

No. 26-317
IN THE
SUPREME COURT OF THE UNITED STATES

NICHOL ROYSTON,
Petitioner,

v.

CITY OF SCOTTSDALE, ARIZONA,
Respondent.

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

SUPPLEMENTAL BRIEF FOR THE
PETITIONER

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INTRODUCTION

Supreme Court Rule 15.8 permits a party to file a supplemental brief “at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.” Pursuant to that Rule, Petitioner Nichol Royston respectfully brings to the Court’s attention intervening matters arising after she filed her petition on May 21, 2026. These matters include related petitions, as well as subsequent decisions in the courts of appeals bearing on both Questions Presented.

These developments reinforce the importance of the questions already presented. They do not alter or expand those questions. Rather, they provide additional authority and related proceedings that illuminate the conflict and recurring issues identified in the petition.

ARGUMENT

I. *Cross* Presents a Related Question Now Pending Before This Court

A. Procedural history of *Cross*

Cross v. Central Contra Costa Transit Authority, No. 26-100, was filed after Petitioner filed this petition. On August 13, 2026, following the respondent’s waiver, this Court called for a response, which is due October 14, 2026.

B. The question *Cross* presents

Cross asks whether a court may accept an employer's asserted legitimate, nondiscriminatory reason at summary judgment when that reason is disputed and the record contains evidence from which a reasonable jury could find pretext. The question arises from the application of the *McDonnell Douglas* framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Cross* contends that Federal Rule of Civil Procedure 56 requires courts to consider the evidence as a whole and leave credibility determinations and the weighing of competing evidence to the jury. *Cross* Pet. 19–26 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150–151 (2000)). *Cross* also contends that the Ninth Circuit failed to address the evidence that directly contradicted the employer's asserted legitimate reason. *Cross* Pet. 12.

C. Why *Cross* bears directly on this case

That issue bears directly on Question Presented No. 2 as the Ninth Circuit affirmed summary judgment on Petitioner's ADA claims by accepting the City's asserted legitimate reasons: "the need for consistent coverage in the photo enforcement and vehicle impound units; the existing backlog in the photo enforcement unit; and Plaintiff's frequent absences." App. 3 (citing *Snead v. Metropolitan Property & Casualty Insurance Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001)). In doing so, the Ninth Circuit did not address the City's own admission that the rescinded position could not be reposted or filled for a

year, Pet. 7; *see* App. 1–4, just as the Ninth Circuit in *Cross* did not address the evidence contradicting her employer's reason, *Cross* Pet. 12. That is the kind of failure *Cross* asks this Court to review. Petitioner raised the summary-judgment issue in her petition, arguing that the record contains "disputed material facts that warrant review by a jury," Pet. 21, and that this disputed evidence, viewed in her favor, permitted a reasonable jury to find the City's explanations inconsistent, unworthy of credence, and pretextual, Pet. 6–8, 20–22. The foregoing is offered not as reargument, but to establish relevance.

Cross highlights that this failure to account for contradictory evidence at summary judgment is not an isolated error, but a recurring issue in the Ninth Circuit's application of *McDonnell Douglas*. The connection to *Cross* is therefore not that the cases involve identical facts, but that both turn on how courts must treat an employer's asserted legitimate reason when competing record evidence contradicts it. Petitioner's second question asks whether past or predicted protected leave may serve as a legitimate reason at all, Pet. i, and that issue was resolved against her below using the same framework now challenged in *Cross*. Thus, *Cross* bears directly on this petition.

D. The issue continues to recur

On August 3, 2026, the Fifth Circuit reversed summary judgment in *Liedtke v. City of Austin*, No. 25-50717, emphasizing that summary judgment is not the stage for choosing between competing factual narratives and that the evidence must be considered

as a whole. *Liedtke v. City of Austin*, No. 25-50717, slip op. at 27 (5th Cir. Aug. 3, 2026). And on September 16, 2026, a petition was filed with this Court in *Bassett v. Gray Media Group, Inc.*, No. 26-385, presenting a related question concerning the application of *McDonnell Douglas* at summary judgment.

II. Post-Filing Decisions Confirm That the Ninth Circuit's Decision Conflicts With the Application of *Muldrow* in Other Circuits

When Petitioner filed her petition, she explained that the Ninth Circuit's adverse-action analysis conflicts with this Court's decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), and with the approach taken by other courts of appeals. Pet. 13–15.

Since then, the Sixth Circuit has further addressed the issue. In *Ahmed v. Hamtramck Public Schools*, No. 24-1775 (6th Cir. June 15, 2026), with the Department of Justice participating as amicus curiae, the court held that an employee need not show a reduction in pay to establish the harm required under *Muldrow*. The court explained that its pre-*Muldrow* caselaw on the issue “does not survive the Supreme Court’s subsequent decision in *Muldrow*”. Slip op. at 8.

