No.

In the Supreme Court of the United States

HUA JIANG,

Petitioner,

v.

CITY OF TULSA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Ames v. Ohio Department of Youth Services*, this Court "assume[d] without deciding that the *McDonnell Douglas* framework applies at the summary-judgment stage of litigation." 605 U.S. 303, 308 n.2 (2025). The courts of appeals regularly use the framework at summary judgment but disagree about whether doing so is mandatory. Some require plaintiffs lacking direct evidence of discrimination to proceed through the framework; others permit them to instead rely on the whole record outside the framework. Two Members of this Court have also expressed willingness to reconsider its use at summary judgment. *See id.* at 319 (Thomas, J., joined by Gorsuch, J., concurring).

The questions presented are:

1. Whether a Title VII plaintiff relying on circumstantial evidence must satisfy the three-step framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to survive summary judgment, or may instead establish a triable claim by showing that the evidence as a whole would permit a reasonable jury to find intentional discrimination.

2. Whether *McDonnell Douglas* should be overruled or held inapplicable at summary judgment in Title VII cases.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Hua Jiang was the plaintiff in the district court and plaintiff-appellant in the court of appeals. Because petitioner is an individual, Rule 29.6 requires no corporate disclosure statement.

Respondent is the City of Tulsa, Oklahoma, which was the defendant in the district court and defendant-appellee in the court of appeals.

STATEMENT OF RELATED CASES

The following proceedings are directly related to this case under Rule 14.1(b)(iii):

Jiang v. City of Tulsa, No. 25-5097 (10th Cir. July 20, 2026) (order denying petition for rehearing en banc)

Jiang v. City of Tulsa, No. 25-5097 (10th Cir. Mar. 17, 2026) (order affirming grant of summary judgment)

Jiang v. City of Tulsa, No. 4:23-CV-00255-CVE-CDL (N.D. Okla. June 2, 2025) (opinion and order granting summary judgment)

Jiang v. City of Tulsa, No. CJ-2023-01968 (Okla. Dist. Ct. Tulsa Cnty.) (removed to federal court June 26, 2023)

TABLE OF CONTENTS

Petition for a writ of certiorari 1
Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Introduction 2
Statement of the case 4
I. The *McDonnell Douglas* burden-shifting framework 4
II. Factual background 7
III. Proceedings below 10
A. State court and district court proceedings 10
B. Court of appeals proceedings 11
C. Dissent from denial of en banc review ... 12
Reasons for granting the petition 13
I. The circuits are divided over whether *McDonnell Douglas* is mandatory at summary judgment 13
A. Three circuits permit an independent Rule 56 route 14
B. Six circuits, including the Tenth Circuit, mandate *McDonnell Douglas* 16
C. The conflict is consequential, entrenched, and important 17
II. The Court should also decide whether to overrule *McDonnell Douglas* or at least hold it inapplicable at summary judgment 20
A. Judges and scholars have long criticized *McDonnell Douglas* 20
B. Two Justices recently invited reconsideration of *McDonnell Douglas* ... 22

C. *Stare decisis* does not stand in the way.. 24
III. This case is an ideal vehicle 26
Conclusion 28

APPENDIX

Opinion, United States Court of Appeals for the Tenth Circuit, March 17, 2026 ..... 1a

Opinion and Order, United States District Court for the Northern District of Oklahoma, June 2, 2025 ..... 20a

Order, United States Court of Appeals for the Tenth Circuit, July 20, 2026..... 46a

Petition, District Court for Tulsa County, Oklahoma, June 2, 2023 ..... 51a

TABLE OF AUTHORITIES

Page(s)

Cases:

Ames v. Ohio Dep't of Youth Servs.,
605 U.S. 303 (2025) ..... i, 4, 6, 13, 19-20, 22-25
Awe v. Harris Health Sys.,
163 F.4th 969 (5th Cir. 2026) 21
Barnett-Morgan v. Inverness Techs., Inc.,
No. 26-327, 2026 WL 3116594
(U.S. Oct. 19, 2026) 27
Bassett v. Gray Media Grp., Inc.,
petition for cert. filed, No. 26-385
(U.S. Sept. 16, 2026) 27
Bekkem v. Wilkie,
915 F.3d 1258 (10th Cir. 2019) 11
Brady v. Off. of the Sergeant at Arms,
520 F.3d 490 (D.C. Cir. 2008) 21
Brown v. Alaska Airlines, Inc.,
179 F.4th 707 (9th Cir. 2026) 15
Burton v. Teleflex Inc.,
707 F.3d 417 (3d Cir. 2013) 16
Canada v. Samuel Grossi & Sons, Inc.,
49 F.4th 340 (3d Cir. 2022) 16
Chen v. Dow Chem. Co.,
580 F.3d 394 (6th Cir. 2009) 17
Cherkaoui v. City of Quincy,
877 F.3d 14 (1st Cir. 2017) 16
Coleman v. Donahoe,
667 F.3d 835 (7th Cir. 2012) 21
Costa v. Desert Palace, Inc.,
299 F.3d 838 (9th Cir. 2002), *aff'd*,
539 U.S. 90 (2003) 14

Cross v. Cent. Contra Costa Transit Auth.,
petition for cert. filed, No. 26-100
(U.S. July 20, 2026) 27
Damiano v. Grants Pass Sch. Dist. No. 7,
140 F.4th 1117 (9th Cir. 2025)..... 15
David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508,
846 F.3d 216 (7th Cir. 2017) 14
Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 23-24
Domanic v. Christian Bros. Auto. Corp.,
No. 25-20486, 2026 WL 2934867
(5th Cir. Sept. 30, 2026) 22
*Etienne v. Spanish Lake Truck &
Casino Plaza, L.L.C.*,
778 F.3d 473 (5th Cir. 2015) 16
Fuentes v. Perskie,
32 F.3d 759 (3d Cir. 1994)..... 17
Green v. McDonnell-Douglas Corp.,
318 F. Supp. 846 (E.D. Mo. 1970) 5
Hall v. Coal Bed Servs., Inc.,
190 F.4th 1286 (11th Cir. 2026)..... 15, 18
Henry v. Wyeth Pharms., Inc.,
616 F.3d 134 (2d Cir. 2010)..... 7
Hittle v. City of Stockton,
145 S. Ct. 759 (2025) 5-6, 22-24, 27
Hollis v. Morgan State Univ.,
153 F.4th 369 (4th Cir. 2025)..... 22
Holloway v. Procter & Gamble Mfg. Co.,
185 F.4th 545 (5th Cir. 2026)..... 21-22
Huber v. Westar Foods, Inc.,
139 F.4th 615 (8th Cir. 2025)..... 17
Ismael v. Roundtree,
161 F.4th 752 (11th Cir. 2025)..... 15, 17-19

Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.,
585 U.S. 878 (2018) 24
Jenny v. L3Harris Techs., Inc.,
144 F.4th 1194 (10th Cir. 2025)..... 21
Kimble v. Marvel Ent., LLC,
576 U.S. 446 (2015) 26
Leath v. Collins,
No. 25-1408, 2026 WL 228827
(6th Cir. Jan. 28, 2026) 17
Licinio v. New York,
146 S. Ct. 1516 (2026) 27
Loeb v. Textron, Inc.,
600 F.2d 1003 (1st Cir. 1979)..... 20
Loper Bright Enters. v. Raimondo,
603 U.S. 369 (2024) 24-25
McCreight v. AuburnBank,
117 F.4th 1322 (11th Cir. 2024)..... 15
McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) .....i, 2-6, 10-22, 24-27
McGinest v. GTE Serv. Corp.,
360 F.3d 1103 (9th Cir. 2004) 14
Nall v. BNSF Ry. Co.,
917 F.3d 335 (5th Cir. 2019) 19, 21
Noonan v. Consol. Shoe Co.,
84 F.4th 566 (4th Cir. 2023)..... 15-16
O'Connor v. Consol. Coin Caterers Corp.,
517 U.S. 308 (1996) 6
O'Horo v. Bos. Med. Ctr. Corp.,
131 F.4th 1 (1st Cir. 2025) 16
Opara v. Yellen,
57 F.4th 709 (9th Cir. 2023)..... 15
Ortiz v. Werner Enters., Inc.,
834 F.3d 760 (7th Cir. 2016) 14

Payne v. Tennessee,
501 U.S. 808 (1991) 25-26
Raytheon Co. v. Hernandez,
540 U.S. 44 (2003) 6
Smith v. Lockheed-Martin Corp.,
644 F.3d 1321 (11th Cir. 2011) 15
Stinnett v. Safeway, Inc.,
337 F.3d 1213 (10th Cir. 2003) 17
Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 4, 7, 13, 25-26
Tex. Dep't of Cmty. Affs. v. Burdine,
450 U.S. 248 (1981) 2, 5, 17
Towery v. Miss. Cnty. Ark. Econ. Opportunity Comm'n, Inc.,
1 F.4th 570 (8th Cir. 2021)..... 17
Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 6, 23, 25
Tynes v. Fla. Dep't of Juv. Just.,
88 F.4th 939 (11th Cir. 2023)..... 6, 15, 20-21
U.S. Postal Serv. Bd. of Governors v. Aikens,
460 U.S. 711 (1983) 7, 12-13, 25
Walton v. Powell,
821 F.3d 1204 (10th Cir. 2016) 21
Wannamaker-Amos v. Purem Novi, Inc.,
126 F.4th 244 (4th Cir. 2025)..... 16
Wells v. Colo. Dep't of Transp.,
325 F.3d 1205 (10th Cir. 2003) 5-6, 21
Wilson v. AIM Specialty Health,
176 F.4th 977 (7th Cir. 2026),
petition for cert. filed, No. 26-554
(U.S. Oct. 23, 2026)..... 14, 27
Young v. United Parcel Serv., Inc.,
575 U.S. 206 (2015) 6

Statutes:

42 U.S.C. § 1981a(c) 6, 25
42 U.S.C. § 2000e-2(a) 4
42 U.S.C. § 2000e-2(a)(1) 1
42 U.S.C. § 2000e-2(m) 25

Miscellaneous:

Sperino, Sandra F., *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743 (2006) 22

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hua Jiang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 169 F.4th 1194 and reprinted at App. 1a-19a.

The Tenth Circuit's order denying rehearing en banc, with Judge Eid's dissent, is reported at 181 F.4th 1333 and reprinted at App. 46a-50a.

The district court's opinion is unreported but is available at 2025 WL 1557283 and reprinted at App. 20a-45a.

JURISDICTION

The Tenth Circuit entered judgment on March 17, 2026. App. 1a. It denied a timely petition for rehearing en banc on July 20, 2026. App. 46a. On September 30, 2026, Justice Gorsuch extended the time to file this petition to and including November 17, 2026. No. 26A418. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

INTRODUCTION

For more than fifty years, courts have analyzed Title VII employment discrimination claims using a judicial invention—the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the three-step framework, the plaintiff makes a prima facie case, the employer articulates a nondiscriminatory reason, and the plaintiff must then show that the reason was a pretext for discrimination. *Id.* at 802-04; *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252-53 (1981).

Although developed for use at bench trials, the framework now operates principally at summary judgment. But the courts of appeals disagree whether its use is mandatory. In the Seventh, Ninth, and Eleventh Circuits, *McDonnell Douglas* is an optional path: a plaintiff may instead defeat summary judgment by showing that the evidence, considered as a whole, would permit a reasonable jury to find intentional discrimination. In the First, Third, Fifth, Sixth, Eighth, and Tenth Circuits, the framework is mandatory. The resulting conflict warrants review.

