

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MARLEAN A. AMES,)
Petitioner,)
v.) No. 23-1039
OHIO DEPARTMENT OF YOUTH SERVICES,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case Number 23-1039,
5 Ames versus the Ohio Department of Youth
6 Services.

7 Mr. Wang.

8 ORAL ARGUMENT OF XIAO WANG

9 ON BEHALF OF THE PETITIONER

10 MR. WANG: Mr. Chief Justice, and may
11 it please the Court:

12 Marlean Ames has worked for the Ohio
13 Department of Youth Services for over two
14 decades, and in 2018, her year-end performance
15 review described her as being very competent in
16 her -- in her role, a pleasure to have on the
17 team, and always willing to assist others.

18 But, in 2019, she experienced two
19 adverse employment actions. First, she sought a
20 promotion to Bureau Chief for which she was
21 qualified, for which she applied, and for which
22 she interviewed. But neither she nor the two
23 other heterosexual employees who applied and
24 interviewed got the job. Instead, the job was
25 held open for eight months before going to a gay

1 employee who neither applied nor interviewed for
2 the position.

3 And second, Ms. Ames lost the job that
4 she was in, and she lost it and was replaced by
5 a separate gay employee who also did not apply
6 or interview for the position.

7 Based on these facts, the Sixth
8 Circuit held that Ms. Ames had satisfied the
9 usual requirements for stating a -- for stating
10 a prima facie case of discrimination under Title
11 VII, but she could not proceed because of the
12 background circumstances rule, which the Sixth
13 Circuit described as an additional showing
14 unique to majority-group plaintiffs.

15 The narrow question before the Court
16 today is whether this judge-made rule is
17 consistent with Title VII. And we submit that
18 it is not. It's not because this Court has said
19 that Title VII aims to eradicate all
20 discrimination in the workplace.

21 But the background circumstances rule
22 doesn't do that. It doesn't eradicate
23 discrimination; it instructs courts to practice
24 it by sorting individuals into majority and
25 minority groups based on their race, their sex,

1 or their protected characteristic, and applying
2 a categorical evidentiary presumption not in
3 favor of but against the non-moving party based
4 solely on their being in a majority group,
5 however you define it.

6 But that's not consistent with the
7 statute that tells us that we are supposed to
8 protect all individuals from individual
9 discrimination based on the individual case.
10 And it's not consistent with McDonald versus
11 Santa Fe Trail, where this Court says that all
12 individuals, whether in majority or minority
13 groups, are protected by Title VII under the
14 same terms and the same standards.

15 For these reasons, we urge the Court
16 to reverse the judgment of the Sixth Circuit.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: What do you do with
19 Respondent's argument that this is merely an
20 application of our precedents?

21 MR. WANG: I don't think it is an
22 application of this Court's precedents, Your
23 Honor, and -- and, Justice Thomas, it's because
24 this Court's precedents in McDonnell Douglas
25 lays out a framework, and then McDonald versus

1 Santa Fe's Trail says they apply to the same
2 terms and same standards.

3 But the background circumstances rule
4 isn't the same term. It's not the same
5 standard. The Sixth Circuit says it's an
6 additional burden. And in prior cases, it says
7 it's a difficult and more demanding burden on
8 majority-group plaintiffs. So I don't think
9 it's consistent with this Court's precedents.

10 CHIEF JUSTICE ROBERTS: What if you
11 have a situation where, say, 60 employees in the
12 company, say, you know, a -- a half dozen
13 African Americans, an African American is --
14 applies for a job, there's an opening, he
15 doesn't get it, remains open for, you know, a
16 couple of months?

17 Does that satisfy the prima facie case
18 if he said I -- it was because of
19 discrimination?

20 MR. WANG: Assuming that they are
21 qualified and --

22 CHIEF JUSTICE ROBERTS: Yeah, yeah.
23 Yeah.

24 MR. WANG: Yes -- yes.

25 CHIEF JUSTICE ROBERTS: Okay. Now,

1 I -- I'm sorry. Is that -- that's a yes?

2 MR. WANG: Yes, that -- that -- that
3 is true, Chief --

4 CHIEF JUSTICE ROBERTS: Okay. Now
5 let's say it's the same thing, but the applicant
6 is white, exactly the same facts, and she says:
7 I was discriminate -- I lost the job because of
8 discrimination on the basis of race. Does that
9 start -- state a prima facie case?

10 MR. WANG: I think it states a prima
11 facie case, but I think it goes in -- perhaps,
12 Your Honor, it goes to the idea of getting
13 employers to come forward with an explanation
14 and then providing sort of a legitimate
15 non-discriminatory reason, which I don't think
16 is a high burden at all. I think, as Reeves, as
17 Burdine, as Furnco have made clear, they just
18 have to provide some sort of legitimate
19 non-discriminatory reason to answer or to rebut
20 the prima facie case.

21 JUSTICE JACKSON: Can I just clarify
22 the Chief's hypo, though?

23 MR. WANG: Yeah.

24 JUSTICE JACKSON: In both situations,
25 the job stays open for a few months, but then it

1 is filled by a person of a different race. Is
2 that right?

3 MR. WANG: I -- I -- I was under the
4 understanding under the Chief Justice's
5 hypothetical it remained open.

6 JUSTICE JACKSON: It just remained
7 open?

8 MR. WANG: Yeah.

9 CHIEF JUSTICE ROBERTS: Yeah, that --

10 JUSTICE JACKSON: That that's enough?

11 CHIEF JUSTICE ROBERTS: -- that -- my
12 understanding too.

13 (Laughter.)

14 MR. WANG: That -- that was my --
15 sorry. Sorry.

16 JUSTICE JACKSON: Okay. Sorry.

17 MR. WANG: And -- and -- and -- and
18 I'm happy to --

19 JUSTICE JACKSON: Sorry. I did --
20 I --

21 MR. WANG: -- answer an alternative.
22 Yeah. Sorry.

23 JUSTICE JACKSON: Okay.

24 MR. WANG: Sorry about that. Yeah.

25 CHIEF JUSTICE ROBERTS: No, no. Well,

1 what if it was changed according to --

2 (Laughter.)

3 MR. WANG: That -- that's -- that's a
4 fair question. And I --

5 JUSTICE JACKSON: I guess my point is
6 that the -- the -- the standard, the test for
7 prima facie case at least as I understood it --
8 and maybe I'm misunderstanding it -- is that you
9 have to state circumstances that could give rise
10 to a reason to believe that there is racial
11 discrimination or discrimination of some sort.

12 And so I would think that just saying
13 I applied for a job and it remained open, I
14 don't know, is that enough, or do you have to
15 say and then it was filled by someone of another
16 race, and that is what then gives rise to the
17 inference of discrimination?

18 MR. WANG: Well -- well, I'm -- let me
19 try to unpack that in --

20 JUSTICE JACKSON: Yeah.

21 MR. WANG: -- in two ways. I think
22 the first is whether when it's filled by someone
23 of the same group or a different race or
24 something, I think that that brings into the
25 issue of whether there's a similarly situated

1 comparator, which is a common analysis that's --
2 takes place in most of, I think, the lower
3 courts when it comes to stating a prima facie
4 case.

5 If it's held open, though, I think
6 that means that the prima facie case serves as
7 an explanation-forcing mechanism. It's just
8 meant to bring the employer to the table, as --
9 as Hicks says, to come forward with some sort of
10 explanation.

11 It's not supposed to be a heavy burden
12 on the employer. I think, naturally, I -- as
13 this Court has pointed out, often it just
14 happens anyway, in depositions or in other
15 declarations. But it's just asking the employer
16 to come forward, provide some sort of
17 explanation in order to continue the process of
18 understanding whether discrimination occurred,
19 Justice Jackson.

