No. 25-6273

IN THE

Supreme Court of the United States

RONNIE COLEMAN,

Petitioner,

v.

CHEVRON PHILLIPS CHEMICAL COMPANY, L.P.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was an at-will employee who worked as a Process Operator in a chemical manufacturing facility for Respondent Chevron Phillips Chemical. After Petitioner failed on multiple occasions to pass a required qualification exam to work on chemical reactors, Chevron Phillips Chemical terminated his employment. Petitioner sued, alleging that the termination was based on his race and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq*. The district court granted summary judgment in favor of Chevron Phillips Chemical, struck some of Petitioner's evidence, and subsequently denied Petitioner's request for a new trial. The Fifth Circuit affirmed.

Contrary to Petitioner's challenge, the court of appeals' decision was fact-driven based on a record that offered no evidence of discriminatory intent—the ultimate issue in every Title VII and ADEA case. The court of appeals' decision does not contravene this Court's decisions in any meaningful way, nor does it demonstrate a material conflict among lower courts regarding the evaluation of evidence of discriminatory intent. Thus, this case presents no issue of serious national significance that warrants review by this Court. The questions presented are:

1. Whether the court of appeals correctly affirmed the district court's determination that Petitioner's race discrimination and age discrimination claims failed as a matter of law, where the record showed that Petitioner's supervisor, who made alleged discriminatory remarks, was completely removed from Petitioner's evaluations and had no influence over or involvement in the decision to terminate Petitioner's employment when he failed to pass a required qualification examination on multiple occasions with multiple other evaluators, including some who were in the same protected classes as Petitioner?
2. Whether review of the Fifth Circuit's so-called "CSC" four-part test is warranted where the court of appeals did not apply the test as petitioner characterizes and no meaningful conflict exists between the Fifth Circuit and other circuits regarding application of the "stray remarks" doctrine and the "cat's paw" theory?
3. Whether review of the Fifth Circuit's "nearly identical" standard is warranted where the court of appeals did not apply the standard as petitioner characterizes and the alleged conflict is semantic, not substantive?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Ronnie Coleman, who was the plaintiff in the district court and the plaintiff-appellant in the court of appeals.

Respondent is Chevron Phillips Chemical Company LP, which was the defendant in the district court and the defendant-appellee in the court of appeals.

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JURISDICTION

The Fifth Circuit entered judgment on March 21, 2024. Pet. App. A. The Fifth Circuit denied petitioner's timely petition for panel rehearing on May 19, 2025. Pet. App. B. The Court extended the time in which to file a petition for writ of certiorari to October 1, 2025. *Coleman v. Chevron Phillips Chemical Company, L.P.,* No. 25A142 (U.S.) (Aug. 6, 2025). The Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed as a process operator at Chevron Phillips Chemical's Pasadena Plastics Complex, located in Pasadena, Texas, from November 2019 until his termination in December 2021. Pet. App. A2.[1] Petitioner is African American and was 57 years old when Chevron Phillips Chemical hired him in 2019. Pet. App. C1.

In January 2021, Chevron Phillips Chemical granted Petitioner a transfer from Plant 7 to Plant 6 at the Pasadena Plastics Complex, after he elected to bid for an opening in Plant 6. Pet. App. C1. In Plant 6, Petitioner was assigned to train on reactors under Supervisor Wayne Kline ("Kline"). Pet. App. C2. Petitioner's

[1] The components of the Petition Appendix are marked alphabetically starting with "A" but are not independently numbered. Accordingly, Chevron Phillips Chemical refers to the original page numbers reflected in each document. For example, "Pet. App. A2" refers to the original page 2 in Appendix item A.

Training Plan on the reactors ran for six months, from January 2021 to July 2021. Pet. App. C1. Under the Training Plan, Petitioner was required to complete various training modules, pass related written examinations, and then complete and pass an area walkthrough examination demonstrating his substantive knowledge of the reactor process in a real-world setting. *Id*.

At his request, Petitioner took a brief break from reactor training in April 2021 but resumed the training in May 2021 and subsequently completed a 60-day evaluation. Pet. App. C2. In four of the five subject areas on the evaluation, Petitioner's supervisor, Kline, rated him as "Needs Improvement" and provided feedback on how Petitioner could improve. *Id*. Petitioner contested Kline's rating and alleged that Kline was harassing him. *Id*. In response to Petitioner's complaint, Human Resources launched an investigation. *Id*. Human Resources could not substantiate Petitioner's complaints because none of the witnesses observed or were aware of any inappropriate or disparate treatment by Kline towards Petitioner. *Id*.