This case illustrates the consequences of making *McDonnell Douglas* mandatory at summary judgment. Petitioner Hua Jiang, a middle-aged Chinese immigrant with an engineering Ph.D., applied to be superintendent of a Tulsa water treatment plant. The job posting required at least a bachelor's degree in a relevant scientific or technical field, but the city instead hired a younger, white candidate with no college degree. When Jiang complained of race and age discrimination, the Civil Service Commission found that the city had violated its written hiring policies. Rather than disqualify its preferred candidate and hire

Jiang, the city rewrote the job qualifications to make the same white candidate eligible—and then hired him again. In depositions, two senior managers criticized the change, and the hiring manager could identify no business justification for setting lower educational requirements for the superintendent than for his subordinate. Even the Tenth Circuit acknowledged that the change "may have been improper and inappropriate." App. 14a. The city conceded that Jiang was qualified and had established a prima facie case of discrimination, but offered a nondiscriminatory reason for denying him the position: it wanted a candidate with more leadership experience.

Applying *McDonnell Douglas*, the Tenth Circuit declared that "[p]retext is where our analysis begins and ends." App. 10a. Considering the evidence "from the decisionmaker's point of view," it concluded that the city's explanation was not "so incoherent, weak, inconsistent, or contradictory" as to be "unworthy of belief." App. 10a (citations omitted). It affirmed summary judgment for the city, concluding that Jiang's evidence did not show pretext. App. 18a. But the court did not undertake a separate Rule 56 inquiry outside the *McDonnell Douglas* framework.

The full court denied en banc rehearing, with four judges voting to grant. App. 47a. Judge Eid, joined by Judges Hartz and Tymkovich, dissented, explaining that *McDonnell Douglas*'s "fixation on pretext is especially problematic in cases like this one, where the facts presented at summary judgment make the case close enough to go to a jury." App. 48a.

Judge Eid's dissent is not the first to question *McDonnell Douglas*. Numerous lower-court judges—including then-Judge Kavanaugh and then-Judge

Gorsuch—have criticized it. *See infra* Part II.A at 20-22. And in *Ames*, Justice Thomas, joined by Justice Gorsuch, called for the Court to reconsider the framework, particularly as applied at summary judgment: "In an appropriate case, this Court should consider whether the *McDonnell Douglas* framework is an appropriate tool to evaluate Title VII claims at summary judgment." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 319 (2025) (Thomas, J., concurring). This is just such a case.

The Court should grant certiorari to resolve the circuit conflict, decide the question it reserved in *Ames*, and consider whether *McDonnell Douglas* should be overruled or held inapplicable at summary judgment. If use of the framework changes summary judgment outcomes, it is incompatible with Title VII and Rule 56; if it does not, it adds needless complexity. Either way, the Court should reconsider its use.

STATEMENT OF THE CASE

I. The *McDonnell Douglas* Burden-Shifting Framework

A. Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring and other terms or conditions of employment because of specified characteristics: race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). The text of Title VII does not contain a burden-shifting framework, but this Court created one in *McDonnell Douglas*.

Under that framework, first, a plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802. This is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002). What precisely is required depends

on the facts, but in a failure-to-hire case, the plaintiff generally must show that he belongs to a protected class, that he was qualified for the job, that he was rejected, and that the circumstances support an inference of discrimination. *See McDonnell Douglas*, 411 U.S. at 802 & n.13; *Burdine*, 450 U.S. at 253 & n.6 ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

Second, if a plaintiff establishes a prima facie case, a presumption of discrimination arises and the employer bears a burden of articulating a "legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

Third, if the employer satisfies that requirement, the plaintiff must demonstrate that the employer's proffered reason is "pretext" for discrimination. *McDonnell Douglas*, 411 U.S. at 804. This can be done "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Those alternatives operate within the framework's third step and do not establish an alternative to it.

B. At the time *McDonnell Douglas* was decided, Title VII cases were tried exclusively to the bench. *See Hittle v. City of Stockton*, 145 S. Ct. 759, 761 (2025) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).[1] The decision was viewed "as a plaintiff-friendly opinion," *Wells v. Colo. Dep't of*

[1] *McDonnell Douglas* itself was an appeal from a bench trial. *See Green v. McDonnell-Douglas Corp.*, 318 F. Supp. 846, 847 (E.D. Mo. 1970).

Transp., 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., writing separately), since it was designed "to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence" of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (citation modified).

In 1991, Congress authorized jury trials in Title VII cases seeking compensatory or punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981a(c)). Summary judgment thus became an especially consequential threshold in many Title VII cases. Although the Court has never held that *McDonnell Douglas* governs summary judgment in Title VII cases, it has used the framework—or at least assumed that it applies—in other employment discrimination cases. *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228-31 (2015) (Pregnancy Discrimination Act); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 & n.3 (2003) (ADA); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (Age Discrimination in Employment Act). But as Justice Thomas has observed, "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." *Ames*, 605 U.S. at 321-22 n.4 (Thomas, J., concurring); *see also Hittle*, 145 S. Ct. at 761 n.2 (Thomas, J., dissenting from denial of certiorari).

In the lower courts, however, *McDonnell Douglas* now operates principally at summary judgment. *See Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 952 n.2 (11th Cir. 2023) (Newsom, J., concurring); Timothy M. Tymkovich, *The Problem With Pretext*, 85 Denv. U. L. Rev. 503, 509 (2008). The framework does not govern

pleading, *Swierkiewicz*, 534 U.S. at 510-12, and after a full trial, the ultimate question of discrimination supersedes the prima facie inquiry, *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-15 (1983).[2]

II. Factual Background

Hua Jiang is a middle-aged man from China. App. 2a. He came to the United States as a student and earned a Ph.D. in environmental engineering. App. 23a. He has worked for the City of Tulsa since 2010 and has been a senior engineer in the water and sewer department since 2012, providing technical support for the operation of water treatment plants. App. 20a-21a.

In 2021, Jiang applied to become superintendent of the city's A.B. Jewell water treatment plant, where he worked. App. 3a. The position would not have increased his pay, but he wanted the managerial experience. App. 22a. He had applied for managerial positions before; each time, the city picked a white candidate instead. App. 3a.

