No. 23-1039

IN THE

Supreme Court of the United States

MARLEAN A. AMES,

Petitioner,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* FOR THE MASSACHUSETTS CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Massachusetts National Organization for Women ("Mass NOW") is the largest intersectional feminist organization in Massachusetts with national implications through our parent organization, National Organization for Women ("NOW"). Our membership is an intersection of feminists paving the way for equitable legislation that benefits all persons, removing barriers to access, including worker's rights against discrimination. Mass NOW advocates for equity and justice to advance the rights of all persons to not face discrimination in the workplace.

SUMMARY OF ARGUMENT

The sufficiency of the evidence forming a *prima facie* case is evaluated in light of the "preponderance of the evidence" standard, and the notion that evidence is relevant if it renders a consequential fact more likely. A minimal *prima facie* case is simply a combination of easily provided information, which indicates the presence of bias, assuming that the employer will refuse to provide an explanation for its conduct. For example, a *prima facie* case is established where the plaintiff has a protected trait, is qualified for a position, is rejected, and the employer searches for other qualified individuals to fill the position. The *prima facie* case may, but does not necessarily rely on evidence expressly establishing some overt disfavor

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[1] No counsel for a party authored this brief in whole or in part, nor has a party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

for the protected trait, such a hostile comments, comparator evidence or statistical proof.

Title VII makes no distinctions in protections between majority and minority populations, and this court has held that both types of cases are judged by the same standards. Moreover, the impulse to assume that one type of discrimination is more usual than other types, and the assumption that particular types of people are unlikely targets of bias, rely on presumptions, and perhaps stereotypes, which are improperly wielded by courts in general, but are particularly inappropriate for summary judgment.

It was incorrect for the Sixth Circuit to impose a heightened burden in cases in which the plaintiff is a member of a "majority" demographic. The *prima facie* case, as it is normally applied, accomplishes its modest purpose, whether or not the plaintiff is in the majority – and it did so in this case. Moreover, the Sixth Circuit's construction of the heightened burden, which prohibits consideration of instances of bias experienced by the plaintiff, constitutes an arbitrary and unmerited restriction on the plaintiff's ability to prove violations of the law and conflicts with the emphasis in the law to focus on the individual's experience, as opposed to that of the relevant group.

INTRODUCTION

Mass NOW hereby submits its amicus curiae brief in support of the Petitioner Marlean Ames. She is a heterosexual woman who claims that her employer demoted and failed to promote her, in favor of two people with same-sex attraction. Ames seeks to recover under Title VII, which prohibits employment discrimination because of sex. 42 U.S.C. § 2000e-2(a)(1). Under the law, discrimination based on sexual

orientation constitutes discrimination because of sex. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 652-53, 658-59 (2020). Ames claims that, all things being equal, she would not have been subjected to the two adverse actions if she was a man.[2]

Ames' claims were dismissed on summary judgment. *Ames v. Ohio Dept. of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023). Because Ames is heterosexual, the Sixth Circuit designated her claim as one alleging bias against a person in the "majority." *Id*. at 825. For such cases, the Sixth Circuit imposes a heightened burden for establishing a *prima facie* case, to include a showing of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id*. at 825. Pursuant to the heightened burden, evidence that the plaintiff has experienced other discriminatory conduct at the same employer cannot be used to demonstrate such "background circumstances." *Id*.

As will be shown below, the heightened burden is based on presumptions and *per se* evidentiary rules which find no basis in the statute, are contrary to the decisions of this Court, and rely on inferences favoring the employer which are inappropriate to summary judgment analysis. We ask that this Court repudiate the heightened burden.

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[2] Where a female employee attracted to a man would get rejected, but a male employee attracted to the same man would get promoted, that is a disadvantage to the woman because of her sex. *See Bostock*, 590 U.S. at 656.

