2024 WL 1219446 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Marlean A. AMES, Petitioner,
v.
OHIO DEPARTMENT OF YOUTH SERVICES, Respondent.

No. 23-1039.
March 18, 2024.

On Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

Petition for a Writ of Certiorari

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***i QUESTION PRESENTED**

Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." App. 5a.

***II RELATED PROCEEDINGS**

United States District Court (S.D. Ohio)
Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2022 WL 912256 (Mar. 29, 2022).

Ames v. Ohio Department of Youth Services, No. 2:20-cv-05935, 2023 WL 2539214 (Mar. 16, 2023). Judgment entered Mar. 16, 2023.

United States Court of Appeals (6th Cir.)

Ames v. Ohio Department of Youth Services, No. 23-3341,87 F.4th 822 (6th Cir. 2023). Judgment entered Dec. 4, 2023.

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*1 PETITION FOR WRIT OF CERTIORARI

Marlean Ames respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 87 F.4th 822 (6th Cir. 2023) and is reproduced in the appendix to this petition at App. 2a-11a. The district court's order on Respondent's motion for summary judgment is unpublished and is reproduced at App. 13a40a. The district court's order on Respondent's motion for judgment on the pleadings is unpublished and is reproduced at App. 42a-57a.

JURISDICTION

The Sixth Circuit issued its opinion on December 4, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). On February 26, 2024, Justice Kavanaugh granted Petitioner's application for extension of time to file a petition for writ of certiorari, from March 3 to March 18, 2024.

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 ***2** 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

Title VII of the Civil Rights Act of 1964 bars employers from "discriminat [ing] against any individual .... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Though this language is unequivocal-prohibiting discrimination against any individual based on a protected characteristic-five courts of appeals require majoritygroup plaintiffs, in addition to the other elements of Title VII, to also prove "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." App. 5a. And as Judge Kethledge observed in his concurring opinion, "application of the 'background circumstances' rule alone" prevented Marlean Ames from obtaining "a jury trial" on her claim of sexual orientation discrimination. App. 10a (Kethledge, J., concurring).

Ames is a heterosexual woman. App. 5a. She has worked at the Ohio Department of Youth Services since 2004, beginning as an Executive Secretary before earning several promotions and eventually becoming a Program Administrator. App. 16a-17a. In 2017, she started reporting to Ginine Trim, a gay woman. App. 3a. In 2019, Ames applied for a promotion to Bureau Chief. App. 4a. She did not receive that promotion. Instead, the ***3** Department offered it to a gay woman who (1) started after Ames, (2) did not originally apply for the promotion, and (3) "lacked the minimum qualifications" for the job, thus requiring the Department to "circumvent[] its own internal procedures" to hire her. App. 20a-21a, App. 10a (Kethledge, J., concurring). Shortly thereafter, the Department removed Ames from her position as Program Administrator, giving her the choice between a demotion or termination. App. 4a, App. 44a. In her place, the Department hired a gay man as the new Program Administrator, despite that individual, like the woman who had obtained the Bureau Chief position over Ames, also "being neither qualified nor having formally applied" for the role. App. 44a.

As the Sixth Circuit observed, under *McDonnell Douglas's* burden shifting framework, "Ames's primafacie case" of sexual orientation discrimination should have been "easy to make." App. 5a. "[H]er claim is based on sexual orientation, which is a protected ground under Title VII, she was demoted from her position [that she had] held ... for five years, with reasonably good reviews; and she was replaced by a gay man. Moreover, for the Bureau Chief promotion that Ames was denied, the Department chose a gay woman." *Id.* (citing *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 651-52 (2020)).

But such facts were insufficient here for Ames to survive summary judgment. That is because, in the Sixth Circuit, a majority-group plaintiff like Ames-i.e., a heterosexual woman alleging sexual orientation discrimination-must, on top of Title VII's other requirements, *also* show background circumstances. *Id.* Ames could do so by proving that a "member of the relevant minority group (here, gay people) made the ***4** employment decision at issue" or by marshaling "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a-6a. A minority-group plaintiff shoulders no such burden. And significantly, because of circuit precedent, Ames could not satisfy background circumstances by referring to her own failure to secure a promotion in favor of a gay woman. Nor could she point to her demotion in favor of a gay man, since a majority-group "plaintiff cannot point to her own experience to establish a pattern of discrimination." App. 6a (citing *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003)).

As Judge Kethledge outlined, the Sixth Circuit is not alone in imposing this additional element. The D.C., Seventh, Eighth, and Tenth Circuits also require majority-group plaintiffs to show background circumstances. App. 10a (Kethledge, J., concurring). Two circuits-the Third and Eleventh-"have expressly rejected this rule." *Id.* And five circuits "simply do not apply it." *Id.* Within this third group, the First and Fifth Circuits have employed language that conveys disapproval of the rule without explicitly rejecting it. The Second, Fourth, and Ninth Circuits, meanwhile, have each acknowledged the existence of the split but declined to take a side. That tack has left district courts in these circuits in disarray, with some judges in the same courthouse requiring background circumstances and others declining to do so.

In short, "nearly every circuit has addressed this issue one way or another." App. 11a. And just like the Sixth Circuit here, half a dozen other courts of appeals have acknowledged a "split" on the issue. *See, e.g., Iadimarco v. Runyon*, 190 F.3d 151, 155 (3d Cir. 1999); ***5** *Zottola v. City of Oakland*, 32 F. App'x 307, 310 (9th Cir. 2002) ("There is currently a circuit split on this issue."); *see also Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011); *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 81 n.5 (2d Cir. 2009); *Weeks v. Union Camp Corp.*, 215 F.3d 1323, *6 n.13 (4th Cir. 2000) (Table); *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 821-22 (7th Cir. 2006). District courts have, in like manner, recognized this "circuit split" and described it as "widespread," *McNaught v. Va. Comm. Coll. Sys.*, 933 F. Supp. 2d 804, 818 (E.D. Va. 2013), and "entrenched," *Newman v. Howard Univ. Sch. of L.*, 2024 WL 450245, at *10 n.5 (D.D.C. Feb. 6, 2024).