20 CHIEF JUSTICE ROBERTS: I guess what I
21 was just -- trying to get at -- and -- I -- I
22 should have been clearer that the -- the -- the
23 position stays open -- that in one case, I
24 suppose, just because of the underlying facts,
25 the -- the assertion that this was

1 discriminatory, it -- it seems to me, is more
2 plausible than the assertion that it was
3 discriminatory if everybody else in the company
4 is -- is white as well.

5 But you're saying that you can't take
6 that fact into account?

7 MR. WANG: I'm not saying you can't
8 take the fact into account. What I'm saying is,
9 with regard to the question presented, it
10 becomes a categorical evidentiary presumption.
11 I don't think that's fair.

12 I think what we've said is that, look,
13 these facts might give rise to a prima facie
14 case of discrimination, and I think that the
15 employer, of course, will come forward with a
16 legitimate non-discriminatory reason. And then,
17 when it comes to pretext, when it comes to
18 the -- the ultimate question of discrimination,
19 one, of course, looks at all the facts that --
20 that's before them.

21 The question, I think, that is
22 presented here is whether there's an additional
23 burden specifically on majority-group
24 plaintiffs. I -- I don't think that's
25 consistent with either Title VII's text or -- or

1 this Court's precedent.

2 JUSTICE BARRETT: Counsel, what do you
3 have to say to the Department's contention that
4 this is just going to throw the door wide open
5 to Title VII suits because now everybody can
6 say, hey, this was discrimination on the basis
7 of race, gender, et cetera?

8 MR. WANG: Well, I -- I don't think
9 that contention is well taken, Justice Barrett,
10 and for two reasons. The -- the first is this
11 is an evidentiary question that arises at
12 summary judgment. So they've already gotten
13 past a discussion with EEOC, plausibility under
14 Iqbal and Twombly, a motion to dismiss. So I --
15 I think, if there were a floodgate issue, that
16 would be sort of more of a -- more on the
17 pleading standards.

18 I think the second point is -- is
19 merely sort of an empirical question. And, as
20 we lay out and as Judge Kethledge lays out in
21 his concurrence, about more than half the
22 circuits don't apply the background
23 circumstances rule. We don't see those circuits
24 having some sort of flood of litigation.

25 And I don't think there's a huge delta

1 between those circuits that apply it and -- and
2 those circuits that don't apply, which I think
3 goes to the narrow question that's before the
4 Court today.

5 JUSTICE KAGAN: And in the -- in the
6 circuits that don't apply it, I guess I was a
7 little bit unclear about one of the points that
8 you made to the Chief Justice.

9 In the circuits that don't apply it,
10 you said it -- the -- the -- the fact of a
11 particular person's particular race or whatever
12 it is, gender or sexual orientation --

13 MR. WANG: Certainly.

14 JUSTICE KAGAN: -- can come into
15 account as a circumstance? What did you mean by
16 that?

17 MR. WANG: Yeah. I'm -- I -- I'm not
18 sure -- if I was a little bit unclear, let me
19 try to clean that up a bit.

20 I think what I meant is, in the
21 circuits that don't apply it, they -- as the
22 Third Circuit and the Eleventh Circuit lay out,
23 they just take the McDonnell Douglas standard
24 and they say: Well, what sort of protected
25 characteristic are you talking about? Are

1 you -- is it adverse? Are you qualified?

2 And -- and, you know, did the job remain open,
3 or did you fill it with a similarly situated
4 comparator?

5 I think the question of, well, you
6 know, context mattering, I think that often
7 comes in at steps 2 and 3. It comes in once the
8 employer comes forward, after you've settled
9 the -- the most common non-discriminatory
10 reasons.

11 If -- once the employer comes forward
12 with the explanation, then, of course, that
13 becomes more case-specific, and you talk about,
14 you know, hiring patterns at the company, the
15 makeup of the company.

16 I think that, of course, all comes
17 into play. And I -- and I think that comes into
18 play in many of the lower courts.

19 JUSTICE GORSUCH: Mr. Wang, I'm going
20 to ask you an unfair question. This case has
21 proceeded on an assumption that McDonnell
22 Douglas applies at the summary judgment stage,
23 and yet this Court has never held that it
24 applies at the summary judgment stage. What
25 should we do or think about that?

1 MR. WANG: Well, Justice Gorsuch, I'm
2 going to try to give you a fair answer to
3 that -- that question.

4 And -- and my sense is that all the
5 parties here take McDonnell Douglas sort of as a
6 given. And I think one -- sort of the first
7 response -- the first-level response I'd have
8 is, because we take it as a given, we're trying
9 to focus just on this narrow question of --
10 of -- of whether this add-on to McDonnell
11 Douglas in the common cases is appropriate.
12 So -- so that's -- that's the first one.

13 I think the second one is, because the
14 parties sort of take it as a given, it's not
15 really the best vehicle to -- to -- to really
16 re-examine it. Of course, as Versana points
17 out, there is another case that's pending before
18 this Court that could be granted that
19 re-examines it.

20 But I think maybe as a final point,
21 whether you have McDonnell Douglas or not,
22 there's still sort of this underlying question
23 of should you apply some sort of categorical
24 evidentiary presumption against an individual
25 based on being in a majority group.

1 And I think the -- the -- your --
2 the -- the Court's opinion in Bostock says the
3 answer should be no.

4 JUSTICE GORSUCH: Yeah. That --
5 that's why it was an unfair question, because
6 nobody's asked us to do anything about it in
7 this case, and I appreciate that. But -- but
8 you're standing at the podium, so what the heck,
9 right?

10 (Laughter.)

11 JUSTICE GORSUCH: McDonnell Douglas
12 was devised back when there were bench trials
13 for these cases, and -- and that -- we passed
14 that a long time ago. And at summary judgment,
15 I had thought the standard a plaintiff needed to
16 meet was just whether there was a material
17 dispute of fact about question of discrimination
18 on an individual basis.

19 MR. WANG: Correct.

20 JUSTICE GORSUCH: But the McDonnell
21 Douglas framework has three steps, none of which
22 appear in summary judgment or in the statute.
23 And the third step has really caught up a lot of
24 plaintiffs, right, having to show that the --
25 that the defendant's stated reasons for the

1 adverse employment action are pretextual.

2 MR. WANG: Right.

3 JUSTICE GORSUCH: It could be that
4 they are -- are not pretextual, but there's
5 still discrimination.

6 MR. WANG: Correct.

7 JUSTICE GORSUCH: Two causes, right?

8 MR. WANG: Correct.

9 JUSTICE GORSUCH: And, normally, we
10 would think Title VII would capture any but-for
11 cause.

12 MR. WANG: Correct.

13 JUSTICE GORSUCH: And -- and so just
14 thoughts about that.

15 MR. WANG: Yeah, I -- I don't want to
16 step on the petitioners or the respondents in
17 the Hittle case at all in this manner. My
18 personal sense is that the statute is trying to
19 understand, as -- as -- as you say, Justice
20 Gorsuch, it's trying to understand whether
21 discrimination happened.

22 And I think the takeaway from Hicks
23 and Reeves versus Sanderson is that: Look, if
24 you have this legitimate non-discriminatory
25 reason, let's not -- let's not just fight over

1 pretext and whether that happened or this
2 happened. Let's just try to get at the root of
3 the issue, whether discrimination happened.

4 And -- and if I can just maybe tie it
5 back to this case. The question is whether
6 individual discrimination happened. It's not
7 about whether, as the Sixth Circuit put it,
8 there's some pattern or practice of group-based
9 discrimination or some specific look at the
10 status of the decisionmaker here.

11 I think it's about the individual
12 circumstances in any individual case.

13 JUSTICE KAVANAUGH: Isn't it about
14 whether the stated reason by the employer was
15 true or, if not, whether it was because of race
16 or sex or what have you?

