No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The *amici* have a strong interest in the standards by which unlawful discrimination may be inferred from circumstantial evidence, because these standards will determine whether numerous victims with meritorious claims will be able to prove their claims and obtain relief. The *amici* oppose standards of proof so high that many violations of the civil rights laws will go unrecognized and unremedied. One or more of the *amici* have, singly or jointly, filed briefs in the majority of this Court's civil rights cases over the last twenty years.

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and

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[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to its preparation or submission.

its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging employment discrimination.

The NAACP Legal Defense & Educational Fund, Inc. ("the Fund"), is a nonprofit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. The Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource

equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964. NWLC has filed numerous *amicus curiae* briefs on employment law and civil rights issues.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW

LDEF is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW LDEF has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1971, the ACLU Women's Rights Project has appeared in nearly every major women's rights case before this Court. A longstanding goal of the ACLU Women's Rights Project has been the elimination of barriers to women's economic equality and independence, such as employment discrimination. Toward this goal, the ACLU is dedicated to preserving the gains made by women and minorities through such key civil rights statutes as Title VII.

STATEMENT OF THE CASE

Sanderson Plumbing Products makes toilet seats and covers. At the time of his discharge, Roger Reeves was 57 years old, and had worked for the company for 40 years. He was the supervisor of the "regular line" in the Hinge Room, under department manager Russell Caldwell. Caldwell also supervised Joe Oswalt, who was 35 years old and ran a "special line" in the Hinge Room. Pet. 2a.

In the Fall of 1993, Powe Chesnut (then the Director of Quality Control, and married to Ruth Sanderson, the company President) placed Reeves on a 90-day probation because of productivity problems on his line. In the Summer of 1995, Caldwell told Chesnut (now the Director of Manufacturing) that the Hinge Room again had production problems, and blamed them on excessive absenteeism and tardiness. An audit revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, confirmed these findings. "Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson that Caldwell and Reeves be dismissed. Ms. Sanderson—who was 52 years old at the time—heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties." Pet. 2a–3a. Oswalt had quit earlier, and Chesnut testified that he would otherwise have been "subject to dismissal." Pet. 3a n.2.

Reeves filed suit under the ADEA and won a jury verdict of $35,000 in back pay, a finding that the discrimination was willful, and liquidated damages doubling his back pay. The district court awarded $28,490.80 in front pay, and denied the company's motion for judgment as a matter of law. Pet. 4a. The company appealed, and the Fifth Circuit reversed.

Reeves relied on four strands of evidence. These are set forth below, along with the Fifth Circuit's reasons for deciding that each was not probative of discrimination. *First*, Chesnut

allegedly made two age-biased statements several months before Reeves was fired: "namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.'" Pet. 3a–4a. The Fifth Circuit held that this was not probative because "these comments were not made in the direct context of Reeves's termination," Chesnut was just one of the persons making the discharge recommendation to Chesnut's wife, and there was no evidence suggesting that the other decisionmakers were motivated by age bias. Pet. 9a.

Second, the company's explanation for Reeves' discharge changed over time. At the time, Reeves was told that he had been fired because he had caused a specific employee to be paid for time she had not worked; at trial, the defendant claimed that the plaintiff's timekeeping mistakes had resulted in the overpayment of numerous employees. The court of appeals saw no difference in kind between the two explanations and added: "That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie." Pet. 7a–8a.

Third, Reeves put on evidence that he did not engage in inaccurate record keeping at all, explained the apparent discrepancies, and asserted that any errors were the result of Caldwell's inattentiveness. He pointed out that "at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications." Pet. 8a. Reeves argued

that this showed Sanderson's proffered reason for his discharge to be pretextual. The court of appeals conceded that "[o]n this point, Reeves very well may be correct," but held that it must also "determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Id.*

Fourth, Reeves relied on evidence that he was treated less favorably than younger employees. Oswalt testified that Chesnut treated Reeves like a child. In addition, Oswalt, then in his early thirties, was not put on probation in 1993 despite similar production problems on the special line in the Hinge Room. "Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny." Pet 9a. The Fifth Circuit held that this did not prove age discrimination, because Oswalt was also accused of inaccurate record keeping. *Id.*

In reversing the trial court and rendering judgment for the company as a result of its "plenary review," Pet. 10a, the Fifth Circuit also relied on the facts (1) that the company President was 52, (2) that Jester was 56, and (3) at the time of the discharge, "20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's." Pet. 9a–10a.

SUMMARY OF ARGUMENT

The inferential model of proof has been applied widely across the field of employment discrimination law, and has worked as well for ADEA cases as for other types of cases. It

should continue to be available in age cases.