Finally, because a background circumstances rule imposes "burdens on different plaintiffs *based on their membership in different demographic groups,"* it is, as Judge Kethledge observed, "not a gloss upon the 1964 Act, but a deep scratch across its surface." App. 9a-10a (emphasis in original). After all, as the Court has "stressed over and over again," interpretation of Title VII "must begin with, and ultimately heed, what [the] statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (internal quotation marks and alterations omitted); *Bostock*, 590 U.S. at 655-56. Yet for decades, five circuits have failed to do just that. With background circumstances proving dispositive for Ames, this case is an ideal opportunity for the Court to examine the rule and hold that it conflicts with Title VII's text and purpose.

***6 STATEMENT OF THE CASE**

A. Legal framework.

A Title VII plaintiff may prove their "case by direct or circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). But because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *id.* at 716, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), outlined a burden-shifting framework for analyzing discrimination claims based on the circumstantial evidence presented by the plaintiff in that case.

First, the plaintiff "must carry the initial burden ... of establishing a prima facie case of racial discrimination." *Id.* at 802. "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* If that prima facie case is met, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, the burden returns to the plaintiff to show that the employer's "stated reason" for its employment action "was in fact pretext." *Id.* at 804.

***7 B. Factual background.**[1]

The Ohio Department of Youth Services ("Department") is "a state agency that oversees juvenile corrections, parole, and the rehabilitation of youth through community programs." App. 14a. Marlean Ames has worked at the Department since 2004, when she was hired as an Executive Secretary. App 16a. She was promoted in 2009 to Community Facility Liaison. *Id.* Between 2011 and 2013, Ames's supervisor "signed off on strong reviews of her performance each year." App. 22a. In 2014, the Department promoted Ames to Program Administrator for the Prison Rape Elimination Act ("PREA"). App. 3a, App. 17a.

In 2017, Ames began reporting to Ginine Trim, a gay woman. App. 3a. In Ames's 2018 review, Trim wrote that Ames had "met 'expectations' in ten competencies and exceeded them in one." *Id.* Ames's evaluation did note that she "needed to improve her management of PREA grant funds." App. 22a. But overall, she received "reasonably good reviews" for her performance. App. 5a.

In April 2019, Ames applied to be the Department's Bureau Chief of Quality Assurance and Improvement. She interviewed for the position with Trim and Julie Walburn, then-Assistant Director of the Department. App. 19a. Although Ames believed she had received "positive feedback" during the interview, she was not ultimately offered the role. *Id.* Instead, the position went unfilled for several months before "Trim ***8** offered the Bureau Chief position" on a temporary (and, eventually, permanent) basis to Yolanda Frierson, a gay woman. App. 20a. Frierson had joined the Department two years after Ames. App. 21a. Unlike Ames, who was "qualified and fulfill[ed] the application requirements," App. 44a, Frierson "lacked the minimum qualifications for the job" and did not apply for the position when it was originally posted, App. 10a (Kethledge, J., concurring). Thus, to promote Frierson to Bureau Chief, "the Department circumvented its own internal procedures." *Id.*

Yet Ames was not just passed over for Bureau Chief. On May 10, 2019, Walburn and Robin Gee, a member of the Department's HR team, informed Ames that she was being removed from her position as PREA Administrator. App. 4a. Ames was given the choice of returning to one of her previous roles, "which would amount to a demotion," or being terminated from the Department. App. 4a, App. 44a. She chose the former and, as a result, her wages nearly halved, from $47.22 per hour to $28.40. App. 4a.

In Ames's place, the Department selected Alexander Stojsavljevic, a gay man, as the new PREA Administrator. *Id.* Stojsavljevic had joined the Department in May 2017 as a social worker. App. 43a. In October of that year, he was promoted to PREA Compliance Manager. Ames testified that such a promotion would have normally "violated the agency's hiring processes" on promoting employees on probationary status. *Id.* To circumvent that rule, Stojsavljevic's superintendent "apparently devised a work-around." App. 24a. According to Ames, Stojsavljevic's supervisor "asked Stojsavljevic to resign from his job and then hired him in the new role the next day." *Id.* That "work-around" allowed the Department to ***9** make Stojsavljevic a Compliance Manager despite him not being "eligible for the promotion." *Id.*

After becoming Compliance Manager, Stojsavljevic expressed to Ames an "impatient attitude towards climbing the ranks within the Department," "claim [ed] that he could manipulate people to get what he wanted on the basis of being a gay man," and "acknowledge[d]" that he had "been angling for Ames's position for some time, stating in front of their coworkers that he wanted the PREA Administrator position." App. 23a; *accord* App. 43a. Ames further alleged that Stojsavljevic "told Trimin front of [Ames]--that [Ames] should retire." App. 43a. Much like Frierson with the Bureau Chief role, the Department appointed Stojsavljevic to PREA Administrator "[d]espite [him] being neither qualified nor having formally applied" for the role. App. 44a.

Ames remains at the Department today; she has, following her 2019 demotion, since been promoted to Human Services Program Administrator. App. 18a.

