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 SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT

DAVE YOST
Attorney General of Ohio
T. ELLIOT GAISER*
Ohio Solicitor General
*Counsel of Record
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
SAMUEL C. PETERSON
Deputy Solicitor General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Respondent

QUESTION PRESENTED

The Court has held that plaintiffs who allege a violation of Title VII of the Civil Rights Act of 1964 must make a prima facie case of discrimination by pointing to facts that, "if otherwise unexplained," are "more likely than not" to suggest illegal discrimination. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

In light of that precedent, must a majority-group plaintiff identify "background circumstances" sufficient to support a suspicion that the defendant is that unusual employer who discriminates against the majority?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS.. ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 4

I. The Ohio Department of Youth Services declined to promote Marlean Ames and later demoted her as part of a broader restructuring of the Department. 4

II. The Sixth Circuit held that Ames had failed to carry her burden of making a prima facie case of discrimination. 6

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. Title VII requires proof of a causal nexus between a protected characteristic and an adverse employment decision. 14

II. The "background circumstances" requirement the Sixth Circuit discussed in this case is merely an application of this Court's existing precedent. 17

A. Title VII plaintiffs must introduce evidence sufficient to give rise to an inference of discrimination. 17

B. Unless plaintiffs must provide some evidence suggesting discrimination, the prima facie showing under Title VII will be functionally meaningless..... 23

C. The Sixth Circuit did not impose a heightened burden when it discussed the types of evidence that can give rise to an inference of discrimination. 26

D. Confusion over the term "background circumstances" does not justify eliminating the prima facie step. 30

III. Ames ignores relevant precedent, which leads her to misunderstand the legal basis for the "background circumstances" analysis. 35

A. Ames ignores the Court's precedent addressing the elements of a prima facie case. 36

B. Ames mischaracterizes the legal basis for the "background circumstances" analysis. 39

IV. Ames's Title VII claim failed because of her litigation choices, not because of the Sixth Circuit's discussion of "background circumstances." 41

A. The Sixth Circuit rejected Ames's promotion claim because she had conceded facts that were fatal to that claim. 41

B. Ames failed to carry her prima facie burden under this Court's precedent. 43

V. Ames cannot challenge the prima facie burden that other Title VII plaintiffs bear. 46

CONCLUSION 49

TABLE OF AUTHORITIES

Cases **Page(s)**

Arendale v. City of Memphis,
519 F.3d 587 (6th Cir. 2008) 26

Baldwin v. Foxx,
EEOC No. 0120133080, 2015 WL
4397641 (July 15, 2015) 39

Bass v. Bd. of Cnty. Comm'rs,
256 F.3d 1095 (11th Cir. 2001) 1

Bostock v. Clayton Cnty.,
590 U.S. 644 (2020) 37

Brady v. Office of the Seargeant at Arms,
520 F.3d 490 (D.C. Cir. 2008) 15, 32, 46

Bundy v. Jackson,
641 F.2d 934 (D.C. Cir. 1981) 20

Comcast Corp. v. Nat'l Ass'n of African American-Owned Media,
589 U.S. 327 (2020) 15

Connecticut v. Teal,
457 U.S 440 (1982) 16

Cullen v. Pinholster,
563 U.S. 170 (2011) 33

EEOC v. Abercrombie & Fitch Stores, Inc.,
575 U.S. 768 (2015) 37

Ford v. Trendwest Resorts, Inc.,
146 Wash. 2d 146 (2002) 1

Furnco Constr. Corp. v. Waters,
438 U.S. 567 (1978) 2, 3, 13, 14, 16, 18, 19, 20, 22, 26, 27, 30, 36, 37, 39, 40, 46, 47

Goller v. Ohio Dep't of Rehab. & Corr.,
285 F. App'x 250 (6th Cir. 2008) 29

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 21

Groff v. DeJoy,
600 U.S. 447 (2023) 37

Harding v. Gray,
9 F.3d 150 (D.C. Cir. 1993) 3, 22, 27

Heckler v. Mathews,
465 U.S. 728 (1984) 47

Hinds v. Sprint/United Mgmt. Co.,
523 F.3d 1187 (10th Cir. 2008) 33, 34

Hittle v. City of Stockton,
Case No. 24-427 35

Iadimarco v. Runyon,
190 F.3d 151 (3d Cir. 1999) 30, 31

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 16, 23, 28, 36

Johnson v. Metro. Gov't of Nashville & Davidson Cnty.,
502 F. App'x 523 (6th Cir. 2012) 26, 27

Laster v. City of Kalamazoo,
746 F.3d 714 (6th Cir. 2014) 20

Lockhart v. Commonwealth Educ. Sys. Corp.,
247 Va. 98 (1994) 1

Mannie v. Potter,
394 F.3d 977 (7th Cir. 2005) 15

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 1, 2, 14, 38

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 2, 7, 8, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 25, 28, 30, 31, 32, 33, 34, 35, 38, 39, 40, 45

Mers v. Dispatch Printing Co.,
19 Ohio St. 3d 100 (1985) 1, 2, 14

Muldrow v. City of St. Louis,
601 U.S. 346 (2024) 3, 15, 18, 37

Murray v. Thistledown Racing Club, Inc.,
770 F.2d 63 (6th Cir. 1985) 3, 20

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 32

Parker v. Balt. & Ohio R.R. Co.,
652 F.2d 1012 (D.C. Cir. 1981) 3, 18, 21, 22, 31, 32, 39, 40

Pearson v. Callahan,
555 U.S. 223 (2009) 33

Pepper v. Precision Valve Corp.,
526 F. App'x 335 (4th Cir. 2013) 33

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 14, 15, 17, 24, 25, 26

Reives v. Ill. State Police,
29 F.4th 887 (7th Cir. 2022)................................ 20

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005) 15

Stallworth v. Singing River Health Sys.,
469 F. App'x 369 (5th Cir. 2012) 33

Strickland v. Washington,
466 U.S. 668 (1984) 33

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 3, 16

Tex. Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 2, 3, 13, 14, 15, 16, 17, 18, 20, 23, 24, 25, 27, 30, 36, 46, 47

Tex. Tech Univ. Health Sci. Center-El Paso v. Flores,
___ S.W.3d ___, 2024 WL 5249446
(Tex. Dec. 31, 2024) 2, 25, 48

United States v. Sineneng-Smith,
590 U.S. 371 (2020) 34

United States v. Williams,
504 U.S. 36 (1992) 42

USPS Bd. of Governors v. Aikens,
460 U.S. 711 (1983) 15, 20, 34, 45, 46

Winters v. Hous. Chron. Publ'g Co.,
795 S.W.2d 723 (Tex. 1990).................................. 1

Statute

42 U.S.C. §2000e-2...............................1, 14, 24, 37, 38

INTRODUCTION

Courts have often used the term "reverse discrimination" when discussing claims brought by majority group plaintiffs who allege that an employer violated Title VII of the Civil Rights Act of 1964. That label, while perhaps convenient, was never accurate. Discrimination is discrimination, regardless of an employee's protected characteristics. The term "reverse discrimination" diminishes the significance of some of those claims. *See Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1102–03 (11th Cir. 2001), *abrogated in part on other grounds*, *Crawford v. Carroll*, 529 F.3d 961, 971, 973–74 (11th Cir. 2008).

The term "reverse discrimination" is particularly inappropriate because the same legal standard applies to all Title VII plaintiffs, regardless of the class to which those plaintiffs belong. Title VII prohibits employment decisions "because of" an individual's "race, color, religion, sex, or national origin," 42 U.S.C. §2000e-2(a)(1), and no one disputes that this prohibition applies with equal force to members of minority *and* majority groups, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976). When courts or litigants have suggested otherwise—including Respondent in the district court—they have misstated what Title VII requires.

Title VII creates an exception to the dominant at-will employment rule. Ohio, like most States, has "long recognized the right of employers to discharge employees at will." *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103 (1985); *see also, e.g., Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 102 (1994) (Virginia); *Ford v. Trendwest Resorts, Inc.*, 146 Wash. 2d 146, 152 (2002) (Washington); *Winters v.*

Hous. Chron. Publ'g Co., 795 S.W.2d 723, 723 (Tex. 1990) (Texas). In an at-will-employment relationship, an employer may hire, fire, promote, or demote an employee for any reason, so long as that reason is not prohibited by law. *Mers*, 19 Ohio St. 3d at 103. Title VII contains one such prohibition.

Because direct evidence of discrimination is often hard to come by, plaintiffs usually rely on circumstantial evidence to prove a Title VII violation. Plaintiffs who rely on circumstantial evidence bear an equal burden, regardless of the group to which they belong. *See McDonald*, 427 U.S. at 278–79. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court adopted a three-part analysis to guide circumstantial inquiries into discrimination. The first step of that analysis is at issue here.