I. EVIDENCE SUPPORTING EMPLOYMENT DISCRIMINATION MUST BE CONSIDERED IN ITS TOTALITY

Under Title VII, the plaintiff may prevail where the totality of the evidence raises an inference of discrimination based on a protected trait. A claim of discrimination may rely on direct evidence, circumstantial evidence, or a combination of both.[3]

In cases in which the plaintiff relies exclusively or "principally" on circumstantial evidence, one way to establish discrimination is through the *McDonnell Douglas* burden shifting analysis. *E.g.*, *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141-42 (2000). Under that analysis, the plaintiff bears the initial burden to produce a *prima facie* case. *Id*. at 142. The *prima facie* burden is a flexible set of proofs that may be tailored to address the facts of a particular case. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). For example, the burden is satisfied where the plaintiff [1] is in a protected class, [2] is qualified for a job, [3] was rejected for that job, and [4] the employer continued to seek similarly qualified applicants for that position. *Id*.

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[3] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (to determine the existence of discriminatory motive, courts should consider "such circumstantial and direct evidence of intent as may be available"); *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"); *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003) (circumstantial and direct evidence should be treated "alike"); *see also Cruz v. Farmers Ins. Exch.*, 42 F.4th 1205, 1217 n.10 (10th Cir. 2022) ("Although we resolve this appeal based on direct evidence, Cruz is not precluded from also relying on circumstantial evidence at trial.").

If the plaintiff's evidence is sufficient, the burden shifts to the employer to articulate one or more legitimate, nondiscriminatory reasons for the relevant job action. *Reeves*, 530 U.S. at 142. If the employer satisfies its burden, the plaintiff is then given the burden to demonstrate that one or more of the employer's reasons were not the true reasons.[4]

If the plaintiff's evidence is sufficient to prove pretext, that evidence, in combination with the *prima facie* case, can in appropriate circumstances, support a reasonable inference that "the employer is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 148-149. "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. *McDonnell Douglas* is a convenient tool for ordering and analyzing evidence to discern whether it supports an inference of discrimination.

However, the *McDonnell Douglas* framework is not the only method of proving discrimination via circumstantial evidence.[5] Although many Circuit decisions erroneously imply that *McDonnell Douglas* is the

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[4] *Reeves*, 530 U.S. at 148; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (discriminatory bias may be proven with evidence of pretext, even if some of the employer's reasons are legitimate and not pretextual); Robert S. Mantell, *Pretext After* Bostock*—Disproving One of the Employer's Reasons Is Enough*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 65, 87 (2022).

[5] *Volling v. Kurtz Paramedic Servs.*, 840 F.3d 378, 383 (7th Cir. 2016) (*McDonnell Douglas* is a "common, but not exclusive, method of establishing a triable issue of intentional discrimination"); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (declining to analyze a disparate treatment claim using the *McDonnell Douglas* framework).

exclusive avenue for discrimination cases relying on indirect proof,[6] in actuality, plaintiffs may prevail simply be establishing, without burden-shifting, that the totality of evidence could support a finding of liability.[7] While *McDonnell Douglas* continues to be an effective and useful tool for analyzing cases, it should not preclude other combinations of evidence sufficient to establish discrimination.

Mass NOW suggests that the Court take this opportunity to affirm that the *McDonnell Douglas* framework is but one tool for establishing an inference of discrimination, and that other combinations of proof may be employed by the plaintiff, at their election. An otherwise supported case should not be dismissed merely because it does not fit neatly into the *McDonnell Douglas* mold. In some jurisdictions, the *McDonnell Douglas* approach is applied correctly, but in other jurisdictions, it has ossified into a set of rigid, hyper-technical rules, which impairs the functioning of Title VII. As will be shown below, the imposition of such gloss has improperly led to the dismissal of the instant case.

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[6] *E.g.*, *Stratton v. Bentley Univ.*, 113 F.4th 25, 38 (1st Cir. 2024) ("Without direct proof of discrimination, Stratton must satisfy the familiar burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*"); *Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 825 (5th Cir. 2022) ("Because Owens does not present direct evidence of discrimination, she must satisfy the *McDonnell Douglas* burden-shifting framework").

