No. 26-100

In the Supreme Court of the United States

SHANNON CROSS, *Petitioner*

v.

CENTRAL CONTRA COSTA TRANSIT AUTHORITY

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

BRIEF OF *AMICUS CURIAE*
PROTECT THE FIRST FOUNDATION
SUPPORTING PETITIONER

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

Civil trials have long rested on a simple division of authority. The judge decides whether the evidence can support a verdict. The jury decides which inference to draw when reasonable minds can differ about the facts. That division was preserved in the Seventh Amendment. And this Court's summary-judgment cases state it in the same terms: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Courts can disrupt that division by applying the *McDonnell Douglas* "order and allocation of proof" framework for Title VII cases at summary judgment. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800, 802-803 (1973). The problem arises when *McDonnell Douglas*'s "pretext" step tempts courts to cross the line Rule 56 polices: choosing between two reasonable accounts of why an employer acted. That happened here. The courts below accepted how the employer described the crash despite a contrary on-board video and an accident-reconstruction expert who

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus*' intent to file this brief.

faulted the bicyclist. Pet.26. The courts thus failed to consider the evidence as a whole.

That error is particularly concerning to *Amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for religious freedom and other First Amendment rights. Because religious-discrimination claims frequently require motive to be inferred from circumstantial evidence, PT1 has a particular interest in preserving disputed questions of motive for the jury.

ADDITIONAL REASONS FOR GRANTING THE PETITION

The petition identifies a recurring problem when courts apply *McDonnell Douglas* at summary judgment. PT1 agrees with Petitioner that the *McDonnell Douglas* framework "has strayed far from its original purpose and now operates to deny employment discrimination plaintiffs the same right to a jury trial that every other civil litigant enjoys." Pet.13. PT1 writes separately to supply the historical and constitutional context for the line the petition asks this Court to draw. At common law, judges screened evidence for legal sufficiency, and juries resolved competing reasonable factual inferences. Rule 56 preserves that allocation. Yet application of *McDonnell Douglas* can blur that boundary at summary judgment. Its "pretext" inquiry can become a judicial choice between competing reasonable explanations for why an employer acted. This case cleanly presents that problem and lets the Court reaffirm a simple rule. Courts may screen factual inferences for reasonableness, but they may not choose among competing reasonable inferences.

I. Choosing Among Competing Reasonable Factual Inferences Is Constitutionally Reserved for the Jury.

This Court has recognized that because the "[m]aintenance of the jury as a fact-finding body" is of central importance, any limit on the Seventh Amendment jury right "should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). That scrutiny looks to the jury trial right as it stood at common law in 1791. *Id.* at 487. Thus, the historical allocation of authority between judge and jury shows where the boundary lies.

A. The historical judge-jury allocation reserved competing reasonable factual inferences for the jury.

The common law the Framers inherited drew the same line between judge and jury that Petitioner asks this Court to draw. Period treatises, such as *Trials per Pais*, explained that juries judge facts and judges decide the law those facts yield. Giles Duncombe, *Trials per Pais: Or, The Law of England Concerning Juries by Nisi Prius* 280 (8th ed. 1766), https://tinyurl.com/yc6eh8f5. The judge's role followed, not supplanted, what the jury found. The judge "saith, the jury finds thus, and then the law is thus, and so we judge, for the law arises upon the fact." *Id.* at 7. Blackstone likewise wrote that an issue of fact "must generally speaking be determined, not by the judges of the court, but *** by jury." 3 William Blackstone, *Commentaries on the Laws of England* 315 (1768), https://tinyurl.com/puwf3jcw.

Two jury functions are central here: assessing credibility and drawing inference. Those functions were allocated to the jury. Jurors judged witness credibility "from other circumstances," and one credible witness could prove a fact. 3 Blackstone, *Commentaries* 370. Jurors could differ in the inferences drawn from the evidence "as oftentimes two Judges do" regarding legal conclusions. Duncombe, *Trials per Pais* 274. Thus, drawing a reasonable factual inference was itself a jury function. Judges, by contrast, decided what legal consequences followed from established facts and screened for legal sufficiency. They did not choose what the facts meant.

The demurrer to the evidence best illustrates this rule. A party who demurred to his opponent's evidence admitted the truth of every fact alleged but claimed those facts were legally insufficient. Upon demurrer, the jury had no further role, and the judge decided the resulting legal questions. 3 Blackstone, *Commentaries* 373. The judge ruled only after the demurrant conceded the opponent's evidence and every reasonable inference it supported. Similarly, the nonsuit withheld a case when the plaintiff's proof could not support a verdict.