Before an applicant can be considered for a promotion, the city's personnel director must certify that he meets the position's minimum requirements. App. 21a. The superintendent job posting required "[g]raduation from an accredited college or university with a

[2] Most courts have also eliminated *McDonnell Douglas* from jury instructions. *See* Tymkovich, 85 Denv. U. L. Rev. at 527-28 (collecting cases); *see also Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 154 (2d Cir. 2010) (calling the *McDonnell Douglas* formulation "at best irrelevant, and at worst misleading to a jury") (quotation omitted).

bachelor's degree in engineering technology, environmental/biological sciences, or a related field." App. 22a.

The personnel director certified Jiang. App. 23a. She also certified two younger, white men—even though neither had a college degree. App. 3a-5a. The city maintained that its longstanding practice allowed applicants with at least half the required education to substitute experience for the remainder. App. 6a. But the city's written policy prohibited such substitution for positions with specific degree requirements. App. 5a, 21a.

After interviews, the hiring manager selected one of the two white candidates over Jiang. App. 4a. That candidate supervised employees at another treatment plant and had led a squad while deployed with the National Guard; Jiang had supervised only a temporary employee and a few interns. App. 3a-4a. Jiang filed a grievance complaining of race and age discrimination and arguing that neither white candidate met the posted education requirement. App. 4a-5a. Human resources denied the grievance, and Jiang appealed to the city's Civil Service Commission. App. 5a. The Commission investigated, agreed that the city had violated its written policies, and told it to "go back and follow" them. *Ibid.*

After the Commission's ruling, Jiang was the only certifiable candidate for the superintendent position. App. 5a; C.A. App. 1254. But in the Tenth Circuit's words, "[p]ut bluntly," the city responded by "chang[ing] the job description to qualify [the two white candidates]." App. 5a. It replaced the degree requirement with 120 college credit hours in any field and five years' experience, or "completion of 60 hours

from an accredited college or university and seven (7) years of experience" in a relevant field. App. 5a, 26a. "Conveniently," as the Tenth Circuit put it, one of the white candidates had exactly 60 credit hours and 7 years' experience; the other—who was selected—had 66 credit hours and 8 years. App. 5a.[3] The revised job description meant that the superintendent position now had lower education requirements than the superintendent's immediate subordinate. App. 6a.

In later depositions, senior managers criticized aspects of the change. *Ibid.* The city's water-quality-assurance manager testified that it was "important" for the superintendent to have a college degree, that it was "improper" to change requirements to certify the two white candidates, and that she could think of no business justification for it. C.A. App. 1024-29; App. 14a. A second manager testified that it is not appropriate to change a job description "[t]o put who you want in a position." C.A. App. 748. And the hiring manager testified that there is no business justification for requiring the superintendent's subordinate to have more education than the superintendent. C.A. App. 476-78.

The personnel director recertified all three candidates under the new criteria, and a panel interviewed them using a revised evaluation matrix. App. 7a. One panelist ranked Jiang first, the hiring manager ranked him second, and the water-quality-assurance manager ranked him last, App. 7a—although she

[3] His 66 credit hours were "mainly non-technical business/philosophy coursework and criminal justice," including "approx[imately] 10 credits for his military leadership training" and only "6 credits for science and math." C.A. App. 1187; *see also* C.A. App. 1114, 1128-29.

later testified that had she known of the job description change, she "probably would have refused to sit on the panel" and would have ranked the candidates differently. C.A. App. 1030-31. Only the hiring manager ranked the previously selected white candidate first. App. 7a. As the final decisionmaker, she chose him again. App. 27a. The Commission denied Jiang's second grievance, concluding that this time the city "did follow its policies." App. 7a.

III. Proceedings Below

A. State court and district court proceedings

Jiang sued in state court, alleging race discrimination and retaliation under Title VII, age discrimination under the Age Discrimination in Employment Act, and related state-law claims. App. 28a-29a. The city removed to federal district court. App. 29a.

After discovery, the district court granted summary judgment to the city. App. 45a. Because Jiang lacked direct evidence of discrimination, the court held that it "must apply the burden-shifting framework set forth in" *McDonnell Douglas*. App. 32a.

At step one, the city conceded the prima facie case and that Jiang was qualified for the position. App. 34a. At step two, the court accepted as a legitimate, nondiscriminatory reason the hiring manager's belief that her selection was strong in technical skills and leadership abilities and "was a better all-around candidate." App. 34a. At step three, the court concluded that Jiang failed to show pretext and that "the City had a good faith belief that [the selected candidate] was better qualified for the position." App. 38a.

B. Court of appeals proceedings

The Tenth Circuit affirmed. App. 1a-19a. Like the district court, the panel applied *McDonnell Douglas*. App. 9a. It noted that "Jiang asks us to stop using the *McDonnell Douglas* framework at summary judgment in Title VII and ADEA cases," but held itself bound by circuit precedent. App. 9a n.3.

At step one, the city conceded the prima facie case. App. 9a. At step two, the city explained that the hiring manager "wanted a candidate with both technical knowledge and leadership experience," and that "though Jiang had more technical knowledge, he didn't have leadership experience." App. 10a.

The case turned on step three. "Pretext," the panel said, "is where our analysis begins and ends." App. 10a. It held that "[a]t summary judgment, an employer's justification is pretextual if it is 'so incoherent, weak, inconsistent, or contradictory' that a reasonable jury could find it 'unworthy of belief.'" *Ibid.* (quoting *Bekkem v. Wilkie*, 915 F.3d 1258, 1268 (10th Cir. 2019)). In evaluating pretext, the court "consider[s] the facts from the decisionmaker's point of view" and asks whether she "honestly believed" her stated reasons. *Ibid.* (citation omitted). "And that's *all* we ask"—not whether the decision was "wise, fair or correct." *Ibid.* (citation omitted).