[7] *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016); *Jenkins v. Nell*, 26 F.4th 1243, 1250 (11th Cir. 2022).

II. THE FUNCTION OF THE PRIMA FACIE CASE

To demonstrate the error of the heightened burden, it is necessary to first examine why the *prima facie* case is probative, and the purpose it serves. We will undertake this task, highlighting four principals. At the outset, however, it is important to understand that when we refer to a *prima facie* case below, we are usually referring to a minimally sufficient collection of evidence. Stronger collections of proof also satisfy the *prima facie* burden, but here we are examining how much evidence is just enough to satisfy the plaintiff's initial burden. *Reeves*, 530 U.S. at 148-49 (strength of the *prima facie* case varies, depending on the proof supporting it).

First, weak evidence can have dispositive effect in civil actions. Claims for discrimination arising under Title VII use the "preponderance of the evidence" standard. *Burdine*, 450 U.S. at 252-553. The plaintiff prevails if she proves an adverse action was more likely than not based on impermissible bias. *Id*. at 254. Evidence is relevant to the extent that it "has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). Thus, evidence establishing a light inference of bias must be considered by courts, and may indeed be dispositive.

Second, the demands of the *prima facie* case must not be equated with the plaintiff's ultimate burden of proof. *Burdine*, 450 U.S. at 254 n.7. Instead, the *prima facie* case was designed to be a non-onerous burden to give rise to a slender inference of discrimination, *assuming that the employer refuses to explain the reason for its action. Burdine*, 450 U.S. at 253. A minimally sufficient *prima facie* case, in effect, creates a presumption of discrimination to the extent that the

employer is "silent" in response. *Id*. at 254. In other words, an unanswered *prima facie* case precludes summary judgment in favor of the employer; but where an employer merely articulates a reason, the presumption favoring the plaintiff is rebutted. *Burdine*, 450 U.S. at 255 & n.10.[8]

The probative value of the *prima facie* case is tested based on the facts produced by the plaintiff, *plus* the assumption that the employer can provide no legitimate explanation for its conduct.[9] It is this combination that generates an inference favoring the plaintiff.

Where the employer responds to a *prima facie* case with silence, or where the affirmative evidence could lead a reasonable jury to believe that one or more of the employer's explanations were not its true reasons,[10] then the employer's conduct remains "unexplained," and the inference of discrimination raised by the *prima facie* case can be seen as preponderating in

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[8] It is, however, possible to theorize that a *prima facie* case may be so strong, and so exceed minimum requirements, that it generates a sufficient inference of discrimination to prevail, even if the employer has articulated a response.

[9] *Burdine*, 450 U.S. at 254; *see also Young v. United Parcel Service*, 575 U.S. 206, 228 (2015) ("an individual plaintiff may establish a prima facie case by showing actions taken by the employer from which one can infer, *if such actions remain unexplained*, that it is more likely than not that such actions were based on a discriminatory criterion illegal under Title VII.") (emphasis added).

[10] We assume for purposes of this brief, that affirmative evidence of pretext constitutes something more than a jury disbelieving the employer's witness, based only on shifty demeanor or other physical indication of untrustworthiness. Examples of affirmative proof can include comparator evidence, or evidence that the employer is blaming the plaintiff for things the employer knows are not the plaintiff's fault. *E.g.*, *Reeves*, 530 U.S. at 144-45.

favor of the plaintiff's case. *Burdine*, 450 U.S at 254. Thus, when we consider whether evidence is sufficient to establish a *prima facie* case, we must make that assessment assuming that the employer will not, or cannot provide a nondiscriminatory, truthful explanation for its conduct.