At that first step, Title VII plaintiffs must make a prima facie case of discrimination. *Id.* at 802. The prima facie requirement applies equally to plaintiffs who are members of minority and majority groups. All plaintiffs, regardless of race, sex, or other characteristics, must point to facts that, "if otherwise unexplained," are "more likely than not" to suggest illegal discrimination. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The prima facie requirement plays an important role. The effects of drawn-out litigation can be "exceptionally harmful to individuals and institutions. Only if the conduct at issue plausibly *was* discriminatory would such harm to others be justifiable." *See Tex. Tech Univ. Health Sci. Center-El Paso v. Flores*, ___ S.W.3d ___, 2024 WL 5249446, *11 (Tex. Dec. 31, 2024) (Young, J., concurring).

Marlean Ames is wrong when she argues that the Sixth Circuit imposed a greater burden on her because she was a member of a majority group. The Sixth Circuit, like many other circuits, has held that majority-group plaintiffs must establish a prima facie case of discrimination by pointing to "background circumstances" that suggest that "the defendant is that unusual employer who discriminates against the majority." *See Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (adopting the reasoning of *Parker*). The so-called "background circumstances" requirement is merely a restatement of the standard that this Court announced in *Furnco*. *Parker*, 652 F.2d at 1017 (quoting *Furnco*, 438 U.S. at 577). It asks whether an employer's decision "raises an inference of discrimination." *See Harding v. Gray*, 9 F.3d 150, 153–54 (D.C. Cir. 1993) (discussing *Parker*, *Furnco*, and *Burdine*); *cf. Burdine*, 450 U.S. at 254.

That the *specific facts* that give rise to a suspicion of discrimination differ from plaintiff to plaintiff does not mean that some parties carry a heavier prima facie burden than others. It just reflects that the "precise requirements of a prima facie case can vary depending on the context." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). In other words, there is "little if any substantive difference between the terminology the Court approve[d]" in *Furnco* and *Burdine* and the "terminology [Ames] doesn't like." *Muldrow v. City of St. Louis*, 601 U.S. 346, 363 (2024) (Alito, J., concurring).

Ames's arguments about why she believes that the Sixth Circuit erred in this case are really arguments about whether *other* Title VII plaintiffs in *other* cases

have borne a *lower* prima facie burden than she did. Ames does not argue that she presented evidence that "more likely than not" suggested discrimination so much as assert that other plaintiffs have been required to provide even less evidence than she did. Whether other litigants should be required to present *more* evidence of discrimination at the prima facie stage is a question best left for another case. If the Court disagrees, then the solution is to apply the same standard that Ames could not meet here to *all* Title VII plaintiffs. It is not to effectively eliminate the prima facie requirement. But that is what Ames's argument would implicitly require—and what some of her amici explicitly request.

STATEMENT

I. The Ohio Department of Youth Services declined to promote Marlean Ames and later demoted her as part of a broader restructuring of the Department.

Marlean Ames worked for the Ohio Department of Youth Services in a variety of roles. Pet.App.3a, 16a–17a. She was the Administrator of the Department's Prison Rape Elimination Act program when the Department created a new position, the Bureau Chief of Quality Assurance and Improvement. Pet.App.18a. Ames applied for the new position. *Id.*

The Department intended that the Bureau Chief would supervise the other members of the Office of Quality and Improvement. Pet.App.19a. Among the key skills that the Department desired in a candidate were management, supervision, and workforce planning. *Id.* Ames was one of three people who applied for the Bureau Chief job. *Id.* After interviews, none were hired. Pet.App.20a. Because the Department

had no fixed timeline for filling the position, it decided to wait until it found an ideal candidate to hire. *Id.*

Eight months after Ames had interviewed for the Bureau Chief role, the Department hired Yolanda Frierson for the job. *Id.* Julie Walburn, the Department's Assistant Director, made the decision to hire Frierson. *See* Pet.App.18a, 20a–21a. Although Frierson did not interview for the Bureau Chief job, J.A.152, Walburn had worked with Frierson in the past and thought Frierson would be a good fit for the role because, among other things, Frierson had significant management experience, Pet.App.21a. Frierson and Ames were both women but Frierson, unlike Ames, was gay. *Id.*

Not long after Ames interviewed for the Bureau Chief position, she was removed from her role administering the Prison Rape Elimination Act program. Pet.App.4a. When the Governor appointed a new Director of the Department, Ryan Gies, the Governor had stressed that addressing sexual victimization within the juvenile corrections system was a high priority. *See* Pet.App.18a, 21a–22a. Gies therefore began restructuring the Department's programs. Pet.App.21a–22a.

That restructuring cost Ames her position. Pet.App.22a. Gies felt that Ames was difficult to work with. *Id.* And Walburn was concerned that Ames could not oversee a more proactive approach to complying with the Prison Rape Elimination Act. *Id.* Ames returned to a previous role within the Department, Pet.App.18a, and Alex Stojsavljevic was selected to oversee the Prison Rape Elimination Act program, Pet.App.22a–23a. Stojsavljevic is a gay man. *See* Pet.App.23a. Ames filed a complaint with the Equal Employment Opportunity Commission and

received a right-to-sue letter. Pet.App.4a. Ames then filed a complaint in federal district court. *Id.* Relevant here, Ames's complaint alleged that the Department discriminated against her on the basis of sexual orientation (which is a form of sex discrimination) when it hired Frierson for the Bureau Chief role (her "promotion claim"), and that it discriminated against her on the basis of both sex and sexual orientation when it demoted her and replaced her with Stojsavljevic (her "demotion claim"). Pet.App.5a–6a. The district court granted summary judgment in the Department's favor on both claims. *See* Pet.App.33a, 39a–40a.

II. The Sixth Circuit held that Ames had failed to carry her burden of making a prima facie case of discrimination.

Ames appealed to the Sixth Circuit, which affirmed the district court's decision. Ames did not argue on appeal that the district court had applied the wrong legal standard or otherwise challenge the "background circumstances" requirement that it had applied. She also did not challenge the district court's ability to determine whether she had carried her prima facie burden. She argued instead that she *had* carried that burden and that she *had* pointed to facts sufficient to suggest discrimination was the basis for the Department's hiring decisions.

In challenging the district court's rejection of her promotion claim, Ames unsuccessfully attempted to walk back a significant concession that she had made in the district court. Ames had conceded in her opposition to the Department's Motion for Summary Judgment that the people who made the employment decision that provided the basis for her promotion claim

were not gay. *See* Opposition to Motion for Summary Judgment, R.72, PageID#2488, PageID#2489–90 (conceding that the Department's statement of the facts was correct). Ames attempted to undo that concession on appeal. Contradicting what she had said below, Ames argued that a different individual made the relevant hiring decision and that *that* individual was gay. *See* Pet.App.6a. The fact that the person who was ultimately hired was also gay, Ames argued, was sufficient to raise a suspicion of discrimination. *See id.*

The Sixth Circuit held Ames to her earlier concession. Because Ames had conceded in the district court that the relevant decisionmakers were not gay, it held that she had forfeited her new argument about the identity of the relevant decisionmaker. *See id.* In other words, the Sixth Circuit held that for purposes of appeal, Ames had forfeited her argument about why she could establish background circumstances with respect to her promotion claim. *Id.*

The Sixth Circuit rejected Ames's other Title VII claim—her demotion claim—after conducting a full *McDonnell Douglas* analysis. Ames had offered two different theories about why her demotion violated Title VII. She argued that the Department had discriminated against her on the basis of her sexual orientation when it transferred her to a new position and replaced her with Stojsavljevic, a gay man. Pet.App.5a. And she argued that, independent of her sexual orientation, the Department had discriminated against her on the basis of sex more generally when it replaced her with a man. Pet.App.6a. The Sixth Circuit held that Ames had made a prima facie case of discrimination with respect to only one of her two theories but held that that was enough to allow it to move on to the next

step in the *McDonnell Douglas* analysis, which asks whether an employer had a nondiscriminatory reason for the challenged employment decision. Pet.App.6a–8a.

The Department carried its burden of articulating a nondiscriminatory reason for replacing Ames with Stojsavljevic. The Sixth Circuit held that the Department's justification for its action—that Ames was difficult to work with and could not carry out the new Governor's desired restructuring—satisfied the Department's burden at the second step of *McDonnell Douglas*'s three-part analysis. *See* Pet.App.6a–7a. The Sixth Circuit ultimately rejected Ames's demotion claim because it determined that Ames had failed to show that the Department's asserted reason for demoting her was pretextual. Pet.App.7a–8a.

Judge Kethledge concurred. Although he joined the opinion in full, he disagreed with Sixth Circuit precedent to the extent that it required Ames to show, as part of her prima facie case of sexual-orientation discrimination, that the Department "is that unusual employer who discriminates against the majority." Pet.App.9a (quotation omitted). The concurrence accepted Ames's characterization of Frierson, the woman who was promoted instead of Ames, as unqualified for the position for which she was hired, *see* Pet.App.10a—despite the fact that the District Court had described Frierson's relevant experience and qualifications, *see* Pet.App.21a.