C. Proceedings below.

On August 21, 2019, Ames filed a charge of discrimination against the Department with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission ("EEOC"). App. 25a. Following an investigation, the EEOC reached a determination of reasonable cause and, on September 20, 2020, issued to Ames a right to sue letter. *Id.* On November 18, 2020, Ames filed suit in the Southern District of Ohio. *Id.* Her complaint asserted causes of action under Title VII, the Fourteenth Amendment, the Age Discrimination in Employment Act ("ADEA"), and state law. *Id.*

***10** On March 29,2022, the district court dismissed Ames's Fourteenth Amendment claim, ruling that the Department was

not a "person" for purposes of 42 U.S.C. § 1983. App. 50a. It also dismissed Ames's ADEA and state law claims, reasoning that, because the State of Ohio had not "waived its immunity," the court lacked subjectmatter jurisdiction. App. 47a-49a. Finally, Ames's complaint alleged three Title VII violations, for (1) sex and sexual orientation discrimination, (2) hostile work environment, and (3) retaliation. App. 25a. The district court dismissed the hostile work environment and retaliation claims for failure to state a claim. App. 53a, App. 57a. The Department did not move to dismiss, and the district court did not address, Ames's claim of sex and sexual orientation discrimination.

After discovery, the Department moved for summary judgment on Ames's remaining claim for sex and sexual orientation discrimination. App. 26a. As to sex discrimination, Ames asserted that the Department discriminated against her on account of her sex because "she was demoted and replaced [as PREA Administrator] by Stojsavljevic," a man. App. 34a. On sexual orientation discrimination, Ames pointed to the fact that she was denied a promotion to Bureau Chief in favor of a gay woman and later removed from her position as PREA Administrator in favor of a gay man. App. 30a-34a.

On her sex discrimination charge, the district court, applying the traditional *McDonnell Douglas* framework, held that Ames could "carry her burden of establishing a *prima facie* claim." App. 34a. She was "a member of a protected class (as a female), was qualified for her role as PREA Administrator, was terminated (i.e., an adverse employment action), and was replaced by a male employee." App. 35a But the Department had also, from ***11** the district court's view, offered "legitimate, nondiscriminatory business reasons" behind its decision: e.g., a "desire to revamp the Department's PREA strategy" and a concern over Ames's "vision, ability, [and] leadership skills," which "shift[ed]" the "burden of production" back to Ames "to show that [these] proffered reason[s] [were] pretextual." App. 35a, 38a. Upon considering the totality of the evidence, the district court concluded that Ames had not cleared that bar. App. 38a-40a

As to Ames's claim of sexual orientation discrimination, the court likewise stated that *McDonnell Douglas* governed. App. 28a. But because Ames is a "member of a majority group"-i.e., a heterosexual woman-she had to overcome the added obstacle of "show[ing] that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority' to establish the first prong of the *prima facie* case." *Id.* (quoting *Parker v. Bait. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). And although the Department had twice promoted a gay employee in a manner adverse to Ames, such evidence was insufficient because "a plaintiff cannot point to her own experience to establish a pattern of discrimination." App. 6a. Because Ames "failed to provide 'background circumstances,"' the district court granted summary judgment to the Department on her sexual orientation discrimination claim. App. 39a-40a.

Ames filed a notice of appeal on her sex and sexual orientation discrimination claim to the Sixth Circuit. On sex discrimination, the Sixth Circuit agreed with the district court that Ames had failed to show that the ***12** Department's "nondiscriminatory reasons for her demotion" were "pretext [ual]." App. 6a-8a.[2]

On sexual orientation discrimination, the Sixth Circuit, like the district court, recognized that the "principal issue" was whether Ames had "made the necessary showing of 'background circumstances."' App. 5a. That is because, as the panel noted, Ames's case under *McDonnell Douglas* was otherwise "easy to make." *Id.* Ames was a member of a protected class, received "reasonably good reviews" as PREA Administrator, was demoted in favor of a gay man, and was denied a promotion to Bureau Chief in favor of a lessqualified gay woman. *Id.* "Where Ames founders, however, is on the requisite showing of 'background circumstances."' *Id.* As the Sixth Circuit noted, "[p]laintiffs typically make that showing with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a-6a. Ames had checked neither box.

Judge Kethledge concurred. Like the majority, he agreed that, but-for background circumstances, Ames's claim of sexual orientation discrimination could have gone forward to a jury. "[N]obody," Judge Kethledge underscored, "disputes that Ames has established the other elements of her prima-facie case": After all, "twice in one year the Department promoted an arguably less-qualified ***13** gay employee in a manner adverse to Ames." App. 10a. Judge Kethledge, though, wrote separately to "express [his] disagreement" with the background circumstances rule. App. 9a. Though he acknowledged that circuit precedent "bound" the court to apply the rule against Ames, he asserted that the Sixth Circuit and several other courts of appeals "have lost their bearings in adopting this rule." App. 9a, 11a. Title VII, Judge Kethledge explained, bars discrimination based on an individual's "race, color, religion, sex, or national origin." App. 9a (quoting 42 U.S.C. §

2000e-2(a)(1)). "The statute," he emphasized, "expressly extends its protection to 'any individual.'" App. 10a. Yet the Sixth Circuit's approach "treats some 'individuals' worse than others-in other words, it discriminates-on the very grounds that the statute forbids." *Id.*

Judge Kethledge characterized background circumstances not as "a gloss upon the 1964 Act, but a deep scratch against its surface." *Id.* He went on to outline a split in the courts of appeals, noting that "five circuits (including our own) have adopted the 'background circumstances' rule since the D.C. Circuit first adopted it in 1981." *Id.* Two circuits have "expressly rejected this rule," and five others "simply do not apply it." App. 10a11a. In sum, "nearly every circuit has addressed this issue one way or another" and, Judge Kethledge concluded, "[p]erhaps the Supreme Court will soon do so as well." App. 11a.

*14 REASONS FOR GRANTING THE PETITION

Under Title VII, an employer may not "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." 42 U.S.C. § 2000e-2. That language, as this Court has long emphasized, is clear: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* Imposing a background circumstances requirement on majority-group plaintiffs, as five courts of appeals have done, defies these fundamental principles.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED OVER WHETHER MAJORITY-GROUP PLAINTIFFS MUST SHOW BACKGROUND CIRCUMSTANCES.