The panel rejected Jiang's pretext arguments—procedural irregularities, subjective criteria, and his superior qualifications—because none made the city's explanation "unworthy of belief." App. 11a-18a. The panel acknowledged that "[r]emoving the degree requirement may have been improper and inappropriate." App. 14a. But it reasoned that the city's "corner

cutting coheres with the city's nondiscriminatory explanation: it wanted a candidate with both technical knowledge and leadership experience." App. 14a-15a. "Even taken together," it concluded, the evidence "wouldn't let a jury find the city's explanation for choosing [the white candidate] pretextual." App. 18a. The panel did not separately assess whether the record raised a genuine dispute of material fact as to discrimination outside *McDonnell Douglas*.

C. Dissent from denial of en banc review

Jiang petitioned for rehearing en banc. The court denied the petition, but four judges—Judges Hartz, Tymkovich, Bacharach, and Eid—voted to grant it. App. 46a-47a.

Judge Eid, joined by Judges Hartz and Tymkovich, also dissented from the denial. App. 48a-50a. She explained why a pretext-only inquiry is problematic. "In focusing our inquiry on evaluating pretext," courts "ignore the summary judgment standard," under which they may not weigh evidence and must view the record in the light most favorable to the nonmovant. App. 49a-50a. By the third step of *McDonnell Douglas*, "both parties will usually have met their burden of production," so the court "need[s] only to determine which party to believe—which is a question of fact for the jury to decide, not a legal question for the court." App. 50a. In her view, courts should directly address whether "the defendant intentionally discriminated against the plaintiff," "just as district courts decide disputed questions of fact in other civil litigation." *Ibid.* (quoting *Aikens*, 460 U.S. at 715-16).

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided over a question this Court has never decided: whether *McDonnell Douglas* is mandatory at summary judgment for a Title VII plaintiff relying on circumstantial evidence. Three circuits let such a plaintiff proceed outside the framework under ordinary Rule 56 principles; six, including the Tenth, make the framework mandatory.

The conflict reflects deeper problems with the framework itself—problems that numerous judges have identified, including two Members of this Court. This case—where discrimination claims were resolved at summary judgment on pretext alone, over the votes of four judges to rehear it en banc—is an ideal vehicle to resolve the conflict and to decide whether the framework should survive at all, especially at summary judgment.

I. The Circuits Are Divided Over Whether *McDonnell Douglas* Is Mandatory At Summary Judgment

"[T]he *McDonnell Douglas* framework does not apply in every employment discrimination case," *Swierkiewicz*, 534 U.S. at 511, and its steps were "never intended to be rigid, mechanized, or ritualistic," *Aikens*, 460 U.S. at 715 (quotation omitted). But this Court has yet to decide whether a Title VII plaintiff asserting a single-motive claim with circumstantial evidence must proceed through the framework or may instead establish a triable claim under ordinary Rule 56 principles. *See Ames*, 605 U.S. at 308 n.2. The courts of appeals are divided.

A. Three circuits permit an independent Rule 56 route

In the Seventh Circuit, the question at summary judgment "is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action," with the evidence "considered as a whole." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). *McDonnell Douglas* remains one way of "organizing, presenting, and assessing circumstantial evidence," but it is "not the only way." *David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 224 (7th Cir. 2017). The court reaffirmed the point earlier this year: "In this circuit, Title VII plaintiffs may choose to present their evidence under either of two frameworks." *Wilson v. AIM Specialty Health*, 176 F.4th 977, 983 (7th Cir. 2026), *petition for cert. filed* No. 26-554 (U.S. Oct. 23, 2026).

The Ninth Circuit likewise permits an alternative route. At summary judgment, "the plaintiff is presented with a choice regarding how to establish his or her case": she may use *McDonnell Douglas* or "simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employer. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). The en banc court explained that "although *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case." *Costa v. Desert Palace, Inc.*, 299 F.3d

838, 855 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).[4]

The Eleventh Circuit agrees. Satisfying *McDonnell Douglas* "is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). A plaintiff may instead present a "convincing mosaic" of circumstantial evidence, by which the court simply means "enough evidence for a reasonable factfinder to infer intentional discrimination." *Tynes*, 88 F.4th at 946. The *McDonnell Douglas* framework and the "convincing mosaic" approach are "two paths to the same destination—the ordinary summary judgment standard." *Hall v. Coal Bed Servs., Inc.*, 190 F.4th 1286, 1292 (11th Cir. 2026) (quoting *McCreight v. AuburnBank*, 117 F.4th 1322, 1335 (11th Cir. 2024)). And the plaintiff's evidence need not "attack—or even have anything to do with—the defendant's purported rationale" to survive summary judgment. *Ismael v. Roundtree*, 161 F.4th 752, 764 (11th Cir. 2025) (§ 1981 retaliation).[5]

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[4] One Ninth Circuit panel treated the alternative as a route only to establish a prima facie case, after which the plaintiff still had to show pretext. *See Opara v. Yellen*, 57 F.4th 709, 721-23 (9th Cir. 2023). But *Opara* acknowledged that the court has described the alternative "variably," *id.* at 721 n.9, and subsequent decisions have continued to recognize an independent route. *See Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1154 (9th Cir. 2025); *Brown v. Alaska Airlines, Inc.*, 179 F.4th 707, 718-19 (9th Cir. 2026).

[5] The Fourth Circuit may also agree, although its position is unclear. One decision said in a footnote that a Title VII plaintiff "need not rely on the burden-shifting framework" and may, "like a plaintiff in any other type of case," present "direct or circumstantial evidence" under "ordinary principles of proof." *Noonan*

B. Six circuits, including the Tenth Circuit, mandate *McDonnell Douglas*

The decision below illustrates the mandatory rule. The panel applied *McDonnell Douglas* "[b]ecause Jiang has no direct evidence" of discrimination. App. 9a; *see also* App. 32a (absent direct discrimination evidence, "the Court must apply the burden-shifting framework"). At the third step, it emphasized, the employee must "identif[y] facts that could let a jury find each of the employer's legitimate reasons pretextual, or else the employer wins." App. 9a.

