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 U.S. Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; LATINOJUSTICE PRLDEF; NATIONAL WOMEN'S LAW CENTER; NATIONAL EMPLOYMENT LAW PROJECT; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF); AND EQUAL JUSTICE SOCIETY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all people in the United States and to break down barriers that prevent Black people from realizing their basic civil and human rights, including equality of employment opportunities. LDF has helped Black people, communities of color, LGBTQ people, women, and other marginalized groups vindicate their rights under Title VII of the Civil Rights Act of 1964 ("Title VII"). In so doing, LDF has represented plaintiffs challenging employment discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has also participated as *amicus curiae* in Title VII cases such as *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024) and *Bostock v. Clayton County*, 590 U.S. 644 (2020). This brief is also submitted on behalf of LatinoJustice PRLDEF, National Women's Law Center, National Employment Law Project, Asian American Legal Defense and Education Fund (AALDEF), and Equal Justice Society. *Amici curiae* have a strong interest

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[1] Pursuant to Supreme Court Rule 37.6, counsel for Amicus Curiae state that no counsel for a party authored this brief in whole or in part and that no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

in the proper interpretation of Title VII; namely, an interpretation that is faithful to the statute's history and purpose.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted Title VII to address workplace discrimination, which the drafters noted particularly plagued Black people. The legislative record and decades of jurisprudence underscore that America's history of discrimination against certain groups both precipitated and necessitated Title VII. To be clear, the statute prohibits employment discrimination based on race, sex, and other protected categories regardless of whether an individual is a member of a "majority" or "minority" group. And the basic inquiry at summary judgment in all Title VII cases should be the same: has the plaintiff presented enough evidence to support an inference that they suffered an adverse employment action because of their protected status? The legislative record and this Court's Title VII jurisprudence also make clear that addressing that inquiry is necessarily a context-specific endeavor in which courts must have enough flexibility to apply the statute's mandates to the individualized facts of every unique plaintiff's claims. Consideration of the context in which an employment action was taken fits within Title VII's purpose and the individualized analysis the statute requires.

Petitioner recasts what some courts describe as an inquiry into the "background circumstances" of a challenged employment action as an extratextual burden that is unique to majority-group plaintiffs, and she asks this Court to interpret Title VII in a way that ignores the realities of this country's persisting legacy of discrimination in evaluating disparate treatment claims. This Court should decline

Petitioner's invitation. Today, just as when Congress enacted Title VII, Black people and members of other marginalized groups are far more likely to endure employment discrimination than their majority-group counterparts. In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), this Court took that reality into account and fashioned a prima facie case that includes consideration of whether the plaintiff belongs to a minority group. That is not an extratextual requirement inconsistent with the text of Title VII; it is simply a recognition that courts should consider context in determining whether circumstantial evidence permits an inference of discrimination. Majority-group plaintiffs are, of course, protected by Title VII. They simply cannot rely on this country's persisting legacy of discrimination targeting minority-group plaintiffs as a relevant factor in support of their claims because they do not share that legacy. Properly understood, this is all that the "background circumstances" inquiry (or whatever label a court chooses to give it) should mean.

To be clear, this is not to say that the Sixth Circuit correctly applied Title VII in this case, or that its particularly rigid understanding of the "background circumstances" inquiry is appropriate. On the contrary, the Sixth Circuit failed to apply the correct summary judgment standard when it dismissed Petitioner's claim without considering the evidentiary record beyond the evidence related to Petitioner's prima facie case of discrimination on account of her sexual orientation. *Amici* agree with the National Employment Lawyers Association that the

McDonnell Douglas framework is meant to be a tool that assists in the organization and presentation of evidence, not a mandatory method of evaluating that evidence in every case. *See* NELA Br. 18–19. Nonetheless, *amici* submit this Court may affirm the judgment below because Petitioner did not present sufficient evidence of discrimination to meet her burden at summary judgment, notwithstanding the Sixth Circuit's error in applying *McDonnell Douglas* and the "background circumstances" inquiry.

Most importantly, nothing about this case calls for revisiting this Court's well-settled Title VII jurisprudence. At summary judgment, every Title VII plaintiff—both minority- and majority-group members[2]—must present either direct evidence of discrimination or sufficient circumstantial evidence to support an inference that unlawful discrimination occurred "because of" a protected characteristic. In circumstantial evidence cases, it is proper for courts to consider the reality that, historically and presently, employment discrimination has been far more likely to occur against minority-group members than majority-group members as part of the relevant context in addressing this inquiry. While a majority-group plaintiff cannot rely on this specific context because it is not one supported by data or fact and, therefore, cannot support an inference of discrimination against a majority-group plaintiff, the

[2] The use of "minority" in describing some plaintiffs is a demarcation employed by courts when referring to a person who belongs to a group that was historically disadvantaged and targeted for group-based discrimination.

majority-group plaintiff can rely on any other evidence that supports an inference of discrimination.