17 MR. WANG: Well, I think, Justice
18 Kavanaugh, that -- that goes to, of course,
19 steps 2 and 3. And I'm -- and I think, whether
20 it's true or not, I -- I -- I think that this
21 Court's precedents, I -- I think, instruct that:
22 Look, if it's not true under Reeves, that's --
23 doesn't necessarily require a finding or require
24 a directed verdict.

25 JUSTICE KAVANAUGH: Right. Not -- it

1 doesn't require --

2 MR. WANG: Right.

3 JUSTICE KAVANAUGH: -- but often will

4 lead that way.

5 I thought McDonnell Douglas kind of

6 dropped out once the employer stated a reason.

7 MR. WANG: Yes. Yes, Your Honor.

8 JUSTICE KAVANAUGH: That's certainly

9 what the D.C. Circuit has said. That's, I

10 thought, what the -- this Court had suggested in

11 cases like -- a variety of cases.

12 MR. WANG: Yeah. And -- and -- and,

13 Justice Kavanaugh, I think that's right. I

14 think that's a --

15 JUSTICE KAVANAUGH: And the employer

16 usually states a reason in the answer, right?

17 MR. WANG: Well -- well -- well, yeah.

18 And -- and let me try to tackle that in -- in --

19 in two ways. I think, first, certainly --

20 JUSTICE KAVANAUGH: We're pretty far

21 afield from the question presented, but --

22 JUSTICE JACKSON: Yeah.

23 MR. WANG: Yeah, yeah. I -- I -- and

24 I -- and I just -- I want to -- to be sort of

25 mindful of that but also provide a -- a fulsome

1 response here.

2 The -- the first point to -- to -- to
3 your question is I think that is a possible
4 takeaway from Aikens. And, certainly, the D.C.
5 Circuit in Brady did hold that.

6 I think the sort of -- why I don't
7 necessarily know if that can be resolved in this
8 case, this particular case, is -- is, look, our
9 client -- our client here, Ms. Ames, lost on
10 step 1. And -- and many other clients lose on
11 step 1. Sometimes you don't get to step 2.
12 It's not often, but sometimes you don't. And --
13 and that's why I think there's a circuit split
14 over whether there should be an additional
15 requirement at step 1.

16 JUSTICE KAVANAUGH: So -- so all you
17 want for this case is a really short opinion
18 that says discrimination on the basis of sexual
19 orientation, whether it's because you're gay or
20 because you're straight, is prohibited, and the
21 rules are the same whichever way that goes?

22 MR. WANG: That -- that's right, Your
23 Honor. And I --

24 JUSTICE KAVANAUGH: That's all we need
25 to say, right?

1 MR. WANG: I -- I think that would be
2 something -- well -- well, I think you'd also
3 have to say reverse or vacate --

4 (Laughter.)

5 MR. WANG: I want to look out for my
6 client here a little bit.

7 But -- but, certainly, as to the
8 reasoning, yes, I -- I entirely agree. I think
9 that this is a narrow question, and it's a
10 question of is there an added burden.

11 And -- and if the answer, I think,
12 under McDonnell and under Title VII's text is
13 no, then -- then this goes back to -- to the
14 lower courts to resolve.

15 CHIEF JUSTICE ROBERTS: Anything?

16 JUSTICE SOTOMAYOR: Just as a
17 footnote, it's not just whether discrimination
18 was a reason, but was it a motivating fact --

19 CHIEF JUSTICE ROBERTS: Motivating.

20 JUSTICE SOTOMAYOR: -- correct? Under
21 the statute, it could be -- it could be a
22 legitimate reason -- as Justice Gorsuch said,
23 but it still could have been based --

24 MR. WANG: -- certainly, Justice --

25 JUSTICE SOTOMAYOR: -- on race or sex

1 or -- or --

2 MR. WANG: Yes, yes.

3 JUSTICE SOTOMAYOR: -- gender

4 identity.

5 MR. WANG: Yes, Justice Sotomayor. I

6 think -- I -- I entirely agree with that. I

7 think that the -- the takeaway from several of

8 these Court's cases, like the Abercrombie &

9 Fitch case, say: Look, it's -- it needs to be

10 the motivating factor. So -- so I -- I entirely

11 agree. And I -- I don't think this case

12 would -- would implicate that -- those -- that

13 line of precedents.

14 CHIEF JUSTICE ROBERTS: Thank you,

15 counsel.

16 MR. WANG: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice

18 Thomas, anything further?

19 Justice Alito?

20 Justice Kavanaugh, anything?

21 Justice Barrett?

22 Justice Jackson?

23 Thank you, counsel.

24 MR. WANG: Thank you.

25 CHIEF JUSTICE ROBERTS: Ms. Robertson.

1 ORAL ARGUMENT OF ASHLEY ROBERTSON
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING VACATUR

4 MS. ROBERTSON: Mr. Chief Justice, and
5 may it please the Court:

6 The court of appeals applied a
7 different and more difficult standard to
8 Petitioner because it considered her a member of
9 the majority, but Title VII draws no
10 distinctions between plaintiffs based on their
11 race, religion, sex, or other protected
12 characteristic.

13 That alone is reason to vacate the
14 decision below, that the Sixth Circuit's test
15 would have been wrong if applied even-handedly.

16 The Court required evidence, reason to
17 suspect an employer usually discriminates
18 against a group, that the statute does not, and
19 it required more evidence to make out a prima
20 facie case than this Court has held is
21 necessary, including in McDonnell Douglas
22 itself.

23 That heightened standard risks
24 screening out cases with merit and complicates
25 litigation by focusing on whether to shift a

1 burden of production that Ohio had already met
2 in this case.

3 The Court should vacate and remand for
4 the court of appeals to apply the proper
5 standards in the first instance, including to
6 consider Ohio's alternative arguments for why
7 summary judgment might still be proper.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: In McDonnell Douglas,
10 Justice Powell -- the first -- he said this may
11 be done -- in -- in setting out the prima facie
12 case, this may be done by showing, one, that he
13 belongs to a racial minority.

14 What work does that do?

15 MS. ROBERTSON: We think that that
16 first prong identifies the protected class to
17 which the plaintiff belongs and, therefore,
18 focuses the litigation on whether the
19 discrimination occurred on the basis of that
20 protected class.

21 We don't think it does the work that
22 the court of appeals and the other courts that
23 have adopted the background circumstance thinks
24 it does, namely, that McDonnell Douglas was
25 predicated on some assumption about the rate at

1 which different groups were discriminated
2 against.

3 The Court has told us that the
4 McDonnell Douglas presumption arises because of
5 a different insight about employers, that they
6 act for reasons and will be able to provide
7 reasons so that if this is the rare employer who
8 can't come forward with any non-discriminatory
9 reason for their action, the reason becomes more
10 likely discriminatory. And that is an insight
11 that holds good regardless of the identity of
12 the plaintiff.

13 Of course, that's not to say that a
14 plaintiff who makes out a prima facie case is
15 necessarily going to trial. In virtually every
16 case, an employer will come forward with some
17 non-discriminatory reason for their actions, and
18 then the question will focus on whether that
19 reason is pretextual or whether there's
20 otherwise evidence to indicate that the employer
21 acted for a discriminatory reason. And that
22 itself is a difficult burden for plaintiffs to
23 meet.

24 We reject the Sixth Circuit's test
25 because it's adding an additional atextual

1 burden at step 1 that risks screening out cases
2 that might otherwise satisfy the statute's
3 standard for liability.

4 JUSTICE BARRETT: Ms. Robertson, could
5 you give us a little background about the EEOC's
6 interpretation of this statute because it has a
7 different approach, right?

8 MS. ROBERTSON: No, the -- or it --
9 the EEOC has a different approach than what the
10 Sixth Circuit does here.

11 JUSTICE BARRETT: Than what the Sixth
12 Circuit. Yeah, yeah.

13 MS. ROBERTSON: Yes.

14 JUSTICE BARRETT: Sorry. I didn't
15 mean than you do.

16 (Laughter.)

