No.

In the Supreme Court of the United States

JULIO LICINIO,

Petitioner,

v.

STATE OF NEW YORK, STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should be overruled.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Julio Licinio was the plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondents are the State of New York, the State University of New York, and the State University of New York Upstate Medical University. They were defendants in the district court and defendants-appellees in the court of appeals.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Licinio v. State of New York, No. 24-2564 (2d Cir. June 17, 2025)

Licinio v. State of New York, No. 5:21-cv-00387-FJS-TWD (N.D.N.Y. Aug. 28, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julio Licinio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit is not reported but is available at 2025 WL 1693108 and reprinted at App. 1a.

The decision of the United States District Court for the Northern District of New York is not reported but is available at 2024 WL 3969010 and reprinted at App. 6a.

JURISDICTION

The final decision of the Second Circuit sought to be reviewed was issued on June 17, 2025. App. 1a. On September 10, 2025, Justice Sotomayor granted a motion to extend the deadline to file a petition for writ of certiorari to November 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be 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 with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

PRELIMINARY STATEMENT

For more than fifty years, Title VII employment discrimination cases have been decided not by the statute Congress wrote, but by a judicial invention—the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That rule has no basis in text or procedure, and it routinely bars juries from hearing meritorious discrimination claims. Under this judge-made test, courts ask the wrong question—not whether discrimination occurred, but whether the employer's excuses are plausible enough to end the case before trial.

Specifically, a plaintiff must first establish a prima facie case of discrimination. *Id.* at 802. If he does, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *Ibid.* If the employer meets its burden, the burden shifts back to the plaintiff to show that the reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Id.* at 804.

In the ensuing decades, the *McDonnell Douglas* framework strayed from its original scope. Lower courts apply the framework not only to Title VII

discrimination claims, but also to retaliation claims.[1] The framework has also been extended—or at least assumed to apply—to other anti-discrimination statutes, including the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and 42 U.S.C. §§ 1981 and 1983.[2] And although the framework was originally developed for judges to use at bench trials, it now applies most commonly—if not exclusively—at the summary judgment stage.[3]

Writing separately last term, Justice Thomas, joined by Justice Gorsuch, twice called for the Court to reconsider *McDonnell Douglas*—particularly as applied at summary judgment. *See Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 314 (2025) (Thomas, J., concurring); *Hittle v. City of Stockton*, 145 S. Ct. 759, 761 (2025) (Thomas, J., dissenting from denial of

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[1] *See* Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following* Mattern*: Will Courts Know It When They See It?*, 14 Lab. Law. 373, 376 (1998) ("Although the Supreme Court developed the *McDonnell Douglas* framework for disparate treatment cases, lower courts have almost universally adopted and applied its principles to retaliation cases.").

[2] *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 (2003) (ADA); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (ADEA); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (42 U.S.C. §§ 1981 & 1983). In addition to federal discrimination statutes, courts have also applied the framework to claims under analogous state statutes. *See, e.g.*, *Gamboa v. Am. Airlines*, 170 F. App'x 610, 611-12 (11th Cir. 2006) (Florida statute); *Gentry v. Ga.-Pac. Corp.*, 250 F.3d 646, 650 (8th Cir. 2001) (Arkansas statute).

[3] *See Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 952 n.2 (11th Cir. 2023) (Newsom, J., concurring) ("[R]esolving cases at summary judgment seems to be *McDonnell Douglas*'s sole remaining office.").

certiorari). Those separate opinions highlighted fundamental problems with the *McDonnell Douglas* framework that weigh in favor of reconsideration—including that it has "no basis in the text of Title VII or any other source of law." *Ames*, 605 U.S. at 320 (Thomas, J., concurring). Other serious problems with the doctrine include: it is "incompatible with the summary-judgment standard"; it "fails to capture all the ways in which a plaintiff can prove a Title VII claim"; it "requires courts to draw and maintain an artificial distinction between direct and circumstantial evidence"; and its extension into the summary judgment context "has caused significant confusion and troubling outcomes on the ground." *Id.* at 319, 322-26 (quotation omitted).

Justices Thomas and Gorsuch are not the only ones to identify flaws in *McDonnell Douglas*. From the outset, it has been the subject of criticism from a chorus of lower court judges—including then-Judge Kavanaugh, who called its prima facie case requirement "a largely unnecessary sideshow" that has "spawn[ed] enormous confusion and wast[ed] litigant and judicial resources." *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (Kavanaugh, J.). Scholars have also criticized the burden-shifting framework and its disconnect with both Title VII and the Rule 56 summary judgment standard. *See, e.g.*, Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459 (2024).

The growing mountain of persuasive criticism points to a simple conclusion: the Court should reconsider and overrule *McDonnell Douglas* in favor of a standard that aligns with Title VII and Rule 56. Under Rule 56, summary judgment must be denied if

there is a genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). In the Title VII context, the question should be whether a plaintiff has presented a genuine factual dispute as to whether discrimination was a but-for cause of an adverse employment action. In departing from the plain text, *McDonnell Douglas* requires courts to divert their attention from that critical question and apply an atextual and confusing test that has plagued the federal courts for over fifty years and that diminishes protections against discrimination. *Stare decisis* factors weigh in favor of reconsideration, as the *McDonnell Douglas* framework is atextual, is unworkable, has been undermined by subsequent decisions, and has not engendered any significant reliance interests.