The special verdict reached the same end. The jury would "state the naked facts, as they find them to be proved, and pray the advice of the court thereon." 3 Blackstone, *Commentaries* 377. The court would then apply the law to the facts the jury found. *Ibid.* And when a judge instructed a jury on a contested question of intent or its equivalent, he did so conditionally—explaining the law that followed from particular facts while leaving the jury to find those facts.

That allocation extended to the critical question here: a party's state of mind. When liability or guilt turned on state of mind, the jury ordinarily inferred it from circumstantial evidence. The eighteenth-century English case, *Pasley* v. *Freeman*, illustrates the point. In that action for deceit, the jury had to decide whether the defendant knowingly made a false representation. As Justice Ashhurst explained, it was "expressly charged that the defendant knew the falsity of the allegation," a matter "which the jury have found to be true." *Pasley* v. *Freeman*, 3 T.R. 51, 100 Eng. Rep. 450, 456 (K.B. 1789). Justice Buller noted that scienter was the jury's to find on the evidence: "[T]he plaintiff must go on to prove that it was false, and that the defendant knew it to be so." *Id.* at 454. The court decided only the legal question—whether those facts stated an actionable wrong. That question, Justice Grose wrote, "is matter of law." *Id.* at 451. So *Pasley* left state of mind to the jury and its legal consequence to the court. That same distinction is what matters in discrimination cases today.[2]

Title VII poses the same problem when liability turns on discriminatory motive. An employer will rarely announce an unlawful purpose, so a jury must infer motive from the surrounding facts. *USPS Bd. of*

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[2] The colonial record reflects the same understanding. In the 1770 Boston Massacre trial, the court instructed the jury at length on the *legal definition* of malice. *The Trial of William Wemms* 184 (1770), https://tinyurl.com/3h43cut8. But the jury, not the court, applied that definition to the facts. *Id.* at 186.

Govs. v. *Aikens*, 460 U.S. 711, 716-717 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes" and the law must inquire into "[t]he state of a man's mind."). Assigning the choice among reasonable motive inferences to a judge at summary judgment therefore usurps the jury's historic role.

Nor did substantial judicial authority at common law alter that rule. Probable cause shows how the common law drew the line. The governing English authority, *Sutton* v. *Johnstone*, treated probable cause as a single "mixed proposition of law and fact." 1 T.R. 493, 545, 99 Eng. Rep. 1215, 1245 (K.B. 1786). Whether the circumstances existed and were proved was for the jury; whether, assuming them true, they amounted to probable cause was for the court. *Ibid.* Thus, even within a single "mixed proposition," the court decided the law only after the jury found the facts. This Court confirmed that rule in *Stewart* v. *Sonneborn*. Relying on *Sutton*, it held that "the existence of malice is always a question exclusively for the jury." 98 U.S. 187, 193-194 (1878).

The jury's role was confirmed in *Farmer* v. *Darling*, 4 Burr. 1971, 98 Eng. Rep. 27 (K.B. 1766). Lord Mansfield "told the Jury, that the Foundation of this Action was MALICE," and left it to the jury to consider the implied malice arising from the baseless prosecution. *Id.* at 1971-1972. And when the losing party asked the court to set the verdict aside as against the evidence, the court could not enter judgment based on its own view of the facts. It could only order a new trial before another jury, which it declined to do. *Id.* at 1974. Thus, even when reviewing the evidence, a judge could not choose an inference and enter judgment on that choice.

To be sure, that historical allocation did not require judges to send juries cases the proof could not support. *Galloway* v. *United States*, 319 U.S. 372, 390 (1943). A judge may withhold a case when the evidence cannot reasonably support a necessary inference. *Id.* at 389-390. But sufficiency screening ends where a reasonable inference begins. *Galloway* explained that the Seventh Amendment "requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." 319 U.S. at 396. A court must prevent "mere speculation" from doing "duty for probative facts," but only "after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Id.* at 395. That boundary is what the history reveals. A judge may screen an inference for evidentiary support. But once the evidence supports competing reasonable inferences, choosing between them is for the jury.

