

IN THE
Supreme Court of the United States

SHANNON CROSS, *Petitioner*,
v.

CENTRAL CONTRA COSTA TRANSIT
AUTHORITY, *Respondent*.

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

REPLY BRIEF FOR PETITIONER

Kelly J. Shackelford
Jeffrey C. Mateer
David J. Hacker
Stephanie N. Taub
Everett C. Martin
First Liberty Institute
2001 W. Plano Pkwy,
Suite 1600
Plano, TX 75075
(972) 941-4444

Rebecca R. Dummermuth
Moriah G. O'Hare
First Liberty Institute
1331 Pennsylvania Ave
NW, Suite 1410
Washington, DC 20004

Jeremy Loren Friedman
Counsel of Record
2801 Sylhowe Road
Oakland, CA 94602
(510) 530-9060
jlfried@comcast.net

Alan J. Reinach
Jonathon Cherne
Church State Council
2686 Townsgate Road
Westlake Village, CA
91361
(805) 413-7398

Counsel for Petitioner

October 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
ARGUMENT	2
I. The Question Presented Is Important	2
II. The Question Requires this Court's Intervention	5
III. This Case Is an Excellent Vehicle	7
IV. The Petition Should Be Granted	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Ames v. Ohio Department of Youth Services</i> , 605 U.S. 303 (2025)	2, 3
<i>Awe v. Harris Health Sys.</i> , 163 F.4th 969 (5th Cir. 2026)	2, 6, 7
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020)	4, 12
<i>Brady v. Off. of Sergeant at Arms</i> , 520 F.3d 490 (D.C. Cir. 2008)	6
<i>EEOC v. Abercrombie & Fitch Stores, Inc.</i> , 575 U.S. 768 (2015)	4
<i>Groff v. DeJoy</i> , 600 U.S. 447 (2023)	6
<i>Hittle v. City of Stockton</i> , 145 S. Ct. 759 (2025) . .	2, 3
<i>Hollis v. Morgan State Univ.</i> , 153 F.4th 369 (4th Cir. 2025)	6

<i>Postal Service Board of Governors v. Aikens</i> , 460 U.S. 711 (1983)	3
---	---

<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	6
---	---

<i>Tynes v. Florida Department of Juvenile Justice</i> , 88 F.4th 941 (11th Cir. 2023)	6
---	---

Statutes

California Vehicle Code § 22106	9
---	---

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(m)	4, 12
--	-------

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(g)	12
--	----

REPLY BRIEF

Respondent contends there is no conflict between ordinary summary judgment standards and the *McDonnell Douglas* framework, which it concedes the Ninth Circuit “correctly” and “faithfully applied.” Yet, as this case demonstrates, imposing *McDonnell Douglas* at summary judgment is incompatible with Rule 56 and this Court’s decision.

Under ordinary Rule 56 standards, Shannon Cross’s claims would have reached a jury. Viewing the record in the light most favorable to the non-moving party, a reasonable jury could readily conclude Cross’s religious practice or complaints of religious harassment was a motivating factor in her termination. Supervisors pressured her to stop wearing her hijab; co-workers mocked her while management watched; and the bus authority never investigated her claims of anti-Muslim harassment. Then, a bicyclist violated traffic rules, lost his balance and bumped into the side of the bus. Although Cross had been rated “exceptional behind the wheel,” she was terminated before she returned to the yard. She was the *only* non-probationary employee ever fired for a collision, despite hundreds of preventable collisions, and worse conduct, by other bus drivers.

Despite this record, the lower courts imposed the *McDonnell Douglas* framework, credited the employer’s disputed account, and put on Cross burdens neither Title VII nor Rule 56 allow. Now, this petition asks the Court to resolve an important and recurring question, and restore to employment cases the ordinary legal standards that govern every other civil action.

ARGUMENT

I. The Question Presented Is Important

Respondent contends the question is unimportant because this Court denied certiorari in *Hittle v. City of Stockton*, 145 S. Ct. 759 (2025), and in other petitions seeking review of the McDonnell Douglas framework. Br. in Opp. 1, 11-12. Quoting from *Ames v. Ohio Department of Youth Services*, 605 U.S. 303, 308 n.2 (2025), Respondent claims the framework “merely aims to provide a sensible, orderly way to evaluate the evidence.” Br. in Opp. 17. Respondent is mistaken on both counts.

Denials of certiorari are not decisions on the merits, and they say nothing about the importance of a question or the fitness of a vehicle. Petitions have percolated for decades precisely because the framework is unworkable. A “resounding chorus” of federal judges – including members of this Court – has called for its reconsideration at summary judgment. *Awe v. Harris Health Sys.*, 163 F.4th 969, 975 (5th Cir. 2026) (Elrod, C.J., concurring) (collecting cases). Justice Thomas has written that the framework is “unworkable” and that those “who have carefully grappled with the framework for decades cannot make sense of it.” *Ames*, 605 U.S. at 326 (Thomas, J., concurring). The denials show only that this Court has been waiting for the right vehicle – a case where the courts imposed the framework on the basis of an employer’s disputed account, and where application of Rule 56 would otherwise have sent the case to a jury. This is just such a case.