17 JUSTICE BARRETT: I meant than the
18 Sixth Circuit.

19 MS. ROBERTSON: Yes. The EEOC has
20 rejected the background circumstances rule. It
21 applies the same prima facie case, the one this
22 Court articulated in McDonnell Douglas, for all
23 plaintiffs. And it's been consistent with that
24 because it understands this Court's subsequent
25 decisions in McDonnell, and Burdine, and Furnco

1 to reject the idea that McDonnell Douglas turned
2 on the race or identity of the plaintiff.

3 JUSTICE BARRETT: And, you know, I --
4 I asked -- I asked before whether this would
5 lead to a floodgate problem, as the Department
6 says, oh, then you're going to have all these
7 people filing suits. But the EEOC -- am I
8 remembering right -- it was like 2001 that it's
9 consistently had this interpretation of the
10 statute? What has the EEOC's experience been?

11 MS. ROBERTSON: The EEOC has had this
12 interpretation since 2006. The -- the EEOC, to
13 be clear, while it does investigate all charges,
14 parties don't need -- don't need the EEOC to
15 conclude that there is reasonable cause to
16 proceed. EEOC will always issue a right to sue
17 letter.

18 But I will say that in our experience
19 as an employer who regularly litigates these
20 cases as a defendant, we don't need a higher
21 prima facie case to weed out cases without
22 merit. That's because, in every case, the
23 government can provide a non-discriminatory
24 reason for its action.

25 And so the case will proceed to step 3

1 whether or not that reason is a pretext or
2 whether or not we ultimately acted for a
3 discriminatory reason. And that in itself, as I
4 said, is a high hurdle, and so, if a plaintiff
5 can't satisfy that bar, they won't go to trial.

6 So we -- we share Ohio's concerns with
7 making sure that meritless cases don't reach
8 trial. We simply think that raising the
9 standard at step 1 would be exactly the wrong
10 way to address that concern because it would
11 focus parties on a question that has often
12 become ancillary by the time a court considers a
13 motion for summary judgment because, during
14 discovery, a defendant will often, virtually
15 always, offer some reason for their action, be
16 it through a deposition, through a declaration,
17 some other paper evidence. And so for the court
18 to focus on whether a plaintiff has triggered a
19 burden of production that a defendant has
20 already met strikes us as beside the point.

21 And, of course, that's what the Court
22 said in Aikens and Hicks. That's what the D.C.
23 Circuit has said. And we think, to the extent
24 that there is confusion about McDonnell Douglas,
25 Justice Gorsuch, it would be helpful for this

1 Court to clarify in remanding to the Sixth
2 Circuit that because Ohio has already met its
3 burden of production here, the court can and
4 should proceed to the ultimate question of
5 whether a fact-finder could find discrimination.

6 JUSTICE GORSUCH: Yeah, that's --

7 JUSTICE ALITO: And when --

8 JUSTICE GORSUCH: -- that's -- I'm
9 sorry. Go ahead.

10 JUSTICE ALITO: Go ahead.

11 JUSTICE GORSUCH: Well -- I -- I do
12 want to pick up on that point, Ms. Robertson,
13 that at least in many circuits, the -- the --
14 the step 3 inquiry on pretext has become kind of
15 a -- an absolute condition that has to be met.
16 You have to show that the -- that the reason
17 offered by the employer is pretextual to get to
18 trial.

19 And -- and -- and, I -- again, we've
20 never held that. This Court's never done it in
21 the summary judgment context. I understand
22 other circuits may do it differently, but many
23 have done what I've described, which seems a
24 little inconsistent with, as Justice Sotomayor
25 pointed out, the motivating factor test and with

1 the but-for causation test, where there are two
2 possible causes. One might be
3 non-discriminatory and another might be
4 discriminatory.

5 Any thoughts about that for us?

6 MS. ROBERTSON: I'm mindful that the
7 Court has before it a pending petition, and so I
8 won't comment on whether what the Ninth Circuit
9 did specifically in that case was incorrect. I
10 will say that we understand that any plaintiff
11 that can produce evidence from which a jury
12 could infer discrimination should go to trial.

13 JUSTICE GORSUCH: Okay. Thank you.

14 JUSTICE JACKSON: Can I ask you about
15 the government's experience in terms of court
16 confusion? I mean, is the -- is -- is it your
17 experience that at least with respect to step 1,
18 there's been sort of widespread misunderstanding
19 of what is supposed to happen?

20 MS. ROBERTSON: I do think there has
21 been confusion in the courts of appeals, and I
22 think that the Court in this case could take two
23 steps that would go a long way towards
24 addressing that confusion.

25 First, it can make clear that the

1 first step of McDonnell Douglas should not
2 screen out any case that might ultimately
3 satisfy the standard -- the statutory standard
4 for liability. So what the Sixth Circuit did
5 here, for instance, by asking for a reason to
6 think that an employer usually discriminates
7 against a group, requires evidence that a
8 plaintiff wouldn't need to establish liability
9 under the statute because, of course, even if an
10 employer generally treats a group well, if a
11 plaintiff has evidence that the employer
12 discriminated against her, she should be able to
13 proceed.

14 JUSTICE JACKSON: So I hear you saying
15 that first step is make sure you make clear
16 that, you know, step 1 is a low bar.

17 MS. ROBERTSON: It's a --

18 JUSTICE JACKSON: You're not proving
19 your case at that point.

20 MS. ROBERTSON: Yes. I do think that
21 that is another -- that that is an important
22 point. A plaintiff is not required at step 1 to
23 prove discrimination is more likely than not.
24 They need to prove at step 1 that the facts, if
25 left unexplained, would make discrimination more

1 likely than not.

2 And that lack of explanation itself
3 does significant work because, if an employer
4 cannot come up with a non-discriminatory reason,
5 any reason, even an arbitrary reason, for why it
6 took the employment action it took, that in
7 itself is highly probative of whether or not
8 there was discrimination. And the additional
9 facts necessary to prove discrimination in that
10 circumstance would be, as this Court has said,
11 quite minimal.

12 JUSTICE JACKSON: And I apologize for
13 cutting you off. You said there were two things
14 the Court could say.

15 MS. ROBERTSON: The second one I hit
16 on earlier and Justice Kavanaugh asked about as
17 well, which is clarifying that if an employer
18 has met its burden of production, whether that
19 employer had the burden in the first place is
20 not something that the court need answer.

21 Instead, the court can focus on the
22 ultimate question of whether there was
23 discrimination, including, of course,
24 considering any evidence that suggests the
25 reason that the employer gave was pretextual.

1 JUSTICE JACKSON: But, of course, that
2 would be going on to talk about step 2 in a way
3 that really is a little bit outside the scope of
4 this case, right?

5 MS. ROBERTSON: We simply think that
6 in remanding to the Sixth Circuit, because Ohio
7 on these facts has -- the court has already
8 held, the court of appeals has already held, has
9 satisfied its step 2 burden, it would be
10 appropriate for the Court to say that the
11 court -- that the court of appeals can proceed
12 directly to step 3.

13 JUSTICE JACKSON: Thank you.

14 JUSTICE ALITO: Would it be -- the --
15 the rule that the Sixth Circuit applied was
16 apparently based on an intuition about the way
17 in which most employers behave. And maybe it
18 was sound at the time when McDonnell Douglas was
19 decided. Maybe, as some of the amici have
20 argued, it's no longer sound today. Suppose we
21 say that that was an error.

22 Would it be permissible for a court to
23 transport that same notion into the subsequent
24 steps of the McDonnell Douglas inquiry? In
25 other words, in taking into account whether

1 there's sufficient evidence to get beyond -- get
2 by summary judgment, can a court take into
3 account the race of the decisionmaker and the
4 race of the -- of the plaintiff?