Ames petitioned for a writ of certiorari. Her petition presented a single question. For the first time, Ames challenged the "background circumstances" analysis that the Sixth Circuit and lower court had applied. *See* Pet.i. Ames accepted *McDonnell*

Douglas's broader three-part framework, however, *see* Pet.28 n.3, and waived any challenge to the Sixth Circuit's conclusion that the Department had not discriminated against her when it replaced her with Stojsavljevic, *see* Pet.12 n.2; Ames Br.18. The Court granted Ames's petition.

SUMMARY OF ARGUMENT

I. The text of Title VII makes clear that plaintiffs must provide proof of a causal nexus between a protected characteristic and an adverse employment decision. In doing so, Title VII creates a motive-based exception to America's at-will employment default. Because every employee has some protected trait, and disputes over what constitutes an adverse action are rarely hard to resolve, the center of most Title VII cases will be causation.

The plaintiff bears the burden of proving causation. Because it is rare that an employer will admit to having illegal motives, Title VII plaintiffs often must prove their claims through circumstantial evidence. This Court's decision in *McDonell Douglas* announced a three-part framework designed to make sifting through such evidence easier on courts and litigants. Under the first part of the test—the only step at issue in this case—the plaintiff must point to facts which, if unexplained, create an inference that an employment decision was based on a discriminatory criterion that is illegal under Title VII. The context of a claim determines what facts are sufficient to raise an inference that the adverse action was "because of" a protected characteristic.

II. The "background circumstances" requirement the Sixth Circuit discussed in this case is an application of this Court's existing precedent.

A. The "background circumstances" requirement is just another way of asking whether the circumstances surrounding an employment decision, if otherwise unexplained, suggest that the decision was because of a protected characteristic. It is not an additional prima facie element, such that majority-group plaintiffs are therefore being held to a higher burden than the one the Court imposed on minority plaintiffs. Because *McDonnell Douglas* was focused on case-specific considerations, it is impossible to apply the decision in that case literally to other types of Title VII claims, and this Court has recognized as much. The *reason* that the elements discussed in *McDonnell Douglas* were sufficient to establish a prima facie case of discrimination was the well-recognized history of discrimination against African Americans.

B. Unless plaintiffs must provide some evidence of discrimination, the prima facie step of *McDonnell Douglas* would be functionally meaningless. *Every* individual belongs to a class that Title VII protects, and *every* plaintiff in a Title VII case has necessarily alleged that they suffered discrimination. Allowing such allegations alone to satisfy the prima facie step is inconsistent with Title VII's text. A prima facie case can support judgment for a plaintiff only if the elements of such a case correspond to the plaintiff's ultimate burden under the statute.

C. The Sixth Circuit has made clear that the background circumstances requirement is not onerous. A plaintiff does not bear a higher burden simply because the evidence that is relevant to her claim is different from the evidence that might be relevant to a different plaintiff bringing a different claim. The fact that the Sixth Circuit in this case discussed several specific types of evidence does not mean that other, future

courts cannot consider other kinds of evidence. If there has been any misunderstanding on that point, the Court should clarify that courts may consider *any* relevant evidence when determining whether a Title VII plaintiff has carried her prima facie burden. But it does not need to reverse the Sixth Circuit's decision in this case to do so because Ames did not seek to introduce any of the evidence that amici discuss, nor has she pointed to any *other* evidence that would give rise to an inference of discrimination.

D. Any confusion over the term "background circumstances" does not justify eliminating the prima facie step. The D.C. Circuit was the first to use that term. But when it explained that a plaintiff must present evidence that a defendant is that "unusual employer who discriminates against the majority," it did not establish a new threshold factual question or element. It merely observed that the inferences that can be drawn from circumstantial evidence will vary depending on the context of a case—a point this Court itself has made.

III. Ames ignores relevant precedent, which leads her to misunderstand the legal basis for the "background circumstances" analysis.

A. Ames ignores the Court's precedent addressing the elements of a prima facie case. Rather than discuss the elements of a prima facie case, Ames only cites cases that involved Title VII's ultimate burden.

B. Ames mischaracterizes the legal basis for the "background circumstances" analysis. The language Ames complains about is just another way of articulating what this Court has recognized: that courts do not consider evidence in a vacuum. Indeed, *McDonnell Douglas* was focused on the plaintiff's

membership in a socially disfavored group, specifically his status as an African American in the 1960s. This was the relevant "background circumstance" that completed that minority plaintiff's prima facie case.

IV. The Sixth Circuit's discussion of background circumstances was not the reason Ames's Title VII claim failed.

A. The Sixth Circuit rejected Ames's promotion claim because she had conceded facts that were fatal to that claim. Below, Ames argued that she had introduced evidence of background circumstances—specifically, that she had shown that the woman who received the job for which Ames had applied shared a sexual orientation with the relevant decisionmaker. But the Sixth Circuit held Ames had conceded facts in the district court that contradicted that argument. Ames does not challenge the Sixth Circuit's conclusions but rather abandons the argument that she made below. Now, Ames acknowledges that the individual who she argued was the relevant decisionmaker below actually "did not have formal decision-making authority." Ames Br.18.

B. Ames also failed to carry her burden to prove a Title VII violation because of another critical admission. In the district court, Ames rested her prima facie case of sexual-orientation discrimination on the fact that she had alleged two separate instances of discrimination. Ames even acknowledged that if the Department had preferred a gay employee over her on only one occasion, then that single decision might not have created an inference of discrimination. That admission is fatal because a single example of alleged discrimination is all that Ames can rely on. The Sixth Circuit held that the Department *did not* discriminate

against Ames when it replaced her with a gay man, and Ames has not appealed that decision. Pet.App.6a–8a. Thus, the only evidence of discrimination that Ames has to offer is that, on a single occasion, she was a woman who did not receive a job for which she was qualified and that the Department instead hired a different woman, who was also qualified but who happened to be gay. Those bare facts are not enough to raise an inference of discrimination.

V. Ames cannot challenge the prima facie burden that other Title VII plaintiffs bear. Ames does not assert a violation of the Equal Protection Clause; her only claim is that the Department discriminated against her in violation of Title VII. Even if Ames is right that some courts have imposed a lesser prima facie burden on minority Title VII plaintiffs, that says nothing about the burden that she herself should bear. If this Court nevertheless concludes that courts are misapplying its precedents and creating disparate prima facie burdens when they consider Title VII claims brought by minority plaintiffs, then it should level up, rather than level down. That will ensure a properly calibrated prima facie burden, which will not only demonstrate fidelity to the text of the statute, but to the background principle of at-will employment.

ARGUMENT

The issue in this case is not novel. The Court made clear as early as 1978 that plaintiffs who bring a Title VII claim must make a prima facie case of discrimination by pointing to facts that, "if otherwise unexplained," suggest that an employment decision was "more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577; *see also Burdine*, 450 U.S. at 254. This case calls for little

more than a straightforward application of *Furnco* and *Burdine*. Because the Sixth Circuit's decision was consistent with those decisions, the Court should affirm the decision below. But if the Court wishes to revisit those standards, it should not effectively eliminate the prima facie step of *McDonell Douglas*. Instead, it should affirm the judgment below and apply the standard that Ames could not surmount here to *all* Title VII claims.

I. Title VII requires proof of a causal nexus between a protected characteristic and an adverse employment decision.

Title VII makes it an "unlawful employment practice" for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" because of that person's "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). In doing so, Title VII creates a motive-based exception to the prevailing at-will employment doctrine. *See Mers*, 19 Ohio St. 3d at 103. Title VII's protections apply with equal force to members of minority and majority groups. *McDonald*, 427 U.S. at 278–79.

The most important part of the text is the causal relationship between improper motivation and an adverse decision. The text assigns to plaintiffs the burden of proving causation—that they were discriminated against "because of" a protected characteristic. *See* 42 U.S.C. §2000e-2(a)(1); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). That makes sense in light of the background rule of at-will employment. Every employee has some protected trait. And disputes over what constitutes an adverse action are rarely hard to resolve. *But see*

Muldrow, 601 U.S. 363 (Alito, J., concurring). That means the center of almost any Title VII case will be causation.

As in other civil claims, the burden of proving a violation of Title VII rests with plaintiffs. *Burdine*, 450 U.S. at 253; *cf. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 589 U.S. 327, 329 (2020) ("Few legal principles are better established than the rule requiring a plaintiff to establish causation."); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (the burden of persuasion "typically" lies "on the party seeking relief"). The "'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253).

That burden is not always easy to carry. There is "seldom … 'eyewitness' testimony as to the employer's mental processes." *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Because an employer will rarely admit to illegal motives, Title VII plaintiffs often must prove their claims through "circumstantial evidence from which the fact-finder could infer intentional discrimination." *Mannie v. Potter*, 394 F.3d 977, 983 (7th Cir. 2005).