A. The D.C., Sixth, Seventh, Eighth, and Tenth Circuits require background circumstances.

The D.C. Circuit was the first court of appeals to apply a heightened standard for claims brought by majoritygroup plaintiffs, doing so in *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981).

In that case, Karl Parker, Jr., a white man, "claim[ed] that his efforts to become a locomotive fireman were defeated by illegal preferences given to black and female applicants." *Id.* at 1014. To examine Parker's claim, the ***15** D.C. Circuit started with *McDonnell Douglas*, noting that "the standard enunciated in that case remains the cornerstone of evidentiary analysis in disparate treatment cases under Title VII." *Id.* at 1016. But, according to the panel, "[b]efore this test can be applied to Parker's claim, however, a further adjustment must be made." *Id.* at 1017. "The original *McDonnell Douglas* standard," the D.C. Circuit noted, "required the plaintiff to show 'that he belongs to a racial minority.'" *Id.* "Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can" there be a general "infer[ence] [of] discriminatory motive from the unexplained hiring of an outsider rather than a group member." *Id.* Although the court acknowledged that "[w]hites are also a protected group under Title VII," it held that "it defie[d] common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." *Id.* Thus, "to prove a prima facie case of intentionally disparate treatment," a majority-group plaintiff must point to "background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.*

The D.C. Circuit expounded on the background circumstances rule in *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993). Emphasizing that "invidious racial discrimination against whites is relatively uncommon in our society," *id.* at 153, the court elaborated on the sort of evidence that could demonstrate background circumstances. It identified two specific categories: (1) "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against" majority groups, and (2) "evidence indicating ***16** that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Id.* Finally, although *Harding* required a majority-group plaintiff to "show additional background circumstances" to "establish a prima facie case," it claimed that "[t]his requirement [was] not designed to disadvantage" such a plaintiff. *Id.* (internal quotation marks omitted).

In the wake of *Parker* and *Harding*, four other courts of appeals soon followed the D.C. Circuit's lead and adopted a background circumstances requirement. *See, e.g., Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992).

Critically, though the D.C. Circuit insisted that a "'background circumstances requirement,' [was] not an additional hurdle" for majority-group plaintiffs, *Harding*, 9 F.3d at 154, cases from each of these five courts of appeals suggest otherwise.

In *Hairsine v. James*, 517 F. Supp. 2d 301,313 (D.D.C. 2007), for instance, the court found that a plaintiffs claim of race discrimination foundered for lack of background circumstances. There was, in the court's view, "no question that the record demonstrates that [the plaintiff] was qualified for the Head Deskperson and Group Chief positions"-positions that ultimately went to Black candidates. *Id.* But because those candidates were "at least as well qualified," the plaintiff could not "demonstrate background circumstances raising an inference that [his employer] discriminated against him based on his race." *Id.* at 314.

***17** The facts here are even more jarring. As noted above, neither Frierson nor Stoksavljevic was even "at least as well qualified" as Ames. *Id.* To the contrary, "twice in one year the Department promoted an arguably lessqualified gay employee in a manner adverse to Ames." App. 10a (Kethledge, J., concurring). The Department, in fact, "circumvented its own internal procedures because Frierson lacked the minimum qualifications for the job," *id.*, and may have done the same for Stoksavljevic as well, App. 44a. That should have been enough, at minimum, to allow Ames to present her case to a jury. But based on "application of the 'background circumstances' rule alone," the Sixth Circuit "den[ied] Ames" that opportunity. App. 10a (Kethledge, J., concurring).

The Sixth Circuit has, beyond this case, elsewhere confirmed that "[a] reverse-discrimination claim carries a different *and more difficult* prima facie burden" because plaintiffs bringing such claims must demonstrate "background circumstances." *Briggs v. Porter*, 463 F.3d 507,517 (6th Cir. 2006) (internal quotation marks omitted) (emphasis added); *see also Pierce v. Commonwealth Life Ins.*, 40 F.3d 796,801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."), *overruled on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Cases from the Seventh Circuit likewise acknowledge the unique and more demanding burden borne by majority-group plaintiffs. In *Katerinos v. U.S. Department of Treasury*, 368 F.3d 733, 736 (7th Cir. 2004), the Seventh Circuit noted that the plaintiff, a white male, needed to show "background circumstances" as part of "his prima facie case." The court, in contrast to the D.C. ***18** Circuit's contention that background circumstances were "not an additional hurdle," characterized this added requirement as "a major hurdle." *Compare Harding*, 9 F.3d at 153, *with Katerinos*, 368 F.3d at 736. And because the plaintiff in *Katerinos* could point to "only one example of such circumstances," his Title VII claim foundered. *Id.* Similarly, in *Gore v. Indiana University*, 416 F.3d 590 (7th Cir. 2005), the court ruled that "a male plaintiff alleging gender discrimination must "show something more than the fact that he is gendered." *Id.* at 592. Rather, plaintiffs "in such cases must show background circumstances," and Gore had "offer[ed] nothing to overcome this added burden." *Id.* at 592, 593 (internal quotation marks omitted).

Courts in the Eighth Circuit have likewise applied the rule to bar potentially meritorious claims. In *Cano v. Paulson*, for instance, the defendant "concede [d] that plaintiff ha[d] met the first three elements of a *prima facie* case." 2008 WL 4378463, at *7 (E.D. Mo. Sept. 23, 2008). But plaintiff, according to the defendant, had "failed to establish that the defendant is that unusual employer who discriminates against the majority." *Id.* The court agreed, dismissing the case. *Id.* at *8.