This Court should affirm these basic principles, thereby ensuring that Title VII remains a vital tool in redressing widespread employment discrimination that continues to blight our nation's rich and diverse tapestry. Data and empirical analysis regarding the common trends in the outcomes of Title VII litigation, namely the rate of success of both majority- and minority-group plaintiffs, further underscore that ongoing discrimination necessitates Title VII's protections and belie any assertions that majority-group plaintiffs are disparately disadvantaged in accessing Title VII relief.

ARGUMENT

I. Congress Enacted Title VII in Recognition of Widespread Discrimination Against Black People That Excluded Them from Equal Employment Opportunities.

Born out of a response to persistent and pervasive discrimination faced by Black people in the workforce, Congress enacted Title VII to achieve equal employment opportunities through the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971); *id.* (noting Congress' objective in enacting Title VII to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

The passage of Title VII was a culmination of various efforts undertaken by the federal government to study and address discrimination in employment against Black people and other communities of color.[3] In a 1961 report by the United States Commission on Civil Rights ("Commission"), the Commission was tasked with "study[ing] and collect[ing] information concerning legal developments constituting a denial of equal protection of the laws under the Constitution [in the workforce]."[4] While the Commission was interested in employment discrimination experienced by "all racial, religious, and ethnic minority groups" the Commission's report was "principally concerned with Negroes," who it concluded were "most generally subject to discriminatory treatment."[5] The Commission's 1961 report captured "the vicious circle of discrimination in employment opportunities"[6] impacting Black people in the federal workforce and provided recommendations for Congress and the

[3] *See* Cong. Rec. 7204 (Apr. 8, 1964), https://www.govinfo.gov/content/pkg/GPO-CRECB-1964-pt6/pdf/GPO-CRECB-1964-pt6-2.pdf ("I now turn to the history of the fair employment practices legislation in Congress. This subject is not new. . . . Since 1944, Congress—both Houses included—has taken more than 5,000 printed pages of testimony and statements on fair employment practices legislation; 481 witnesses have been heard; 85 days of hearings have been held. . . . So it cannot be said that Congress has not had an opportunity over the past 20 years to inform itself fully of the need and desirability of legislation dealing with fair employment practices.").

[4] U.S. Comm'n on C.R., Book 3 of 5: Employment 3 (1961), https://www2.law.umaryland.edu/marshall/usccr/documents/cr11961bk3.pdf.

[5] *Id.* at 4.

[6] *Id.* at 153.

President to take in order to address these issues.[7] After several failed attempts to pass federal equal protection legislation,[8] former President John F. Kennedy stressed in a message to Congress the importance of "fair and full employment"; that the relief of unemployment in the Black community required "eliminating racial discrimination in employment"; and renewed his support of "pending Federal fair employment practices legislation."[9]

The "Fair Employment Practices" provision of H.R. 7152 that emerged from negotiations in a House subcommittee would later become known as Title VII of the Civil Rights Act of 1964.[10] Congress crafted Title VII to broadly protect all people from employment discrimination, while recognizing that such discrimination overwhelmingly singled out Black people.[11] As such, the congressional record for

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[7] *Id*. at 161.

[8] Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966) (describing hundreds of FEP bills that were filed "at the federal level; all died, usually in the House or Senate Committee to which the bill was referred, and at times, if a bill was reported and reached the Senate floor, it died as the result of a Senate filibuster.").

[9] *Id*. at 432.

[10] Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives On The 1964 Civil Rights Act And Its Interpretation*, 151 U. Penn. L. Rev. 1417, 1467 (2003) ("The most important change was the addition of a fair employment practices provision, which would become Title VII.").

[11] In an excerpt from a Report of the Labor and Public Welfare Committee, it was noted that "although Negro and other

Title VII is replete with evidence of the drafters' intent to address workforce discrimination that targeted Black people for unequal treatment. As Senator Joseph S. Clark stated in support of Title VII:

> I turn now to the background of racial discrimination in the job market, which is the basis for the need for this legislation. I suggest that economics is at the heart of racial bias. The Negro has been condemned to poverty because of lack of equal job opportunities . . . .[12]

As explained in an article co-authored by LDF's former Director-Counsel, Julius J. Chambers, the Eighty-eighth Congress passed Title VII to usher in an end to "the odious legacy of slavery and racial oppression."[13]

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nonwhite Americans constitute only 10 percent of the labor force, they make up more than twice that figure in the ranks of unemployed." Burke Marshall Personal Papers, Series 1.13. Civil Rights Act of 1964: Bipartisan Civil Rights Newsletter No. 17, John F. Kennedy Presidential Library & Museum (Mar. 30, 1984), https://www.jfklibrary.org/asset-viewer/archives/bmpp-027-009#?image_identifier=BMPP-027-009-p0029.