Because few wrongdoers admit discrimination, the standards under which an inference of discrimination can be drawn from circumstantial evidence govern the disposition of the vast majority of civil rights cases. If those standards are set too high for ordinary claimants with meritorious claims, they will be unable to prove the merits of their claims. The inferential model already requires plaintiffs to engage in significant discovery of the defendant and its officials as to pretext, and raising the evidentiary bar makes plaintiffs' task far harder, even as the discovery rules impose increasing limits on discovery. Thus, only claimants with extraordinary proof will be able to prevail. Such a regime of adjudication frustrates the Congressional intent of providing a make-whole remedy for victims and deterring future acts of discrimination.

The lower court's limitations on the probative value of discriminatory remarks, its failure to consider the more favorable treatment of a younger employee, and its presumption that discrimination did not occur because some members of a protected class are in management, all impermissibly tilt the process of adjudication in favor of the defendant.

The decision below is an illustrative example of a regime of adjudication constructed by several Circuits, placing the bar of proof too high. They have unjustifiably limited the evidence that can be considered probative of discrimination, and have routinely substituted their own inferences for the inferences that could reasonably be drawn by a jury. The lower courts that

have adopted a "pretext-plus" standard for the determination of claims of discrimination under the inferential model, and those courts that have adopted an adequacy-of-evidence standard coupled with limitations on the probative value of evidence, have misapplied the teachings of of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), misunderstood their limited roles under Rules 50 and 56, and failed to respect the restrictions imposed by the Seventh Amendment.

Where the evidence is sufficient to justify a jury inference that the defendant has presented a "nondiscriminatory reason" that is not the defendant's actual reason, the intent of Congress can be fulfilled only by allowing the case to proceed to trial, and according strong presumptive finality to the jury's decision to draw the further inference of discrimination. The jury's decision should be overturned only in limited circumstances, as is done in other cases. Plaintiffs' verdicts in civil rights cases should not be singled out for heightened review.

ARGUMENT

A. The *McDonnell Douglas / Burdine / Hicks* Model Should be Followed in Age Discrimination Cases

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), this Court left open the question whether claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, could properly be resolved under the burden-shifting, inferential model of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept.*

of Community Affairs v. Burdine, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

We urge the Court to follow the same model in ADEA cases as it has followed in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Where there is no direct evidence of discrimination, the lower courts have found the inferential model useful in resolving claims under 42 U.S.C. §§ 1981 and 1983,[2] under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, where the defendant denies basing its decision on disability[3] or the claim involves retaliation,[4] under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*,[5] under the First Amendment where the plaintiff is a public employee and the defendant denies that the challenged action was taken because of the plaintiff's

[2] *E.g.*, *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999).

[3] *E.g.*, *Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1099–1100 (D.C. Cir. 1997); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121–22 (5th Cir. 1998); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1021 (8th Cir. 1998); *Butler v. City of Prairie Village*, 172 F.3d 736, 747 (10th Cir. 1999).

[4] *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 753 (9th Cir. 1998), *modified in other respects*, 196 F.3d 979 (9th Cir. 1999).

[5] *E.g.*, *Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998).

speech or association,[6] in retaliation cases under the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*,[7] in constitutional-tort cases against Federal officials,[8] and in ADEA cases.[9]

The reception given by the lower courts to the *McDonnell Douglas / Burdine / Hicks* inferential model of proof reflects their shared judgment of its utility in helping to winnow meritorious cases from those that lack merit. Describing *McDonnell Douglas*, a leading commentator stated that this Court "deliberately used this case as the occasion and the vehicle for the promulgation of a general rule designed to bring order to a chaotic situation that had developed within the lower courts." Lex K. Larson, 1 Employment Discrimination (2d ed., Matthew Bender, New York, NY, 1999) § 8.01[1] at 8–5. He stated that the formula "is entitled to unusual weight at any point where it might be relevant." *Id.*

The use of the inferential model in ADEA cases has been

[6] *E.g.*, *Whitaker v. Wallace*, 170 F.3d 541, 544 (6th Cir. 1999).

[7] *King v. Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir. 1999).

[8] *Duffy v. Wolle*, 123 F.3d 1026, 1035–37 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

[9] *E.g.*, *Cardona Jimenez v. Bancomerico de Puerto Rico*, 174 F.3d 36, 40–41 (1st Cir. 1999); *Ross v. Univ. of Texas*, 139 F.3d 521, 525 (5th Cir. 1998); *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 n.19 (8th Cir. 1998); and *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1165 (10th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 617, 142 L. Ed. 2d 556 (1998).

successful, and parallels its use under Title VII. Larson, 8 Employment Discrimination § 135 at 135–1 to 135–56; Barbara Lindemann and Paul Grossman, Employment Discrimination Law (3d ed., Bureau of National Affairs, Washington, D.C., 1996) 586–96; Richard T. Seymour and Barbara Berish Brown, Equal Employment Law Update, Spring 1999 Edition (Bureau of National Affairs, Washington, D.C., 1999) at 14–263 to 14–525. While fine-tuning is an essential part of the inferential model, there is risk of undesirable confusion across the field of employment law if numerous ADEA cases are to be subject to standards departing sharply from those of the inferential model.