Respondent's reliance on *Ames* fares no better. The very language Respondent quotes comes from a footnote in which the unanimous Court assumed without deciding that the framework applies at summary judgment. *Id.* at 308 n.2 (quoting *Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). The questions at oral argument and the concurrence made plain that the propriety of applying *McDonnell Douglas* at summary judgment is very much an open question. *See Ames*, 605 U.S. at 321 n.4 (Thomas, J., concurring) ("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"). *See also Hittle*, 145 S. Ct. at 761 n.2 (Thomas, J., dissenting from denial of certiorari) ("As far as I can tell, this Court has never applied *McDonnell Douglas* in a Title VII case in the summary-judgment context").

The question presented by this petition is important because the *McDonnell Douglas* framework precludes courts from doing what Rule 56 requires: apply ordinary summary judgment standards in discrimination and retaliation cases. The framework inverts the Rule 56 inquiry at every stage. It sorts the employee's evidence into 'direct' and 'indirect' categories, applying different standards of proof to each. It imposes a prima facie burden on the employee – the non-moving party – to establish that employees who received better treatment were "comparably situated." It permits the employer – the moving party – to rebut a presumption of unlawful motivation merely by articulating a single non-discriminatory or non-retaliatory reason, without proving that the reason

was the *only* motivating factor. And it requires the employee to show that the articulated reason was not the real reason – a task Rule 56 never imposes on a non-moving party. In short, the framework compels a court to resolve, in the moving party’s favor, precisely the disputed questions of motive that Rule 56 leaves to the jury.

The third step of *McDonnell Douglas* conflicts with *Bostock v. Clayton County*, 590 U.S. 644 (2020). The framework’s notion of “pretext” requires the employee to disprove the employer’s stated reason – to show the stated reason was not the real reason. That presupposes an employment decision has a single true cause: either the lawful reason, or one made unlawful under Title VII. *Bostock* rejects that premise. A defendant “cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.” *Id.* at 656 (original emphasis). More than one cause can be true; the employer’s reason can be genuine, and discrimination can be a motivating factor. Because a protected characteristic is actionable if it was merely “a motivating factor,” the employee need not show that the employer’s lawful reason was false or pretextual. 42 U.S.C. § 2000e-2(m).

The *McDonnell Douglas* framework also nullifies *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015), which holds that “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” At summary judgment, the framework lets an employer defeat a religious-discrimination claim by pointing to a neutral-sounding rule – such as a dress code – even

where the practice and asserted infraction are the same act. Rule 56 reserves for the jury to determine between competing reasonable inferences about the employer’s motivation. *See* Brief of Amicus Curiae Protect the First 3-7, Cross v. Central Contra Costa Transit Authority, No. 26-100 (U.S. Sept. 14, 2026).

McDonnell Douglas’s inversion of burdens under Rule 56 in Title VII cases has real consequences for the lower courts. Summary judgment is granted in employment discrimination cases far more often than in other civil litigation – roughly seventy-seven percent of the time, compared with sixty-one percent in tort cases and fifty-nine percent in contract cases. *See* Brief of Amici Curiae California Employment Lawyers Association *et al.* 13-15, Cross, No. 26-100 (U.S. Sept. 14, 2026). Because the framework unfairly favors the employer at summary judgment, Title VII cases often do not settle early, and they generate more motion practice than other civil litigation. The framework has created a special class of civil plaintiffs – employees – held to a more demanding standard than any other, and denied the right to have a jury decide the disputed questions of motive and credibility these cases present. *See* Brief of Amicus Curiae Muslim Public Affairs Council 13-18, Cross, No. 26-100 (U.S. Sept. 14, 2026).

II. The Question Requires this Court’s Intervention

Respondent argues Petitioner has not identified a clean “split” between circuits. Br. in Opp. 8. The Petition instead points to opinions across circuits that highlight the deeply fractured state of the law caused by federal courts struggling to apply a broken

framework. Pet. 15-16, 19-22. The fractures are real and will not heal on their own; they are the product of a framework lower courts feel bound to apply.

Respondent observes that no circuit has repudiated the *McDonnell Douglas* framework. Br. in Opp. 1, 17-18. That absence of abandonment is not a sign that all is well, however. It is a sign that correction must come from this Court. No lower court may abandon what it takes to be a decision of this Court, and no circuit can correct it in a meaningful way. Only this Court can disabuse the lower courts of a decades-long assumption about the framework's reach. *Cf. Groff v. DeJoy*, 600 U.S. 447, 471-72 (2023) (correcting the courts of appeals' misreading of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), under Title VII's religious-accommodation provision).