[12] Cong. Rec. 7204, *supra* note 2.

[13] Julius J. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, 49 L. & Contemp. Probs. 9, 12 (1986); *see also id.* at 11 ("The various forms of employment discrimination established after the Civil War created the patterns which existed when Title VII became effective nearly 100 years later. At the end of the Civil War blacks constituted approximately eighty percent of

Of the forty amendments to Title VII that were put forth for adoption, only two of the sixteen that were adopted in the House survived in the Senate. Notably, one of the two included Representative Howard W. Smith's amendment adding "sex" as a proscribed basis for discrimination.[14] In support of the "sex" amendment, Pauli Murray presented a memorandum to Congress[15] to ensure lawmakers were alert to discrimination faced by workers who were part of overlapping minority groups. As Murray explained, Black women are "subject to all of the

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all skilled tradesmen in the South. . . . After the Civil War, the economic tables turned. Skilled, free blacks threatened the economic well-being of whites. The post-Civil War period saw the development of extensive efforts to limit or eliminate opportunities for black workers to use their skills or to acquire new ones. . . . Even as late as 1961, blacks were trained only for those jobs to which they were relegated in a segregated job market.")

[14] Vaas, *supra* note 7, at 439; *see also* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9(2) L. & Ineq. 163 (1991) ("He proposed to add 'sex' to the bill in order 'to prevent discrimination against another minority group, the women . . . .'").

[15] Pauli Murray, Song in a Weary Throat: Memoir of an American Pilgrimage 464–65 (1987) ("I was asked to prepare a "memorandum in Support of Retaining the Amendment to H.R. 7152 (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex." It was a strongly worded document, pointing to the historical interrelatedness of the movements for civil rights and women's rights and the tragic consequences in the United States history of ignoring the interrelatedness of all human rights.It declared: "A strong argument can be made for the opposition that Title VII without the 'sex' amendment would benefit Negro males primarily and thus offer genuine equality of opportunity to only half of the potential Negro work force.").

disabilities of women generally in an aggravated form."[16] Without the inclusion of the "sex" amendment, "Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex."[17] Murray's analysis looked to "the fate of 'Negro women' [as] the ultimate barometer of the civil rights bill's success."[18]

The resulting statute, Title VII, assured equal employment opportunities for all through the prohibition of employment practices that discriminate on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("[D]iscriminatory preference for any group, minority or majority, is . . . proscribed."). However, the realities faced by Black employees in America—persistent discrimination and exclusion from employment opportunities—were the animating force

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[16] Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex, at 19 (Apr. 14, 1964), https://documents.alexanderstreet.com/d/1000680941.

[17] *Id.* at 20; *see also* Murray, *supra* note 14, at 463–64 (Murray recalled "I was overjoyed to learn of the House action, particularly because, as a Negro Woman, I knew that in many instances it was difficult to determine whether I was being discriminated against because of race or sex and felt that the sex provision would close a gap in the employment rights of all Negro women.").

[18] Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. Rev. 713, 719 (2015).

that drove Congress to act. Thus, "the purpose of Congress" in enacting Title VII was not only "to assure equality of employment opportunities" but also "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas*, 411 U.S. at 800.

II. Consideration of "Background Circumstances" Evidence Reflects Title VII's History and Purpose and Is Consistent with *McDonnell Douglas*.

A. Properly Applied, the *McDonnell Douglas* Burden-Shifting Framework Furthers Congress' Goal of Equalizing Employment Opportunities and Ensures a Faithful Application of Title VII.

Against the backdrop of the widespread and persistent anti-Black discrimination Congress acknowledged in enacting Title VII, in *McDonnell Douglas*, this Court articulated a burden-shifting framework for analyzing a claim of discriminatory treatment in employment under the statute.[19] 411 U.S. at 792. This Court designed and adopted the framework "to assure that the 'plaintiff [has their] day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc. v. Thurston*,

[19] The *McDonnell Douglas* burden-shifting framework is also a practical framework that allows for courts to rely on an inference of discrimination to shift the burden of production more easily to the employer, in light of what is most often an asymmetry of information between an individual employee plaintiff and a defendant employer.

469 U.S. 111, 121 (1985) (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)).

In *McDonnell Douglas*, a Black mechanic and laboratory technician filed a lawsuit against his employer for failing to rehire him following his participation in a protest and racially discriminatory hiring practices in violation of his rights under Title VII. 411 U.S. at 797. The Eighth Circuit reversed the district court's dismissal of his claim, and this Court granted certiorari to address the allocation of proof in an employment discrimination action. *Id*. at 800.