5 MS. ROBERTSON: I think it's important
6 to distinguish between two ways that a court
7 might take race into account. The first is the
8 way that the Sixth Circuit did, which is tell me
9 your race and I will tell you how much evidence
10 you need to -- to produce, or you'll -- or I'll
11 apply a different standard. That would be wrong
12 at any stage in the proceeding.

13 JUSTICE ALITO: Okay.

14 MS. ROBERTSON: That's not to say that
15 race is irrelevant in a race discrimination case
16 or that sex is irrelevant in a sex
17 discrimination place. And I think it's helpful
18 to understand how that type of evidence comes in
19 in practice.

20 In our experience litigating those
21 case -- these cases, it typically takes two
22 forms. First, a plaintiff can introduce
23 evidence that their employer has a history of
24 discriminating against their particular group,
25 be it a discriminatory pattern of hiring or

1 firing or a history of derogatory comments
2 directed at a particular group.

3 Second, courts can consider a
4 plaintiff's identity to help them draw
5 inferences from the evidence in the record. So
6 comments that look neutral in a vacuum might
7 take on a different valence when directed at a
8 certain group.

9 And just to give you an example of
10 what that means, in PriceWaterhouse, this Court
11 had no trouble understanding that when a male
12 supervisor tells a female subordinate that her
13 chances at promotion would be better if she wore
14 makeup, wore jewelry, was less aggressive, that
15 that comment invokes sex stereotypes, whereas,
16 if an employer told a female subordinate meet
17 your deadlines, common sense would tell us
18 that's not sex-based, absent some other evidence
19 to suggest it is, like the employer doesn't
20 enforce deadlines for male colleagues.

21 So, of course, the Court can consider
22 those -- that type of context and common-sense
23 inferences. What a court can't do is what the
24 Sixth Circuit did here, which is draw inferences
25 solely from the identity of the plaintiff and

1 the court's own judgment, independent of any
2 evidence in the record, about how frequently
3 that group may or may not experience
4 discrimination.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Is a protected characteristic on the
8 part of the decisionmaker alone enough to
9 establish a prima facie case?

10 MS. ROBERTSON: No, we don't think so,
11 Chief Justice. And that hits at an oddity about
12 the Sixth Circuit's opinion, is that it suggests
13 that evidence that wouldn't be enough to make
14 out a prima facie case suddenly would be if you
15 changed the identity of the decisionmaker.

16 But, because the prima facie case is
17 hitched to step 2 and looks to what would happen
18 if an employer couldn't come forward with any
19 explanation, we think that whether or not the
20 decisionmaker was of a particular identity or
21 not, if they can't come up with any
22 non-discriminatory reason for their actions,
23 that alone is a strong signal of discrimination.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Well, I want to follow
3 up on the point that you were answering
4 previously. So I -- I do think it's an
5 important point.

6 When you say that some of what the
7 Sixth Circuit appeared to be concerned about can
8 be considered at a later stage of the McDonnell
9 Douglas process, that does not mean that the
10 mere -- that that stereotypes based solely on
11 the decisionmaker's race and the plaintiff's
12 race are permissible.

13 MS. ROBERTSON: That's right. The
14 Court always needs to look at the evidence in
15 the record before them. And I -- we think that
16 when the court is confronted with particular
17 facts about a particular employer, of course,
18 that's appropriate to consider.

19 And the fact that a plaintiff was a
20 member of a group that this employer has
21 historically discriminated against, of course,
22 can be relevant, and we wouldn't want the Court
23 to suggest otherwise in an opinion.

24 Likewise, as we said in Note 1 of our
25 brief, this case doesn't have to do with the

1 prima facie case in a pattern or practice case,
2 where, of course, whether the employer usually
3 discriminates is exactly the point.

4 But the Court should not, based on its
5 own independent sense of which group --
6 experiences more discrimination or not, draw its
7 own conclusions absent evidence.

8 JUSTICE ALITO: Okay. So this is not
9 a pattern and practice case, and yet you say
10 that it would be permissible for a court at a
11 later stage of the McDonnell Douglas process to
12 take into account the -- the -- the employer's
13 hiring patterns. Yeah. So what does that --
14 what would that mean here?

15 Suppose that the plaintiff said:
16 Look, they -- I mean, they discriminated against
17 me because I'm -- because I'm heterosexual, and
18 here are five other instances where they did the
19 same thing.

20 Is that going to come in? Is the
21 court going to have mini trials or mini summary
22 judgment proceedings on all of these other
23 alleged instances?

24 MS. ROBERTSON: I think there are two
25 types of historical evidence about an employer's

1 hiring or firing patterns that might come in.
 2 The first is statistical evidence of the sort
 3 that the Court in McDonnell Douglas said may be
 4 relevant at step 3 of the litigation.

5 The second is any comparator evidence.
 6 So, if a plaintiff can point to five similarly
 7 situated individuals of a different protected
 8 group that the employer treated differently,
 9 that would be relevant.

10 CHIEF JUSTICE ROBERTS: Justice
 11 Sotomayor?

12 Justice Kagan?

13 Justice Kavanaugh?

14 Justice Jackson?

15 Okay. Thank you, counsel.

16 Mr. Gaiser.

17 ORAL ARGUMENT OF T. ELLIOT GAISER

18 ON BEHALF OF THE RESPONDENT

19 MR. GAISER: Mr. Chief Justice, and
 20 may it please the Court:

21 Ohio agrees it is wrong to hold some
 22 litigants to a higher standard because of their
 23 protected characteristics. But that is not what
 24 happened in this case.

25 When Governor DeWine took office in

1 January 2019 and appointed a new cabinet-level
2 director of the Ohio Department of Youth
3 Services, the state's juvenile corrections
4 system, Petitioner was an unclassified civil
5 servant, effectively an at-will political
6 appointee.

7 She claims the Department took two
8 adverse actions against her in the first five
9 months of the administration, denying her a
10 promotion and demoting her because of her sexual
11 orientation.

12 But, after discovery, she could not
13 establish that anybody was motivated by sexual
14 orientation or even knew her sexual orientation,
15 nor the orientation of the unclassified
16 political appointees, Ms. Frierson and Mr.
17 Stojasavljevic, that she points to as
18 comparators.

19 In other words, she failed to make out
20 a prima facie case under the first step of
21 McDonnell Douglas that should apply to every
22 Title VII plaintiff. She didn't provide
23 evidence that, to quote Furnco, "if otherwise
24 unexplained, raises an inference of
25 discrimination."

1 Whether that evidentiary standard is
2 framed as background circumstances, as in
3 Parker, or circumstances which give rise to an
4 inference of unlawful discrimination, as in
5 Burdine, this Court has said a prima facie case
6 under Title VII must be complete enough for the
7 court to enter judgment for the plaintiff before
8 the burden shifts to the employer.

9 Because the best reading of the Sixth
10 Circuit judgment applies that standard, this
11 Court should affirm.

12 If this Court nevertheless holds
13 Petitioner made out a prima facie case on these
14 facts, then McDonnell Douglas has effectively
15 two prongs, and the Court will have made Title
16 VII that unusual statute that presumes liability
17 for employers and swallows what remains of
18 at-will employment.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Do you think the
21 Sixth Circuit's -- opinion is consistent with
22 your argument here?

23 MR. GAISER: I think, Justice Thomas,
24 that's the best way to read what the Sixth
25 Circuit was doing. My friends on the other side

1 have language they can point to about additional
2 or higher burden that -- that we think this per
3 curiam shouldn't be scrutinized on that level.

4 JUSTICE THOMAS: But it does say that
5 if the Petitioner were of a minority -- a
6 different group, that the additional burden
7 would not be necessary. So how is that
8 consistent with your argument?

9 MR. GAISER: Well, I -- I think that
10 what the court was doing was saying just going
11 through the four elements that what McDonald
12 calls the sample pattern of proof wasn't enough
13 in this particular case because there wasn't any
14 evidence that raised an inference of
15 discrimination merely from those bare four
16 facts.