To make sifting through Title VII claims easier on litigants and courts alike, this Court adopted a three-part framework designed to guide this type of circumstantial inquiry. *See McDonnell Douglas*, 411 U.S. 802–04. While some have questioned the consistency of this framework with Title VII, *cf. Brady v. Office of the Seargeant at Arms*, 520 F.3d 490, 493 n.1 (D.C. Cir. 2008) (Kavanaugh, J.), Ames specifically waived that issue here. Pet.28 n.3.

Only the first step of that tripartite framework is at issue now. That step requires plaintiffs who allege a violation of Title VII to make a prima facie showing of discrimination. *McDonnell Douglas*, 411 U.S. at 802. To do so, plaintiffs must point to facts which, if unexplained, "create an inference that an employment decision was based on a discriminatory criterion illegal under" Title VII. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977). "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because [courts] presume [the facts], if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577; *Burdine*, 450 U.S. at 254. Like the *McDonnell Douglas* analysis more broadly, the prima facie inquiry is merely a means to an end. It "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8.

The facts that will be sufficient to raise an inference that an adverse action was because of a protected characteristic depend on the context of a claim. *Swierkiewicz*, 534 U.S. at 512. The "principal focus" of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee." *Connecticut v. Teal*, 457 U.S 440, 453–54 (1982). The evidence that will support a prima facie showing of discrimination therefore depends on the unique circumstances of the individual plaintiff who brings a Title VII claim.

The analytical process that the Court described in *McDonnell Douglas* is not a strict test, and it is not an end in and of itself. *Burdine*, 450 U.S. at 253 n.6

(*McDonnell Douglas*'s prima facie requirement "is not inflexible" and the facts necessary to establish a prima facie case "will vary in Title VII cases" (quotation omitted)); *McDonnell Douglas*, 411 U.S. at 802 n.13 (same). It is simply a helpful device that is intended to "bring the litigants and the court expeditiously and fairly to [the] ultimate question" at issue under Title VII: whether an employer intentionally discriminated against an employee. *Burdine*, 450 U.S. at 253. "Although intermediate evidentiary burdens shift back and forth" under *McDonnell Douglas*, plaintiffs at all times bear the burden of proving illegal discrimination. *Reeves*, 530 U.S. at 143.

II. The "background circumstances" requirement the Sixth Circuit discussed in this case is merely an application of this Court's existing precedent.

The Sixth Circuit held that Ames failed to make a prima facie case of discrimination because she did not show "background circumstances" that suggested the Department discriminates against majority-group members. Pet.App.5a. Its decision was consistent with this Court's precedent.

A. Title VII plaintiffs must introduce evidence sufficient to give rise to an inference of discrimination.

Although Ames never challenged the requirement that she demonstrate "background circumstances" below, she does so now. Her Question Presented asks whether majority-group plaintiffs "must show 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" Ames Br.i (quoting App.5a). Ames goes on to argue that the "background

circumstances" requirement is an additional prima facie element, and that majority-group plaintiffs are therefore being held to a higher burden than the one the Court imposed on minority plaintiffs in *McDonnell Douglas*. *See* Ames Br.25–27. This is doubly wrong: It is not, and they are not.

The "background circumstances" requirement is best understood as just another way of asking whether the circumstances surrounding an employment decision, "if otherwise unexplained," suggest that the decision was "based on the consideration of impermissible factors" by the employer. *See Furnco*, 438 U.S. at 577; *see also Parker*, 652 F.2d at 1017. There is "little if any substantive difference between the terminology the Court approve[d]" in *Furnco* and *Burdine* and the "terminology [Ames] doesn't like." *Cf. Muldrow*, 601 U.S. at 363 (Alito, J., concurring).

A brief review of the Court's precedent, beginning with *McDonnell Douglas*, shows why. The plaintiff in *McDonnell Douglas* was a civil rights activist who had worked for the McDonnell Douglas Corporation before he was laid off as part of a general reduction in force. *McDonnell Douglas*, 411 U.S. at 794. After he was laid off, the plaintiff participated in several civil rights protests that targeted McDonnell Douglas's employment practices. *See id.* at 794–95. When McDonnell Douglas posted a new position for which the plaintiff was qualified, he applied, but the company declined to hire him. It did not hire anyone else either; the position remained open. *See id.* at 802. The company made the decision not to rehire the plaintiff in 1965—barely one year after Congress enacted Title VII. *See id.* at 796. At oral argument, much of the discussion focused on how to determine whether that decision was driven by race, or by the plaintiff's participation

in concededly illegal protests. *See* Tr. of Oral Argument in No. 72-490 at 21–34.

The Court's discussion in *McDonnell Douglas* of what constitutes a prima facie case of discrimination reflected these case-specific facts. *See McDonnell Douglas*, 411 U.S. at 802 n.13. The Court held that a Title VII plaintiff may make a prima facie case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The *reason* that those elements were sufficient to establish a prima facie case of discrimination in *McDonnell Douglas* was the well-recognized history of discrimination against African Americans—discrimination that the plaintiff himself had been protesting. There were, to put it in the language of this case, "background circumstances" sufficient to generate an inference of discrimination out of those elements.

The factors the Court discussed in *McDonnell Douglas* were never intended to be an exhaustive list of factors that constitute a prima facie case of discrimination in all cases. *Furnco*, 438 U.S. at 577. They simply reflected the fact that the claim at issue *in that case* involved a member of a racial minority who alleged that he was discriminated against by an employer who refused to hire him. *McDonnell Douglas*

did not preclude the consideration of other factors, in other cases, involving other plaintiffs or claims. *See* 411 U.S. at 802 n.13.

Because *McDonnell Douglas* was focused on case-specific considerations, it is impossible to apply the decision in that case literally to other types of Title VII claims. This Court has recognized as much: *McDonnell Douglas*'s discussion of the elements of a prima facie case was "'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *Aikens*, 460 U.S. at 715 (quoting *Furnco*, 438 U.S. at 577). The prima facie requirement exists simply to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253–54.

Lower courts have adapted the prima facie analysis to meet the needs of the specific claims that they confronted. They have, for example, adopted modified versions of the *McDonnell Douglas* analysis to govern discriminatory promotion claims, *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981), retaliation claims, *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014), and discriminatory discipline claims, *Reives v. Ill. State Police*, 29 F.4th 887, 891–92 (7th Cir. 2022); *see also Thistledown Racing Club,* 770 F.2d at 67 (noting that "courts have modified the *McDonnell Douglas* standard to address disparate treatment cases involving all discrimination prohibited by the Act in promotion, firing, compensation or other conditions of employment").

Courts have needed to similarly adapt *McDonnell Douglas* when confronted with Title VII claims

brought by majority-group members. One cannot apply *McDonnell Douglas* as written to such claims: that decision asks whether a plaintiff "belongs to a racial minority." *McDonnell Douglas*, 411 U.S. at 802. Majority-group plaintiffs obviously do not. So either *McDonnell Douglas* stands for the proposition that Title VII only protects minorities (it does not), or it stands for the proposition that individual plaintiffs must make out a unique prima facie case that the employer took an adverse action "because of" a protected characteristic of that plaintiff. Only the latter makes sense.

Some other background assumptions the Court made in *McDonnell Douglas* may not apply when a plaintiff is a member of a majority group. Implicit in the Court's discussion of the elements of a prima facie case in *McDonnell Douglas* was the assumption that employers were likely to discriminate against African Americans when making employment decisions. Whatever the merits of that assumption now, it was a fair one at the time. When the company made the employment decision at issue in *McDonnell Douglas*, many employers had only recently abandoned policies that had explicitly restricted employment opportunities for African Americans. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971). And McDonnell Douglas's own employment practices had been challenged repeatedly; the plaintiff in *McDonnell Douglas* had protested some of those practices. *See* 411 U.S. at 794–96.

The "background circumstances" requirement is little more than an attempt to capture this Court's underlying assumptions. The first court to discuss "background circumstances" was the D.C. Circuit. *See Parker*, 652 F.2d at 1017. It did so because it

recognized that "[m]embership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated." *Id.* Only in that context, it wrote, could it be "stated as a general rule that the 'light of common experience' would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member." *Id.* (quotation omitted). Because "present society" did not justify an inference of prejudice when a member of a minority group was promoted over a majority group member, the D.C. Circuit wrote that majority group plaintiffs must point to something else—some other "background circumstances"—sufficient to give rise to the inference of discrimination that *Furnco* requires at the prima facie step. *Id.* The D.C. Circuit has made clear, however, that the "background circumstances" element is simply a judicial tool for "determining when an employer's conduct raises an inference of discrimination under the Supreme Court's *McDonnell Douglas/Burdine* standard"; it is not intended to disadvantage plaintiffs who are members of majority groups, nor is it "an additional hurdle" that such plaintiffs must meet. *Harding*, 9 F.3d at 153–54.

The United States argues that there is no need for a plaintiff to provide evidence of background circumstances that suggests discrimination because the prima facie case as articulated in *McDonnell Douglas* serves a more limited purpose. It notes that the Court has held that the prima facie case requires a plaintiff to show only that an employment decision "'did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.'" United States

Br.16–17 (quoting *Int'l Bhd. of Teamsters*, 431 U.S. at 358 n.44). But the United States overlooks that, under the at-will employment system, a plaintiff's rebuttal of the most common reasons for a decision creates an inference of a statutory violation only if there is *already a reason* to otherwise suspect discrimination.