Finally, in *Adamson v. Multi Community Diversified Services, Inc.*, 514 F.3d 1136 (10th Cir. 2008), the Tenth Circuit held that a minority-group plaintiff may establish a "presumption of invidious intent" under *McDonnell Douglas "because* the plaintiff belongs to a disfavored group." *Id.* at 1149 (emphasis in original). But "[w]hen [a] plaintiff is a member of a historically favored group, by contrast, an inference of invidious intent is warranted only when background circumstances" are presented. *Id.* (internal quotation marks omitted). That "burden," the Tenth Circuit explained, "is higher" for majority-group ***19** plaintiffs. *Id.* at 1141. And this "higher" burden sank one of the claims in *Adamson* because the plaintiff's facts fell "short of demonstrating 'background circumstances' sufficient to create an inference of reverse discrimination." *Id.* at 1141, 1150.

B. The Third and Eleventh Circuits have explicitly rejected a background circumstances requirement.

Cognizant of the difficulties with applying a background circumstances test, two courts of appeals have explicitly repudiated the requirement.

In *ladimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999), the Third Circuit summarized the problems posed by the rule and "reject[ed] the 'background circumstances' analysis set forth in *Parker*, *Harding*, and their progeny." First, the court noted that, in *Parker* and *Harding*, the D.C. Circuit claimed "that the background circumstances test is not an additional hurdle for white plaintiffs" and was "merely a faithful transposition of the *McDonnell Douglas/Burdine* test." *Id.* at 159 (citing *Harding*, 9 F.3d at 154) (internal quotation marks omitted). But when it came to applying this legal standard to actual cases, *Iadimarco* noted, "some courts have concluded that substituting 'background circumstances' for the first prong of *McDonnell Douglas* does raise the bar." *Id.* These courts have, like the decisions discussed above in I.A., described background circumstances as imposingn] a more onerous burden" or levying a "heightened burden" on majority-group plaintiffs. *Id.* (quoting *Eastridge v. Rhode Island Coll.*, 996 F. Supp. 161, 166 (D.R.I. 1998), and *Ulrich v. Exxon Co.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993)). Requiring a plaintiff to prove that their supervisor is an "unusual employer" ***20** that discriminates against the majority is an "arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims." *Id.* (citing *Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1320 (W.D. Mo. 1990)).

Second, imposing background circumstances strays from Title VII's text and purpose. As the Third Circuit explained, the "central focus of the inquiry" in a Title VII suit "is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.* at 160 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). "[A]ll that should be required," then, "is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." *Id.* at 161. Asking a plaintiff to state their case "in terms of 'background circumstances'" is "both problematic and unnecessary." *Id.*

Finally, "the concept of 'background circumstances' is irredeemably vague and ill-defined." *Id.* Many courts, the Third Circuit noted, had found it "difficult, if not impossible, to come up with a definition of 'background circumstances' that is clear, neither under nor over inclusive, and possible to satisfy." *Id.* at 162-63. In other words, even *if* the D.C. Circuit meant for background circumstances "to merely be a restatement of *McDonnell Douglas,"* the test had become "too vague and too prone to misinterpretation and confusion to apply fairly and consistently." *Id.* at 163-64 n.10.

The Eleventh Circuit has also declined to impose a heightened requirement for majority-group plaintiffs, stating decades ago that "reverse discrimination" claims are held to the same standard as other Title VII claims. ***21** *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1102-03 (11th Cir. 2001), *overruled in part on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). And in *Smith v. Lockheed-Martin Corp.,* 644 F.3d 1321,1325 n.15 (11th Cir. 2011), the Eleventh Circuit drew on *Bass* to explicitly reject a background circumstances requirement. Plaintiff in *Smith* claimed that his former employer, Lockheed-Martin, discriminated against him because of his race when it fired him for sending an offensive email but did not fire Black employees for a similar infraction. *Id.* at 1324. The court explained that, to establish his prima facie case, a plaintiff must show that he is a member of a protected class, and he had done so since race is one such protected characteristic. *Id.* at 1325.

The Eleventh Circuit acknowledged that other courts had "require[d] majority-member plaintiffs to establish" background circumstances. *Id.* at 1325 n.15 (citing *Parker*, 652 F.2d at 1017). But it "rejected" that requirement because, as the court emphasized, "discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim." *Id.* (quoting *Bass*, 256 F.3d at 1103). More recent cases from both the Third and Eleventh Circuits have, following *ladimarco* and *Smith*, declined to require a heightened showing for majority-group plaintiffs. *See, e.g., Phillips v. Legacy Cabinets*, 87 F.4th 1313, 1321 (11th Cir. 2023); *Ellis v. Bank of New York Mellon Corp.*, 837 F. App'x 940, 941 n.3 (3d Cir. 2021).

C. The First, Second, Fourth, Fifth, and Ninth Circuits do not apply the rule.

In his concurrence, Judge Kethledge grouped the courts of appeals into three categories. Beyond those that have either explicitly adopted the requirement or ***22** explicitly rejected it, he stated that "[f]ive other[] [circuits] simply do not apply it." App. 10a.

Within this third category, two courts of appeals-the First and the Fifth Circuits-have not expressly addressed the rule but have in their decisions declined to impose a heightened burden on majority-group plaintiffs. In *Williams v. Raytheon*, 220 F.3d 16 (1st Cir. 2000), for instance, the First Circuit applied the traditional *McDonnell Douglas* framework to a male plaintiffs claim of gender discrimination, with the court holding that the plaintiff "sustained the 'not onerous' burden of establishing a prima facie case" of gender discrimination. *Id.* at 19 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981)). In *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000), the Fifth Circuit held that membership in a majority group "does not prevent [an employee] from making a *prima facie* case of reverse discrimination." Instead, a plaintiff must only "be a member of ... a group protected under Title VII" to bring a claim; the plaintiff in *Byers* could therefore establish a prima facie case of reverse discrimination even though he "was not a racial minority in his workplace." *Id.*

District courts within these two circuits have read decisions like *Williams* and *Byers* as constructively rejecting background circumstances. *See, e.g., Duchesne v. Banco Popular De Puerto Rico, Inc.*, 742 F. Supp. 2d 201, 212 (D.P.R. 2010) ("While the First Circuit has not addressed the 'background circumstances' requirement, the Court gleans from the appellate court's language that a heightened burden should not be substituted for the first prong of *McDonnell Douglas."*) (citation omitted); *Metoyer v. American Eagle Airlines, Inc.*, 806 F. Supp. 2d 911, 918 (W.D. La. 2011) ("The Fifth Circuit, however, ***23** and other courts, apply the *McDonnell Douglas* analysis without such an additional element.").