17 JUSTICE KAGAN: I mean --

18 JUSTICE THOMAS: So do you think the
19 concurrence got it wrong too?

20 MR. GAISER: Well, with great respect
21 for Judge Kethledge, we think that he latched
22 onto what Ms. Ames had said about the relative
23 qualifications. And so Ohio sees it differently
24 from Judge Kethledge.

25 JUSTICE KAGAN: Mr. Gaiser, I -- I

1 mean, you can say, well, there's language. I
2 mean, I think that that's the absolutely
3 critical language in this opinion. Because Ames
4 is heterosexual, she must make a showing in
5 addition to the usual ones for establishing a
6 prima facie case.

7 And then it says, you know, Ames's
8 prima facie case would have been easy to make
9 had she belonged to the relevant minority group,
10 here, gay people.

11 So, I mean, this is what the Court
12 did.

13 MR. GAISER: Well, and we can't
14 retreat from what the Court here said, but we
15 think the best way to construe that language is
16 consistent. But, nevertheless, I think that --

17 JUSTICE KAGAN: Well, the best way to
18 construe that language is, like, as the language
19 says.

20 MR. GAISER: Well, Justice Kagan, yes,
21 the Court said what it said. The important
22 point is the prima facie step this Court has
23 laid out needs to be complete enough before the
24 employer has any burden under Title VII to show
25 an inference of discrimination.

1 JUSTICE KAVANAUGH: You -- you agree
2 that those passages are wrong?

3 MR. GAISER: We're not defending the
4 exact language there. This -- this per curiam,
5 we asked for oral --

6 JUSTICE KAGAN: I mean, the exact
7 language or you're defending something like that
8 language? I -- I mean, it's a little bit of a
9 peculiar situation, isn't it, because this is
10 what the court said. And you're up here, and I
11 don't know exactly what to make of this, that --
12 are -- do you think that that's right, or do you
13 think that it's wrong?

14 MR. GAISER: I think the idea that you
15 hold people to different standards because of
16 their protected characteristics is wrong. And
17 if there's any upshot from this case, let
18 reverse discrimination completely fall out of
19 the Federal Reporter.

20 JUSTICE KAVANAUGH: So you agree with
21 Petitioner and the Solicitor General then?

22 MR. GAISER: On -- on that major
23 premise point. But we don't think --

24 JUSTICE KAVANAUGH: Which is the
25 question presented.

1 MR. GAISER: Well, we think that the
2 question presented here is -- is: What must a
3 plaintiff do to show at the prima facie step
4 that there's an inference of discrimination?
5 And we don't think Ms. Ames did that. And we
6 think that saying that what the United States
7 says, that just eliminating the two most common
8 reasons and then --

9 JUSTICE KAVANAUGH: That could be all
10 sorted out on remand, right? I mean, all we
11 have before us is really what Justice Kagan was
12 reading, I thought.

13 MR. GAISER: Well, our argument is
14 that this Court reviews judgments, and the
15 judgment was correct.

16 I think that everyone here agrees that
17 everyone should be treated equally.

18 JUSTICE JACKSON: All right. So what
19 is that treatment? What must a plaintiff do in
20 your view?

21 MR. GAISER: So, under Reeves, this
22 Court said: Provide enough evidence that
23 there's an inference of discrimination -- this
24 is also Footnote 7 of Burdine -- a legally
25 mandatory presumption of discrimination.

1 And then the Court said in --

2 JUSTICE JACKSON: Do -- do we -- do we
3 not have the steps anymore within the -- you
4 know, that he was a member of a protected class,
5 that he suffered an adverse employment action,
6 that he was qualified and was replaced by
7 someone else? Is that not how you conceive of
8 this as, like, the statement?

9 You seem to be suggesting that
10 evidence has to come in at this very first stage
11 and you have to really establish that you have
12 been discriminated against. And -- and then I
13 had not understand -- understood the first stage
14 to be that onerous.

15 MR. GAISER: Well, we don't think it's
16 onerous, but this is at summary judgment. This
17 is after complete discovery, document
18 production. Here, I think we had six
19 depositions under oath. If you can't show any
20 evidence that the employer was motivated by a
21 protected characteristic when they took the
22 adverse action, and, certainly, if you can't
23 show an adverse action at all, that's not enough
24 to create any burden of production for the
25 employer.

1 And that sample pattern of proof, the
2 four elements that McDonnell Douglas lays out,
3 courts have adapted that under this Court's
4 guidance. So, in Swierkiewicz versus Sorema,
5 this Court said, before discovery has unearthed
6 relevant facts and evidence, it may be difficult
7 to define the precise formulation of the
8 required prima facie case in a particular case.

9 And so what those four elements
10 happened to be, this Court has directed lower
11 courts to never treat them as an exclusive or --

12 JUSTICE JACKSON: I understand, but I
13 guess, you know, what -- what's happening is
14 that we have a burden-shifting test that we have
15 indicated on several occasions is sort of
16 graduated in terms of how you get to the
17 ultimate question.

18 And I -- I thought that the -- what
19 was necessary to shift the burden to the
20 employer to come up with the reason or explain
21 what -- was not supposed to be all the evidence
22 that you have related to discrimination, that it
23 was just enough that you give -- say things or
24 have enough evidence that -- that -- that --
25 that established an inference, you know, that

1 you could more likely than not, and then the
2 burden shifts and the employer really has to
3 explain what -- what's going on here.

4 MR. GAISER: Well, I agree with your
5 characterization, Justice Jackson. And that's
6 what this Court said in Reeves, where the Court
7 made clear that if you have enough evidence at
8 the prima facie stage, that you could, looking
9 alone at that, grant judgment for the plaintiff.
10 Then the employer has a burden.

11 JUSTICE JACKSON: So what was --

12 JUSTICE BARRETT: Mr. --

13 JUSTICE JACKSON: -- the failing --
14 oh, sorry. Go ahead.

15 JUSTICE BARRETT: I -- I was just
16 going to -- I just wanted to clarify what you
17 were saying to Justice Kagan and Justice
18 Kavanaugh.

19 Do you agree that if the law in the
20 Sixth Circuit is as Judge Kethledge's opinion
21 describes it, that it's wrong?

22 MR. GAISER: I -- I think that if that
23 were an accurate characterization, yes.

24 JUSTICE BARRETT: So this whole
25 dispute then is really just about how we

1 interpret what the Sixth Circuit said?

2 MR. GAISER: No, I don't think that's
3 alone what's at issue, Justice Barrett. I
4 think, you know, the case that we cite I think
5 has -- has a better description.

6 You know, this per curiam opinion, we
7 asked the Department for oral argument, and my
8 friends on the other side too asked for oral
9 argument. The court just came out with this
10 decision two weeks -- or two months after the
11 Court's briefing.

12 JUSTICE BARRETT: So it might have
13 been sloppy, maybe it wasn't stated well, but
14 you agree that if it means what it says, what
15 Justice Kagan read to you, or if Judge
16 Kethledge's understanding was correct, you agree
17 that that's wrong?

18 MR. GAISER: We -- we agree. Ohio
19 agrees that it's wrong to treat people
20 differently.

21 JUSTICE BARRETT: So, if we said
22 someone like Ms. Ames, who is a member -- it --
23 it doesn't matter if she was gay or whether she
24 was straight; she would have the exact same
25 burden and be treated the exact same way under

1 Title VII if she sued as someone who was gay and
2 argued that they were discriminated against
3 under Title VII? Same?

4 MR. GAISER: -- I -- I think that
5 the -- she should have the same burden and that
6 the best reading of -- of what the Sixth Circuit
7 said --

8 JUSTICE BARRETT: Well, no, no, no.
9 I -- I'm just asking you what you think of the
10 statute. So that is what you think of the
11 statute. And same for someone who brings a race
12 discrimination, someone who brings -- you know,
13 a woman or a man who brings a sex discrimination
14 suit on the basis of -- a discrimination against
15 the basis of sex, all of those, you agree that
16 the courts should apply the exact same burden,
17 treat them the exact same way?