B. Rule 56 preserves the same judge-jury allocation.

Modern summary-judgment doctrine preserves the same line. This Court has held that on a motion under Rule 56 or Rule 50 the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. The reason is simple: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Ibid.* (quoting *Anderson*, 477 U.S. at 255). Similarly, a court errs when, "[b]y weighing the evidence and reaching factual inferences contrary to [the nonmovant's] competent evidence," it resolves a dispute that belongs to the jury. *Tolan* v. *Cotton*, 572 U.S. 650, 660 (2014). Again, the judge's function "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 656 (quoting *Anderson*, 477 U.S. at 249).

Rule 56's sufficiency inquiry performs the same screening function. Under this Court's cases, the "genuine issue" standard mirrors the reasonable-jury standard for judgment as a matter of law. In each, the question is whether the evidence would let a reasonable jury return a verdict for the non-movant. *Anderson*, 477 U.S. at 251-252. The question, then, is screening, not selection—whether the nonmovant's inference is reasonable, not whether the movant's competing inference is more persuasive.

II. *McDonnell Douglas* cannot be used at summary judgment to choose among reasonable factual inferences.

That historical rule resolves the modern problem. The *McDonnell Douglas* framework may organize the evidence, but it cannot change who decides what competing evidence means. Its "pretext" step crosses that line when a court uses it not to identify a factual dispute but to resolve it. A court cannot decide that an employer's explanation outweighs the plaintiff's competing reasonable inference.

A. *McDonnell Douglas* organizes proof; it does not authorize judges to resolve factual inferences.

The *McDonnell Douglas* framework was designed to govern “the order and allocation of proof” in a Title VII case. 411 U.S. at 800. At the time, judges tried Title VII cases without juries, and the statute provided only equitable relief. *McDonnell Douglas*, 411 U.S. at 800. So, *McDonnell Douglas*’s burden-shifting steps were designed to organize proof, not to decide cases. The “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated” remained “at all times with the plaintiff.” *Tex. Dep’t of Cmty. Affs.* v. *Burdine*, 450 U.S. 248, 253 (1981).

Congress later authorized damages and jury trials for intentional discrimination. 42 U.S.C. §1981a(a)(1), (c). And courts continued to apply *McDonnell Douglas* at summary judgment, but then in cases destined for juries—a use this Court has never approved. See *Ames* v. *Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 308 & n.2 (2025); *id.* at 321 & n.4 (Thomas, J., concurring). Other courts have criticized that use. Indeed, Justice Thomas has noted the “remarkable number of lower court judges [that] have gone out of their way to describe the chaos sown by *McDonnell Douglas*.” *Hittle* v. *City of Stockton, Cal.*, 145 S.Ct. 759, 762 (2025) (Thomas, J., dissenting from denial of certiorari) (collecting cases).

One source of that confusion matters here. “Pretext” can disguise inference-selection as applying a legal test. And when “pretext” becomes something the plaintiff must prove to the judge rather than evidence from which a jury may infer discrimination, courts invade the jury's historical role in at least four ways.

First, they credit the employer's explanation as true, when a reasonable jury could disbelieve it. *Reeves*, 530 U.S. at 150-151. Second, they weigh the employer's explanation against the plaintiff's and rule for the side they find more convincing—the classic act of weighing that Rule 56 forbids. *Anderson*, 477 U.S. at 255; see also *Tolan*, 572 U.S. at 660. Third, courts compartmentalize circumstantial evidence. They examine each item alone and discount it as inconclusive, rather than asking whether a jury could reasonably infer discrimination from the whole record. *Reeves*, 530 U.S. at 150-151, 153. And fourth, they treat reasonable inferences—from suspicious timing, more favorably treated comparators, departures from ordinary procedure, shifting or post-hoc justifications, and hostile statements by decisionmakers—as insufficient because the employer also offers a lawful account. But a competing lawful inference is precisely when the *jury* must choose, *Reeves*, 530 U.S. at 147-148.

Each of these moves substitutes the court's view of the evidence for the jury's. And this Court corrected that error in *Reeves* because the court of appeals "impermissibly substituted its judgment concerning the weight of the evidence for the jury's" in holding that competing circumstances overwhelmed the plaintiff's proof of discriminatory intent. 530 U.S. at 152-153. *Reeves* also explains how pretext bears on the jury's task. A plaintiff's *prima facie* case, together with evidence that would allow the factfinder to disbelieve the employer's explanation, can support a verdict. *Id.* at 147-148. But it is for the trier of fact—not the court—to decide whether to draw that inference. *Ibid.*

The Court need not discard *McDonnell Douglas* to correct that error. Its framework may help organize the proof and identify a genuine dispute. But *McDonnell Douglas* may not resolve that dispute. Pretext is evidence from which a jury may infer discrimination. And when that inference is reasonable, the judge may not reject it only because the employer offers another reasonable account.