For the reasons identified in Justice Thomas's separate opinions in *Ames* and *Hittle*, this Court should grant the petition to overrule this unworkable and egregiously wrong test.

STATEMENT OF THE CASE

I. Factual Background

Dr. Julio Licinio is an accomplished medical doctor and psychiatrist. App. 101a. In 2017, he was hired to be the new Dean of the College of Medicine at the State University of New York ("SUNY Upstate") in Syracuse, New York. App. 8a-9a. His employment contract specified that he would be provided with eight months' notice if he were to be asked to step down for any reason other than misconduct. App. 104a. A little over two years later, on September 12, 2019, the Interim President of SUNY Upstate demoted Dr. Licinio from his position as Dean, "effective immediately." App. 2a, 43a-44a. Although

Dr. Licinio was allowed to retain a position as a tenured professor, his salary was reduced by more than half. App. 44a, 125a.

Dr. Licinio claims that his demotion was in retaliation for his attempts as Dean to correct what he perceived as an entrenched system of discriminatory practices and lack of diversity at SUNY Upstate. App. 2a-3a, 57a-59a. Among other things, he sought to combat what he saw as underrepresentation of female employees at the school, sought to increase the number of females on the school's Budget Committee, and reported to the Dean of Student Affairs that Black students at the school were not being adequately prepared for career development. App. 76a-85a.

On August 12, 2019, Dr. Licinio also complained to the school's Interim President about the school's decision to reduce the salary of his wife, Dr. Ma Li Wong, a professor at SUNY Upstate. App. 87a. Dr. Wong is of Asian ancestry and culturally Hispanic, and Dr. Licinio told the President that because of the salary reduction, she would have reason under both Title VII and Title IX to file a discrimination complaint, since white male professors were not subject to the same reduction. App. 87a. Dr. Licinio's demotion from Dean occurred one month later. App. 2a.

Prior to his demotion, Dr. Licinio never received any negative performance reviews, and there is no documentation of any performance issues. App. 95a. He was also not afforded the eight-month transition period specified by his contract. App. 95a. During a deposition, the school's Associate Vice President for Human Resources admitted that Dr. Licinio's

whistleblowing activities "could have been part of" the reason for demoting him. App. 5a.

After his demotion, Dr. Licinio filed a complaint with the New York State Department of Human Rights (DHR), charging SUNY Upstate with unlawful discriminatory practices. App. 100a. DHR determined there was probable cause to believe that the school had committed an unlawful discriminatory practice and set a public hearing. App. 100a. Dr. Licinio ultimately decided to dismiss the DHR complaint and instead pursue a discrimination claim in federal court. App. 100a-101a. He received a right to sue letter from the EEOC in January 2021. App. 101a.

II. Proceedings Below

A. District court proceedings

Dr. Licinio sued in district court, claiming both discrimination and retaliation under Title VII. App. 98a-142a. After discovery, the district court granted summary judgment to Defendants on both sets of claims. App. 6a-97a. As for his discrimination claims, the court concluded that Dr. Licinio had failed to exhaust administrative remedies. App. 69a. In the alternative, applying the *McDonnell Douglas* burden-shifting framework, the court concluded that Dr. Licinio failed to establish a prima facie case of discrimination under Title VII. App. 72a.

As for his retaliation claims, the court again applied *McDonnell Douglas*, concluding at the first step that Dr. Licinio failed to establish a prima facie case by showing that he was demoted for engaging in protected activity under Title VII. App. 74a-92a. Even if he had met his burden at the first step, the

court held that Defendants met their burden under the second step by proffering nondiscriminatory reasons for his demotion—namely, an alleged pattern of unprofessional conduct and wasteful spending as Dean. App. at 92a-94a. As for the third step, the court held that Dr. Licinio failed to demonstrate that Defendants' asserted nondiscriminatory reasons for demoting him were mere pretext for discrimination. App. 94a-97a. It therefore granted summary judgment to Defendants. App. 97a.

B. Court of appeals proceedings

Dr. Licinio appealed the dismissal of his retaliation claims, but not his discrimination claims. App. 3a. The Second Circuit affirmed, in a short summary order that, like the district court, relied on *McDonnell Douglas*. App. 3a. As to the first prong, the court did not adopt the district court's conclusion, but instead "assume[d] without deciding that Licinio engaged in protected activity." App. 3a. The court specifically highlighted Dr. Licinio's statement to the school President that decreasing his wife's salary when white male professors were not subject to the same reduction "would give her reason both under Title 7 and Title 9, to file a complaint." App. 3a (citation omitted).

As to the second prong, the panel agreed with the district court that SUNY Upstate had "presented legitimate, non-retaliatory reasons for removing Licinio." App. 3a-4a.