18 MR. GAISER: We -- we agree with
19 that --

20 JUSTICE BARRETT: Okay.

21 MR. GAISER: -- Justice Barrett.

22 JUSTICE BARRETT: Thank you.

23 MR. GAISER: The only thing I would
24 add is it can't simply be the tick through the
25 mechanical rubric and then the employer has the

1 burden to disprove liability under Title VII.
2 That's inconsistent with the text of Title VII.

3 And we think what this Court said --
4 I -- I would point the Court to page 3 of my
5 friend's reply brief. They cite this per
6 curiam -- this unpublished decision from the
7 Third Circuit that really re-articulates what
8 the United States says at page 20 of their
9 brief, and what they say at the top of page 20
10 is that the fourth element of a prima facie case
11 should just be circumstances which give rise to
12 an inference of discrimination.

13 If that's the rubric that this Court
14 says it should apply in every case, then I think
15 Ms. Ames hasn't made out a prima facie case.

16 JUSTICE BARRETT: So you're not
17 worried about -- you are not concerned -- you're
18 on the same page as your friends on the other
19 side when it comes to the central question of
20 how we should interpret Title VII. Your concern
21 is that we'll say something more about what kind
22 of evidence any plaintiff has to show no matter
23 what group they belong to?

24 MR. GAISER: Yes, our requirement --

25 JUSTICE BARRETT: But, if we didn't

1 say that, you would be satisfied with an opinion
2 that just said everyone's treated the same under
3 Title VII?

4 MR. GAISER: Well, I -- I think the
5 courts could be misled by hearing that, that
6 basically the prima facie case, as the National
7 Employment Lawyers Association explicitly asks
8 for, doesn't really play a factor in McDonnell
9 Douglas. McDonnell Douglas is a judicial gloss
10 on the statute that is trying to make it easier
11 for plaintiffs, but it's not such that the
12 burden is always and everywhere on the regulated
13 party. The Title VII standard still requires
14 the plaintiff to make out the burden of proof.

15 JUSTICE KAVANAUGH: Why then,
16 though --

17 JUSTICE SOTOMAYOR: Sorry. Why --
18 why -- why is it so hard on an employer to just
19 say why they didn't hire someone?

20 MR. GAISER: Well --

21 JUSTICE SOTOMAYOR: I -- I mean,
22 you're making it sound as if, by making out a
23 prima facie case, it's unfair to the employer to
24 say you didn't hire them, explain why.

25 MR. GAISER: Well, two responses to --

1 JUSTICE SOTOMAYOR: They don't have to
2 prove the why.

3 MR. GAISER: Yeah, two responses to
4 that, Justice Sotomayor.

5 Number one, the text of the statute
6 allocates the burden not to disprove liability
7 but to prove liability. And so the prima facie
8 case needs to be a complete case enough at that
9 circumstantial stage before the employer has a
10 burden under the text.

11 And then, secondly, doctrine. This
12 Court has said that that case needs to be enough
13 to create a legally mandatory inference of
14 discrimination.

15 JUSTICE SOTOMAYOR: But you seem to be
16 putting this on its head. You seem to be saying
17 that they have to be able to win the case on the
18 prima facie evidence. That -- that's what
19 you're suggesting.

20 MR. GAISER: If -- I'll -- an
21 answer --

22 JUSTICE SOTOMAYOR: Because Judge
23 Kethledge basically said you have a situation
24 here where she alleged she was a member of the
25 majority group, she was 20-year employee, great

1 reviews, and then all of a sudden she's not
2 hired, and someone's hired who's gay, doesn't
3 have her level of college experience, and didn't
4 even want the job. It -- something's suspicious
5 about that. It certainly can give rise to an
6 inference of discrimination.

7 Now, whether those facts are enough to
8 make out that the employer's proffered reason is
9 pretextual or -- pretextual in some way, the
10 court hasn't gotten to that yet.

11 MR. GAISER: Well, so, Justice
12 Sotomayor, I think the -- the really -- crucial
13 fact here is every circuit -- and we point this
14 out in our bio -- every circuit has said that if
15 you -- the employer isn't even aware of the
16 protected trait, it's not possible to infer that
17 they were motivated by that protected trait.

18 And that doesn't come in at prong 2 of
19 the McDonnell Douglas burden-shifting. You
20 don't have to disprove the negative. It's the
21 burden on the plaintiff at very minimum to say
22 they knew about your protected characteristic.

23 And what the evidence here showed was
24 that no one knew Ames's or -- or Frierson's
25 sexual orientation. The Petition Appendix at

1 32a, the district court made a factual finding
2 that has not been appealed here that no one knew
3 Ms. Ames's sexual orientation at the time of the
4 relevant employment decisions. And Director
5 Gies testified that he did not know
6 Mr. Stojasavljevic was gay, even though others
7 may have suggested that in the record to other
8 people, and that's at J.A. 46 and 48.

9 JUSTICE KAGAN: General --

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 JUSTICE KAGAN: -- I'm -- I -- I -- I
13 guess my reaction to a lot of what you're saying
14 is this: You say you agree with your friends on
15 the question that we took this case to decide.
16 The question presented is whether a
17 majority-group plaintiff has to show something
18 more than a minority-group plaintiff, here,
19 whether a straight person has to show more than
20 a gay person. Everybody over here says no. You
21 say no too. That was the question that we took
22 the case to decide.

23 And now you're asking us to opine on
24 various other aspects of how the McDonnell
25 Douglas test works, what we should think of the

1 first step as doing, then what we should think
2 of the second and third steps as doing, that
3 are, you know, really not intertwined at all
4 with that question.

5 Whatever McDonnell Douglas does, it
6 does for majority-group plaintiffs and
7 minority-group plaintiffs alike is all that we
8 have to say. Why shouldn't we approach the case
9 in that way?

10 MR. GAISER: Well, I -- I think there
11 are two responses to that, Justice Kagan.

12 First of all, while we all agree that
13 everyone should be treated equally, we don't
14 agree about what that prima facie step actually
15 looks like when we do that.

16 JUSTICE KAGAN: Yes, I know. That's
17 exactly what my -- my -- my point is. But
18 that's -- that's -- that's orthogonal to the
19 question we took. So, I mean, why would we use
20 this case, which is about the -- whether a
21 majority-group plaintiff has an extra burden, to
22 opine on a range of things that have nothing to
23 do with that question?

24 MR. GAISER: Well, so what the Sixth
25 Circuit did here, that's -- this is my second

1 reason, Justice Kagan, if the first one doesn't
2 satisfy you -- is exactly what we think every
3 court should do: ask for enough evidence to
4 raise an inference of discrimination.

5 And simply going through those four
6 prongs, copy/pasting McDonnell Douglas with
7 subbing out racial minority for any particular
8 protected group, doesn't do that. It -- it
9 doesn't satisfy what this Court said in Reeves
10 and Burdine in Footnote 6 and 7.

11 And so our thought is the Court should
12 still affirm because what the Sixth Circuit's
13 judgment did here is what we ask every court to
14 do at the first step of McDonnell Douglas even
15 if we agree that saying that an additional
16 burden is a mischaracterization of what this
17 Court has said in the past.

18 JUSTICE GORSUCH: Mr. Gaiser, I -- I
19 guess maybe another way of coming at perhaps the
20 same question is what would be wrong with a
21 judgment holding that everybody is treated
22 equally at the first step of McDonnell Douglas,
23 if it applies at summary judgment, we've never
24 so held, but let's assume, and that you would
25 then on remand be able to argue about what that

1 fourth prong of the first prong of McDonnell
2 Douglas means for everybody? What -- what's
3 enough circumstances to give rise to an
4 inference of discrimination?