Petitioner completed his last training module and written examination in August 2021 and progressed to the last phase of his training—the area walkthrough examination. *Id*. In his first area walkthrough exam, Petitioner was evaluated by Kline and Marlon Jordan, an African American Chief Daylight Operator. *Id*. Kline and Jordan both determined that Petitioner did not pass the August 2021 area walkthrough. *Id*.

Petitioner subsequently complained that Kline had made racist comments and failed to provide him proper training. *Id*. As a result of Petitioner's complaints, Chevron Phillips Chemical removed Kline from the process going forward and Kline did not participate in any of Petitioner's subsequent evaluations. *Id.*; Pet. App. A2.

Petitioner participated in a second walkthrough exam in September 2021, which was evaluated by Howard Williams, who is also African American and older than Petitioner. Pet. App. C2-3. Williams concluded that Petitioner did not pass the second area walkthrough. Pet. App. C3. Chevron Phillips Chemical gave Petitioner additional time to prepare for a third area walkthrough, which included multiple evaluators and took place in November 2021. *Id*.; Pet. App. A2. All evaluators determined that Petitioner did not pass the third exam, specifically noting that he had trouble identifying equipment, describing correct process flows, and demonstrating an overall understanding of the reactor process. Pet. App. A2, C3.

Petitioner requested and was granted a fourth walkthrough exam, which took place in December 2021, giving Petitioner yet more time to prepare. Pet. App. C3. Williams evaluated Petitioner on the fourth walkthrough exam and again determined that Petitioner did not pass because he was not at the "expected knowledge level." Pet. App. C3. Chevron Phillips Chemical subsequently terminated Petitioner's employment. *Id*.

Petitioner filed this lawsuit alleging that Chevron Phillips Chemical discriminated against him based on his race and age, among other claims.[2] Pet. App. C3. After the close of discovery, Chevron Phillips Chemical moved for summary judgment and subsequently moved to strike some of the evidence Petitioner offered in opposition to the motion. *Id*. Before granting Chevron Phillips Chemical's motion for summary judgment on all Petitioner's claims, the district court struck some of Petitioner's evidence, including (1) parts of his affidavit that contradicted his sworn deposition testimony, (2) parts of several third-party affidavits where the witnesses lacked personal knowledge regarding Petitioner's training, performance and treatment, and (3) the entire affidavit of a witness whom Petitioner failed to timely disclose before the close of discovery and only disclosed after Chevron Phillips Chemical moved for summary judgment. Pet. App. C9-20.

Regarding Petitioner's discrimination claims, the district court concluded that he failed to create a genuine issue of material fact with either direct evidence or circumstantial evidence of race discrimination. Pet. App. C22, 24. In reaching its decision on Petitioner's race discrimination claim, the district court noted that the record was completely devoid of any evidence that Kline—the only person Petitioner claims "was racially motivated"—participated in or influenced decisions related to the second, third and fourth area walkthrough exams or the termination

[2] Petitioner also asserted a claim under ERISA, but that claim is not before the Court.

decision. Pet. App. C24. Regarding Petitioner's age discrimination claim, the district court determined that Petitioner's statement that an unidentified person told him he "was too old to work on reactors" was not tied to any decisionmakers or the termination decision and, therefore, did not create a genuine issue of material fact, among other things. Pet. App. C25.

The court of appeals affirmed the district court's evidentiary rulings as well as summary judgment on all claims.[3] Pet. App. A. As relevant here, the court of appeals held that Petitioner failed to create a genuine issue of material fact as to whether Chevron Phillips Chemical acted with discriminatory animus when it terminated his employment after his fourth unsuccessful area walkthrough exam. Pet. App. A5-6. The court of appeals acknowledged that Petitioner could prove his claims through either direct or circumstantial evidence and evaluated his claims through both of those evidentiary lenses.[4] *Id*.