B. The decision below cleanly presents the recurring conflict between *McDonnell Douglas* and Rule 56.

The conflict is unusually clear here. Four categories of evidence yielded competing reasonable inferences. Yet the courts below repeatedly selected the employer's inference rather than asking, as Rule 56 requires, whether a jury could reasonably draw an inference in favor of Petitioner.

1. The employer's stated reason for terminating Petitioner was a bus-bicycle collision it deemed her fault. But an on-board video and an accident-reconstruction expert found that the bicyclist, not Petitioner, caused the collision by entering the lane unsafely. Pet.16. That evidence was not a bare assertion. It was video and expert analysis showing what caused the crash on which the employer relied. The record thus supported two inferences: that Petitioner drove negligently and was fired for it, or that she did not and the stated reason was unfounded. But on appeal, the panel instead recited the

employer's version—that Petitioner was "completely at fault"—as established fact. Pet.26. The panel did not address the video or the expert analysis at all. Choosing that account over contrary competent evidence was inference-selection, not sufficiency review. See *Tolan*, 572 U.S. at 657, 660.

2. Petitioner was the only non-probationary driver ever terminated for a collision, though her driving record was clean and she had recently completed probation with strong marks. Pet.18. Other drivers fared far better for far worse conduct: drivers who left the scene of collisions, who were dishonest, and who committed serious infractions received last-chance agreements and kept their jobs. Pet.19. From that disparity a jury could infer that the collision was not the real reason for her discharge. The courts below found Petitioner not "similarly situated" to another driver, based on the employer's explanation for why they were treated differently. Pet.21. But those distinctions did not eliminate the competing inference supported by the broader disciplinary record: that Petitioner was punished far more harshly for conduct that cost no other employee a job. The question at summary judgment was whether that inference was reasonable, not whether the employer's explanation was better.

3. Two supervisors also told Petitioner she could not wear "that" or "that thing" on her head, referring to her hijab. Pet.14. These were not remote or stray remarks. One of the supervisors who made those remarks later participated in the video review that led to Petitioner's termination. And that same supervisor then delivered the termination notice. Pet.17. That

discharge came roughly six weeks after Petitioner complained about religious harassment. Pet.20. A jury may infer discriminatory motive from a decisionmaker's hostility and role in the decision, and the decision's timing. *Reeves*, 530 U.S. at 151-153.

The record therefore supported two competing inferences: religious animus or a neutrally enforced dress code. The courts below chose the second. They adopted the employer's explanation as the "obvious alternative" to discrimination. And they treated the supervisors' statements as relevant only to a separate hostile-environment claim, declining to consider them as proof of why Petitioner was fired. Pet.31. But Rule 56 permitted the court to ask only whether the discriminatory-motive inference was reasonable. It did not permit the court to reject that inference because it found the employer's alternative more convincing.

4. The record also supports a reasonable inference that the employer assembled its reasons after deciding to fire Petitioner. The termination letter predated the police report it invoked. Management reviewed the on-board video outside the window the collective-bargaining agreement permitted. And at that point the employer had already decided to fire her. The employer also charged Petitioner with rolling-stop infractions that had never been charged against any other driver. Pet.18-19. The employer also departed from its ordinary practice, which put drivers on paid leave after a collision. Pet.17.

Standing alone, any one of these facts might be explained innocently. Considered together—as Rule 56 requires—they support a reasonable inference that the stated reasons were pretextual and assembled to justify an earlier decision to fire her. But the courts below credited the employer's reasons without confronting their timing, and they considered the evidence piecemeal rather than as a whole. Pet.21.

No single item had to compel a verdict for Petitioner. The question was whether the record, viewed in her favor, would let a jury find that religion or her protected complaints motivated her discharge. *Reeves* confirms that evidence casting doubt on an employer's explanation may support that inference. 530 U.S. at 147-148. A competing lawful explanation does not eliminate the dispute; it confirms it.

CONCLUSION

Rule 56 allows judges to screen for sufficiency, not choose among competing reasonable factual inferences. Recurring misapplications of the *McDonnell Douglas* framework cannot be allowed to erase a boundary that predates Rule 56 and is preserved by the Seventh Amendment. The petition should be granted.

Respectfully submitted,

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