As to the third prong, the court also agreed with the district court that Dr. Licinio "failed to adduce admissible evidence that SUNY Upstate's non-retaliatory reasons for his demotion are 'mere pretext' for retaliation." App. at 4a. Although there was an

undeniable "temporal proximity" between his complaints about discrimination and his demotion, the panel held that was not enough to defeat Defendants' motion for summary judgment. App. 5a. Nor, in the panel's view, was it enough that Dr. Licinio had not previously been given any negative performance reviews or that SUNY Upstate's Associate Vice President for Human Resources testified that Dr. Licinio's efforts to combat what he saw as discrimination "could have been part of" the basis for his demotion. App. 5a. Thus, under *McDonnell Douglas*, the panel affirmed the grant of summary judgment to Defendants. App. 5a.

REASONS FOR GRANTING THE PETITION

The *McDonnell Douglas* framework is an atextual, judge-made test that denies plaintiffs with potentially meritorious discrimination claims their day in court. The test conflicts with the text of Title VII and Rule 56 and has caused decades of confusion among the lower courts. That confusion is not theoretical: it has led courts to dismiss claims that present genuine factual disputes, forced litigants and judges to navigate needless doctrinal puzzles, and replaced the straightforward inquiry Congress prescribed with a judicial maze of shifting burdens and presumptions. Judges and scholars have rightly criticized the test, and *stare decisis* factors weigh in favor of jettisoning it. For the reasons articulated last term by two Justices of this Court, *McDonnell Douglas* has outlived its utility and should be overruled.

I. *McDonnell Douglas* Should Be Overruled Because It Created an Artificial, Judge-Made Framework That Is Unworkable and Contrary to Statute

A. *McDonnell Douglas*'s burden-shifting framework

1. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on specified protected characteristics: race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Prohibited employment practices include not only firing or refusing to hire someone, but also "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of" that individual's protected characteristics. 42 U.S.C. § 2000e-2(a). It is also unlawful under Title VII for an employer to retaliate against an employee "because he has opposed any . . . unlawful employment practice . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

2. Title VII does not establish a burden-shifting framework. *See generally* 42 U.S.C. § 2000e *et seq*. The Court created a three-part burden-shifting framework in *McDonnell Douglas*. Under that framework, first, a plaintiff bears the burden of establishing a prima facie case of discrimination. 411 U.S. at 802-07. This is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002). Although the precise formulation may vary, the prima facie requirement is generally interpreted as requiring a plaintiff to prove several elements: "the plaintiff [(1)] is a member of a protected

class, [(2)] was qualified, [(3)] suffered an adverse employment action, and [(4)] has at least minimal support for the proposition that the employer was motivated by discriminatory intent." *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015); *see also Reeves*, 530 U.S. at 142 (petitioner established a prima facie case under the ADEA because (1) he was a member of the protected class, (2) he was qualified for his position, (3) he was discharged by his employer, and (4) the employer hired younger persons to fill his position).

If a plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802.

If the employer satisfies that requirement, the burden shifts back to the plaintiff to prove that the employer's proffered reasons are mere "pretext" for discrimination. *Id.* at 804. Under this third step, the plaintiff may succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981). But later decisions acknowledged the framework's inconsistency: disbelief of an employer's stated reason, standing alone, does not establish discrimination. *See St. Mary's Honor Ctr.*, 509 U.S. at 514-16.

Notably, *McDonnell Douglas* is not grounded in the text of Title VII—indeed, the Court did not provide any explanation as to the source of the newly created framework. *See* Sandra F. Sperino, *Flying Without a*

Statutory Basis: Why McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743, 746 (2006) ("[T]he test draws little support from the text, intent, or purpose of Title VII."); Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 St. John's J. Legal Comment. 67, 70 (1993) ("The *McDonnell Douglas* Court gave no justification or authority for its establishment of this structure . . . ."). But as the Court later explained, the purported purpose of the framework is to "bring the litigants and the court expeditiously and fairly to th[e] ultimate question": whether "the defendant intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253.

3. At the time *McDonnell Douglas* was decided, Title VII cases were tried exclusively to the bench. *See Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting from denial of certiorari). *McDonnell Douglas* itself was an appeal from a bench trial. *See Green v. McDonnell-Douglas Corp.*, 318 F. Supp. 846, 847 (E.D. Mo. 1970). In that context, this Court's decision was viewed "as a plaintiff-friendly opinion," *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., writing separately), since it was designed "to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence" of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (cleaned up).

In 1991, Congress amended Title VII to allow for jury trials, 42 U.S.C. § 1981a(c), Pub. L. No. 102-166, 105 Stat. 1071, which raised the issue of whether *McDonnell Douglas* should be applied at summary-judgment in Title VII cases. This Court has never held that such use is appropriate. And in *Trans World*

Airlines the Court concluded that the framework was inapplicable at summary judgment because the plaintiff had presented direct evidence of discrimination. 469 U.S. at 121.