When reviewing direct evidence that involves discriminatory remarks, the court explained that it examines the record for four general factors, including the

[3] Petitioner does not challenge the court of appeals' decision regarding the district court's evidentiary rulings in this proceeding. Thus, Petitioner's references to evidence that was struck is improper and should be disregarded. *Cf.* Pet. 5-6 and Pet. App. C11-12 (striking certain statements in paragraph 19 of Petitioner's declaration, which Petitioner includes in his petition at pp. 5-6).

[4] The court of appeals evaluated Petitioner's race discrimination claim looking at both direct evidence and circumstantial evidence, but evaluated Petitioner's age discrimination claim looking at circumstantial evidence only because Petitioner did not argue direct evidence in support of his age discrimination claim. Pet. App. A6. Petitioner does not challenge the court's decision in this respect.

extent to which the discriminatory remarks are made by an individual with authority over the employment decision at issue, among other things. Pet. App. A4-5. Applying those principles to the record in this case, the court of appeals concluded that there was no basis to infer race-based discriminatory intent on Chevron Phillips Chemical's part. Pet. App. A5. In particular, the court of appeals examined the record regarding Kline's participation in Petitioner's training and termination and found that the record showed that Kline participated in the first evaluation only, which did not result in Petitioner's termination. *Id*. The court of appeals further concluded that the record reflected no evidence that Kline had authority or influence over the second, third, or fourth walkthrough exams or the termination decision. *Id*.

The court also determined that Petitioner lacked sufficient circumstantial evidence to support his race and age discrimination claims. Pet. App. A5-6. Evaluating the record at large, the court concluded that there was no evidence of a similarly situated comparator and that Petitioner's subjective belief of race discrimination was insufficient to show pretext. Pet. App. A6. The court also noted that Petitioner's age discrimination claim was largely based on the same circumstantial evidence he proffered in support of his race discrimination claim and, therefore, failed for the same reasons. Pet. App. A6. The court of appeals additionally concluded that Petitioner's age discrimination claim failed because the

record was devoid of any evidence that his younger replacement was "clearly less qualified."[5] *Id*.

Petitioner petitioned for a panel rehearing, which the court of appeals denied *per curiam* on May 19, 2025. Pet. App. B.

REASONS TO DENY CERTIORARI

Petitioner contends the court of appeals erred in its evaluation of Kline's remarks, particularly that the court's treatment of the "stray remarks" doctrine and the "cat's paw" theory contravene the Court's decisions in *Reeves* and *Staub,* respectively, and widens a circuit split. Pet. 8-10. Petitioner additionally challenges the court's use of the "nearly identical" standard to evaluate circumstantial evidence of discrimination, arguing that it is unworkable and widens a circuit split. Pet. App. 10. Further review of these issues is unwarranted for multiple reasons.

A. The Fifth Circuit's application and treatment of the stray remarks doctrine and cat's paw theory was proper and consistent with *Reeves* and *Staub*, and there is no genuine conflict between the Fifth Circuit's decision here and other circuits

Petitioner challenges the court of appeals' evaluation of Kline's remarks on two fronts: first, that the court of appeals "mechanically" applied a four-part test, known as the "CSC test," and dismissed Kline's remarks as "irrelevant as a matter

[5] Petitioner does not challenge the court of appeals' use of the "clearly less qualified" standard here.

of law;" and second, that the court ignored the "cat's paw" theory altogether. Pet. 8-10. For several reasons, neither challenge warrants further review.

1. **Petitioner did not directly raise the "cat's paw" challenge below and this case would be a poor vehicle for the Court to rule on that theory and the "stray remarks" doctrine**

To start, Petitioner did not directly raise or challenge the court's application of the "cat's paw" theory below. Instead, he focused on three discrete arguments: (1) that Kline's conduct and use of racially-charged language was sufficient by itself to raise a material fact issue, (2) that he received disparate treatment compared to White employees who had fewer or shorter area walkthrough exams, and (3) that the training he received was deficient in several respects. Pet. App. A5-6. Thus, the court of appeals had no opportunity to fully examine or expound on the "cat's paw" theory in this case and review from this Court would necessarily require examination of issues not presented in the court of appeals' opinion. Petitioner's failure to present the argument and brief it before the court of appeals is reason alone to deny certiorari. *Hoggard v. Rhodes,* 141 S.Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari).