B. Some Courts Have Improperly Insisted on Standards of Evidence Effectively Requiring Direct Proof of Discrimination

This is not to say that further clarification is unnecessary. Some courts have applied the inferential model in ways that raise the plaintiffs' burden of proof higher than many plaintiffs with meritorious claims can reach. As a result, a large number of cases are thrown out by judges under Rules 50 and 56, Fed. R. Civ. P., and meritorious cases are among them.

This Court has noted that proving discriminatory intent "is both sensitive and difficult," and has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). *Accord, Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 1552, 143 L. Ed. 2d 731 (1999) (racial redistricting case; "Outright admissions of impermissible

racial motivation are infrequent and plaintiffs often must rely upon other evidence."). The courts of appeals, including the Fifth Circuit, have often recognized the unavailability of direct evidence and the need to rely on circumstantial evidence.[10]

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[10] Several Circuits have emphasized the rareness of cases involving direct proof of discrimination, and the corresponding need to rely on inferential proof. *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence."); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (*en banc*) ("Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. . . . [D]irect evidence of an employer's motivation will often be unavailable or difficult to acquire."), *cert. denied*, 521 U.S. 1129 (1997); *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) ("only rarely will a plaintiff have direct evidence of discrimination. Gone are the days (if, indeed, they ever existed) when an employer would admit to firing an employee because she is a woman, over forty years of age, disabled or a member of a certain race or religion."); *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.), *cert. denied*, 522 U.S. 1016 (1997) ("Direct evidence of an employer's discriminatory intent is rare; therefore, plaintiffs must ordinarily prove their claims through circumstantial evidence."); *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449 (5th Cir. 1996); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 40 (5th Cir. 1996) ("direct evidence of discrimination is rare"); *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997) ("Direct evidence of discrimination is rare."); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997) ("In effect, the district court placed a nearly impossible burden on Kline

Unfortunately, some of these courts have not heeded the resulting holding of *Aikens* that plaintiffs are not required to submit direct evidence of discriminatory intent. 460 U.S. at 716. The court below stated: "To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." Pet. 6a (footnote omitted). There are numerous similar decisions suggesting strongly that a jury cannot draw a reasonable inference of discrimination from adequate evidence that a proffered reason is a sham, but can only draw the inference if the plaintiff also produced evidence pointing directly at the unlawful motive.[11] One *en banc* court

requiring direct evidence of discrimination. Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available."); *Mills v. First Federal Savings & Loan Ass'n of Belvidere*, 83 F.3d 833, 841 (7th Cir. 1996) (remarks revealing hostility to older workers are "'rarely found'"; citation omitted); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996) ("direct evidence of intent is often unavailable").

[11] *E.g.*, *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 460, 465–67 465 (1st Cir. 1996) (holding that there was not enough evidence to justify an inference of racial discrimination, although the jury could reasonably find (a) that the employer had departed from its otherwise uniform practice in denying short-term disability benefits to an African-American employee, (b) that the denial of disability benefits occurred before the results of an independent medical examination were known, (c) that the employer had rigged the independent medical examination, and (d) that the employee's supervisor — who was involved in the decision — had repeatedly complained that "you people" are lazy); *Mulero-Rodriguez v. Ponte, Inc.*,

has not only held that something more is often needed to justify a finding of discrimination, but did so on the basis that employers should frequently be excused from making false statements

98 F.3d 670, 675 (1st Cir. 1996) (holding that the Title VII plaintiff had shown enough evidence that the defendant's proffered reasons for firing him as General Manager were pretextual, and that the question then became whether he could prove that the real reason was discrimination based on his Puerto Rican national heritage); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 98 (2d Cir. 1999) ("the district court ultimately did not err in granting judgment as a matter of law on Norville's age discrimination claim because Norville produced no evidence that the hospital's reasons, even if pretextual, served as pretext for age discrimination"); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 200 (2d Cir. 1999) (affirming summary judgment to the defendant) ("We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also *either use of a pretext that itself implies a discriminatory stereotype, or use of a pretext to hide age discrimination.* This, he did not do." (emphasis in original)), *cert. denied*, __ U.S. __, 120 S. Ct. 399 (1999); *Nichols v. Lewis Grocer*, 138 F.3d 563, 566 (5th Cir. 1998) (the plaintiff can prevail only "if the record as a whole (1) creates a fact issue as to whether Supervalu's stated reason was what actually motivated it to deny Nichols the promotion *and* (2) creates a reasonable inference that sex was a determinative factor in that selection" (emphasis in original)); *O'Sullivan v. Minnesota*, 191 F.3d 965, 969–70 (8th Cir. 1999) ("Even if we agreed with O'Sullivan that LSC did not convey the true reason for her layoff, summary judgment is still proper" because there was no adequate evidence pointing to gender discrimination); *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124, 1128 (8th Cir. 1999) (holding that the plaintiff cannot prevail merely by discrediting the employer's proffered explanation. "Spencer must also prove that the proffered reason was a pretext for age discrimination.").