Finally, and unlike the First and Fifth Circuits, the Second, Fourth, and Ninth Circuits-have addressed the background circumstances rule but have ultimately declined to take a side. In *Aulicino v. N.Y.C. Department of Homeless Services*, 580 F.3d 73 (2d Cir. 2009), the Second Circuit recognized that some courts, like the D.C. Circuit, require majority-group plaintiffs to "proffer evidence of background circumstances" while others, like the Third Circuit, have rejected the requirement. *Id.* at 80 n.5 (citing *Parker*, 652 F.2d at 1017, and *ladimarco*, 190 F.3d at 160). But the court "d[id] not decide" whether parties in the Second Circuit must do so. *Id.* The *Aulicino* defendants did not argue for the rule and, in any event, there was "sufficient evidence" of background circumstances. *Id.* Similarly, the Ninth Circuit has noted the "circuit split" but held, in *Zottola v. City of Oakland*, 32 F. App'x 307, 310-11 (9th Cir. 2002), that it "need not take sides in this inter-circuit dispute" since plaintiffs claim failed for other reasons. Likewise, the Fourth Circuit has acknowledged that some courts "impose[] a higher prima facie burden on majority plaintiffs," but has "expressly decline [d] to decide ... whether a higher burden applies." *Lucas v. Dole*, 835 F.2d 532,534 (4th Cir. 1987); *accord Weeks v. Union Camp Corp.*, 215 F.3d 1323, at *6 n.13 (4th Cir. 2000) (Table) ("We have not taken a position on this issue.").

Unsurprisingly, this "deciding-not-to-decide" approach has not produced a clear or workable framework for plaintiffs, defendants, or judges. To the contrary, courts in the Second, Fourth, and Ninth Circuits are in disarray. In the Second Circuit, for instance, most district ***24** courts have "rejected a heightened burden of proof" for majority-group plaintiffs. *Pesok v. Hebrew Union Coll.--Jewish Inst. of Religion*, 235 F. Supp. 2d 281, 286 (S.D.N.Y. 2002); *Maron v. Legal Aid Soc'y*, 605 F. Supp. 3d 547, 558 n.7 (S.D.N.Y. 2022). But at least one court has held otherwise, applying "a slightly altered analysis" to a majority-group plaintiff. *Olenick v. N.Y. Tel./A NYNEX Co.*, 881 F. Supp. 113, 114 (S.D.N.Y. 1995). In the same vein, at least one Ninth Circuit case has analyzed a sex discrimination claim without discussing background circumstances. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151 (9th Cir. 2010). And several district courts have "explicitly rejected" a background circumstances rule, *Ducharme v. Las Vegas Metro. Police Dep't*, 2006 WL 8441859, at *4 (D. Nev. Jan. 19, 2006), or "appl[ied] the traditional, non-modified *McDonnell Douglas* elements," to majority-group plaintiffs, *Hilber v. Int'l Lining Tech.*, 2012 WL 1831558, at *3 n.4 (N.D. Cal. May 18, 2012). But just this year, a district court went the other way, applying background circumstances to bar a discrimination claim. *Seidler v. Amazon*, 2024 WL 97351, at *5 (W.D. Wash. Jan. 9, 2024).

Courts in the Fourth Circuit exemplify this state of indecision and confusion. As one judge from the District of South Carolina recently noted, "some courts in this District have held that a plaintiff asserting ... discrimination against a member of the majority group ... must establish one additional element"-i.e., "background circumstances." *Owen v. Boeing Co.*, 2022 WL 5434230, at *7 n.6 (D.S.C. Mar. 3, 2022). "However, other courts in this District have not required plaintiffs to prove this extra element to establish a prima facie case." *Id.* In other words, different judges in the same district court have taken different approaches to and required ***25** different showings for claims arising under the same federal law. Such

circumstances, emblematic of the broader split of authority on this critical issue, underscore the need for this Court's review.

II. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

The Sixth Circuit erred in invoking background circumstances as a basis for denying Ames relief. That is because the requirement (a) conflicts with the statutory text, (b) is contrary to precedent, and (c) is already "irredeemably vague and ill-defined," *Iadimarco*, 190 F.3d at 161, and will only become harder to administer.

A. Requiring only majority-group plaintiffs to show background circumstances is contrary to Title VII's text.

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 673-74 (2020). "The people," *Bostock* notes, "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* at 674. But as Judge Kethledge observed, by imposing a heightened burden on majority-group plaintiffs, the Sixth Circuit and other courts have done just that: "disregard[ed]" Title VII's "plain terms based on some extratextual consideration," *id.*, thereby leaving "a deep scratch across [the Act's] surface," App. 10a (Kethledge, J., concurring). That is because Title VII's plain language does not distinguish between plaintiffs of different demographic groups. App. ***26** 9a (Kethledge, J., concurring). To the contrary, as this Court has explained, the law explicitly forbids "treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Aikens*, 460 U.S. at 715 (quoting *Furnco Constr. Corp.*, 438 U.S. at 577)).