With respect to the "stray remarks" doctrine and the "CSC test," the court of appeals' decision shows no rigid application of the test at all. Rather, as described *infra*, the court specifically declined to discuss three of the four parts of the "CSC test" because the record overwhelmingly showed that Kline had no involvement in

or influence over Petitioner's second, third and fourth area walkthrough exams or his termination.[6] Thus, this case offers no basis for the Court to substantively analyze Petitioner's challenge that the "CSC test" as a whole contravenes *Reeves*, and it would be a poor vehicle for the Court to examine that issue.

2. The Fifth Circuit's unpublished opinion does not contravene *Reeves* or *Staub*

More importantly, the court of appeals' application of the "stray remarks" doctrine and treatment of the "cat's paw" theory in this case require no review because the decision is unpublished with little, if any, precedential effect in the Fifth Circuit and does not materially contravene *Reeves* or *Staub* in any event.

In *Reeves*, the Court clarified the proper method for evaluating evidence related to discriminatory intent, including at the summary judgment stage. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The Court emphasized the importance of looking at the record in its totality and not through rigid rules that isolate or compartmentalize evidence. *Reeves,* 530 U.S. at 151-52. Nonetheless, the Court reaffirmed that "evidence supporting the moving party that is uncontradicted and unimpeached" should be given credence when evaluating claims on summary judgment. *Id.* at 151. In *Staub,* the Court expanded somewhat on *Reeves* by

[6] For example, the court's opinion does not find that Petitioner's claims failed because Kline's remarks were not related to the employment decision or were too distant from the termination decision, which are two additional parts of "CSC test" for evaluating direct evidence of discrimination. Pet. App. A5. Thus, this case offers the Court no basis to fully examine the "CSC test" because the Fifth Circuit's unpublished opinion does not fully examine it.

clarifying that, when reviewing the entire record, evidence of discrimination may exist when a biased individual influences an employment decision, even when the individual did not have a formal role in the decision-making. *Staub v. Proctor Hosp.,* 562 U.S. 411, 423 (2011). However, *Staub* explains that evidence of biased intent is not sufficient by itself to support liability. *Staub,* 562 U.S. at 422. Rather, there must also be proof of a causal link between the biased individual's actions and the ultimate employment decision at issue. *Id*. Together, *Reeves* and *Staub* emphasize the importance of examining the record as a whole to determine whether there is probative evidence of a causal link between discriminatory animus and an employment decision. Neither of those decisions establishes a rule that prohibits dismissal on summary judgment when the record provides no evidence of the critical causal link between an individual's bias and the employment decision at issue.

Here, the court of appeals' decision is entirely consistent with *Reeves* and *Staub* because the court considered the entire record and ultimately concluded that there was no evidence of a causal link between Kline's remarks and the decision to terminate Petitioner's employment. Pet. App. A5. First, the court properly affirmed the district court's decision to strike certain evidence, including statements in Petitioner's summary judgment affidavit that conflicted with his earlier deposition testimony. Petitioner does not challenge the court's ruling on those evidentiary

issues here and, therefore, those statements and others are not part of the record.[7] Second, excluding the stricken evidence, the court reviewed the record and acknowledged Kline's early involvement in the evaluation process but noted that the record also showed that Kline was removed from all subsequent evaluations and did not participate in those evaluations or the termination decision. Pet. App. A2, 5. Petitioner argues that Kline "sabotaged" and "influenced" the process, but this is pure hyperbole and not based on any actual record evidence. Pet. 4, 6. In fact, as the court of appeals confirmed, the record offers no proof of Kline's involvement in or influence over the second, third, and fourth examinations or the termination decision. Pet. App. A2, 5. Moreover, the record offers no proof that Kline's assessment of Petitioner on the first examination had any effect on the rest of his training, the subsequent evaluations, or the termination decision. Instead, the record showed that Chevron Phillips Chemical gave Petitioner additional time to train, an unprecedented fourth opportunity to pass the area walkthrough, and multiple other evaluators who determined Petitioner did not pass, including two evaluators who were also African American and at least one evaluator who was older than Petitioner. Pet. App. A2, 5; C2-3.

[7] *See* fn. 3, *supra,* describing Petitioner's improper reference to evidence the court of appeals affirmed was properly stricken, which Petitioner does not challenge here.