In establishing a prima facie case of racial discrimination, the plaintiff "must carry the initial burden under the statute of [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. If the plaintiff succeeds in proving the prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Should the employer meet that burden, the plaintiff is "afforded a fair opportunity to show that [the employer's] stated reason for [complainant's] rejection was in fact pretext." *Id*. at

804–06; *id.* at 805 (noting that the "respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

In *McDonnell Douglas*, this Court expressly found that one factor relevant to whether the plaintiff can establish his prima facie case is whether he belongs to a racial *minority* group. *See id.* at 802 (agreeing with the Eighth Circuit's conclusion that the complainant proved a *prima facie* case); *see also Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 353 (8th Cir. 1972) ("When a [B]lack man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination."). As this Court acknowledged, "[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments *to the disadvantage of minority citizens*." *McDonnell Douglas*, 411 U.S. at 800 (emphasis added). Recognizing that workplace discrimination often operates to "the disadvantage of minority citizens," *id.*, *McDonnell Douglas* permits an inference that if the plaintiff is a Black person and the other prima facie factors are satisfied, there is a colorable basis to believe discrimination has occurred such that the burden should then shift to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. *Furnco Const. Corp. v.*

Waters, 438 U.S. 567, 577 (1978) ("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.").

Notably, the *McDonnell Douglas* Court also explained that "[t]he facts necessarily will vary in Title VII cases, and the specification [as provided in this decision] of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802, n.13. Put simply, the *McDonnell Douglas* framework "was never intended to be rigid, mechanized, or ritualistic" but "[r]ather, 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." *Furnco*, 438 U.S. at 577 (1978); *see also Teamsters v. United States*, 431 U.S. 324, 358 (1977) (recognizing that the Court "did not purport to create an inflexible formulation" for a prima facie case).[20] For that reason, courts should not abandon "common sense[] and an appropriate sensitivity to social context" in their assessment of Title VII claims. *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 80 (1998). Thus, proper consideration of "background circumstances"—circumstantial evidence that situates the employment decision in a broader context

[20] *Amici* share the understanding of the National Employment Lawyers Association that the *McDonnell Douglas* framework is non-exclusive analytical framework for courts to evaluate and plaintiff to seek to prove disparate treatment claims under Title VII.

and takes account of common experiences and dynamics of discrimination—is a proper facet of the *McDonnell Douglas* framework.

As the text of Title VII makes clear and this Court has explicitly acknowledged, the statute's antidiscrimination protections extend to majority- and minority-group plaintiffs equally. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 n.6 (1976) (noting the *McDonnell Douglas* burden-shifting framework "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."). But as is always true, circumstantial evidence cases ultimately turn on what inference, if any, to draw based on the evidence, and that inquiry appropriately and necessarily takes context into account.

And as explained above, Congress recognized in enacting Title VII that the fact of employment discrimination which has overwhelmingly targeted and continues to target Black people and other marginalized groups is relevant context in Title VII cases. Indeed, this Court has likewise recognized the historical asymmetry in discrimination against certain groups outside of the Title VII statutory context and has acknowledged that "it is ***well known*** that prejudices often exist against ***particular classes*** in the community." *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (citing *Strauder v. State of W. Virginia*, 100 U.S. 303, 309 (1879)) (emphasis added). This Court's focus in *McDonnell Douglas* on articulating the prima facie inquiry to ask whether

the plaintiff is a member of a minority group simply takes the known reality of discrimination into account.

B. Properly Applied at Summary Judgment, the "Background Circumstances" Standard Is Simply an Application of *McDonnell Douglas*.

Although the *McDonnell Douglas* framework allows for a plaintiff to shift the burden of production to a defendant employer, the burden of persuasion—that is the burden of establishing by a preponderance of the evidence that a challenged action was "because of" a protected characteristic—remains with the plaintiff. *See* 42 U.S.C. § 2000e-2(a)(1). Thus, to overcome a summary judgment motion, a Title VII plaintiff who cannot rely on direct evidence of intentional discrimination must proffer *some* circumstantial evidence that would allow a factfinder to determine they have experienced discrimination "because of" a protected characteristic. *See* Fed. R. Civ. P. 56.1; *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327, (1986) ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact.").

Accordingly, every plaintiff who relies on *McDonnell Douglas* to establish their disparate treatment claims by circumstantial evidence faces the same challenge of making their case. That evidence may include, but is not limited to, instances and/or patterns of more favorable treatment of particular groups as compared to others, and comments by

decisionmakers demeaning or favoring certain groups as compared to others.

This Court has made abundantly clear that what may constitute relevant circumstantial evidence of impermissible discrimination in each case depends on the particular circumstances of the case and context of requirements and norms in their professional field. *See, e.g.*, *McDonnell Douglas*, 411 U.S. at 793 (describing evidence "that may be relevant, depending on the circumstances"). Petitioner's argument that the "background circumstances" standard necessarily creates a heightened evidentiary requirement that is unfairly burdensome to majority plaintiffs misapprehends this fundamental principle. Properly understood, the "background circumstances" standard is simply a way for courts to apply a neutral standard—i.e., Title VII's prohibition on employment discrimination—to determine if there is sufficient circumstantial evidence of such discrimination in claims brought by individuals with different experiences and relationships with the historical and continuing legacy of status-based discrimination in the United States.