Third, the *prima facie* case does not necessarily depend upon evidence that expressly indicates disfavor of a protected trait, such as hostile remarks or comparator evidence. In *Reeves v. Sanderson Plumbing Prods.*, the plaintiff established his *prima facie* case with replacement evidence, and he also proved pretext, by showing that he was being blamed for issues that were not his fault, nor within his authority. *Reeves*, 530 U.S. at 142, 144-45. The court held that this combination of evidence, alone, was sufficient to establish unlawful discrimination. *Id*. at 146-48. The *Reeves* decision noted that further evidence was available to support Reeves' case, including comparator evidence and hostile remarks referencing Reeves' age. *Id*. at 152-53. Noteworthy was the fact that such evidence of express hostility to age was not a requirement to establish the *prima facie* case – indeed, it was not necessarily a requirement for establishing liability at all. *Id*. at 146-48.

Instead, the *prima facie* case typically operates by eliminating the employers' most common nondiscriminatory reasons, such as lack of qualification or lack of available position. *Burdine*, 450 U.S. at 254. This point bears emphasis. The *prima facie* burdens do not require any overt expression of discriminatory animus. For example, one iteration of the *prima facie* case establishes the discriminatory "character" of the job action where the employer rejects a qualified person in the protected class, for a position it wants filled by someone with similar qualifications. *McDonald v.*

Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976); *Burdine*, 450 U.S. at 253 n.6.

Fourth, where an employer accepts a replacement after rejecting the plaintiff, an inference of bias may arise if the replacement is unlike the plaintiff in terms of protected class membership. So, for example, where a qualified 68-year-old employee is replaced by someone substantially younger, that satisfies the fourth element of the *prima facie* burden. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). This is so, even if the younger replacement is over age 40, and is themselves within the protected class. *Id*. at 312-313. Moreover, replacement evidence does not depend on statistical proof. For example, even though we would assume it would be statistically likely that a 68-year-old would be replaced by someone substantially younger, such a replacement satisfies the weak *prima facie* burden. *E.g.*, *id*. at 313.

With this understanding of the *prima facie* case, and the modest burden it satisfies, we will next examine whether it was appropriate for the Sixth Circuit to adopt a heightened burden in "majority" discrimination cases.

III. IT IS IMPROPER TO IMPOSE A HEIGHTENED *PRIMA FACIE* BURDEN

According to the Sixth Circuit, the usual function and value of the *prima facie* case breaks down in cases asserting discrimination against a "majority" group. It held that for a claim alleging bias against a heterosexual woman, that the plaintiff must prove, as an additional part of their *prima facie* case, that there are "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Ames*, 87 F.4th at

825. As will be shown, the Sixth Circuit test is erroneous, as [1] Title VII imposes no relevant distinctions between discrimination cases brought by members of majority and minority groups, [2] decisions of this Court establish that the legal and evidentiary standards for proving discrimination claims brought by members of majority and minority groups are the same; and [3] it is improper to presume at summary judgment that certain individuals would be less likely to be victims of discrimination.

A. The Text of Title VII Accords Protection to Women, Without Distinction

It is wrong to single out certain types of sex discrimination claims to impose a heightened burden. Title VII bars all sex discrimination that falls within its prohibition. The statute makes it an unlawful "practice for an employer . . . to discriminate against any individual . . . because of [their] . . . sex." 42 U.S.C. § 2000e-2(a)(1). These words, on their face, apply equally, regardless of whether or not a "majority" group member is involved. *Id*. The text does not indicate any blind spot for heterosexual women, or any other type of woman.

This Court has repeatedly recognized that Title VII includes no exception or restriction with respect to discrimination against a majority trait, or so-called "reverse discrimination." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-280 & n. 8 (1976). "Discriminatory preference for any group, *minority or majority*, is precisely and only what Congress has proscribed." *McDonnell Douglas*, 411 U.S. at 800-801 (1973) (emphasis added); *see also Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 78-79 (1998) (Title VII prohibition against sex discrimination supports a claim of sexual harassment of a man). This is because the

text of the law controls, as opposed to our speculations about the primary concerns of the original legislators. *Oncale*, 523 U.S. at 79.

Thus, the statute, which itself is designed to prevent discrimination, undermines the notion that it should be more difficult for a plaintiff in the majority to recover.