In reaching its conclusion regarding the impact of Kline's remarks, the court of appeals invoked the four-part framework it announced in *Clark v. Champion Nat'l Sec., Inc.,* 952 F.3d 570, 581 (5th Cir. 2020) to determine whether Kline's remarks were sufficient to qualify as direct evidence of discrimination. Pet. App. A4-5. However, contrary to Petitioner's challenge, the court's decision does not apply the *Clark* "CSC" test in a way that deems remarks by non-decisionmakers "irrelevant as a matter of law."[8] Pet. 8. In fact, the court acknowledged that Kline was removed from the process after the first area walkthrough exam, but still analyzed whether he had any influence over the remainder of the process, including the decision to terminate Petitioner's employment. Pet. App. A5. The court's fact-based determination, from its review of the record, that there was a lack of evidence of Kline's influence is not tantamount to the court determining that such evidence would be irrelevant. In other words, the court of appeals' decision does not reflect a standard that the bias of a non-decisionmaker is immaterial in all cases, only that in this case there was no evidence of the non-decisionmaker's influence or authority over Petitioner's termination.

[8] Petitioner also suggests that the court of appeals discounted Kline's remarks because they were not made "in the immediate context of the termination." Pet. 8. This is incorrect. As described *supra*, the court never determined that Petitioner's claims failed because there were not made in the immediate context of the termination. In fact, the court did not rely at all on that prong of the four-part "CSC test" because the record was so clear that there was no connection between Kline and his discriminatory remarks, on one hand, and the decision to terminate Petitioner's employment, on the other hand. Pet. App. A5, fn. 4.

The court's decision aligns with *Reeves* and *Staub* in this regard because it looked at the entire record for evidence for a causal link between Kline's remarks, on one hand, and the ultimate termination decision, on the other. Pet. App. A5. Finding that the record showed that Kline was entirely removed from the process, that Chevron Phillips Chemical provided Petitioner additional time to train and deviated from its normal procedure by providing Petitioner a fourth opportunity to test and multiple evaluators, including some in the same protected classes as Petitioner, the court of appeals performed exactly the type of holistic examination that *Reeves* and *Staub* mandate. Pet. App. A2, 5-6. The court never applied the "stray remarks" doctrine in an exclusionary fashion that found Kline's remarks immaterial, nor did it ignore the "cat's paw" theory in evaluating Kline's potential influence over the termination decision.

3. The Fifth Circuit's unpublished opinion does not demonstrate any real conflict among the circuits regarding the "stray remarks" doctrine or the "cat's paw" theory and the outcome of this case would be the same in other circuits

The court of appeals' unpublished decision also does not create or further any real conflict among the circuits regarding the application of the "stray remarks" doctrine or the "cat's paw" theory. Although Petitioner contends that the court's use of the *Clark* "CSC" test makes it an outlier among other circuits, that is not the case and *Russell,* which Petitioner cites, is a good example of this. There, the Fifth Circuit looked at the totality of the circumstances and held that "[i]f the employee can

demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000). In other words, *Russell* shows that the Fifth Circuit has not adopted a rigid rule that categorically disregards remarks when they are not made by the ultimate decisionmaker. In line with *Russell*, the court of appeals in this case looked at the full context of the evidence, including the extent to which Kline or his remarks influenced or tainted the employment decision at issue, to evaluate whether there was probative evidence of discrimination. The court's decision does not reflect a standard that disregards or excludes "stray remarks" categorically. Rather, its decision is fact-bound and based on the fact that the record was completely devoid of any evidence of Kline's "influence" or "leverage."

All the circuits cited in the petition have similar approaches to evaluating "stray remarks," although using admittedly different terminology. For example, the Second Circuit utilizes a multi-factor framework that examines whether discriminatory remarks along with other evidence contribute to an inference of discrimination. *See Henry v. Wyeth Pharm, Inc.,* 616 F.3d 134 (2nd Cir.). The First Circuit has a materially similar framework that rejects emphasis on the speaker's formal role and focuses on the full evidentiary context to assess whether discriminatory remarks are sufficiently tied to an employment decision. *See*

Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001). Similarly, the Tenth Circuit looks at the totality of the circumstances for a nexus between remarks and an employment decision. *See Tomsic v. State Farm Mut. Auto. Ins. Co.,* 85 F.3d 1472 (10th Cir. 1996). The Seventh Circuit looks at the record as a whole to determine whether discriminatory motive can be inferred but specifically emphasizes that remarks are probative when they are made by a decisionmaker or someone who influences the decision, among other things. *See Schuster v. Lucent Technologies*, 327 F.3d 569 (7th Cir. 2003). Finally, the Ninth Circuit also looks at the full context of the evidence, including the extent to which the discriminatory remarks bear some connection to the decision-making process. *See Metoyer v. Chassman,* 504 F.3d 919 (9th Cir. 2007).