America's particular history (and present reality) of *de jure* and *de facto* discrimination against certain minority groups like Black and/or LGBTQ people, and the virtual absence of widespread discrimination targeting certain majority groups like white people and straight people, is well-documented, and it is a relevant and important consideration "in light of common experiences as it bears on the critical question of discrimination" that courts should not

ignore. *See Furnco*, 438 U.S. at 577. As the United States acknowledges in its brief, the distinct history of discrimination against certain minority groups in America is circumstantial evidence that bears differently on a plaintiff's prima facie case of discrimination depending on the particular facts of the plaintiff's own identity and life experiences.[21] *See* Amicus Br. of United States 32. Of course, contextual evidence cannot alone carry a Title VII disparate treatment claim, but ignoring the reality of historical and present-day discrimination would strip Title VII of both its force and purpose.

Indeed, historically marginalized people continue to experience discrimination at much higher rates than workers who belong to majority groups. For example, according to a 2023 study of United States workers, 41 percent of Black workers, 25 percent of Asian American workers, and 20 percent of Hispanic workers reported having experienced racial discrimination in hiring, pay, or promotions because of their race, compared to 8 percent of white

[21] As discussed above in Section I, Congress had this specific history of discrimination against particular groups of people because of distinct aspects of their identity in mind when it enacted Title VII. Likewise, this Court has repeatedly recognized that history is factoring differently into the facts of how workplace discrimination may unfold for people of different backgrounds such that Petitioner's assertion that courts are engaging in the very discrimination "the statute forbids," Pet. Br. 21, is reductive to the point of willful ignorance. It is the historical record of how identity and class-based distinctions have played a role in how legal and social institutions alike have treated certain groups of people less favorably as compared to others that informs and circumscribes the relevant context and background circumstances of alleged workplace discrimination.

workers.[22] LGBTQ people, similarly, experience high rates of discrimination in the workplace, with studies showing over half of LGBTQ workers surveyed report experiencing discrimination or harassment in the workplace.[23] Further, 22 percent of LGBTQ workers surveyed noted that they had been fired or not hired, and 21 percent reported being denied a promotion, wage, equal wages, or training opportunities, because of their LGBTQ status.[24] Transgender people, especially, report high rates of discrimination, with

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[22] In a 2022 study, 64 percent of Black adults, 49 percent of Asian American adults, and 41 percent of Hispanic adults reported that racial bias in hiring and unfair treatment based on a job applicant's race or ethnicity is a major problem, as compared to 30 percent of white adults. Katherine Schaeffer, *Black Workers' Views and Experiences in the U.S. Labor Force Stand Out in Key Ways*, Pew Rsch. Ctr. (Aug. 21, 2023), https://www.pewresearch.org/short-reads/2023/08/31/black-workers-views-and-experiences-in-the-us-labor-force-stand-out-in-key-ways/. Studies have also shown that job applicants with "white-sounding names" are significantly more likely to receive a job than people with "nonwhite-sounding names." *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004); *see also* Sonia Kang et al., *Whitened Resumes: Race and Self-Presentation in the Labor Market*, 61 Admin. Sci. Q. 469 (2016).

[23] Caroline Medina & Lindsay Mahowald, Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022, Ctr. for Am. Prog. (2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/.

[24] *Id.*

surveys showing that 70[25] to 90[26] percent of transgender people surveyed have experienced workplace discrimination. And, surveys also confirm that women are almost twice as likely to experience discrimination due to their sex than men, with 42 percent of employed women surveyed reporting experiencing discrimination as compared to 22 percent of men.[27] In particular, over half of the employed Black women surveyed report experiencing discrimination on the basis of their sex at work, as compared to 40 percent of white women.[28]

This discrimination stymies opportunity, limiting workers from achieving their full potential. A National Bureau of Economic Research study found that Black workers remain disproportionately concentrated in lower-wage professions compared to white workers with the same level of education.[29] Further, the study found that Black workers also earn

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[25] *Id.*

[26] Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Nat'l LGBTQ Task Force (2011), https://www.thetaskforce.org/app/uploads/2011/02/NTDS_Exec_Summary.pdf.

[27] Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, Pew Rsch. Ctr. (Dec. 14, 2017), https://www.pewresearch.org/short-reads/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/.