B. Title VII Applies the Same Standards to Cases of Discrimination Against Majority and Minority Groups

From the foregoing, it follows that the legal and evidentiary standards, including *McDonnell Douglas*, apply equally to "majority" and "minority" plaintiffs. The "same standards" apply to Title VII reverse discrimination claims as they do to ordinary claims. *McDonald*, 427 U.S. at 280.

In *McDonald v. Santa Fe*, the plaintiffs were two White employees who were terminated for stealing their employer's anti-freeze, while an equally guilty Black employee was retained. *McDonald*, 427 U.S. at 275-76. Addressing whether Title VII prohibits reverse discrimination, the Supreme Court explicitly referred to the *prima facie* case identified in *McDonnell Douglas* as being consistent with the notion that Title VII prohibits discrimination against White persons. *McDonald*, 427 U.S. at 279 n.6. In doing so, the Court tacitly accepted that the *McDonnell Douglas prima facie* case applies to reverse discrimination claims. *Id*.

Additionally, the Court held that the analysis to be applied in *McDonald v. Santa Fe* is "indistinguishable from *McDonnell Douglas,"* and held that the White plaintiffs should be accorded the chance to establish pretext in conformity with the *McDonnell Douglas* framework. *Id*. at 282. Also, the Court wrote:

> We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime. . .. The Act prohibits *all* racial discrimination in employment, without exception for any group of particular employees.

McDonald, 427 U.S. at 283-284. Thus, *McDonnell Douglas* principles, including its construction of the *prima facie* case, applies to cases involving discrimination against those in the majority. *Id*. at 279 n.6.

C. The Sixth Circuit's Skepticism that a Member of a Majority Demographic Group Would be Subjected to Discrimination is Both Erroneous as a Matter of Fact and Law, and Represents an Assumption Incompatible with the Summary Judgment Standard

Under the Sixth Circuit's reasoning, Ames would have easily satisfied her *prima facie* burden if she was a lesbian employee who was rejected in favor of a heterosexual replacement. *Ames*, 87 F.4th at 825. However, according to the Sixth Circuit, Ames' status as a heterosexual plaintiff requires the imposition of the heightened burden. This extra burden appears to rest upon skepticism that a member of a majority group would be subjected to discrimination. *See Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (holding that it would defy common sense to infer discrimination when a Black person is selected over a White person).

This Court has repeatedly rejected any *a priori* presumption that any particular group would be more

or less subject to discrimination. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Castaneda v. Partida*, 480 U.S. 482, 499 (1977).

Likewise, this Court has rejected any categorical presumption that members of a group will not discriminate against members of that same group. *Oncale*, 523 U.S. at 78 ("we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."). "The proposition that people in a protected category cannot discriminate against their fellow class members is patently untenable." *Danzer v. Norden Sys.*, 151F.3d 50, 55 (2nd Cir. 1998).

Indeed, the creation of different tests based on assumptions about the discriminatory attitudes that particular people would more likely harbor appears to rely on the very types of stereotypes that Title VII was designed to render powerless. *LeVegliz v. TD Bank*, No. 2:19-cv-01917-JDW, 2020 U.S. Dist. LEXIS 85659 (E.D. Pa. May 15, 2020), at 9 ("Arguments suggesting that people act in a certain way based on their membership in a protected class have no place in the judicial system"). Unequal tests based expressly on protected traits should be repudiated. As this Court has said, the "way to stop discrimination . . . is to stop discriminating . . .." *Parents Involved in Cmty Sch. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

Unfortunately, discrimination appears to be a human condition, with many types of people capable of discriminating against many other types of people, including their own. The agendas behind discriminatory bias are as varied and unique as the people making the decisions. We should not be assuming at

summary judgment that certain types of discrimination are less credible, where the facts that ordinarily establish discrimination are present.

The majority/minority bifurcation used by the Sixth Circuit is unworkable. Demographics may change, but attitudes may not. And attitudes may change where demographics remain stable. A traditional or stereotypical view of what discrimination looks like cannot overshadow the broad scope and language of Title VII.