The First Circuit likewise requires use of *McDonnell Douglas* for Title VII claims lacking direct evidence, and at the third step the plaintiff must make "two showings": that the employer's reasons "w[ere] mere pretext" and "that their true motive . . . was discriminatory." *O'Horo v. Bos. Med. Ctr. Corp.*, 131 F.4th 1, 13, 15 (1st Cir. 2025) (quoting *Cherkaoui v. City of Quincy*, 877 F.3d 14, 27 (1st Cir. 2017)).

The Third Circuit likewise applies *McDonnell Douglas* whenever a Title VII discrimination plaintiff lacks direct evidence. *Burton v. Teleflex Inc.*, 707 F.3d 417, 425-26 (3d Cir. 2013) (Title VII and ADEA claims); *see also Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 346 (3d Cir. 2022) (Title VII retaliation and other claims "are controlled by the three-step burden-shifting framework").

So does the Fifth Circuit. *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 475 (5th

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v. Consol. Shoe Co., 84 F.4th 566, 572 n.3 (4th Cir. 2023) (quotations omitted). But another decision described only "two methods": direct evidence or *McDonnell Douglas*. *Wannamaker-Amos v. Purem Novi, Inc.*, 126 F.4th 244, 255 (4th Cir. 2025).

Cir. 2015) ("If the plaintiff presents only circumstantial evidence, then she must prove discrimination inferentially using the three-step *McDonnell Douglas-Burdine* 'minuet.'") (quotation omitted).

The Sixth Circuit is the same. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009). At summary judgment, it requires a plaintiff at the third step to produce evidence to show that a jury could reasonably doubt the employer's explanation. *Id.* at 400 n.4; *see also Leath v. Collins*, No. 25-1408, 2026 WL 228827, at *6 (6th Cir. Jan. 28, 2026) (unpublished) (applying the framework when a plaintiff offers only circumstantial evidence).

The Eighth Circuit, sitting en banc, recently confirmed that there are only "two ways to establish the necessary causal link: direct evidence or the *McDonnell-Douglas* burden-shifting framework." *Huber v. Westar Foods, Inc.*, 139 F.4th 615, 624 (8th Cir. 2025) (en banc) (ADA); *see also Towery v. Miss. Cnty. Ark. Econ. Opportunity Comm'n, Inc.*, 1 F.4th 570, 573 (8th Cir. 2021).[6]

C. The conflict is consequential, entrenched, and important

The difference matters. Courts like the Eleventh Circuit permit a plaintiff to survive summary judgment by showing that a reasonable jury could infer

[6] Several of these circuits have recited language from *Burdine* that there are two ways to satisfy the framework's third step. *See, e.g.*, *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1218 (10th Cir. 2003); *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). But those are ways to satisfy *McDonnell Douglas*, not alternatives to it. The conflict is over whether a plaintiff must proceed through the framework at summary judgment.

discrimination, even without satisfying the *McDonnell Douglas* framework. *See Ismael*, 161 F.4th at 761-64 (reversing summary judgment because the district court treated failure to show pretext as dispositive); *Hall*, 190 F.4th at 1292-93 (reversing summary judgment on a Title VII claim even while assuming the plaintiffs' comparator was invalid "for *McDonnell Douglas* purposes"). In the Tenth Circuit, by contrast, a plaintiff must proceed under *McDonnell Douglas*, and he will lose at summary judgment if he cannot show that each of the employer's reasons is pretextual. App. 9a.

In this case, the mandatory framework determined how the evidence was evaluated. The Tenth Circuit considered the evidence "taken together," but only to ask whether it would "let a jury find the city's explanation . . . pretextual." App. 18a. Thus, it tested each piece of evidence by whether it showed that the hiring manager had not "honestly believed" the leadership rationale. App. 10a. The panel acknowledged that the city may have "cut corners to hire [the white candidate]," but discounted those irregularities because that "corner cutting coheres with" the city's leadership rationale. App. 14a-15a. It likewise discounted the Commission's finding that the city violated its written policies because that finding did not "contradict[] the city's explanation." App. 12a-13a. And it concluded that the anomaly that the superintendent now needed less education than his subordinate did not make the city's leadership rationale "incoherent." App. 15a.

In circuits allowing an independent Rule 56 route, however, the court would also ask whether the evidence permits a reasonable jury to find discrimination, even without discrediting the employer's stated rationale. *See Ismael*, 161 F.4th at 760 (recognizing

that "suspicious timing, ambiguous statements . . . , and other bits and pieces from which an inference of discriminatory intent might be drawn" can support an inference of discrimination apart from pretext) (quotation omitted). And the "inability to disprove the defendant's rationale cannot be the sole grounds for summary judgment." *Id.* at 764. After Jiang complained of race discrimination and the Commission found that the city had violated its policies, the city rewrote the posting to qualify the two white candidates. App. 4a-5a, 25a-26a. The rewrite did not strengthen any leadership requirement—the supervisory criteria were unchanged—but it eliminated the degree requirement that left Jiang the only certifiable applicant. App. 22a-26a; C.A. App. 1254. And it came against a history in which every managerial role Jiang sought went to a white candidate, which the panel's pretext analysis did not address. App. 3a. Whether or not the city valued leadership, a reasonable jury could infer from these circumstances that the city would not have changed the rules had Jiang been white. The Tenth Circuit never asked whether the evidence, considered as a whole, would permit that inference. Under its mandatory framework, the pretext determination was dispositive.

The conflict is entrenched. The Tenth Circuit held itself bound to apply *McDonnell Douglas,* App. 9a n.3, and declined further review despite four judges voting to rehear the case, App. 46a-50a. Justice Thomas has observed that "litigants and lower courts are free to proceed without the *McDonnell Douglas* framework." *Ames*, 605 U.S. at 326 (Thomas, J., concurring). Not so at summary judgment in the Tenth Circuit and five other circuits. Only this Court can resolve the conflict.

The issue is important and recurring. As of 2019, *McDonnell Douglas* had been cited in more than 57,000 opinions, *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J., specially concurring), and its principal remaining use is at summary judgment, *see Tynes*, 88 F.4th at 952 n.2 (Newsom, J., concurring). Whether an employee may take his evidence to a jury under ordinary Rule 56 principles should not depend on the circuit where he is employed.