[28] *Id.*

[29] Ashley Jardina et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers*, at 13 (Nat'l Bureau Econ. Rsch., Working Paper No. 31641, 2023).

more than 20 percent less than similarly educated white workers.[30]

Contrary to Petitioner's claims, studies of Title VII cases show that courts do not apply Title VII to the disadvantage of majority-group plaintiffs. The reality is that employment discrimination cases are generally very difficult to win, for everyone.[31] But, studies of outcomes of Title VII lawsuits reveal that majority-group plaintiffs are often more likely to prevail. According to a study of intersectional Title VII claims where plaintiffs alleged that they experienced discrimination because of two or more protected categories, white men were three times more likely to win on their claims than non-white women.[32]

Despite this context, based on a misidentification of the Sixth Circuit's error, Petitioner invites this Court to eliminate "background circumstances" from consideration by *any* court adjudicating a Title VII

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[30] *Id.*

[31] *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev 555, 556 (2001). Studies indicate that employers prevail in 98 percent of federal employment discrimination cases resolved at the pretrial stage. *Id.* A recent review of federal job discrimination, harassment, and retaliation claims found that only one percent of plaintiffs win on the merits at trial. Stephen Rynkiewicz, *Workplace Plaintiffs Face Long Odds at Trial, Analytics Data Indicates*, A.B.A. J. (July 17, 2017), https://www.abajournal.com/news/article/workplace_trial_analytics_lex_machina [https://perma.cc/BT4F-22AW].

[32] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & Soc'y Rev. 991, 991 (2011).

claim on the basis of a single circuit's rigid application of a concept that is not at odds with the statute's purpose. Indeed, the consideration of "background circumstances" as part of a holistic review of a majority-group plaintiff's disparate treatment claim merely recognizes that employment discrimination claims should not be evaluated divorced from the context in which they arise, and the notion that the plaintiff must adduce some evidence establishing that they were discriminated against ***because of*** their majority-group status not only goes to what this Court has described as "[t]he central focus of the inquiry in a case such as this," *Furnco*, 438 U.S. at 577, but is reflective of and responsive to the statutory text itself, *see* 42 U.S.C. § 2000e-2(a)(1).

Case law from other circuits is instructive in how to apply these principles. As both the D.C. Circuit and Seventh Circuit have explained, the plaintiff's identity is relevant context in determining whether a factfinder may reasonably infer discrimination based on circumstantial evidence. *See, e.g.*, *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (explaining that "an inference of discrimination arises when the employer simply passes over the [minority] plaintiff for a promotion to a position for which he is qualified" but that in situations where the plaintiff is a member of the majority group, no such inference arises because "[i]nvidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant."). The D.C. Circuit has explained that a majority

plaintiff is required to show "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority" as a "substitute[] for the minority plaintiff's burden to show that he is a member of a racial minority," because "both are criteria for determining when the employer's conduct raises an "inference of discrimination." *Id.* Likewise, the Seventh Circuit has explained its consideration of "background circumstances" as reflecting presumptions based on context about who tends to be a target of discrimination in our society:

> [T]he presumption that arises once the *McDonnell Douglas* prima facie test is met—that unless otherwise explained discrimination is more likely than not the reason for the challenged decision—is "not necessarily justified when the plaintiff is a member of an historically favored group." Thus, these circuits have modified the prima facie test and added various substitutes (referred to as "background circumstances") for the burden imposed on minority or women plaintiffs to show that they are members of a protected class.

Mills v. Health Care Serv. Corp., 171 F.3d 450, 455 (7th Cir. 1999) (citation omitted). The Eighth Circuit has similarly considered whether a majority group plaintiff's "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority" as part of the

question of whether the plaintiff established a genuine issue of material fact that the employer's reason is a pretext. *See, e.g.*, *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 903 (8th Cir. 2015). The Second Circuit does not employ a so-called "background circumstances" test for majority group plaintiffs, but that Circuit's articulation of the four elements of a prima facie case of disparate treatment under Title VII nonetheless incorporates the consideration of "background circumstances." *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (considering claim by a majority-group plaintiff without explicitly considering "background circumstances" while nonetheless applying the standard that all plaintiffs must introduce evidence to support a finding that "the adverse employment action occurred *under circumstances giving rise to an inference of discriminatory intent*") (emphasis added).

In discussing case law from these other circuits, *amici* are not urging the adoption of any specific framework or approach to the so-called "background circumstances" inquiry. The purpose for this overview is simply to depict for this Court how other courts have correctly recognized that context matters in applying the *McDonnell Douglas* framework. Moreover, at summary judgment, once an employer proffers a legitimate non-discriminatory reason to take the challenged action, "'the *McDonnell Douglas* framework—with its presumptions and burdens'—disappear[s] and the sole remaining issue [is]

'discrimination *vel non*.'"[33] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43, (2000) (citations omitted). Whether the circumstantial evidence in the record may be referred to by some courts as evidence establishing "background circumstances" for claims brought by majority plaintiffs is no longer of any consequence. The only question is whether, on balance, the plaintiff has placed in the record evidence that supports a reasonable inference that the challenged employer action was "because of" a protected characteristic. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 35–36 (2024).