Consistent with that understanding, the Court has routinely rejected similar departures from the Civil Rights Act's text. *Bostock*, for example, carefully reviewed Title VII's text to hold that the Act prohibits discrimination based on sexual orientation. 590 U.S. at 662. In reaching this conclusion, the Court emphasized that "only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* at 654. It is inappropriate for judges to "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations." *Id.* at 654-55. To do so would "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id.* at 655.

Next, in his concurring opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 290 (2023), Justice Gorsuch examined Title VI by reviewing, in part, the text and precedent governing Title VII. From the premise that when Congress uses the same terms in the same statute those words "have the same meaning," Justice Gorsuch concluded that both Title VI and Title VII "codify a categorical rule of 'individual equality.'" *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 n.19 (1978) (Stevens, J., opinion concurring in judgment in part and dissenting in part) (emphasis deleted)). Put another ***27** way, "to safeguard the civil rights of all Americans, Congress chose a simple and profound rule" barring all discrimination. *Id.* Courts, Justice Gorsuch underscored, have "no right to make a blank sheet" of either Title of the Civil Rights Act. *Id.* at 310; *see also Smyer v. Kroger Ltd. P'ship I*, 2024 WL 1007116, at *7 (6th Cir. Mar. 8, 2024) (Boggs, J., concurring) (asserting that *SFFA* "significantly undermined" the background circumstances analysis).

Last, in *Groffv. Dejoy*, 600 U.S. 447, 468 (2023), the Court reiterated that "statutory interpretation must begin with, and ultimately heed, what a statute actually says." *Id.* (internal quotation marks and alteration omitted). Consequently, *Groffheld* that the term "undue hardship" in Title VII should not be read to mean any effort or cost that is "more than [] de minimis" for purposes of assessing a worker's claim for religious accommodation, as several lower courts had done. *Id.* at 454.

The reasoning from these opinions contradicts *Parker*, which, as Judge Kethledge noted, forms the basis of the background circumstances requirement. App. 10a (Kethledge, J., concurring). *Parker* did not follow Title VII's text. Instead, the court there posited that "it defie[d] common sense to suggest that the promotion" of a minority candidate could "justif[y] an inference of prejudice" against a majority-group plaintiff. 652 F.2d at 1017. Although such reasoning was "likely a good faith effort to address societal concerns," *Smyer*, 2024 WL 1007116, at *9 (Readler, J., concurring), it ultimately belies Title VII's mandate of "individual equality," *SFFA*, 600 U.S. at 310 (Gorsuch, J., concurring)--a mandate accomplished by applying the law as written, ***28** *Groff*, 600 U.S. at 468, rather than invoking "extratextual sources," such as a judge's "own imagination,"

Bostock, 590 U.S. at 655, or "common sense," *Parker*, 652 F.2d at 1017.

B. The background circumstances rule conflicts with precedent.

For their part, both *Parker* and the D.C. Circuit's subsequent decision in *Harding* tried to characterize background circumstances as adhering to *McDonnell Douglas.* After all, the plaintiff in *McDonnell Douglas* established his prima facie case by showing that "he belong[ed] to a racial minority." *McDonnell Douglas*, 411 U.S. at 802. And in a footnote, this Court observed that, because "[t]he facts necessarily will vary in Title VII cases," the "specification" of "the prima facie proof required ... is not necessarily applicable in every respect to differing factual situations." *Id.* at n.13. Thus, read in isolation, *McDonnell Douglas could* justify background circumstances for majority-group plaintiffs as a necessary update to that case's burden-shifting framework.[3]

***29** But courts are not supposed to "stitch together" words from a single case to scaffold a doctrine out of whole cloth. *Denezpi v. United States*, 596 U.S. 591, 602-03 (2022). That is especially true where, as here, precedent both before and after *McDonnell Douglas* disclaims a heightened burden for majority-group plaintiffs.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)decided five years before *McDonnell Douglas-declared* that discriminatoryoy preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII. *McDonnell Douglas* itself quoted this very passage from *Griggs* before outlining its burden-shifting framework, seemingly making explicit that Title VII protects all individuals from discrimination. *McDonnell Douglas*, 411 U.S. at 800-01.

Furthermore, even if some language from *McDonnell Douglas* may have left things muddled, the trend line of subsequent cases is clear. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 276 (1976), for instance, a pair of white plaintiffs alleged that their employer "had discriminated against" them when it fired them for misconduct but retained a Black employee who had participated in the same misconduct. Writing for the Court, Justice Marshall underscored that Title VII's "terms are not limited to discrimination against members of any particular race." *Id.* at 278-79. "The Act prohibits *all* racial discrimination in employment," he declared, "without exception for any group of particular employees." *Id.* at 283 (emphasis in original). "We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they Negroes and Jackson white." *Id.* at 280 (emphasis ***30** added). *Santa Fe Trail*, importantly, rejected the respondents' efforts to rely on *McDonnell Douglas* for support, explicitly holding that "[w]e find this case indistinguishable from *McDonnell Douglas." Id.* at 282. Employment criteria "must be 'applied[] alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not." *Id.* at 283 (quoting *McDonnell Douglas*, 411 U.S. at 804).

Case law after *Sante Fe* is of a piece. In *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), the Court emphasized that "the factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff"--no more, no less. *Id.* at 715. (internal quotation marks and alteration omitted).[4] In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), it ruled that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous," which plainly conflicts with the "different and more difficult prima facie burden" shouldered by majority-group plaintiffs like Ames, *Briggs*, 463 F.3d at 517.

And in more recent cases, the Court has held that Title VII "focuses on discrimination against individuals, not groups," which squarely conflicts with the Sixth Circuit's decision here to impose a more demanding pleading ***31** requirement on an entire sub-group of plaintiffs. *Bostock*, 590 U.S. at 667.