That much is clear from an earlier part of the footnote from which the United States quotes—but the United States does not discuss that language. The Court in *International Brotherhood of Teamsters* specified that it was discussing what "an applicant who belongs to a racial minority" needed to do to create an inference of discrimination. 431 U.S. at 358 n.44. So while it is true that the prima facie case allocates the burden "on a discrete issue—the defendant's asserted reason for acting," *see* United States Br.17—it does so only after a plaintiff has presented some evidence both rebutting the most common reasons for an employer's action *and* suggesting discrimination.

B. Unless plaintiffs must provide some evidence suggesting discrimination, the prima facie showing under Title VII will be functionally meaningless.

Every individual belongs to a class that Title VII protects, and *every* plaintiff in a Title VII case has necessarily alleged that they suffered discrimination. Allowing mere allegations of discrimination to satisfy a plaintiff's burden would ignore the "important function" that the prima facie inquiry plays in Title VII cases. *Burdine*, 450 U.S. at 253–54. It would transform the prima facie requirement into an empty formality under which *every* plaintiff carries her burden the moment she files a complaint. That first step

would protect neither law-abiding employers nor the judicial docket from meritless claims.

Such a low burden is inconsistent with Title VII's text. A prima facie case must involve evidence that the adverse action was "because of" a protected class. That is why a prima facie showing, if unrebutted, is by itself a sufficient basis on which a court can find for a Title VII plaintiff. If an "employer is silent in the face of the presumption" that a prima facie case creates, then a court "must enter judgment for the plaintiff." *Id.* at 254. And even when a defendant rebuts the prima facie case by providing a nondiscriminatory reason for its decision, the prima facie case still has an important role to play—and it can still provide the basis for finding in the plaintiff's favor. 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." *Reeves*, 530 U.S. at 148. In such cases, the strength of a plaintiff's prima facie case helps determine whether she carried her Title VII burden. *Id.* at 148–49.

A prima facie case can support judgment for a plaintiff only if the elements of such a case correspond to the plaintiff's ultimate burden under 42 U.S.C §2000e-2(a)(1). If Title VII plaintiffs are not required at the prima facie step to introduce at least *some* evidence that gives rise to an inference of illegal employer motive, then the prima facie case would lose all meaning. It could not support a judgment for plaintiffs because the prima facie case would be entirely disconnected from the question that is ultimately at issue in Title VII cases. Without a meaningful prima facie requirement, there is little to distinguish "actual discrimination from disappointment in employment

results." *Tex. Tech*, 2024 WL 5249446 at *11 (Young, J., concurring).

A thought experiment helps illustrate the point. Imagine that a man and a woman both apply for a job for which they are equally qualified. Imagine also that the employer does not decide to hire either of them. If the Court were to adopt Ames's literal application of the prima facie case discussed in *McDonnell Douglas,* then *both* applicants could make a prima facie case of discrimination. Each applicant could say (i) they belonged to a protected class, (ii) that they were qualified, (iii) that they were not hired, and (iv) that the position remained open to qualified applicants. *See McDonnell Douglas*, 411 U.S. at 802 (discussing the elements of a prima facie case). Such a conclusion makes little sense, particularly in light of the fact that an unrebutted prima facie case leads to a judgment in a plaintiff's favor. *See Burdine*, 450 U.S. at 254.

The fact that a plaintiff must provide some minimal amount of evidence sufficient to raise an inference of discrimination at the prima facie step does not "import[]" into the prima facie requirement the "evidentiary requirements ordinarily reserved" for *McDonnell Douglas*'s third step. *Contra* United States Br.22. It simply grounds the prima facie analysis in the language of Title VII. The Court has already recognized that there is overlap between a plaintiff's prima facie burden and her ultimate burden of proving discrimination. It wrote in *Reeves* that a "trier of fact may still consider the evidence establishing the plaintiff's prima facie case" when considering whether an employer's explanation for its actions was pretextual. *Reeves*, 530 U.S. at 143. Its decision in that case makes sense only if the elements of a prima facie case

relate back to Title VII's ultimate causation requirement. If the elements of a prima facie case are not tied to causation at all, then the Court's decision in *Reeves* would be wrong. The prima facie case would not be enough to support a judgment in favor of a plaintiff because it would not provide any evidence of causation; it would not suggest that the employer took a challenged employment action "because of" a plaintiff's race. *See id.*

C. The Sixth Circuit did not impose a heightened burden when it discussed the types of evidence that can give rise to an inference of discrimination.

The Sixth Circuit's discussion of the "background circumstances" element, both generally and in this case, is consistent with *Furnco*. As a general matter, the Sixth Circuit has made clear that the background-circumstances requirement "is not onerous, and can be met through a variety of means." *Johnson v. Metro. Gov't of Nashville & Davidson Cnty.*, 502 F. App'x 523, 536 (6th Cir. 2012); *see also Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008). It did not do anything different in this case. It looked to see whether Ames had introduced evidence sufficient to create an inference of discrimination—and held that she had not.

The Sixth Circuit discussed at least two types of evidence that would be sufficient to create an inference of discrimination against majority-group plaintiffs. It noted that plaintiffs "typically" show "background circumstances" by providing "evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with

statistical evidence showing a pattern of discrimination by the employer against members of the majority group." Pet.App.5a–6a. The Sixth Circuit was not wrong about the fact that the types of evidence it mentioned can be enough to satisfy a plaintiff's prima facie burden. Such evidence *would* give rise to an inference of discrimination and *would* therefore be more than sufficient to establish a prima facie case of discrimination. *See Furnco*, 438 U.S. U.S. at 577; *Burdine*, 450 U.S. at 253–54.

Ames does not appear to disagree. She argues only that "a Title VII plaintiff need not prove" any of the things that the Sixth Circuit discussed. Ames Br.34. On that point she is right. But while Title VII plaintiffs do not need to provide any *specific* type of evidence at the prima facie step, they must still present *some* evidence that "raises an inference of discrimination." *Furnco*, 438 U.S. at 577; *Burdine*, 450 U.S. at 254. The Sixth Circuit correctly held that Ames failed to do so.

The evidence that the Sixth Circuit discussed is not the only kind sufficient to make a prima facie case of discrimination, and the Sixth Circuit did not create a new burden for majority-group plaintiffs when it discussed that evidence. What is "typically" done is not what must *always* be done. Title VII plaintiffs remain free to rely on any evidence sufficient to create an inference of discrimination. *See Johnson*, 502 F. App'x at 536 (the "background circumstances" requirement "is not onerous, and can be met through a variety of means"). The D.C. Circuit, for example, has held that *any* "evidence about the 'background' of the case at hand—including an allegation of superior qualifications"—can be enough to satisfy a majority-group plaintiff's burden. *Harding*, 9 F.3d at 153–54.

The decision below is consistent with this Court's recognition that there is no one type of evidence on which Title VII plaintiffs must rely when making a prima facie case of discrimination. *See Int'l Bhd. of Teamsters*, 431 U.S. at 358–59. A plaintiff does not bear a higher burden simply because the type of evidence that is relevant to her claim is different from the type of evidence that might be relevant to a different plaintiff bringing a different claim. "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* at 358.

The United States makes a similar point; it notes that there is nothing to distinguish the categories of evidence the Sixth Circuit discussed from "the many other circumstances that might give rise to an inference of discrimination." *See* United States Br.24. And it provides a list of "[c]ircumstances that may give rise to an inference of discrimination." *Id.* at 20 n.5. But the fact that the Sixth Circuit in this case discussed several specific types of evidence does not mean that other, future courts cannot consider evidence of the type the United States discusses at the prima facie step.

If the Court believes that there has been any misunderstanding on that point, it should clarify that courts may consider *any* relevant evidence when determining whether a Title VII plaintiff has carried her prima facie burden. But it does not need to reverse the Sixth Circuit's decision in this case to do so. Ames did not seek to introduce any of the evidence that the

United States discusses, nor has she pointed to any *other* evidence that would give rise to an inference of discrimination. Nothing about the Sixth Circuit's discussion of the "background circumstances" requirement prevented it from considering any evidence at all, much less any evidence that might give rise to an inference of discrimination.

Ames misleadingly cites the Department's earlier pleadings when she claims that the Department "admits" that the "background circumstances" requirement the Sixth Circuit applied imposed a higher burden on her because she is a member of a majority group. *See* Ames Br.26. The Department admits no such thing. It said the exact opposite in its Brief in Opposition to Certiorari. It wrote that "the 'background circumstances' requirement *is not* a higher burden, merely a different one." BIO at 10 (emphasis altered). It is true that the Department used the term "higher" to describe Ames's prima facie burden in the Motion for Summary Judgment that it filed in district court. *See* Motion for Summary Judgment, R.71, PageID#2381. It was wrong at the time; the case that it cited did not support the proposition that majority-group plaintiffs bear a higher burden. *See id.* (citing *Goller v. Ohio Dep't of Rehab. & Corr.*, 285 F. App'x 250, 255–56 (6th Cir. 2008)). The Department has not used the term "higher" to describe Ames's burden since then, and it has made clear that its earlier statement was incorrect. *See* BIO at 10. It is only by selectively quoting from two separate pleadings that Ames can imply otherwise. *See* Ames Br.26.