That decision bears directly on Question Presented No. 1. The Ninth Circuit panel emphasized that Petitioner’s reassignment “did not change her rank, title, or salary.” App. 2. And it disposed of

Petitioner’s claims by citing pre-*Muldrow* circuit precedent, including *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233, 1237 (9th Cir. 2012), App. 2, a decision that, as the petition explained, the en banc Tenth Circuit had already rejected as “an outlier.” Pet. 10 (citing *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784, 810 (10th Cir. 2020) (en banc)).

Additionally, on September 3, 2026, a petition was filed with this Court in *Barnett-Morgan v. Inverness Technologies, Inc.*, No. 26-327, arising from a decision in which the Sixth Circuit acknowledged that *Muldrow* “does not neatly answer how to characterize Barnett-Morgan’s reassignment,” slip op. at 9 (6th Cir. June 8, 2026). That petition shows the question is recurring and important.

III. Post-Filing Authority Bears Directly on Question Presented No. 2

Question Presented No. 2 asks whether the ADA and the FMLA allow employers to use past protected leave or speculative future leave related to a disability as a legitimate reason for adverse actions without following the ADA’s interactive process or showing undue hardship. Pet. i.

Since the petition was filed, the Eighth Circuit decided *Klimek v. CentraCare Health System*, No. 25-1837 (8th Cir. June 15, 2026), a published decision reversing summary judgment for the employer on an ADA failure-to-accommodate claim. There, the employer relied on a hypothesized future burden: that it might need to return a disabled employee from

remote work to in-person work. The Eighth Circuit rejected reliance on speculative circumstances, holding that an undue hardship must rest on case-specific circumstances, cannot be proved by hypothetical facts, and “must be sufficiently real rather than speculative.” *Klimek*, slip op. at 13 (quoting *Naylor v. County of Muscatine*, 151 F.4th 973, 976 (8th Cir. 2025)). Notably, the Eighth Circuit applied the *McDonnell Douglas* framework to the failure-to-accommodate claim, yet required the employer at the burden-shifting stage to “prove that it was unable to accommodate the employee” by demonstrating undue hardship, not merely to articulate a legitimate reason. *Id.* at 4, 13 (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002)).

The significance of *Klimek* is not that the facts are identical but that it provides post-filing appellate authority addressing the distinction between a demonstrated, case-specific burden and a speculative future burden under the ADA. That distinction bears directly on the question.

IV. Post-Filing Matters Reveal a Recurring Issue in the Ninth Circuit

On October 5, 2026, after Petitioner filed her petition, this Court denied certiorari in *Petersen v. Snohomish Regional Fire & Rescue*, No. 25-1210. Similar to this petition, *Petersen* challenged the Ninth Circuit’s acceptance at summary judgment of an employer’s forward-looking predictions of hardship without proof that the predicted burden would actually occur.

Cross, *Petersen*, and this case share a common, recurring procedural posture. In all three, a public employer secured summary judgment in the Ninth Circuit notwithstanding evidence that the petitioners claimed should have precluded summary judgment. These cases were decided by different panels with no panel judges in common, and in all three, rehearing en banc was sought and denied. Collectively, the petitions claim that the Ninth Circuit misapplied or departed from this Court’s established precedents, including *Bostock v. Clayton County*, 590 U.S. 644 (2020), *Groff v. DeJoy*, 600 U.S. 447 (2023), *Anderson*, 477 U.S. at 255, *Muldrow*, 601 U.S. 346, and *McDonnell Douglas*, 411 U.S. 792. Although *Cross* and *Petersen* arise under Title VII, and this case arises under the ADA and FMLA, the Ninth Circuit applies the same summary-judgment framework across those statutes. App. 3; see App. 4 n.1.

Cross describes the same pattern: the Ninth Circuit “has retreated into unpublished memorandum dispositions that apply *McDonnell Douglas* to credit the employer’s account,” and “the lower courts will not — and in the Ninth Circuit, given the pattern of unpublished dispositions, cannot — correct it themselves.” Cross Pet. 18. Like *Cross*, this case was resolved in an unpublished memorandum disposition. App. 1.

The Ninth Circuit is the nation’s largest federal circuit, spanning nine States and two territories and covering more American workers than any other. When these issues recur across three distinct panels and multiple federal statutes, and rehearing en banc is repeatedly denied, they will not correct themselves.

That recurring pattern warrants this Court's attention.

CONCLUSION

Post-filing developments reinforce that this case presents a clean vehicle to address these recurring issues. The judgment below rests on two alternative grounds, both of which turn on legal standards that this Court can clarify without resolving disputed facts. Properly applied, *Muldrow* addresses the first ground, regarding adverse employment action, as *Ahmed* confirms. *Cross* addresses the second ground, regarding the summary-judgment treatment of an employer's legitimate, nondiscriminatory reason when competing evidence exists. Resolved in Petitioner's favor, those questions would eliminate both grounds supporting the judgment below.

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the petition should be granted. Alternatively, Petitioner respectfully requests that the Court hold this petition pending its disposition of *Cross* and, if review is granted there, dispose of this petition as appropriate in light of that decision.

Respectfully submitted,

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Dated: October 7, 2026