Respondent suggests that the circuit courts are working to address "any 'confusion' surrounding *McDonnell Douglas*." Br. in Opp. 17. The decisions respondent cites prove the opposite. The Fifth Circuit in *Awe*, the Eleventh Circuit in *Tynes v. Florida Department of Juvenile Justice*, 88 F.4th 941 (11th Cir. 2023), the Fourth Circuit in *Hollis v. Morgan State Univ.*, 153 F.4th 369 (4th Cir. 2025), and the D.C. Circuit in *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008), each recognized the framework's distortion and strained to reach the correct result around it. A framework that can only be saved by straining, case by case, is not a workable framework. Law is not result-oriented; it is made up of well reasoned and consistently applied principles. So long as the framework remains applicable at summary

judgment, courts will be compelled either to follow it to an unjust result or to labor to avoid it.

The circuit courts cannot self-correct. As aptly stated by Chief Judge Elrod in *Awe*, the lower courts are bound by a framework that compels results that conflict with Rule 56. 163 F.4th at 975-76 (concurring). The *McDonnell Douglas* framework leads lower courts to resolve disputed questions of motive that Rule 56 leaves to the jury – a standard applied in no other category of civil litigation. Only this Court can free the lower courts to do what they know how to do: apply Rule 56.

III. This Case Is an Excellent Vehicle

As demonstrated in the petition, Cross presented evidence of facts which, under Rule 56 standards, were sufficient for a jury to find in her favor on the motivation element – that a discriminatory or retaliatory motive was a contributing factor in her termination. Pet. 3-11, 16-17. Viewed as a whole and in the light most favorable to Cross, the record shows:

- The employer had no religious-accommodation policy and began enforcing a headwear ban only after she sought to wear her hijab.
- Supervisors pressured Cross to abandon her religious practice; one chased her down and another gave her a disgusted look and called her hijab “that thing.”
- Coworkers mocked Cross about seeking permission to wear a hijab while the supervisor stood by, and even participated.

- Because of this workplace harassment, Cross experienced anxiety and fear on a daily basis.
- Human Resources refused to investigate Cross's complaints about the religious harassment.

Pet. 4-6.

Then, a bicyclist jumped off the curb into her lane, with less than a second before the bus passed, without looking or signaling. He turned his wheel, lost his balance, and fell into the side of the bus. Knowing this, the employer nonetheless abandoned its progressive discipline policy and determined to summarily terminate Cross before she even returned to the yard. Aline Carroll – about whom Cross had complained to HR after she told Cross she could not wear “that thing” – delivered the notice of termination with a “pleased and smug look on her face.” Pet. 6-7.

Despite being rated as “exceptional behind the wheel” and *not having a single prior incident*, Cross was the only non-probationary employee ever fired for a collision, out of hundreds of preventable collisions and worse conduct by other drivers. Pet. 3, 6-9. One other driver – Ronnette Brown – violated several safety measures when she ran over and seriously injured a teenage bicyclist; and yet, Brown was not even disciplined. Pet. 9-10. Only three had ever been denied a last-chance agreement, and two of them – Cross and Keith Polee – had complained of harassment. Pet. 10.

This evidence is more than enough to create a genuine issue of material fact, and it should have ended the inquiry. But the Ninth Circuit never applied Rule 56 standards. It imposed the *McDonnell Douglas*

framework in a way that compartmentalized and dismissed much of Cross's evidence while crediting the employer's account of disputed facts. The framework's application here is the problem this petition presents: evidence sufficient to reach a jury was resolved against the employee on a paper record.

Respondent repeats that error. Its brief credits the employer's disputed account and views every fact through that lens. Br. in Opp. i, 2, 4-6, 21-23. Although the employer asserted that it relied on evidence of multiple safety and vehicle code infractions, it submitted no such evidence into the record. Each is a disputed question of fact about the employer's motivation for the jury to resolve at trial, not the judge to resolve on summary judgment.

Completely at fault. Respondent repeats that Cross was "completely at fault" for the collision. The video shows the bicyclist hop into Cross's lane just before the bus passes him, without looking or signaling, then wobble and fall into the side of the bus. Pet. 6. After reviewing the same video viewed by the employer, bicycle safety expert David Brinton concluded that the bicyclist caused the collision by unsafe actions in violation of California Vehicle Code § 22106. Pet. 6. Cross never received any points on her driving record. Pet. App. 42a, ¶62. The police report respondent relies upon postdates the termination letter, Pet. 8, and the officer who wrote it did not witness the incident; neither the report nor respondent's account can replace the jury viewing the video and deciding for itself what happened.