The Court should consider the arguments that the Department makes now, not a stray comment that it made in the district court. If the Court were to hold the parties to the arguments that they made in their

prior pleadings, then Ames could make none of the arguments she makes now. In the courts below, she did not raise *any* of the arguments that she makes before this Court.

D. Confusion over the term "background circumstances" does not justify eliminating the prima facie step.

The United States, for its part, argues that the "background circumstances" requirement would be "inoffensive but also 'unnecessary'" if it merely restated the requirements of *Furnco* and *Burdine*. United States Br.30 (quoting *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999)). The United States is right that such a prima facie standard would be "inoffensive." It is wrong about its utility. The *Iadimarco* case the United States cites shows why.

The Third Circuit in *Iadimarco* did not dispense with the requirement that a Title VII plaintiff establish a prima facie case of discrimination; it applied the same prima facie standard for which the Department argues in this case. Looking to *Furnco*, it asked whether the plaintiff presented "sufficient evidence to allow a fact finder to conclude that the unexplained decision that forms the basis of the allegation of discrimination was motivated by discriminatory animus." 190 F.3d at 163. Far from deeming such an inquiry "unnecessary," the Third Circuit reaffirmed its importance. It held that "[i]nasmuch as everyone belongs to some 'class,' substituting membership in an undefined class for membership in a minority group," as originally required in *McDonnell Douglas,* would be "tantamount to eliminating the first prong of the

McDonnell Douglas framework *sub silentio*." *Id.* The Department agrees. *See above,* 23–26.

It was the *term* "background circumstances"—not the requirement that a Title VII plaintiff produce evidence at the prima facie stage sufficient to give rise to an inference of discrimination—that the Third Circuit held was "unnecessary." *See id* at 161. At most, *Iadimarco* shows that there is a problem with terminology, not with the relevant legal standard. At least one member of the *Iadimarco* panel thought exactly that. The panel noted that that judge believed that the "background circumstances" requirement was "merely a restatement of the *McDonnell Douglas* test just as the Court of Appeals for the D.C. Circuit intended it to be." *Id.* at 163 n.10. He simply felt that the *term* "background circumstances" was "too vague and too prone to misinterpretation and confusion to apply fairly and consistently." *Id.*

The arguments that Ames and some amici make reinforce the idea that it is the terminology surrounding the "background circumstances" requirement that has caused confusion. Ames focuses on the difficulty of determining who is a member of the majority and what groups are "socially disfavored," *see* Ames Br.39–41 (quotation omitted), and some of her amici discuss whether an employer is "unusual," *see,* American Alliance for Equal Rights Br.3; America First Legal Br.2–3. They miss the forest for the trees. When the D.C. Circuit in *Parker* wrote that a plaintiff must present evidence that a "defendant is that unusual employer who discriminates against the majority," 652 F.2d at 1017, it was not establishing a new threshold factual question that a court must answer before deciding what legal standard to apply. It was merely observing that the inferences that can be drawn from

circumstantial evidence will vary depending on the context of a case. *See id.* This Court has made similar observations. *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (determining whether a Title VII violation occurred "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target" and "depends on a constellation of surrounding circumstances").

In light of the confusion surrounding the language of "background circumstances," it would make sense for the Court to follow the Third Circuit's lead and clarify that terminology. But that does not mean that it needs to adopt a new legal standard—or reverse the Sixth Circuit's decision. As the Department explained above, the Sixth Circuit's decision was consistent with this Court's precedent—regardless of the specific language that it used—and Ames failed to introduce any evidence that would give rise to an inference of discrimination. *See below,* 43–46.

What the Court in this case should not do is abandon the *McDonnell Douglas* analysis or hold that courts cannot or should not decide whether a plaintiff made a prima facie case of discrimination. At least one amicus asks the Court to hold just that. *See* Nat'l Empl. Lawyers Ass'n Br.18; *see also* Professors' Br.9–10. Citing the D.C. Circuit's decision in *Brady*, 520 F.3d 490, the National Employment Lawyers Association argues that the biggest problem with the Sixth Circuit's decision is not with the evidence it demanded at the prima facie step but that there is such a step "at all." *See* Nat'l Empl. Lawyers Ass'n Br.16–17, 21–22, 27–28. And although the United States does not go quite as far as the Employment Lawyers Association, the logical endpoint of its argument is the same. *See*

United States Br.28–29, 31–32. There are at least three problems with these arguments.

First, even when an employer provides a nondiscriminatory reason for its employment decision, there is no reason that a court cannot resolve a plaintiff's Title VII claim on the basis that the plaintiff failed to carry even the minimal burden of introducing *some* evidence that suggests discrimination was a factor in that decision. Parties often make belt-and-suspenders arguments by offering multiple reasons that they should prevail. Courts, in response, are free to resolve a case on any available grounds. In the qualified-immunity context, for example, they do not need to find that there was no constitutional violation when they can more easily hold that the relevant law was not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). When they confront an ineffective-assistance-of-counsel claim they do not need to consider *Strickland v. Washington*'s two steps in order; they can dispose of a claim on whichever ground is "easier." 466 U.S. 668, 697 (1984). And in habeas cases, they can reject a claim on the merits, even though a State has also explained why that claim was procedurally defaulted. *See Cullen v. Pinholster*, 563 U.S. 170, 187 n.11 (2011).

The same should be true in Title VII cases. At least three circuits have held just that. *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008) (Gorsuch, J.); *Pepper v. Precision Valve Corp.*, 526 F. App'x 335, 336 n.* (4th Cir. 2013) (per curiam); *Stallworth v. Singing River Health Sys.*, 469 F. App'x 369, 372 (5th Cir. 2012) (per curiam). They have recognized that it can be "pointless to go through the motions of the remainder of the *McDonnell Douglas* framework," when a plaintiff clearly

failed to raise even an *inference* of discrimination. *See Hinds*, 523 F.3d at 1202 n.12.

The Court's decision in *Aikens* does not suggest otherwise. At issue in that case was whether an appellate court could revisit a plaintiff's prima facie case after a trial court had held a bench trial and determined that the employer had not violated Title VII. *Aikens*, 460 U.S. at 713–14. The Court held that it made little sense to contest the elements of a prima facie case after the case was "fully tried on the merits." *Id.* at 714. *Aikens* did not address a court's ability to consider, at the summary judgment stage, whether a plaintiff had carried her prima facie burden. *See generally, id.*

Second, Ames never challenged the Sixth Circuit's ability to decide whether she carried her prima facie burden, and she has explicitly waived any challenge to the *McDonnell Douglas* framework more generally. Pet.28 n.3. So even if the Court believes that *Brady*'s reasoning is correct, Ames's waiver means that it should not adopt that reasoning in this particular case. The Court should not address an issue that Ames herself has not raised. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (discussing party presentation principles). And it especially should not do so when there is disagreement between the circuits on that very point.

If the Court wishes to address the continuing viability of the *McDonnell Douglas* analysis or the role that a prima facie case plays once a defendant has offered a nondiscriminatory reason for its actions, then it should wait for a case that presents those questions. As of the time this brief was filed, the Court had pending before it a petition for a writ of certiorari that

challenged the continuing viability of the *McDonnell Douglas* analysis. *See Hittle v. City of Stockton*, Case No. 24-427. The arguments that Ames's amici raise are better suited for that case, not this one. (Although the Court often vacates and remands cases so that lower courts can apply newly announced legal rules in the first instance, Ames's waiver of any challenge to the prima facie requirement means that course of action would not be an option here should the Court grant cert in the pending case.)

Third, even if the Court were to adopt *Brady*'s reasoning here, it would not change the outcome of this case. The Sixth Circuit rejected Ames's promotion claim because she failed to produce any evidence from which one could infer discrimination. *See* Pet.App.5a. But the Department also offered legitimate, nondiscriminatory reasons for not promoting Ames. *See* Department Appellee Br., Doc. 22-1, Page 34–36. If Ames could not carry her comparatively light prima facie burden, then she certainly cannot carry her heavier burden of showing that the Department's reasons for hiring Frierson for the Bureau Chief position instead of Ames were pretextual or otherwise discriminatory. So even if the Court were to adopt *Brady*'s reasoning, the most it should do in this case is affirm the Sixth Circuit's decision on other grounds.

III. Ames ignores relevant precedent, which leads her to misunderstand the legal basis for the "background circumstances" analysis.