Women represent the majority of the adult population in the United States, and yet women are the ones traditionally disfavored for hire in certain professions. It would be absurd to impose a heightened *prima facie* burden on female plaintiffs, simply because their population represents a numerical majority. Likewise, it may be said that in some contexts in our society, older men can experience a relatively advantaged status. However, when considering an age discrimination case brought by an older man, this Court accepted a standard *prima facie* case involving replacement evidence, without any heightened requirement. *Reeves*, 530 U.S. at 142; *O'Connor*, 517 U.S. at 313. Thus, discrimination against certain people greatly depends on the particular contexts and personalities of those involved. The requirements for proof for an individual case should not rise and fall based on judicial ruminations about societal trends.

Title VII focuses on the treatment of an individual. 42 U.S.C. § 2000e-2(a)(1). Consequently, when fashioning evidentiary tests, the focus should be "on individuals, not groups." *See Bostock*, 590 U.S. at 658. Given that the individual is central to a Title VII claim, that means that the specific circumstances and participants in a particular case are likewise unique. The presumption that an adequate *prima facie* case for

discrimination against a gay or lesbian individual is inadequate for a claim brought by a heterosexual individual ignores the individual circumstances of the case, and make unwarranted assumptions that "majority" plaintiffs are somehow immunized from bias. *Castaneda*, 480 U.S. at 499.

Likewise, the Sixth Circuit's focus on whether particular types of discrimination are "unusual" is seriously flawed. It makes presumptions based on ungrounded observations about society, or region, in general, as opposed to an examination of the facts of a particular case. The Sixth Circuit does not describe its method for determining whether a type of discrimination is "unusual," and it does not identify the necessary frequency needed for it to consider a discriminatory practice to be "usual."

Finally, there is nothing in this Court's decisions that tie the sufficiency of a *prima facie* case to whether a particular type of discrimination is more expected. Recall that the *prima facie* case does not depend on the statistical likelihood that the employer would prefer someone who does not share the plaintiff's particular protected characteristics. *O'Connor*, 517 U.S. at 313 (*prima facie* burden satisfied when a 68-year-old is replaced by substantially younger person).

To dismiss a case based on the assumption that a certain type of discrimination is unusual reflects an inappropriate reliance on inferences favoring the employer, which must not be considered at summary judgment. *Reeves*, 530 U.S. at 150-51 (applying JNOV standard, but also noting that the same standard applies to summary judgment). Thus, a heightened burden for women with majority traits should be rejected.

IV. THE SIXTH CIRCUIT IMPROPERLY PRECLUDES EVIDENCE OF OTHER DISCRIMINATION EXPERIENCED BY THE PLAINTIFF

According to the Sixth Circuit, the "background circumstances" necessary to satisfy Ames' *prima facie* case, must not include evidence of other discrimination experienced by Ames while working at the defendant-employer. *Ames*, 87 F.4th at 825 ("a plaintiff cannot point to her own experience"). This rule, which bars judges from considering proof of discrimination in a Title VII case, is Kafkaesque.

This Court has repeatedly rejected arbitrary rules that establish the requirement for certain types of evidence while diminishing the value of different, otherwise probative evidence. *Desert Palace*, 539 U.S. at 100-101 & n.3 (rejecting rule that requires direct evidence in order to prove discrimination pursuant to 42 U.S.C. § 2000e-2(m); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-188 (1989), *superseded by statute on other grounds* (evidence of pretext may take a variety of forms, and it was error to require pretext evidence that focuses on qualifications, to the exclusion of other proof of bias).

Here, the Sixth Circuit has excluded from consideration evidence of Ames' workplace experience, which under ordinary circumstances, would be considered evidence of discrimination. For example, to support her failure-to-promote claim, she shows that she was also demoted in favor of a less qualified person with same-sex attraction. We know that an employer's ongoing treatment of the plaintiff may be probative of the employer's motive with respect to a specific adverse action. *McDonnell Douglas*, 411 U.S. at 804 ("Other evidence that may be relevant to any showing

of pretext includes facts as to the [employer's] treatment of [the plaintiff] during his prior term of employment . . ..").