Nonetheless, the Court has used the *McDonnell Douglas* framework—or at least assumed that it applies—at summary judgment in discrimination cases under other statutes. *See, e.g.*, *Babb v. Wilkie*, 589 U.S. 399, 403 (2020) (ADEA); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 231 (2015) (ADA and Pregnancy Discrimination Act); *Raytheon Co.*, 540 U.S. at 49-50 & n.3 (ADA); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 309 (1996) (ADEA). In each case, it did so without examining or discussing the appropriateness of applying the framework in that context. *See Ames*, 605 U.S. at 321 n.4 (Thomas, J., concurring) ("[A]s far as I can tell, this Court has never had occasion to decide whether the *McDonnell Douglas* framework is a useful or appropriate tool for evaluating any kind of claim at summary judgment."). Most recently, the Court in *Ames* "assume[d] without deciding that the *McDonnell Douglas* framework applies at the summary-judgment stage of litigation" in a Title VII case. *Id.* at 308 n.2.

In the lower courts, however, *McDonnell Douglas* is frequently—and almost exclusively—applied to decide cases at summary judgment. *See Tynes*, 88 F.4th at 952 n.2 (Newsom, J., concurring) ("[R]esolving cases at summary judgment seems to be *McDonnell Douglas*'s sole remaining office."); *Raytheon Co.*, 540 U.S. at 49 n.3 ("The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-

treatment cases.").[4] That is not just a matter of happenstance, but is largely because this Court has held that the *McDonnell Douglas* burden-shifting analysis is inapplicable both at the pleading stage, *see Swierkiewicz*, 534 U.S. at 508, and in deciding post-trial motions, *see U.S. Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 715 (1983).

As for trial, most federal circuits have eliminated the *McDonnell Douglas* framework from jury instructions. *See* Tymkovich, 85 Denv. U. L. Rev. at 527-28 (collecting cases); *Vance v. Ball State Univ.*, 570 U.S. 421, 444-45 & n.13 (2013) (collecting cases); *see also, e.g.*, *Mobasher v. Bronx Cmty. Coll. of City of New York*, 269 F. App'x 71, 73 (2d Cir. 2008) ("The language used in the traditional *McDonnell Douglas* formulation, developed by appellate courts for use by judges, is at best irrelevant, and at worst misleading to a jury." (internal quotation marks omitted)); Ninth Circuit Jury Instructions Committee, *Manual of Model Jury Instructions for the District Courts of the Ninth Circuit* (2017 ed., last updated Sept. 2025), at 296 (stating "a *McDonnell Douglas* burden-shifting instruction should not be given in a Title VII case"). Half a century later, a device originally meant to organize trial evidence now instead decides who reaches trial—displacing the statute Congress enacted with a judicial test of the Court's own making.

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[4] *See also* Timothy M. Tymkovich, *The Problem With Pretext*, 85 Denv. U. L. Rev. 503, 509 (2008) ("To the extent that *McDonnell Douglas* still matters, it only affects how judges evaluate motions for summary judgment."); Sperino, 102 N.C. L. Rev. at 496 ("Courts primarily use *McDonnell Douglas* at the summary judgment stage.")

B. *McDonnell Douglas* has been criticized by lower court judges and scholars

1. For more than fifty years, courts have struggled to apply *McDonnell Douglas*—a struggle that has only deepened with time. Just six years after the Court created the framework, the First Circuit observed that "the subtleties of *McDonnell Douglas* are confusing" and "have caused considerable difficulty for judges of all levels." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979). A decade later, Justice Kennedy agreed, explaining that the numerous and complicated frameworks courts use in the employment context make employment law "difficult for the bench and bar" and confirming that "[l]ower courts long have had difficulty applying *McDonnell Douglas*." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 279, 291 (1989) (Kennedy, J., dissenting). In an article 20 years later, Judge Tymkovich observed: "Lower courts have struggled to implement the [*McDonnell Douglas*] burden-shifting framework for over thirty years." Tymkovich, 85 Denv. U. L. Rev. at 529.

McDonnell Douglas has now been on the books for over fifty years, and things have not improved with age. Instead, the disconnect between the burden-shifting framework and the plain text of Title VII and Rule 56 has repeatedly led lower court judges to question its ongoing utility. In a 2003 concurring opinion, Judge Hartz concluded that "[t]he *McDonnell Douglas* framework only creates confusion and distracts courts from 'the ultimate question of discrimination *vel non*.'" *Wells*, 325 F.3d at 1221 (Hartz, J., concurring) (quoting *Aikens*, 460 U.S. at 714). His frank conclusion was that "*McDonnell Douglas* has served its purpose and should be

abandoned." *Ibid.*; *see also McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122, 1144 (10th Cir. 2024) (Hartz, J., concurring) ("The *McDonnell Douglas* framework is an anomaly . . . [that] distracts the courts from what should be the focus of the inquiry . . . ."). The next year, Judge Magnuson likewise noted that "[s]ince its inception, *McDonnell Douglas* has befuddled the Courts" and that "[i]t is simply impossible to reconcile the ancient *McDonnell Douglas* paradigm with the clear language of the Civil Rights Act." *Griffith v. Des Moines*, 387 F.3d 733, 746-47 (8th Cir. 2004) (Magnuson, J., concurring). In his view, "*McDonnell Douglas* should not be used by courts to analyze Title VII claims" because it "is not supported in the language of the statute, nor does it impose liability under Title VII as Congress intended." *Id.* at 745.