5 We -- we wouldn't say anything that
6 would prohibit you from making these arguments
7 to that court in the first instance. And,
8 normally, of course, we are a court of review,
9 not first views, Justice Ginsburg would like to
10 remind us.

11 MR. GAISER: Well, Justice Ginsburg
12 was very wise, Justice Gorsuch. And we don't
13 want to make assumptions either way. I think
14 the -- the Court should still affirm. I'm
15 defending the judgment on behalf of my client.

16 But, if the Court is going to say
17 anything about what but -- that first prong
18 happens to mean --

19 JUSTICE GORSUCH: Well -- well --
20 I'm -- I'm -- I'm positing a circumstance where
21 we don't; affiants sayeth not anything about
22 what that first prong means, other than to say
23 it applies same to everybody.

24 MR. GAISER: Well, we agree that the
25 Court should say that at the very, very minimum.

1 But, if --

2 JUSTICE GORSUCH: We're -- we're in
3 radical agreement today on that, it seems to me.

4 (Laughter.)

5 JUSTICE GORSUCH: The -- the --
6 counsel before us seem to be in total agreement.

7 And then, if your argument is, as
8 applied to everybody, she fails on the fourth
9 prong of the first prong of McDonnell Douglas,
10 perhaps a court should take a look at that
11 before we do.

12 What's -- what would be wrong with
13 that?

14 MR. GAISER: Well, I -- I think
15 there's something in between those two levels
16 of -- of abstraction, Justice Gorsuch. We agree
17 on that first level. And we think that the
18 Court can avoid that -- that sort of third level
19 down. But the second level here is --

20 JUSTICE GORSUCH: Boy, I'm lost. We
21 have four prongs and three prongs and four
22 levels.

23 (Laughter.)

24 JUSTICE GORSUCH: Just what's wrong
25 with the opinion I outlined to you?

1 MR. GAISER: Well, I think a lot of
2 courts are going to get the misimpression that
3 that first prong of the prima facie case, that
4 McDonnell Douglas step 1, if it applies equally
5 to everyone and the Court sayeth nothing further
6 about that, that it just means the burden is on
7 the employer to produce evidence --

8 JUSTICE GORSUCH: No, no.

9 JUSTICE KAVANAUGH: I don't know
10 why --

11 JUSTICE GORSUCH: No. We -- we -- why
12 would that be? We would say -- I mean, you
13 know, you -- you -- as the government points
14 out, you point out, everybody points out, you've
15 got to show you're a member of a protected
16 class, one; two, who is qualified for the
17 relevant position; three, was subject to an
18 adverse employment action; and, four -- and this
19 seems to be where the dispute is -- was taken
20 under circumstances which give rise to an
21 unlawful discrimination.

22 And you say that's not met because the
23 relevant decisionmakers didn't know the
24 plaintiff's sexual orientation. Interesting
25 argument. Not presented here. Let a lower

1 court pass on it first.

2 Why wouldn't that be a wise course for
3 this Court to follow?

4 MR. GAISER: I -- I -- I think it
5 would be wise if the Court adopted the four
6 prongs read just as you read them, Justice
7 Gorsuch. And if the Court doesn't want to say
8 anything more about that, we still think the
9 Court can affirm, but if the Court is going to
10 make sure to say what is at the -- top of page
11 20, I -- I think that would be good guidance for
12 this Court to give.

13 JUSTICE KAVANAUGH: Well, I thought --
14 this is not what I think we should do, but I'm
15 just going to throw it out there, which is, if
16 we talk about McDonnell Douglas, I thought, once
17 the employer stated a reason, the whole thing
18 kind of drops out, and then, as Justice Gorsuch
19 says, you're just figuring out was there -- was
20 it based on the stated reason or was it based on
21 a prohibited characteristic.

22 MR. GAISER: Well, I -- I think there
23 are two issues with that. Number one, if you
24 have a case like this one where the employer has
25 good evidence that they didn't even know the

1 relevant protected characteristic, the employer
2 shouldn't have to say, if I want to make that
3 argument, I also have to forego providing a
4 legitimate reason if I want to be able to win on
5 that first fundamental threshold.

6 So, under the -- the Brady opinion in
7 the D.C. Circuit, I think there's a really good
8 argument that McDonnell Douglas no longer
9 applies, this Court has already said it at -- in
10 Aiken at trial, and it doesn't apply because
11 this Court said it in Sorema at motion to
12 dismiss. And what does it do in summary
13 judgment?

14 I still think there needs to be room
15 for the employer to proffer a good reason and
16 use that as an alternative grounds for, and the
17 plaintiff didn't even meet their prima facie
18 case. In other words, the employer shouldn't be
19 forced to choose one of those two --

20 JUSTICE KAVANAUGH: Well, it's we --

21 MR. GAISER: -- possible litigation
22 tactics.

23 JUSTICE KAVANAUGH: -- we fired the
24 person because of X and we didn't even know they
25 were, you know, whatever the characteristic is.

1 MR. GAISER: Well, I -- I think --

2 JUSTICE KAVANAUGH: I mean, I don't
3 know if you -- calling it prima facie, I'm --
4 I'm far afield, but, you know, I -- as you're
5 aware, I don't think that's pretty -- very
6 useful to how to figure out these cases once the
7 employer has stated a reason, so I'll leave it
8 there, though.

9 MR. GAISER: Well, I -- I think the
10 Court should allow employers to be able to make
11 that alternative argument. They didn't make a
12 prima facie case, and we have a good reason.
13 And either is a grounds on which --

14 JUSTICE KAVANAUGH: Well, I think
15 they're -- I agree with that, but they're both
16 arguments for why it wasn't discriminatory. I
17 think the -- the decision to fire the person was
18 not based on their sexual orientation or their
19 race or what have you. It was based on
20 something else.

21 MR. GAISER: Well, I -- I think
22 they -- they both do go to the ultimate
23 question, Justice Kavanaugh. I do think,
24 though, that one is a very negative shield sort
25 of argument and the other is an affirmative

1 sword sort of argument. And the prima facia
2 case is there to capture was there enough
3 evidence to show at sort of freezing time in
4 place with no answer at all from the employer
5 that Title VII elements could be met, that there
6 could be an inference of discrimination at the
7 first step.

8 And I don't think the Court should
9 retreat from any of those statements that it's
10 made from Burdine to Furnco to Reeves.

11 JUSTICE KAVANAUGH: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Anything further?

15 JUSTICE THOMAS: No.

16 CHIEF JUSTICE ROBERTS: Anything
17 further? No?

18 Thank you.

19 Rebuttal, Ms. -- Mr. Wang?

20 REBUTTAL ARGUMENT OF XIAO WANG

21 ON BEHALF OF THE PETITIONER

22 MR. WANG: Thank you, Mr. Chief
23 Justice. I'll be very brief.

24 I -- I just want to conclude, I think,
25 with several members of the Court have -- have

1 talked about this theme, and it's actually
2 something that -- that my co-counsel,
3 Mr. Gilbert, and I talked about when entering
4 the Court this morning, which is, I think, what
5 this case is all about, and those are the four
6 words on the side of this building: equal
7 justice under law, equal justice under law.

8 Now I know that sometimes we don't
9 fulfill that promise. I understand that. But,
10 at the heart of this case, at bottom, all
11 Ms. Ames is asking for is equal justice under
12 law. Not more justice, not more justice, but
13 certainly not less and certainly not less
14 because of the color of her skin or because of
15 her sex or because of her religion.

16 We're simply asking for equal justice
17 under law because I think that's what Title VII
18 says, and I think that's consistent with what
19 this Court has held in numerous cases, and it's
20 consistent with Congress's intent in passing a
21 civil rights law to protect the civil rights of
22 all Americans.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. WANG: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is
2 submitted.

3 (Whereupon, at 11:06 a.m., the case
4 was submitted.)

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