The evidence that a plaintiff relied on to establish their prima facie case may be considered by the court as part of the overall evidentiary record, *see Tex. Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 256 n.10 (1981) ("[T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."), but the relevant question to ask of the evidence is *not* whether a prima facie case has been established. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714–15

[33] Unlike at earlier stages of the litigation where the plaintiff seeks to shift the burden of production to the defendant by establishing a prima facie case giving rise to an inference of discrimination, at the summary judgment stage, "[t]he defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether the plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

(1983). Rather, "when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII." *Id.*

C. The Sixth Circuit's Reconsideration of the Prima Facie Case in Deciding a Motion for Summary Judgment Is a Misapplication of *McDonnell Douglas*.

A court may nonetheless err in applying the *McDonnell Douglas* framework and here, *amici* agree that the Sixth Circuit misapplied *McDonnell Douglas* and departed from the summary judgment standard in granting Respondent summary judgment.

As in the Petitioner's case, at summary judgment, the Sixth Circuit routinely assesses the sufficiency of evidence at each of the three stages of the *McDonnell Douglas* burden-shifting framework without conducting a full review of the evidence unless it first finds that the plaintiff has placed sufficient evidence in the record to establish their prima facie case. *See, e.g.*, *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 240 (6th Cir. 2005) ("In order to survive summary judgment on a claim of sex discrimination using circumstantial evidence, the plaintiff must produce evidence sufficient to meet her *prima facie* burden under the four-prong test initially developed in *McDonnell Douglas.*"); *see also Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000) ("On a motion for summary judgment, a district court

considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry.").

Notwithstanding the summary judgment posture of Petitioner's case, the Sixth Circuit analyzed the sufficiency of Petitioner's evidence to establish a prima facie case and concluded that Petitioner failed to make "the necessary showing of 'background circumstances'" showing that Respondent Ohio is the unusual employer who discriminates against people because they are heterosexual and "[f]or that reason her claim of sexual-orientation discrimination fail[ed]." *Ames v. Ohio Dep't of Youth Servs.,* 87 F.4th 822, 825 (6th Cir. 2023). Thus, the court neither discussed nor considered Respondent's proffered reasons for the employment action or whether Petitioner could meet her burden of proving pretext. Put simply, the Sixth Circuit concluded its analysis without proceeding to evaluate the evidentiary inquiry before it at the summary judgment stage: whether Petitioner has created a genuine issue of material fact as to whether Ohio's proffered reason was pretextual. *Id.*

Because a "plaintiff must be given the opportunity to introduce evidence that the [defendant's] proffered justification is merely a pretext for discrimination," *Furnco*, 438 U.S. at 578, the Sixth Circuit erred by re-evaluating the sufficiency of Petitioner's prima facie case without considering the full evidence before it. In other words, the Sixth Circuit's application of the *McDonnell Douglas* analytical framework at the summary judgment stage was fundamentally at odds with the summary judgment standard that is

applicable in all cases. In revisiting the sufficiency of Petitioner's prima facie case and concluding its analysis without full consideration of whether Petitioner had met her burden of production to establish Respondent's stated reasons for not promoting Petitioner were pretextual, the Sixth Circuit failed to correctly apply this Court's precedent from *Burdine* and *Hicks*. *See, e.g.*, *Aikens*, 460 U.S. at 715 ("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. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" (quoting *Burdine*, 450 U.S. at 253)). By considering only the evidence it deemed relevant to a prima facie inquiry, the Sixth Circuit's misapplication of *McDonnell Douglas* also had the effect of improperly limiting the *types* of permissible evidence Petitioner should have been able to rely on to prove discrimination at a stage in the case where a court should be considering the full record. *See, e.g.*, *Hicks*, 509 U.S. at 507–08 (noting that after the defendant carries the burden of production, "[t]he plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,'") (citation omitted).

Moreover, the Sixth Circuit's application of *McDonnell Douglas* was also inconsistent with this Court's previous clarification that the prima facie

case, as it applies in the context of the *McDonnell Douglas* burden-shifting framework, is not meant to constitute additional elements of a disparate treatment claim, each of which the Plaintiffs must prove to prevail at summary judgment. *See Burdine*, 450 U.S. at 254 ("The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense.") (citation omitted).

The Sixth Circuit's departure from the proper summary judgment standard and misapplication of *McDonnell Douglas* allowed the "background circumstances" inquiry to preclude full consideration of Petitioner's claim. But the error lies not with the approach of considering background circumstances in applying *McDonnell Douglas* as a general matter, but with the Sixth Circuit's failure to correctly apply *McDonnell Douglas* in light of the specific procedural posture at hand.