A few years later, then-Judge Kavanaugh condemned *McDonnell Douglas*'s prima facie case requirement as "a largely unnecessary sideshow" that has "spawn[ed] enormous confusion and wast[ed] litigant and judicial resources." *Brady*, 520 F.3d at 494. That was followed by Judge Wood of the Seventh Circuit (joined by Judges Tinder and Hamilton) calling attention to "the snarls and knots" that *McDonnell Douglas* and its progeny have "inflicted on courts and litigants alike." *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring). Judge Wood likened *McDonnell Douglas* to an "allemande worthy of the 16th century," a complicated and outdated ritual. *Ibid.* In her view, even if such a dance was necessary "when Title VII litigation was still relatively new in the federal courts," it has by now lost all utility. *Ibid.*; *see also Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J.,

concurring) (calling *McDonnell Douglas* "the 'kudzu' of employment law").

Then-Judge Gorsuch soon aired similar concerns, arguing that *McDonnell Douglas* "has proven of limited value" and that its application invites "confusion and complexities." *Walton v. Powell*, 821 F.3d 1204, 1210 (10th Cir. 2016). Citing the opinions of Judges Hartz and Wood, as well as Judge Tymkovich's article, he noted that "more than a few keen legal minds have questioned whether the *McDonnell Douglas* game is worth the candle." *Id.* at 1211. In his view, courts should

> employ the same and straightforward standard for liability . . . for all cases at all stages in the litigation rather than devis[ing] special and idiosyncratic (*McDonnell Douglas*) rules that depend on what kind of proof you allege, what kind of case you allege, and where in the life of the litigation you happen to find yourself.

Id. at 1212.

Two years ago, the Eleventh Circuit sought to clarify *McDonnell Douglas*'s prima facie requirement, noting that it has caused "continuing confusion." *Tynes*, 88 F.4th at 941, 945. Judge Newsom concurred in the decision, but took the opportunity to express "even deeper skepticism of *McDonnell Douglas*." *Id.* at 949 (Newsom, J., concurring). He noted that the framework "seems . . . awfully made up"; that "it seems to have taken on a life of its own"; and that "perhaps worst of all," it "obscures the actual Title VII inquiry, especially at summary judgment." *Id.* at 951-54 & n.6.

Finally, earlier this year, Judges Eid and Quattlebaum each joined the chorus of judges voicing

criticism of *McDonnell Douglas*, especially when it is used at summary judgment. *See Jenny v. L3Harris Technologies, Inc.*, 144 F.4th 1194, 1202 (10th Cir. 2025) (Eid, J., concurring) (noting the "many problems with the *McDonnell Douglas* framework," including that it "demands too much of plaintiffs at summary judgment"); *Hollis v. Morgan State Univ.*, 153 F.4th 369, 388, 391 (4th Cir. 2025) (Quattlebaum, J., concurring) ("I join those urging the Supreme Court to clarify or overturn *McDonnell Douglas*" because (1) "it's counter-textual," (2) it "is more restrictive than the language in [Title VII]," (3) "it imposes a higher burden than Federal Rule of Civil Procedure 56 requires at summary judgment," and (4) "it is unnecessarily complex").

2. In addition to judges, the academy has been deeply critical of *McDonnell Douglas*. Numerous scholars have criticized the test and called for its abandonment. *See, e.g.*, Sperino, 102 N.C. L. Rev. at 495 & n.188 (citing articles); Sperino, 43 Hous. L. Rev. at 806 ("[T]he [*McDonnell Douglas*] standard was adopted without proper regard to the operative text, the legislative history, and the broad policies of Title VII. . . . Now is the time to reconsider the legal heritage and appropriateness of *McDonnell Douglas*."); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 396 (2021) ("*McDonnell Douglas* and related judge-created doctrines must be clarified to conform to the statutory standard—or simply abandoned."); Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 Fla. St. U. L. Rev. 859, 862 (2004) (although the *McDonnell Douglas* framework "was arguably justified as initially conceived[,] . . . it no longer serves

any meaningful purpose" and should "be abandoned"); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703, 761 (1995) ("The Supreme Court should discard the *McDonnell Douglas* scheme . . . ."); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich. L. Rev. 2229, 2320 (1995) ("[A]bandoning *McDonnell Douglas-Burdine* would have several important advantages: it would increase intellectual honesty, deter the creation of dangerous pseudo-uniform rules, and encourage a more subtle and creative understanding of discrimination in its many forms.").