While Petitioner did not specifically invoke the "cat's paw" theory and focused instead on arguing that Kline was directly involved in the process leading to his termination when the evidence refuted his claim, the court of appeals did not ignore the theory, as Petitioner challenges. Rather, the court specifically considered whether Kline remained involved after the first exam, how the subsequent exams were handled and evaluated, and whether Kline had any influence over Petitioner's termination. In other words, the court applied the "cat's paw" theory—even if it did not specifically mention it by name—to determine whether Kline's bias tainted the process in any respect. This reflects no departure from *Staub* or conflict with the

circuits cited in the petition. Indeed, like the Fifth Circuit, those courts examine the record for a causal link between an individual's bias and the ultimate employment decision. *See Parker v. United Airlines Inc.,* 49 F.4th 1331 (10th Cir. 2022) (holding that cat's paw may apply if bias is shown to taint employment decision); *Woods v. City of Berwyn,* 803 F.3d 865 (7th Cir. 2015) (holding that cat's paw theory may apply when decisionmakers rely on input from biased individual); *Smith v. Bray, McKenna v. City of Philadelphia,* 649 F.3d 171 (3rd Cir. 2011) (applying *Staub* and holding that cat's paw theory supports liability when discriminatory motives influence employment decision). None of those courts has applied the "cat's paw" theory in a manner that compels a liability finding when the record so clearly refutes a causal connection, as is the case here.

Thus, the Fifth Circuit's decision adhered to *Reeves* and *Staub* because it examined the full context of the record, including the extent to which Kline's remarks were tethered to the employment decision. Nowhere in the court's decision does it adopt or advance a *per se* rule excluding stray remarks, nor does it disregard the "cat's paw" theory as part of the analysis. Rather, consistent with *Reeves* and *Staub*, the court evaluated the record for evidence tying Kline and his remarks to the termination decision, which was critical to the ultimate issue of discriminatory intent. Having found no connection in the record between Kline and the termination decision, the court correctly made a fact-based decision to affirm summary

judgment. The results would be the same in any of the other circuits because there simply is no record evidence linking Kline to the results of Petitioner's second, third, or fourth exams or to the termination decision. Accordingly, further review of this decision is thus unwarranted.

B. The Fifth Circuit's "nearly identical" standard is consistent with the standard applied in other circuits and this case provides a poor vehicle to review the standard

Petitioner also challenges the court of appeals' application of the "nearly identical" standard, used when assessing whether comparator evidence provides circumstantial proof of discrimination. Pet. 10-11. Petitioner specifically contends that the "nearly identical" standard is an "unworkable" "high bar" that deviates from the standard applied in other circuits, including the Sixth, Seventh, Eighth, and Eleventh circuits. But this challenge does not warrant the Court's review for several reasons.

1. Petitioner does not challenge the *McDonnell Douglas* framework generally and the Fifth Circuit's unpublished decision provides a poor vehicle for the Court to address the "nearly identical" standard

First, as a preliminary matter, Petitioner does not challenge the application of the *McDonnell Douglas* framework generally or the requirement that he establish a prima facie case when using circumstantial evidence to prove discriminatory intent. Pet. 10. Rather, his only challenge is to the court of appeals' use of the "nearly identical" standard to evaluate comparator evidence. *Id*. Thus, this case provides

no basis for the Court to revisit the well-settled burden-shifting framework announced in *McDonnell Douglas* and it respectfully should decline to do so here.

Second, review of the "nearly identical" standard is unwarranted because the court of appeals' decision on the issue is unpublished with little, if any, precedential effect regarding the application of the standard in the circuit. Indeed, as described more *infra,* the court's opinion provides little if any evaluation of the standard at all and provides this Court no substantive content on which to fully examine Petitioner's challenge to the "nearly identical" standard generally. Thus, this case is a poor vehicle for the Court to examine and rule on the standard, including regarding an alleged conflict among the circuits.