The Court can resolve the conflict by holding that *McDonnell Douglas* is not the exclusive summary-judgment route, without deciding the question of whether the framework should be overruled or declared inapplicable at that stage. Courts and litigants who find the framework "a sensible, orderly way to evaluate the evidence" could still use it. *Ames*, 605 U.S. at 308 n.2 (quotation omitted).

II. The Court Should Also Decide Whether To Overrule *McDonnell Douglas* Or At Least Hold It Inapplicable At Summary Judgment

But the Court should reach the second question. The *McDonnell Douglas* framework has no basis in Title VII's text, its use at summary judgment conflicts with Rule 56, it has generated decades of confusion, and it risks screening out otherwise triable claims. Two Members of this Court have signaled their willingness to reconsider it, and *stare decisis* does not stand in the way.

A. Judges and scholars have long criticized *McDonnell Douglas*

Just six years after the Court created the framework, the First Circuit observed that "the subtleties of *McDonnell Douglas* are confusing" and "have caused

considerable difficulty for judges of all levels." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979). In 2008, Judge Tymkovich observed: "Lower courts have struggled to implement the burden-shifting framework for over thirty years." Tymkovich, 85 Denv. U. L. Rev. at 529.

McDonnell Douglas has now been on the books for over *fifty* years, and the criticism has persisted. *See, e.g.*, *Wells*, 325 F.3d at 1221 (Hartz, J., writing separately) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from the ultimate question" and "should be abandoned." (citation modified)); *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) (likening *McDonnell Douglas* to an "allemande worthy of the 16th century"); *Nall*, 917 F.3d at 351 (Costa, J., specially concurring) (calling *McDonnell Douglas* "the 'kudzu' of employment law").

In 2008, then-Judge Kavanaugh called the prima facie inquiry "a largely unnecessary sideshow." *Brady v. Off. of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). A few years later, then-Judge Gorsuch wrote that *McDonnell Douglas* "has proven of limited value" and questioned "whether the *McDonnell Douglas* game is worth the candle." *Walton v. Powell*, 821 F.3d 1204, 1210-11 (10th Cir. 2016) (Gorsuch, J.). More recently, Judge Newsom has observed that the framework "seems . . . awfully made up" and "obscures the actual Title VII inquiry, especially at summary judgment." *Tynes*, 88 F.4th at 951, 953, 958 (Newsom, J., concurring) (calling for "relegat[ing] *McDonnell Douglas* to the sidelines"). And Chief Judge Elrod and Judges Eid, Ho, Quattlebaum, and Oldham have recently called for its reconsideration. *Awe v. Harris*

Health Sys., 163 F.4th 969, 975-76 (5th Cir. 2026) (Elrod, C.J., concurring); *Jenny v. L3Harris Techs., Inc.*, 144 F.4th 1194, 1202 (10th Cir. 2025) (Eid, J., concurring); *Holloway v. Procter & Gamble Mfg. Co.*, 185 F.4th 545, 551 (5th Cir. 2026) (Ho, J., joined by Elrod, C.J., concurring); *Hollis v. Morgan State Univ.*, 153 F.4th 369, 388, 391 (4th Cir. 2025) (Quattlebaum, J., concurring); *Domanic v. Christian Bros. Auto. Corp.*, No. 25-20486, 2026 WL 2934867, at *5 (5th Cir. Sept. 30, 2026) (Oldham, J., concurring in the judgment).

Scholars have also criticized *McDonnell Douglas*, and some have called for its abandonment. As Professor Sperino put it, even twenty years ago it was "time to reconsider the legal heritage and appropriateness of *McDonnell Douglas*." Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743, 806 (2006); *see also, e.g.*, Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 495 & n.188 (2024); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 396 (2021).

B. Two Justices recently invited reconsideration of *McDonnell Douglas*

Justice Thomas, joined by Justice Gorsuch, has invited reconsideration of *McDonnell Douglas* at summary judgment and identified five concerns with the framework. *Ames*, 605 U.S. at 319-26 (Thomas, J., concurring).

First, the framework was made "out of whole cloth," *Ames*, 605 U.S. at 320 (Thomas, J., concurring) (quoting *Hittle*, 145 S. Ct. at 760 (Thomas, J., dissenting

from denial of certiorari)), and has "no basis in the text of Title VII or any other source of law." *Ibid.*

Second, the framework is incompatible with Rule 56's summary-judgment standard. *Ames*, 605 U.S. at 322 (Thomas, J., concurring). Under Rule 56, a plaintiff opposing an employer's motion "need not establish or prove any elements—by a preponderance or otherwise—to survive summary judgment." *Ibid.* (quoting *Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting from denial of certiorari)). Yet the panel required Jiang to identify facts showing pretext or lose. App. 9a.

Third, the framework "fails to capture all the ways in which a plaintiff can prove a Title VII claim." *Ames*, 605 U.S. at 323 (Thomas, J., concurring). "[A] plaintiff who cannot establish a prima facie case at the first step or pretext at the third step can still prevail under Title VII so long as his evidence raises a reasonable inference of unlawful discrimination." *Id.* at 324. Yet the panel below ended its analysis at pretext. App. 10a.

Fourth, because *McDonnell Douglas* does not apply when there is direct evidence of discrimination, *see Trans World Airlines*, 469 U.S. at 121, the framework "requires courts to draw and maintain an artificial distinction between direct and circumstantial evidence." *Ames*, 605 U.S. at 324 (Thomas, J., concurring); *cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.") (quotation omitted). That distinction does not appear in Title VII's text. Yet here it decided which path Jiang had to take. App. 9a.

Fifth, the *McDonnell Douglas* framework continues to cause confusion among lower courts. *See Ames*, 605

U.S. at 325-26 (Thomas, J., concurring); *Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting from denial of certiorari) (use of *McDonnell Douglas* at summary judgment has caused "significant confusion" and "troubling outcomes on the ground").