3. A common thread of the criticisms by both judges and scholars is that applying *McDonnell Douglas* at the summary-judgment stage is unwarranted. A straightforward Rule 56 analysis in a Title VII discrimination case would simply ask if the plaintiff has created a material factual dispute over whether discrimination based on a protected characteristic was a reason for an adverse employment action. *See* Fed. R. Civ. P. 56(a); 42 U.S.C. § 2000e-2(a)(1). Likewise, the summary judgment question in a Title VII retaliation case should be whether the plaintiff has created a material factual dispute over whether there was "unlawful retaliation" that "would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

Instead, *McDonnell Douglas* requires the plaintiff to show that the employer's proffered legitimate reasons for the action—which it will "almost always" have asserted by the time a case reaches the summary judgment stage, *see* Sperino, 102 N.C. L. Rev. at 486—

were pretextual. As Judge Newsom explained, this pretext requirement

> not only lacks any real footing in the text of Rule 56 but, worse, actually obscures the answer to the only question that matters at summary judgment: Has the plaintiff shown a "genuine dispute as to any material fact"—in the typical Title VII case, as to whether her employer engaged in discrimination based on a protected characteristic.

Tynes, 88 F.4th at 949 (Newsom, J., concurring); *see also, e.g.*, *Jenny*, 144 F.4th at 1203 (Eid, J., concurring) (courts should "focus[] on the true Rule 56 question: whether the record, viewed in the light most favorable to [the plaintiff], would allow a jury to infer intentional discrimination"). Put another way, "[r]ather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue." *Wells*, 325 F.3d at 1224 (Hartz, J., writing separately).

The chorus of judicial and scholarly criticism is remarkable in its uniformity. From Justice Kennedy to Judges Hartz, Magnuson, Tymkovich, Kavanaugh, Wood, Gorsuch, Newsom, Eid, and Quattlebaum, jurists across decades and circuits have concluded that *McDonnell Douglas* obscures rather than clarifies the discrimination inquiry. When the lower-court bench consistently describes a precedent as "confusing," "unworkable," and "awfully made up," the doctrine has reached the end of its useful life.

C. As recently recommended by two Justices, *McDonnell Douglas* should be reconsidered

The concerns voiced by judges across the country for decades have now reached this Court itself. Last term, Justice Thomas, joined by Justice Gorsuch, surveyed the history and criticisms of *McDonnell Douglas* and summarized key problems with its burden-shifting framework. He identified five flaws that should lead the Court to reconsider *McDonnell Douglas*:

First, the framework was "made . . . out of whole cloth," *Hittle*, 145 S. Ct. at 760 (Thomas, J., dissenting from denial of certiorari), and has "no basis in the text of Title VII or any other source of law." *Ames*, 605 U.S. at 320 (Thomas, J., concurring). The lack of any connection to the text of Title VII, Rule 56, or any other apparent source of law is reason enough to reconsider *McDonnell Douglas*. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overruling the judge-made and counter-textual *Chevron* test as contrary to the Administrative Procedure Act). This lack of any connection to the statutory text also underscores and exacerbates the other flaws with the framework.

Second, it is incompatible with the Rule 56 summary-judgment standard. *Ames*, 605 U.S. at 322 (Thomas, J. concurring); *see also* Sperino, 102 N.C. L. Rev. at 506 (arguing that *McDonnell Douglas* "is not consistent with the summary judgment standard and . . . significantly distorts the discrimination inquiry in the defendant's favor"). Because the framework was developed for use in bench trials, not summary judgment, it is perhaps understandable that it "does

not speak in terms of 'genuine dispute[s]' regarding the facts." *Ames*, 605 U.S. at 322 (Thomas, J., concurring) (quoting Fed. R. Civ. P. 56(a)). But whether there is a genuine dispute should be the *only* relevant factual inquiry at summary judgment. Under Rule 56, a plaintiff opposing an employer's motion "need not establish or prove any elements—by a preponderance or otherwise—to survive summary judgment." *Ibid.* (quoting *Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting from denial of certiorari)). That it requires a plaintiff to do so is a fatal flaw in *McDonnell Douglas*, especially since as the framework has evolved, "resolving cases at summary judgment seems to be *McDonnell Douglas*'s sole remaining office." *Tynes*, 88 F.4th at 952 n.2 (Newsom, J., concurring).

Third, it "fails to capture all the ways in which a plaintiff can prove a Title VII claim." *Ames*, 605 U.S. at 323 (Thomas, J., concurring). As Congress amended the statute in 1991, discrimination claims under Title VII only require proof that discrimination was "a motivating factor . . . even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Thus, it is not (or at least should not be) fatal that an employer can offer legitimate, non-discriminatory reasons for its adverse employment action at step two of *McDonnell Douglas*, so long as the plaintiff is proceeding under a "mixed motive" theory that claims discrimination was one of several motivations. Requiring a plaintiff to prove that an employer's proffered reasons are pretext is contrary to the plain terms of Title VII.