2. The Fifth Circuit did not apply the "nearly identical" standard as petitioner characterizes

In addition, review of the "nearly identical" standard is unwarranted because the court of appeals did not apply the standard as Petitioner describes. In granting summary judgment, the district court held that Petitioner made a prima facie case of both race and age discrimination but failed to create a genuine issue of material fact regarding pretext. Pet. App. C23-25. The district court did not conduct a substantive analysis of the "nearly identical" standard at all.[9] In the court of appeals, Petitioner

[9] Related to this, the district court noted that Petitioner inappropriately attempted to rely on stricken evidence regarding alleged "similarly situated" employees, but it did not provide any reasoning on the "nearly identical" standard *per se*. Pet. App. C25.

argued that there was sufficient evidence of at least one alleged comparator but never challenged the application of the "nearly identical" standard generally, as he tries to do here. Pet. App. A5-6. The court of appeals ultimately held that Petitioner's evidence fell short, but its unpublished opinion offers no substantive evaluation regarding the application of the "nearly identical" standard to the facts of this case. Pet. App. A6. More specifically, the court of appeals affirmed the district court's decision to strike certain comparator evidence, which Petitioner does not challenge here, and then concluded that there was no remaining comparator evidence to evaluate. Pet. App. A6 ("[d]isregarding the properly stricken evidence, none remains of a comparator that performed equivalently on a walkthrough."). In other words, the court reached its decision because it determined the record was devoid of *any* comparator evidence whatsoever, not because it applied the "nearly identical" standard in way that improperly evaluated Petitioner's experience against the experiences of any alleged comparators.[10] Thus, the court's decision did not turn on any substantive application of the "nearly identical" standard, and this case provides a poor vehicle for the Court to review that issue.

[10] The court affirmed the district court's decision to strike some of Petitioner's evidence either because the evidence was defective for lack of personal knowledge, or it contradicted prior sworn deposition testimony, or a witness was not timely disclosed. Pet. App. A3-4. Although Petitioner improperly refers to some of that evidence in the petition, he does not challenge those evidentiary findings here and, therefore, cannot challenge the court's decision to disregard those pieces of evidence, including those referenced in his petition. *See* fns. 3, 7, *supra.*

3. This case does not demonstrate any meaningful conflict between the Fifth Circuit's "nearly identical" standard, on one hand, and the standards used in other circuits, on the other hand

The court of appeals' unpublished decision also does not create or further any real conflict among the circuits. The Fifth Circuit has affirmed on numerous occasions that the "nearly identical" standard does not require identical experiences between an employee and alleged comparators, but rather sufficiently similar experiences that allow meaningful inferences to be drawn regarding differences in treatment. *See Lee v. Kansas City Southern Rwy.,* 574 F.3d 253 (5th Cir. 2009); *see also Owens v. Circassia Pharm., Inc.,* 33 F.4th 814 (5th Cir. 2022); *Hernandez v. Yellow Transp.,* 670 F.3d 644 (5th Cir. 2012). In this regard, the "nearly identical" standard is not a rigid rule but a functional and context-driven one, requiring examination of a variety of factors to determine if comparators are sufficiently similar to support an inference of discrimination based on differences in treatment. *Lee v. Kansas City Southern Rwy.,* 574 F.3d 253 (5th Cir. 2009). In practice, the Fifth Circuit applies the "nearly identical" standard with the same substantive lens that other courts apply using different terminology, such as "in all material respects" or "directly comparable in all material respects." *See Lewis v. City of Union City,* 918 F.3d 1213 (11th Cir. 2019); *Burton v. Arkansas Sec. of State,* 737 F.3d 1219 (8th Cir. 2013); *Coleman v. Donahoe,* 667 F.3d 835 (7th Cir. 2012); *Bobo v. United Parcel Svc., Inc.,* 665 F.3d 741 (6th Cir. 2012). Like these other courts, the Fifth

Circuit looks for material similarities, not exact congruence. Thus, to the extent there is any difference between the Fifth Circuit's "nearly identical" standard and the standards other circuits have adopted, the difference is primarily semantic, not substantive. *See Reeves,* 530 U.S. at 150. In any event, the court's decision in this case provides no meaningful opportunity to examine the "nearly identical" standard against standards articulated in other circuits because, as described *supra,* the court's decision was fact-driven, based in part on evidentiary rulings that Petitioner does not challenge here, and did not turn on a substantive application of the "nearly identical" standard. For all these reasons, further review is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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