Likewise, Ames has introduced evidence that the individual who replaced Ames after her promotion, claimed that he could manipulate people to get what he wanted on the basis of being a gay man, and indicated that he wanted Ames' job. Many courts have held that the statements of those in a position to influence an employment decision can be probative of discrimination.[11] Here, where the replacement himself claimed that he was in the position to influence such decision, and himself was the beneficiary of that very decision, that statement can likewise support a claim of discrimination. *E.g.*, *Mulero-Rodgriguez v. Ponte, Inc.*, 98 F.3d 670, 676 (1st Cir. 1996) (racist statement of person who eventually took over the plaintiff's responsibilities was considered probative, as he was in a position to influence the employer's decision).

This Court has instructed us that the *prima facie* case was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Likewise, this court has rejected the notion of applying *per se* rules to exclude evidence of

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[11] *Mulero-Rodgriguez v. Ponte, Inc.*, 98 F.3d 670, 676 (1st Cir. 1996) (where an accountant was more trusted than plaintiff (General Manager and Director) and was given some of the plaintiff's responsibilities, the accountant's racist comment was admissible, because he was "in a position to influence Ponte, Inc.'s decision-making"); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) (biased remarks could be considered, "even if uttered by one other than the formal decisionmaker, provided that the individual is a position to influence the decision"); *Bledsoe v. TVA Bd. of Dirs.*, 42 F.4th 568, 582 (6th Cir. 2022) (applying "position to influence" standard).

discrimination, in the absence of a case-specific evaluation of the probative value of such evidence. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 382-383, 387 (2008) (holding in an age discrimination case that it would be improper *per se* rule to exclude all evidence of comparators who do not share the same supervisor as the plaintiff). However, in this case, the heightened burden seeks to both impose a rigid, mechanistic approach to *McDonnell Douglas*, and a categorical ban on the use of certain types of otherwise admissible evidence. The Sixth Circuit's practice of ignoring competent evidence of discrimination is simply wrong. Given Title VII's focus on protecting individuals, as opposed to groups, a rule that excludes evidence of discrimination experienced by an individual plaintiff cannot be correct. *Bostock*, 590 U.S. at 659 (noting Title VII's "focus on individuals rather than groups").

This brief concludes where it began – making the point that *McDonnell Douglas* is co-extensive with, and runs parallel to a "totality of the evidence" analysis. *McDonnell Douglas* is a valuable, time-tested framework that focuses the courts on circumstances that can support a discrimination claim. However, it must not be wielded in a way that precludes plaintiffs from gaining the benefit of *all* the evidence that would otherwise would be at their disposal. Plaintiffs must be permitted to rely on instances of discrimination to which they were subjected, and expression of bias that they have witnessed, to support their claims. To hold otherwise would be to put form over substance, in direct violation of *Furnco, Burdine*, and many other decisions.

V. AMES SATISFIED THE *PRIMA FACIE* BURDEN

Ames has satisfied a minimal *prima facie* burden, in that she has provided sufficient evidence to generate a weak, yet sufficient, inference of discrimination, if we assume that the employer refuses to explain its action in response. *Burdine*, 450 U.S at 254. Indeed, the Sixth Circuit acknowledged that Ames would have easily met her burden, had she been alleging discrimination as the constituent of a minority group. *Ames*, 87 F.4th at 825. The proof offered by Ames has effectively eliminated the common defenses of lack of qualification and lack of available position. *Burdine*, 450 U.S at 254. She has shown that the employer preferred two unqualified individuals outside her protected class, for positions the employer wished to be filled. *See O'Connor*, 517 U.S. at 313. Ames' collection of proof is sufficient to create an inference of discrimination assuming that the employer cannot or will not articulate a legitimate, nondiscriminatory reason in response.

CONCLUSION

For the foregoing reasons, Amicus Curiae Mass NOW requests that this Court reject the imposition of the heightened *prima facie* burden imposed by the Sixth Circuit for claims brought by members of majority groups.

Respectfully submitted,

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