C. Requiring background circumstances is administratively unwieldy.

Finally, background circumstances are "irremediably vague and ill-defined." I*adimarco*, 190 F.3d at 161. One way, to be sure, to show such circumstances is through "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." App. 5a-6a. But gathering such evidence is often a challenging exercise for any plaintiff. That is especially so for an individual like Ames, who cannot-under circuit precedent-"point to her own experience to

establish a pattern of discrimination." App. 6a

Yet the other methods for showing background circumstances are even more "amorphous," *ladimarco*, 190 F.3d at 163: asking plaintiffs to show "there is something 'fishy' about the facts of the case at hand," *Harding*, 9 F.3d at 153, or that their employer is "unusual," *Parker*, 652 F.2d at 1017. These standards provide little meaningful guidance. "What may be 'fishy' to one [judge] may not be to another." Christian Joshua Myers, *The Confusion of* McDonnell Douglas: *A Path Forward for Reverse Discrimination Claims*, 44 SEATTLE U. L. REV. 1065, 1121 (2021).

What is more, we live in "a world where it has become increasingly difficult to determine who belongs in the majority." *Smyer*, 2024 WL 1007116, at *7 (Boggs, J., concurring). And, to this point, the case law provides little instruction on how to define or circumscribe "majority" and "minority" status given demographic change. A plaintiff who is a racial, gender, or sexual orientation ***32** minority in one profession or geography could well be part of the majority group in another profession or geography, and vice versa.

This case uniquely and vividly captures several of these administrability concerns. Ames, after all, alleged both sex and sexual orientation discrimination because the Department demoted her in favor of a gay man. Since she had also been denied a promotion in favor of a gay woman, her "evidence of pretext is notably stronger" as to sexual orientation discrimination than sexdiscrimination. App. 10a (Kethledge, J., concurring).

On sex discrimination, the Sixth Circuit did not require background circumstances, instead applying the traditional *McDonnell Douglas* framework and concluding, at the final step, that Ames had failed to show pretext. App. 6a-8a. But on sexual orientation discrimination, where Ames's "evidence of pretext [was] notably stronger" and which involved the same demotion decision between the same two employees, the Sixth Circuit never even reached *McDonnell Douglas's* final step. App. 10a (Kethledge, J., concurring). Instead, "application of the 'background circumstances' rule alone" prevented Ames from receiving "a jury trial on this claim." *Id.* There is no plausible way that Congress meant for this result when it enacted Title VII.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE AN IMPORTANT ISSUE OF DISCRIMINATION LAW.

Judge Kethledge captured the depth and importance of the issue at hand when he wrote that "nearly every circuit has addressed this issue one way or another. ***33** Perhaps the Supreme Court will soon do so as well." App. l1a. Foisting a background circumstances rule departs from text and precedent and is "prone to misinterpretation and confusion." I*adimarco*, 190 F.3d at 163 n.10. Disagreement over the rule has resulted in a deep, defined, and open circuit split; "[i]t appears that the Federal Circuit is the only circuit not to opine on the issue." *Smyer*, 2024 WL 1007116, at *7 n.1 (Boggs, J., concurring). The split has been analyzed in scholarship, *see supra* Myers, and recognized by courts, *see Aulicino*, 580 F.3d at 80 n.5. And it touches on a critical question: As this Court has recognized, "few pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock*, 590 U.S. at 649-50.

This case offers an ideal opportunity to resolve this important split. To start, Ames's case cleanly and squarely presents the legal question at hand. As the Sixth Circuit observed, "the necessary showing of 'background circumstances' is the principal issue," as the rest of Ames's prima facie case was "easy to make." App. 5a. Judge Kethledge spoke in even stronger terms: Because of the "application of the 'background circumstances' rule alone ... we deny Ames a jury trial on" her sexual orientation discrimination claim. App. 10a.

What is more, the Sixth Circuit's disposition rendered Ms. Ames's case final. Seven of her eight claims were dismissed by the district court, and Ames elected not to appeal those claims to the Sixth Circuit. App. 3a, 26a. When the Sixth Circuit disposed of the remaining Title VII count--for sex and sexual orientation discrimination--it left nothing for the district court to decide. Ames now seeks review only on her sexual orientation discrimination claim. Such facts make this ***34** matter an excellent vehicle to address this important question in employment discrimination law that has divided the federal courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Footnotes

[1] Because this matter arises in a summary judgment posture, the facts are viewed in the light most favorable to Ames, with reasonable inferences drawn in her favor. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

[2] Ames did not raise her state law, ADEA, or Fourteenth Amendment claims before the Sixth Circuit. Though she did seek review before the Sixth Circuit of the district court's sex discrimination ruling, her petition here concerns only the court of appeals's decision on her allegations of sexual orientation discrimination.

[3] Courts that apply a background circumstances analysis require plaintiffs to show such evidence as part of their prima facie case under the *McDonnell Douglas* framework. *See, e.g.*, App. 5a, App. 28a. As one judge recently noted, however, that underlying framework-that is, *McDonnell Douglas-lacks* a "textual warrant in Title VII," is inconsistent

with the Federal Rules, and should be "relegated] ... to the sidelines." *Tynes v. Fla. Dep't of Juvenile Just.*, 88 F.4th 939, 952, 958 (11th Cir. 2023) (Newsom, J., concurring). Petitioner takes no position on this question. That is because, regardless of the baseline lens one employs in evaluating a discrimination claim, imposing a "different burden on different plaintiffs *based on their membership in different demographic groups,"* flouts the statutory text and relevant precedent. App. 9a (Kethledge, J., concurring).

[4] *Aikens* did observe that *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." 460 U.S. at 715. But that comment only means that courts can and should adapt *McDonnell Douglas* to different employment situations, not different plaintiffs. Though *McDonnell Douglas* arose in the context of a rehiring decision, for example, this Court and others have adapted it to account for other situations, such as discriminatory discharge, and has modified the relevant aspects of the prima facie case accordingly. *See, e.g.*, *Burdine*, 450 U.S. at 255-58.