach.

be adjudicated in mixed-motive cases are not before this Court. *See, e.g., Furaus v. Citadel Communications Corp.*, 168 Fed. Appx. 257, 260 (10th Cir. 2006) (unpublished) (declining to address appellant’s arguments concerning the validity of *McDonnell Douglas* in mixed-motive cases following *Desert Palace* where she “did not raise any mixed motive theory in the district court”); *see also Cronquist*, 237 F.3d at 925.

Additionally, even if this Court were inclined to address whether summary judgment would have been justified had the case ever been argued as a mixed-motive claim, the case does not present such an opportunity because Dr. Laul has not proffered *any* direct or circumstantial evidence that age or national origin was a “motivating factor” in any of the employment decisions at issue.

b. Petitioner failed to assert or demonstrate that any animus based on a status protected by Title VII was a “motivating factor” in any of the employment actions at issue.

Among other protections, Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms and conditions of employment, or benefits because of an individual’s national origin. 42 U.S.C. § 2000e-2(a). An employee may pursue a claim for violation of Title VII under either a single-motive/pretext theory or a mixed-motive theory.

Although a litigant is not required to label his or her case as a pretext or mixed-motive case at the outset, at some point the employee “must persuade the factfinder either that the evidence shows [discriminatory animus] was a ‘motivating factor’ (in which case the evidence is analyzed within the mixed-motive framework) or that it shows the employer’s reason is unworthy of belief (in which case it is analyzed within the pretext framework).” *Fye*, 516 F.3d at 1225. At all times below, Dr. Laul sought to persuade the district court that LANS’ legitimate, nondiscriminatory reasons for taking adverse action were pretext for unlawful discrimination.

Petitioner never asserted and still fails to demonstrate with admissible evidence that national-origin discriminatory animus played a “motivating part”¹⁶ in LANS’ employment decision. *See Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 998 (10th Cir. 2011) (observing that in a mixed-motive case, if the plaintiff shows that an “[unlawful] animus played a ‘motivating part’ in the employment . . . the burden shifts to the employer to demonstrate that it would have taken the same action irrespective of the [unlawful] motive”). In order to meet his burden, “the plaintiff must demonstrate that the alleged [unlawful discriminatory]

¹⁶ In *Price Waterhouse*, this Court defined the “motivating factor” standard using the following example: “In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.” 490 U.S. at 250.

motive actually relates to the question of discrimination in the particular employment decision and may do so through the production of either direct or circumstantial evidence.” *Id.* (internal quotation marks and citation omitted).

Here, as below, Petitioner fails to identify for this Court any evidence or argument in the record that LANS’ “actions were motivated even in part by a discriminatory animus.” *Fox v. Wichita State Univ.*, 489 F. Supp. 2d 1216, 1227 n.32 (D. Kan. 2007) (holding that, even assuming *arguendo* that a mixed-motive theory was applicable, the plaintiff nonetheless failed to meet his burden at summary judgment). Rather, the district court and the Tenth Circuit thoroughly considered all of Dr. Laul’s proffers meant to raise an inference of discriminatory animus based on his protected status under Title VII and rejected them as insufficient in every regard. Dr. Laul does not claim that the District Court or Tenth Circuit erred in their analyses and therefore fails to demonstrate a contrary result would have occurred had a mixed-motive framework been applied at the summary judgment stage. Under such circumstances, the Petition should be denied. *See, e.g., Tysinger v. Police Dep’t of City of Zanesville*, 463 F.3d 569, 578 (6th Cir. 2006) (refusing to decide “whether the evidence [in a Title VII mixed-motive case] is evaluated in terms of prima facie case elements, pretext requirements, or a mixed-motive analysis” because “[u]nder any of these constructs, [the plaintiff]’s evidence clearly falls short of creating a genuine issue of material fact”).

IV. THE OPINION UNDER REVIEW HAS MINIMAL PRECEDENTIAL VALUE.

The Tenth Circuit opinion under review has limited precedential value because it is unpublished. Tenth Circuit Rule 32.1 states in pertinent part, that “[u]npublished decisions are not precedential but may be cited for their persuasive value.” The fact that the decision is unpublished underscores its lack of importance and is further support for denial of the Petition. There is no compelling reason for this Court to grant the Petition because the Tenth Circuit opinion at issue is of significance only to the parties involved.



CONCLUSION

For the reasons set forth above, the Supreme Court of the United States should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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