Repeatedly violated traffic laws. The only infraction Respondent suggested was the “three-foot rule,” which did not apply because the bicyclist was stationary and not “proceeding” in the lane. Alleged stop-sign, speeding, and phone violations were never cited or documented. The employer raised them only after the termination decision was made, and never put that evidence into the record on summary judgment. Pet. 8-9.

Brown was not similarly situated. The courts below adopted the employer’s disputed assertion that Brown was not comparable. And yet, whether Brown – a driver with a record of prior incidents and whom the employer itself initially found at fault – was comparable to Cross is a question of fact for the jury. Pet. 9-11.

Dress code, not religion. The courts accepted the employer’s account that the supervisors were “merely attempting to enforce the dress code.” Pet. 20; Pet. App. 3a, 17a. But the headwear ban was not enforced before Cross sought to wear her hijab, and her hijab was in uniform colors. Pet. 4, 17. The supervisors *possibly could* have been enforcing a neutral rule; but whether they were is precisely the fact question Rule 56 reserves for the jury.

The *post hoc* nature of the employer’s reasons confirms their weakness. The termination letter, dated June 13, cited a police report that was not even issued until June 19. The “preventability” determination came after the termination. The employer searched unknown hours of video outside the window the union agreement permitted, and did so after she had already been fired.

Pet. 8-9. Respondent describes a considered “final discharge decision” (Br. in Opp. 2, 5, 21-22); but the record shows the decision to terminate preceded the process (Pet. 6-9).

In short, this case squarely presents the flaws of the *McDonnell Douglas* framework because its imposition leads courts to invert ordinary summary judgment standards. Respondent urges this Court to credit the employer’s version of disputed facts, to compartmentalize Cross’s evidence, and to resolve against her questions of motive that Rule 56 leaves to the jury. Had the courts below applied ordinary summary judgment principles, Cross would have had her day in court. The judicially imposed framework deprived her of the jury determination of the employer’s contested motivation that Rule 56 guarantees – and this case is the vehicle through which the Court can correct that error.

IV. The Petition Should Be Granted

The petition asks this Court to restore ordinary Rule 56 standards to Title VII cases. The *McDonnell Douglas* framework is judicially imposed, atextual, and incompatible with Rule 56 and this Court’s decisions. It has been used to deny employees the jury trial right every other civil litigant enjoys. This case shows the harm: a jury-worthy record resolved against the employee on paper.

Respondent invokes *McDonnell Douglas* as “well-settled statutory precedent,” but *stare decisis* is not implicated. This Court has never held the framework applies at summary judgment – the precise

question presented by this petition. The cases respondent cites (Br. in Opp. 14-15) addressed the framework's operation. An opinion clarifying that the framework does not apply at summary judgment would correct a decades-long misconception in the lower courts without overruling any decision of this Court.

Nor did Congress "leave the framework intact." Br. in Opp. 15. Congress changed the framework's premises by authorizing jury trials and adopting a motivating-factor standard – one which holds employers liable "even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Congress addressed the "alternative non-discriminatory reason" problem directly, making the employer's lawful reason, at best, an affirmative defense to continuing damages. *Id.* § 2000e-5(g)(2)(B). Respondent pleaded that defense but neither moved on it nor carried its burden.

Respondent advocates for a related rule this Court also has never endorsed: an "honest belief" in a non-discriminatory or non-retaliatory reason insulates an employer's decision to impose an adverse employment action even if that reason was wrong. Br. in Opp. 13, 18, 23. Any so-called "honest belief" rule would be fundamentally at odds with *Bostock*. An employer's sincere belief in a lawful reason does not prove that a discriminatory or retaliatory motive was absent. "Honest belief" is thus no substitute for what Rule 56 and *Bostock* together require for an employer to prevail on summary judgment: a showing, as a matter of undisputed fact, that a prohibited motive played no contributing part in the decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelly J. Shackelford
 Jeffrey C. Mateer
 David J. Hacker
 Stephanie N. Taub
 Everett C. Martin
 First Liberty Institute
 2001 W. Plano Pkwy,
 Suite 1600
 Plano, TX 75075
 (972) 941-4444

Rebecca R. Dummermuth
 Moriah G. O'Hare
 First Liberty Institute
 1331 Pennsylvania Ave
 NW, Suite 1410
 Washington, DC 20004

Jeremy Loren Friedman
Counsel of Record
 2801 Sylhowe Road
 Oakland, CA 94602
 (510) 530-9060
 jlfried@comcast.net

Alan J. Reinach
 Jonathon Cherne
 Church State Council
 2686 Townsgate Road
 Westlake Village, CA
 91361
 (805) 413-7398

October 28, 2026

Counsel for Petitioner