C. *Stare decisis* does not stand in the way

Fifty years of experience have exposed the shortcomings of treating a judge-made evidentiary framework as a mandatory summary-judgment rule. To begin, this Court has never held that *McDonnell Douglas* governs summary judgment; it has assumed so without deciding. *See Ames*, 605 U.S. at 308 n.2. Additionally, the Court's *stare decisis* factors—reasoning, workability, subsequent developments, and reliance—all favor reconsidering the framework itself. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 917 (2018).

First, like the recently discarded *Chevron* deference, *McDonnell Douglas* is a judge-created rule that lacks a foundation in the governing text. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024) (criticizing *Chevron* for failing to grapple with the statute governing judicial review). *McDonnell Douglas* prescribed an order of proof without grounding it in Title VII's language, and this Court has never explained how mandatory use of that framework at summary judgment comports with Rule 56. *See Ames*, 605 U.S. at 320, 322 (Thomas, J., concurring).

Second, *McDonnell Douglas* has proved unworkable, as five decades of judicial criticism show. *See supra* Part II.A-B at 20-24. As Justice Thomas observed, that "those who have carefully grappled with the framework for decades cannot make sense of it" suggests that it is "unworkable." *Ames*, 605 U.S. at 326

(Thomas, J., concurring). Among other things, the framework turns on a line between direct and circumstantial evidence that this Court has said makes no difference, *see Desert Palace*, 539 U.S. at 100, and it now operates mainly at a stage it was not designed for. There is little reason to expect these difficulties to disappear without this Court's intervention.

Third, intervening developments have narrowed the framework's role and called into question its mandatory use. The Civil Rights Act of 1991 authorized jury trials for certain Title VII claims and established a motivating-factor standard. 42 U.S.C. §§ 1981a(c), 2000e-2(m). And this Court has said the framework (1) is unnecessary where direct evidence establishes discrimination, *Trans World Airlines*, 469 U.S. at 121; (2) does not govern pleading, *Swierkiewicz*, 534 U.S. at 510-12; and (3) no longer controls the analysis after a full trial, *Aikens*, 460 U.S. at 713-15. These developments have left *McDonnell Douglas* operating principally at summary judgment—a use this Court has assumed but never decided is proper.

Fourth, no significant reliance interests justify preserving the framework. Although courts and litigants have long organized their arguments around *McDonnell Douglas*, the framework has not produced consistent rules across the circuits. *Cf. Loper Bright*, 603 U.S. at 410 (explaining how inconsistent application and an unclear standard undermine reliance). And the framework does not govern primary conduct: employers and employees order their affairs around Title VII's prohibitions, not around the order of proof in later litigation. *Stare decisis* considerations are "at their acme in cases involving property and contract rights," but "the opposite is true" for "procedural and

evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Even if the "enhanced force" of statutory *stare decisis* applied, *see Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015), these factors would overcome it. *McDonnell Douglas* did not ground its burden-shifting methodology in specific statutory language; it created "an evidentiary standard," *Swierkiewicz*, 534 U.S. at 510, to order proof at bench trials. And Congress has never codified the framework. The absence of a statutory foundation, persistent workability problems, intervening developments, and limited reliance interests support overruling it, particularly as applied at summary judgment.

III. This Case Is An Ideal Vehicle

The questions are squarely presented by a published Title VII decision. The court of appeals expressly passed on Jiang's challenge to mandatory use of *McDonnell Douglas* at summary judgment—although he urged the court to stop applying the framework, the panel held that circuit precedent bound it. App. 9a n.3. And Judge Eid, writing for three of the four judges who voted for rehearing, identified this case as an opportunity "to address pretext in the summary judgment context." App. 47a, 49a.

The record also shows why the choice of framework matters. Viewed in Jiang's favor, the evidence would permit a jury to infer discrimination. Every time Jiang had applied for a managerial role, the city had picked a white candidate. App. 3a. Here, the city hired a white candidate without the required degree over an Asian candidate with a Ph.D. App. 2a-5a. After the Civil Service Commission found a policy violation, the city changed the job description to qualify the

two white applicants. App. 5a-6a. Senior managers questioned the propriety of that change and could not identify a business justification for it. App. 14a; C.A. App. 748, 1027-29. And in the second hiring round, only the final decisionmaker ranked the selected candidate first, and even the panelist who ranked Jiang last testified that, had she known the job description had been changed, she would have ranked the candidates differently. App. 7a; C.A. App. 1030-31. As Judge Eid concluded, the record was "close enough to go to a jury." App. 48a.

Other recent petitions, some still pending, have raised questions about the proper role of *McDonnell Douglas*.[7] But this case presents a particularly suitable vehicle: a square circuit conflict, a Title VII disparate-treatment claim, a published decision from a circuit that treats *McDonnell Douglas* as mandatory, and an express challenge that the court of appeals considered and rejected. If the Court grants review in another case raising these questions, it should at a minimum hold this petition pending its decision.

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[7] *See, e.g.*, *Barnett-Morgan v. Inverness Techs., Inc.*, No. 26-327, 2026 WL 3116594 (U.S. Oct. 19, 2026) (denying certiorari; unpublished Sixth Circuit decision with alternative holding); *Licinio v. New York*, 146 S. Ct. 1516 (2026) (denying certiorari; retaliation claim resolved by unpublished summary order); *Hittle v. City of Stockton*, 145 S. Ct. 759 (2025) (Ninth Circuit Title VII case; Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *see also Bassett v. Gray Media Grp., Inc.*, *petition for cert. filed*, No. 26-385 (U.S. Sept. 16, 2026) (unpublished Fifth Circuit decision); *Cross v. Cent. Contra Costa Transit Auth.*, *petition for cert. filed*, No. 26-100 (U.S. July 20, 2026) (unpublished Ninth Circuit decision); *Wilson v. AIM Specialty Health*, *petition for cert. filed*, No. 26-554 (U.S. Oct. 23, 2026) (Seventh Circuit decision holding claims failed under either *McDonnell Douglas* or the circuit's alternative approach).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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