At the same time, the "mixed motive/single motive" dichotomy that grew out of *McDonnell Douglas* is confusing and questionable. Congress added the

"motivating factor" language to Title VII in response to this Court's divided decision in *Price Waterhouse*, which created the mixed motive/single motive distinction and found *McDonnell Douglas* inapplicable to mixed-motive cases. *See* Tymkovich, 85 Denv. U. L. Rev. at 522 (discussing *Price Waterhouse* and the 1991 amendment). Yet "[n]othing in the text of the Civil Rights Act of 1991 . . . indicates that Congress intended courts to maintain th[e] dichotomy." *Ibid.*[5] Putting that complication aside, even in a so-called single motive case, "[a] plaintiff who cannot establish a prima facie case at the first step or pretext at the third step" should still be able to defeat an employer's summary judgment motion "so long as his evidence raises a reasonable inference of unlawful

[5] Further confusing the issue, in 2003 the Court held that a plaintiff can get a mixed-motive jury instruction without direct evidence of discrimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003). The Court did not address or even cite *McDonnell Douglas* and did not explain to what extent the new *Desert Palace* standard applies at summary judgment, *see* Tymkovich, 85 Denv. U. L. Rev. at 523-24, or to single motive cases, *see* Sperino, 43 Hous. L. Rev. at 790 ("[*Desert Palace*] does not discuss how the 1991 amendments affected single-motive discrimination cases, and the issue remains unsettled."). Some viewed *Desert Palace* as "confirm[ing] the demise of the *McDonnell Douglas* framework." *Griffith*, 387 F.3d at 746 (Magnuson, J., concurring). Yet six months later, the Court acknowledged the ongoing viability of *McDonnell Douglas* in an ADA case, *Raytheon*, 540 U.S. at 49 n.3, without addressing *Desert Palace*. *See Griffith*, 387 F.3d at 747 n.11 (Magnuson, J., concurring) ("Just as the Supreme Court ignored *McDonnell Douglas* in the *Desert Palace* opinion, the Supreme Court likewise ignored *Desert Palace* in the *Raytheon* opinion. These inconsistencies further demonstrate the confusion that *McDonnell Douglas* creates.").

discrimination." *Ames*, 605 U.S. at 324 (Thomas, J., concurring).

Fourth, because *McDonnell Douglas* does not apply when a plaintiff presents direct evidence of discrimination, *see Trans World Airlines*, 469 U.S. at 121, use of the framework "requires courts to draw and maintain an artificial distinction between direct and circumstantial evidence." *Ames*, 605 U.S. at 324 (Thomas, J., concurring). Title VII claims need not be proved using any particular type of evidence. *See id.* at 325 (Thomas, J., concurring) ("'[I]n any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence,' or some combination thereof.") (quoting *Aikens*, 460 U.S. at 714 n.3); *see also Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) ("[D]istrict courts must stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards."); *Desert Palace*, 539 U.S. at 100 ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.") (quotation omitted). Yet "[r]ather than simply deciding whether the evidence is sufficient to sustain the plaintiff's claim, [under *McDonnell Douglas*] the courts must engage in the singularly unproductive exercise of deciding whether some item of evidence is 'direct evidence' in order to decide how to go about analyzing whether the plaintiff's claim survives." *Wells*, 325 F.3d at 1225 (Hartz, J., concurring); *see also Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting) (highlighting the difficulty of "mak[ing] the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence"). And of course, the distinction between direct and indirect evidence has no connection to the text of Title VII.

Fifth, the *McDonnell Douglas* test continues to cause immense confusion among the lower courts. *See Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting) ("Lower courts long have had difficulty applying *McDonnell Douglas*"); *Griffith*, 387 F.3d at 746 (Magnuson, J., concurring) (the *McDonnell Douglas* framework "has befuddled" courts "[s]ince its inception"); Tymkovich, 85 Denv. U. L. Rev. at 529 ("Lower courts have struggled to implement the burden-shifting framework for over thirty years."); *Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting from denial of certiorari) (use of *McDonnell Douglas* at summary judgment has caused "significant confusion" and "troubling outcomes on the ground"). This "continuing confusion," *Tynes*, 88 F.4th at 945 (Newsom, J., concurring), calls out for resolution—which can only come from this Court.

* * * *

The flaws identified by Justices Thomas and Gorsuch are not remediable tweaks; they strike at the foundation of the doctrine. After five decades of confusion, only this Court can restore Title VII to the straightforward inquiry Congress wrote. *See Wells*, 325 F.3d at 1221 (Hartz, J., concurring) ("*McDonnell Douglas* has served its purpose and should be abandoned."); *Griffith*, 387 F.3d at 745 (Magnuson, J., concurring) ("*McDonnell Douglas* should not be used by courts to analyze Title VII claims."); *Coleman*, 667 F.3d at 863 (Wood, J., concurring) ("By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility."); *Tynes*, 88 F.4th at 958 (Newsom, J., concurring) (calling for "relegat[ing] *McDonnell Douglas* to the sidelines"); *Hollis*, 153 F.4th at 395 (Quattlebaum, J., concurring) ("I join many other judges and Justices in calling for

the clarification, or overturning, of *McDonnell Douglas*' burden-shifting framework."). The question is no longer whether *McDonnell Douglas* works, but whether this Court will heed the call to replace it with the rule Congress enacted.

D. *Stare decisis* considerations weigh in favor of overruling *McDonnell Douglas*

Fifty years of experience have confirmed what *McDonnell Douglas* failed to recognize: atextual doctrine breeds confusion, not stability. Under this Court's established *stare decisis* factors, every consideration—reasoning, workability, consistency and doctrinal development, and reliance—points toward a need for correction. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 917 (2018).