In challenging the Sixth Circuit's decision, Ames's brief begins at an uncontroversial starting point. It notes that the touchstone of any Title VII case is the text of the statute and that that text applies to

everyone equally—regardless of race, sex, or other protected characteristics. *See* Ames Br.1. From there, Ames takes several wrong turns. First, she fails to discuss, or even acknowledge, directly on-point precedent. Second, she mischaracterizes the origin of, and legal basis for, the "background circumstances" analysis.

A. Ames ignores the Court's precedent addressing the elements of a prima facie case.

Although Ames purports to challenge the prima facie standard that the Sixth Circuit applied below, she spends little time discussing the precedent that led to that standard. Missing from Ames's brief is any meaningful discussion of the Court's decisions in *Furnco* and *Burdine*. She never acknowledges, for example, that the Court has held that to establish a prima facie case of discrimination, Title VII plaintiffs must point to evidence that is sufficient to "create an inference that an employment decision was based on a discriminatory criterion illegal under" Title VII. *Int'l Bhd. of Teamsters*, 431 U.S. at 358; *Furnco*, 438 U.S. at 577; *Burdine*, 450 U.S. at 254.

Rather than discuss the elements of a prima facie case, Ames focuses on Title VII's ultimate burden. She argues that courts must enforce Title VII's text as written, *see* Ames Br.26–29, and that all plaintiffs, regardless of their protected characteristics, bear the same burden under the statute, *see* Ames Br.29–33. There is no disagreement about that. There should also be no disagreement about the fact that plaintiffs can make a prima facie showing of discrimination only by pointing to evidence that, if otherwise unexplained,

will give rise to an inference of discrimination. *See Furnco*, 438 U.S. at 577.

Ames never mentions that aspect of the Court's Title VII jurisprudence. She instead cites a handful of cases that she argues stand for the proposition that courts "must not 'add to, remodel, update, or detract' from" Title VII's "statutory text." Ames Br.26 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020)). True but irrelevant. All the cases Ames cites involved Title VII's ultimate burden. *See* Ames Br. 26–28. In both *Muldrow* and *Groff v. DeJoy*, 600 U.S. 447 (2023), for example, the Court held that lower courts had erred by imposing a "significance," *Muldrow*, 601 U.S. at 350, or "undue hardship" requirement on Title VII plaintiffs as a condition of relief, *Groff*, 600 U.S. at 453–54, 468. And in *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Court rejected an "actual knowledge" requirement that had no basis in Title VII's text. 575 U.S. 768, 773–74 (2015). Not one of the cases Ames cites discussed the elements of a prima facie case of discrimination; the term "prima facie" did not appear in any of them—not even once.

This case is different from those cases. In all three of the cases, the lower courts improperly imposed an atextual requirement that plaintiffs had to meet before they could obtain relief under Title VII. The "background circumstances" analysis, as applied by the Sixth Circuit and other courts, is not an additional element. It is a method of analysis that is intended to address the only relevant question under the text of Title VII: whether an employer "discriminate[d] against" an individual because of a protected characteristic. 42 U.S.C. §2000e-2(a)(1). The "background circumstances" inquiry is not, in other words, an "addition" to Title VII. *Contra* Ames Br.3 (quotation

omitted). It is a way to prove the causation that the statute requires. *See* §2000e-2(a)(1).

Ames's discussion of *McDonald* suffers from a similar problem. *See* Ames Br.31–32. Like the other cases Ames cites, *McDonald* did not ask what constitutes a prima facie case of discrimination. The Court in that case was concerned with the question of whether Title VII's prohibition on racial discrimination applies equally to minorities and non-minorities. *See* 427 U.S. at 279–80. Again, the relevant question was about Title VII's *ultimate* burden. *See id.* To the extent that *McDonald* discussed the elements of a prima facie case, it did so only to make clear that the "sample pattern of proof" that the Court discussed in *McDonnell Douglas* was just one example about "how the racial character of the discrimination could be established in the most common sort of case." *Id.* at 279 n.6. In doing so, it distinguished between a prima facie case and the "substantive limitation of Title VII's prohibition of racial discrimination." *Id.*

The Equal Employment Opportunity Commission Compliance Manual that Ames cites is similarly distinguishable. *See* Ames Br.36–38. That manual notes that "[t]he Commission … applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used." *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2006-1, *Section 15 Race and Color Discrimination* (2006). The manual notes that the EEOC does not impose a "background circumstances" requirement, but does not discuss the specific evidence that *will* support an inference of discrimination at the prima facie stage of a case. *See id.* at n.23. The single EEOC decision that Ames cites also does not address that question. It was concerned only with the complainant's

timeliness and the scope of the EEOC's jurisdiction and took "no position on the merits" of the complainant's claim. *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641, *1 n.1 (July 15, 2015).

B. Ames mischaracterizes the legal basis for the "background circumstances" analysis.

When Ames turns to the D.C. Circuit's decision in *Parker*, which was the first to articulate the "background circumstances" analysis, her error goes from one of omission to commission. Ames characterizes that decision as hinging on "seven words plucked from *McDonnell Douglas*." *See* Ames Br.29. The D.C. Circuit's analysis of this Court's precedent was much more thoughtful and extensive than Ames suggests.

Begin with the actual basis for the D.C. Circuit's opinion in *Parker*: *McDonnell Douglas* as a whole and, more importantly, this Court's discussion in *Furnco* about what a Title VII plaintiff must do to establish a prima facie case of discrimination. *See Parker*, 652 F.2d at 1017 (quoting *Furnco*, 438 U.S. at 577). The D.C. Circuit analyzed this Court's conclusion that a "prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* Ames ignores this discussion. As noted above, *see* 36–37, Ames never discusses *Furnco* in any meaningful way. If anyone's analysis of precedent should be faulted, it is Ames's; *Parker* engaged with the Court's precedent much more thoroughly than her brief does.

Ames takes issue with *Parker*'s statement that "'[m]embership in a socially disfavored group was the

assumption on which the entire *McDonnell Douglas* analysis was predicated.'" Ames Br.33 (quoting *Parker*, 652 F.2d at 1017). That statement is entirely consistent with *Furnco*, which emphasized that courts evaluate evidence of discrimination "in light of common experience." *Furnco*, 438 U.S. at 577. On that basis, *Furnco* stated that courts are willing to presume a discriminatory motive when they "know from our experience" that a plaintiff's evidence suggests that an employer likely acted for an impermissible reason. *Id*. The language Ames complains about in *Parker* is just another way of articulating what the Court said in *Furnco*. Both decisions recognize that courts do not consider evidence in a vacuum.

Now consider what Ames says about *McDonnell Douglas*. Ames argues that *Parker* was wrong when it noted that "[m]embership in a socially disfavored group" was the assumption on which "the entire *McDonnell Douglas* analysis was predicated." *See* Ames Br.20 (quoting *Parker*, 652 F.2d at 1017). It is Ames who is wrong. The Court in *McDonnell Douglas* *was* focused on plaintiff's membership in a socially disfavored group, specifically his status as an African American. The plaintiff's race was, for example, the subject of much of the discussion at oral argument. *See* Tr. of Oral Argument in No. 72-490, at 21–34.

The Court's focus on the plaintiff's race is also reflected in the *McDonnell Douglas* opinion itself. The Court explicitly recognized the importance of race to the plaintiff's claim when it wrote in that opinion that the first element of a prima facie case required the plaintiff to show "that he belongs to a racial minority." *McDonnell Douglas*, 411 U.S. at 802. This language is more than a mere "observation" about the character of the claim at issue in *McDonnell Douglas*. *Contra*

Ames Br.32. The Court elsewhere in its opinion discussed the types of evidence that could be relevant to the lower courts on remand as they worked to determine whether the employment decision at issue was driven by the plaintiff's race, as opposed to his illegal protest activities. *Id.* at 805–06. It would not have done so if the plaintiff's race was not substantively important to its decision.

IV. Ames's Title VII claim failed because of her litigation choices, not because of the Sixth Circuit's discussion of "background circumstances."

Ames made several decisions about how to litigate this case that were fatal to her claim. She conceded important facts and presented only limited evidence of discrimination. Ames failed to carry her prima facie burden because of those choices, not because of the Sixth Circuit's discussion of "background circumstances."

A. The Sixth Circuit rejected Ames's promotion claim because she had conceded facts that were fatal to that claim.

Below, Ames argued that she had introduced evidence of background circumstances sufficient to give rise to an inference of discrimination. Specifically, Ames argued that she had shown that Frierson, the woman who received the job for which Ames had applied, shared a sexual orientation with the relevant decisionmaker. *See* Ames Appellant Br., Doc.21, Page 17–18.

The Sixth Circuit did not reject Ames's argument because the facts on which Ames relied, if proved,

would have been insufficient to establish a prima facie case of discrimination. It rejected Ames's argument because she had forfeited it. Ames, it held, had conceded facts in the district court that contradicted the argument she made on appeal. *See* Pet.App.6a. The Department had explained in its statement of the facts in its Motion for Summary Judgment that the relevant decisionmakers *did not* share a sexual orientation with the woman that they hired, Motion for Summary Judgment, R.71, PageID#2367 and 2375, and Ames conceded that those facts were correct, Opposition to Motion for Summary Judgment, R.72, PageID#2488. The Sixth Circuit merely held Ames to her earlier concession. Pet.App.6a.