Accordingly, this Court should not redefine the contours of a prima facie case of discrimination, but rather, correct the Sixth Circuit's misapplication of *McDonnell Douglas* and erroneous failure to apply the

correct standard in deciding Respondent's motion for summary judgment.[34]

D. Regardless of the Sixth Circuit's Consideration of "Background Circumstances," Petitioner Failed to Meet Her Burden to Overcome Ohio's Proffered Nondiscriminatory Reason.

To prevail at summary judgment under *McDonnell Douglas,* all plaintiffs must adduce evidence to demonstrate that the employer's proffered reasons for its actions are mere pretext for discrimination. The Sixth Circuit failed to properly apply this standard below, but even if it had, Petitioner would still lose because she fails to adduce the requisite evidence of pretext.

To overcome Respondent's summary judgment motion, Petitioner's burden was to "establish that [s]he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)

[34] It is worth noting that the Sixth Circuit's characterization of "background circumstances" as an "extra" requirement and/or "heightened" standard for majority-group plaintiffs may very well be too reductive and formalistic an application of the *McDonnell Douglas* framework should it be applied at an earlier stage of litigation at which, in conjunction with the other applicable legal standards, it functions to impose what is actually a materially different burden on majority-group plaintiffs. But those are not the facts before the Court in this case.

(citation omitted). On this record, Petitioner failed to meet that burden.

As this Court has repeatedly recognized, a defendant employer's burden in proffering a non-discriminatory reason for taking a particular employment action is minimal. *See Burdine*, 450 U.S. at 254 (noting the defendant's only burden is to produce evidence that legitimate, nondiscriminatory reasons exist for the challenged employment action).

Here, with respect to her claim of discrimination because of her sexual orientation, Petitioner failed to overcome Respondent's proffered reasons for not promoting her to the position of Bureau Chief, and for later demoting her. The Respondent met their burden of producing evidence that it had legitimate, non-discriminatory reasons for choosing not to promote Petitioner and for later demoting her. With respect to the demotion, the Respondent proffered evidence that it relied on lukewarm performance reviews, as well as deposition testimony from the director of the Department stating that, in his view, Petitioner was not the right choice to fulfill his vision of exceeding the position's minimal standards. With respect to Respondent's decision not to promote the Petitioner, Respondent again proffered evidence of non-discriminatory reasoning. It did so by offering evidence that the personnel in charge of hiring for the position chose Ms. Frierson rather than Petitioner because, among other things, the position involved managing a team and Ms. Frierson had previously served in leadership positions that the

hiring personnel had knowledge of. *See* Frierson Dep., Doc. 63, at 1389.

In attempting to overcome Respondent's proffered reasons for demoting her, Petitioner relies on an argument that the Respondent's proffered reasoning has no basis in fact and that Respondent offered shifting justifications. But Sixth Circuit caselaw makes clear that unless there is conflict between shifting justifications from an employer, the fact that the employer offers more than one non-discriminatory justification does not, on its own, create a genuine dispute with respect to pretext. *Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 890–91 (6th Cir. 2020). Turning to Respondent's proffered reasons for hiring Ms. Frierson, Petitioner relies heavily on her own subjective view that she was more qualified for the promotion. This, however, does not meet Petitioner's burden because "[a] plaintiff's subjective belief that she is more qualified does not . . . suffice to show pretext." *Leisring v. Clerk of Hamilton Cnty. Mun. Ct.*, 838 F. App'x 956, 958–59 (6th Cir. 2020) (citation omitted).

Thus, even if the court below had properly applied the standard at summary judgment and proceeded with its analysis beyond the prima facie case, Petitioner would have nonetheless lost on this factual record. For these reasons, the lower courts' consideration of "background circumstances" is not what ultimately doomed Petitioner's claim.

CONCLUSION

Title VII remains a critical and necessary tool to address ongoing discrimination, particularly for Black people and other historically marginalized people who experience discrimination in the workplace at disparate rates. An inquiry into the "background circumstances" of a challenged employment action effectuates the context-specific analysis required by Title VII because, while majority-group plaintiffs are unquestionably protected by Title VII, this nation's persisting legacy of discrimination targeting minority-group plaintiffs is not a relevant factor in their claims. While Petitioner argues that she has no legal recourse because of an application of the *McDonnell Douglas* framework that accounts for "background circumstances," the reality is that majority-group plaintiffs generally do not fare worse in Title VII cases.

This case does not require this Court to disrupt its well-settled Title VII jurisprudence. This Court can affirm the judgment below because Petitioner did not present sufficient evidence of discrimination to meet her burden at summary judgment, notwithstanding the Sixth Circuit's error in applying *McDonnell Douglas* and the "background circumstances" inquiry.

Respectfully submitted,

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