First, as with the recently overruled *Chevron* doctrine, *McDonnell Douglas* is a judge-created rule that does not comport with the text of the underlying statute and "has proved to be fundamentally misguided." *Loper Bright*, 603 U.S. at 407. As Judge Newsom recently declared, "*McDonnell Douglas* masks and muddles the critical Rule 56 inquiry," and there is "no textual warrant in Title VII or the Federal Rules for so elaborate a scheme." *Tynes*, 88 F.4th at 952, 958 (Newsom, J., concurring). The decision's failure to grapple with the text of the statute it purported to be applying confirms that, again like *Chevron*, from the outset it "has been a 'rule in search of a justification,' if it was ever coherent enough to be called a rule at all." *Loper Bright*, 603 U.S. at 407 (quoting *Knick v. Twp. of Scott*, 588 U.S. 180, 204 (2019)).

Second, as the judges and scholars who have critiqued the doctrine attest, *McDonnell Douglas* is unworkable. *See supra* Part I.B. It has created ongoing

confusion among courts and litigants and creates anomalies in the law. For example, this Court held in *Desert Palace* that Title VII "treat[s] circumstantial and direct evidence alike," 539 U.S. at 100, yet the artificial *McDonnell Douglas* framework applies only in indirect-evidence cases, *Trans World Airlines*, 469 U.S. at 121. And although the framework was never designed to be applied at summary judgment, that has become perhaps its "sole remaining office." *Tynes*, 88 F.4th at 952 n.2 (Newsom, J., concurring). These are not issues that will be worked out over time—indeed, the longer *McDonnell Douglas* remains in place, the more the confusion grows.

Third, the framework has been significantly undermined by subsequent cases and amendments that have altered and diluted *McDonnell Douglas*'s role. For example, *Trans World Airlines* held that the burden-shifting framework does not apply when a plaintiff presents direct evidence of discrimination. 469 U.S. at 121. *Price Waterhouse* concluded that *McDonnell Douglas* does not apply in mixed-motive cases. 490 U.S. at 246-47. Congress altered the scope of Title VII by allowing for jury trials and adding the "motivating factor" language as part of the Civil Rights Act of 1991. 42 U.S.C. § 1981a(c), Pub. L. No. 102-166, 105 Stat. 1071. And this Court has held that the burden-shifting framework does not apply at the pleading stage, *Swierkiewicz*, 534 U.S. at 508, or in deciding post-trial motions, *Aikens*, 460 U.S. at 715. Put

simply, the state of discrimination law is very different than it was in 1973, such that *McDonnell Douglas* has been relegated to an uncertain corner.[6]

Fourth, no reliance interests justify preserving the *McDonnell Douglas* framework. As with *Chevron*, it has been "inconsistent[ly] appli[ed] by the lower courts" and "does not provide a clear or easily applicable standard." *Loper Bright*, 603 U.S. at 410 (internal quotation marks omitted); *see also, e.g.*, *Hollis*, 153 F.4th at 393 (Quattlebaum, J., concurring) ("While the text of Title VII is straightforward, the *McDonnell Douglas* framework is not."). Moreover, *McDonnell Douglas* was designed to be used by judges, not by the employers or employees who are regulated under Title VII—and who do not rely on the burden-shifting framework in ordering their day-to-day interactions. It would be a relatively simple matter for judges to instead apply the text of Title VII and the summary judgment standard of Rule 56 with which they are very familiar.

II. This Case Is an Excellent Vehicle

This case cleanly presents the question whether *McDonnell Douglas* should continue to govern Title VII and other discrimination cases at summary judgment. The decision below turned entirely on that framework: both the district court and the Second Circuit applied *McDonnell Douglas*'s three-step burden-shifting test and held at step three that Dr. Licinio

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[6] *McDonnell Douglas* is far from an insignificant precedent, however. As of 2019, "[m]ore than 57,000 court opinions ha[d] cited it," *Nall*, 917 F.3d at 351 (Costa, J., specially concurring), and thousands more have done so since then.

failed to "prove" pretext. App. 2a-5a, 94a-97a. No alternative issues or procedural complications obscure the question presented.

The record also illustrates exactly how *McDonnell Douglas* distorts the summary-judgment inquiry. Despite undisputed evidence—including that: (1) Dr. Licinio had received no negative performance reviews, (2) SUNY Upstate's human-resources officer admitted Dr. Licinio's diversity efforts "could have been part of" the reason for his demotion, (3) there was close temporal proximity between his protected activity and his demotion, and (4) he was inexplicably denied the eight-month transition period promised in his contract—the courts below concluded that he did not satisfy *McDonnell Douglas*'s pretext requirement at summary judgment. App. 4a-5a, 95a. In a world governed by Rule 56, those same facts would have created a genuine dispute for trial.

The posture is final, the record is clean, and the issue is dispositive. This petition therefore offers the ideal opportunity for the Court to reconsider—and replace—a half-century-old framework that has no basis in Title VII's text or the Federal Rules of Civil Procedure. By granting review, the Court can restore summary-judgment analysis to the straightforward question Congress enacted: is there a genuine factual dispute as to whether there was intentional discrimination?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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