Ames does not challenge the Sixth Circuit's conclusions and does not point to any evidence that would give rise to an inference of discrimination. She in fact abandons the argument that she made below. Ames now acknowledges that the individual she argued was the relevant decision maker in the Sixth Circuit actually "*did not* have formal decision-making authority." Ames Br.18 (emphasis added).

In her briefing in this Court, Ames instead criticizes the Sixth Circuit for making "no attempt at all to justify" the "background circumstances" requirement that it applied. *See* Ames Br.29. That is likely because Ames never challenged that requirement. Her failure to do so might not constitute forfeiture in a formal sense. *See United States v. Williams*, 504 U.S. 36, 44 (1992). But it should at least preclude her from complaining that the Sixth Circuit did not respond to an argument she never made.

B. Ames failed to carry her prima facie burden under this Court's precedent.

1. The limited evidence that Ames introduced below did not give rise to a suspicion of discrimination. In the district court, Ames rested her prima facie case of sexual-orientation discrimination on the fact that she had alleged two separate instances of discrimination. She argued that the two employment decisions "constitute[d] a pattern" and that that pattern established a prima facie case of discrimination. *See* Opposition to Motion for Summary Judgment, R.72, PageID#2492. Ames acknowledged that if the Department had preferred a gay employee over her only once, then that single decision arguably would not have created an inference of discrimination. It likely would have been, she wrote, "simply a coincidence." *Id.*

That admission is fatal because a single example of alleged discrimination is all that Ames has to rely on. The Sixth Circuit held that the Department *did not* discriminate against Ames when it replaced her with a gay man, and Ames has not appealed that decision. Pet.App.6a–8a. The only evidence of discrimination that Ames now has to offer is therefore that, on a single occasion, she was a woman who did not receive a job for which she was qualified and that the Department instead hired a different woman, who was also qualified but who happened to be gay.

At the end of the day, Ames has not identified a single piece of evidence that suggests that sexual orientation played any role in the hiring decision at issue in her promotion claim. She did not point to any evidence that suggested that the relevant decision makers knew about her sexual orientation—or about the

sexual orientation of the woman who they decided to hire. Ames also did not point to any evidence that those decisionmakers shared a sexual orientation with the woman they hired. The Department noted these facts in the district court, Motion for Summary Judgment, R.71, PageID#2367 and 2375, and Ames conceded that (with a few exceptions not relevant here) the Department's statement of the facts was correct, Opposition to Motion for Summary Judgment, R.72, PageID#2488–89.

Ames has also abandoned any argument that the woman the Department hired was not qualified for the job. Ames had argued in the Sixth Circuit that Frierson, the woman that the Department hired for the Bureau Chief position, was unqualified, *see* Ames App.Ct.Br., Doc.21 at 12–13, and Judge Kethledge repeated Ames's characterization in his concurring opinion, Pet.App.10a. Ames was wrong about Frierson's qualifications, however. The undisputed evidence showed that Frierson *was* qualified. The Bureau Chief job posting listed alternative qualifications: an applicant was required to have either a college degree or relevant work experience. Motion for Summary Judgment, East Decl., R.71-4, PageID#2419. And while Frierson did not have a degree, she did have the experience. Motion for Summary Judgment, Frierson Decl., R.71-5, PageID#2460–68. It is therefore not surprising that Ames has abandoned the qualifications argument that she made in the Sixth Circuit. She now argues only that Frierson was "arguably less qualified" for the position. *See* Ames Br.2, 41 (quotation omitted).

In the light of Ames's district-court concession and her shifting argument about Frierson's qualifications, all that Ames has left is her bare allegation that the

Department discriminated against her with respect to a single hiring decision. Those bare facts are not enough to raise an inference of discrimination. Even Ames has said so. *See* Opposition to Motion for Summary Judgment, R.72, PageID#2492.

2. To explain why she believes she carried her prima facie burden, Ames argues that she was discriminated against on two separate occasions: one with respect to her demotion claim and the other with respect to her promotion claim. *See* Ames Br.41–42; *see also id.* at 32 (writing that she had "two data points" in support of her sexual-orientation discrimination claim) (quotation omitted). The United States makes a similar argument. *See* United States Br.31. Both ignore the fact that the Sixth Circuit rejected Ames's demotion claim after conducting a full *McDonnell Douglas* analysis. It held that the Department *did not* discriminate against her when it replaced her with Stojsavljevic. The Sixth Circuit, in other words, decided "the ultimate question of discrimination *vel non*" with respect to Ames's demotion claim and held that that claim lacked merit. *See Aikens*, 460 U.S. at 714–15; Pet.App.7a–8a. Ames did not appeal that portion of the Sixth Circuit's decision. *See* Pet.12 n.2.

Whether Ames was able to make a prima facie case of discrimination with respect to her demotion claim is therefore now irrelevant. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Aikens*, 460 U.S. at 715. That is, once a defendant has provided a nondiscriminatory reason for the employment action in question, it no longer matters whether a Title VII plaintiff made a prima facie case; the inquiry has moved on to the ultimate question:

whether the defendant took that employment action for a prohibited reason. *See Brady*, 520 F.3d at 493–94.

The inquiry moved on to that ultimate issue here, at least with respect to Ames's demotion claim. Having lost on the ultimate question of whether the Department "intentionally discriminated against" her, *Burdine*, 450 U.S. at 253, it is "surprising to find [Ames] still addressing the question whether [she] made out a prima facie case" with respect to that claim, *Aikens*, 460 U.S. at 714.

V. Ames cannot challenge the prima facie burden that other Title VII plaintiffs bear.

Much of Ames's argument rests on the idea that it is unfair to require majority-group plaintiffs to point to background circumstances sufficient to create an inference of discrimination because, she claims, minority group plaintiffs are not required to make a similar showing. See Ames Br.28–29. There are at least two problems with her argument.

The first problem is that Ames does not accurately describe the burden that minority-group plaintiffs bear. As discussed above, under *Furnco* and *Burdine*, *all* Title VII plaintiffs must present evidence at the prima facie step that, if otherwise unexplained, is sufficient to create an inference of discrimination. *Furnco*, 438 U.S. U.S. at 577; *Burdine*, 450 U.S. at 253–54. The relevant question is not legal but evidentiary. It is not whether minority plaintiffs bear the same burden—they do—but what evidence is sufficient to carry that burden.

The second problem with Ames's argument is that she cannot challenge the burden that other Title VII

plaintiffs bear. Ames's claim in this case does not assert a violation of the Equal Protection Clause that can be remedied by either "withdraw[ing] of benefits from the favored class" *or* by "exten[ding] … benefits to the excluded class." *See Heckler v. Mathews*, 465 U.S. 728, 740 (1984). Her only claim is that the Department discriminated against her in violation of Title VII. But even if Ames is right that some courts have imposed a lesser prima facie burden on minority Title VII plaintiffs, that says nothing about the burden that she herself should bear. That inquiry calls for a different case in a different posture.

If the Court nevertheless concludes that courts are misapplying *Furnco* and *Burdine* when they consider Title VII claims brought by minority plaintiffs and are failing to require sufficient evidence at the prima facie stage, then the solution is to correct that misapplication by raising the bar in that type of case. Thus, if the Court decides that majority and minority plaintiffs face functionally different burdens under existing precedent, it should still affirm the Sixth Circuit. That would make clear that no plaintiff can avoid showing *some* evidence of discrimination in making out a prima facie case. In other words, if the Court agrees (1) that it can reach the standard that *other* plaintiffs must surmount at the first step of *McDonald Douglas*, and (2) that there is a disparity, then it should level up, rather than level down.

A properly calibrated prima facie burden not only demonstrates fidelity to the text of the statute, but to the background principle of at-will employment. Even meritless Title VII claims can impose ruinous costs, especially on smaller businesses, that ultimately reduce employment, incent automation, and inflate prices for consumers—or consume Ohioans' tax

dollars. Today, *McDonnell Douglas*'s already "relaxed evidentiary standard" imposes "many billions every year" in economic costs. *Tex. Tech*, 2024 WL 5249446 at *7–*9 (Blacklock, J., concurring). If the prima facie case is reduced to a frictionless step for litigating discrimination, then everyone is encouraged to be a plaintiff. Maintaining a robust threshold step, by comparison, ensures that many specious or vexatious Title VII lawsuits die on the desk of busy plaintiffs' lawyers, and that "American workplaces" remain "lively engines of innovation and competition," not "sclerotic bureaucracies whose prime directive is to avoid litigation rather than to achieve excellence." *Id.* at *7.

CONCLUSION

The Court should affirm the Sixth Circuit's judgment.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
SAMUEL C. PETERSON
Deputy Solicitor General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Respondent

JANUARY 2025