in judicial proceedings.[12] One Circuit has imposed a test of "substantial evidence" that the employer's proffered nondiscriminatory reasons are not the real reasons, before plaintiffs can escape the need to show greater evidence of intentional discrimination.[13] Adding to the confusion, these cases are sometimes inconsistent with other cases in the same Circuits.[14]

These Circuits seem to misunderstand their role in the review of jury verdicts under the inferential model. *Hicks* taught that "a reason cannot be proved to be 'a pretext *for*

[12] Without identifying any record basis for its holding, *Fisher v. Vassar College*, 114 F.3d 1332, 1346–47 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998) stated that "employers characteristically give false explanations for employment decisions for many different reasons," that the stronger the evidence of discrimination, the more likely that the reason for the false explanation is to conceal discrimination, and that the weaker the evidence of discrimination, "the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions." In light of Rule 11, Fed. R. Civ. P., and other efforts to impress on counsel the need to perform adequate factual investigations to ensure that representations to a court are reliable, it is difficult to comprehend why defendants who fail to perform an adequate investigation — and therefore put on evidence that is untrue — should be protected from the consequences of their failure. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d at 1069.

[13] *E.g.*, *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 337 (5th Cir. 1999) (holding that a jury may infer discrimination from substantial evidence that the employer's proffered reasons are false).

[14] *See generally*, Seymour & Brown, Chapter 14 (The *McDonnell Douglas / Burdine / Hicks* Model) in the Summer 1996, Spring 1998, and Spring 1999 editions.

discrimination' unless it is shown both that the reason was false, *and* that discrimination was the real reason," 509 U.S. at 515 (emphasis in original), that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination," *id.* at 511, that "[e]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*," *id.* at 511 n.4 (emphasis in original), and "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review . . . ." *Id.* at 524. Conflating all of these requirements, these courts have often in practice treated their review function as entitling them to discard evidence entirely if there is a question going to its weight, and to engage in "plenary review" of the reasonableness of the jury's drawing of the inference of discrimination. They have not paid attention to *Hicks*' caution that review of an inference drawn at a bench trial is subject to the "clearly erroneous" standard, *id.* at 524, and have similarly not heeded the holding of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), that the ultimate question of discrimination *vel non* in a bench trial is a question of fact subject to deferential review under the "clearly erroneous" standard. They have in effect misunderstood their role under *Hicks* as that of super-juries.

In an unusually candid example, *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 172 (1st Cir. 1998), noted that the question whether to grant summary judgment "is a close one because both GD and Hodgens have presented probative evidence tending to support their respective versions of the facts, on the question whether GD's reason for discharging Hodgens was legitimate or merely a pretext to retaliate against him for taking FMLA-protected medical leave," but simultaneously held that no reasonable factfinder could resolve this close case for the plaintiff.

C. The Treatment of the Discriminatory Remarks Herein Set the Bar of Proof Too High

In reviewing judgments under Rules 50 and 56, some of the Circuits have combined their high evidentiary hurdles with a refusal to allow juries to give weight to admissions of bias. There is a difference between the eminently proper goal of a system of justice that is blind, and a system that blinds itself to strong evidence of discrimination. Of course, we make no contention that all biased statements in the workplace bar the dismissal of a plaintiff's claim. Clearly, a number of factors affect the weight to be accorded such remarks:

> The probative strength of direct statements or other direct evidence of bias depends on several factors, including: (1) the lack of ambiguity in the statement or other evidence; (2) the intensity of any bias shown by the statement or other evidence; (3) the time elapsed between the statement or other occurrence and the challenged action; (4) the frequency with which such statements or other events happened, (5) whether the statements or other indications of bias came from management officials with direct or indirect power over the challenged actions, and (6) the employer's response to the statements or other incidents in question.

Seymour & Brown at 17–602 (summarizing the case law). A jury should be mindful of all these factors in weighing evidence.

However, many of the lower courts have taken from the jury the function of determining the weight to be accorded biased statements. In resolving motions for summary judgment under Rule 56 and motions for judgment as a matter of law under Rule 50, they have either weighed such evidence themselves or adopted bright-line rules barring much relevant evidence as non-probative or according preclusive effect to some types of defense evidence. In this case, for example, the court of appeals deprived the jury of its right to evaluate a statement by a key decisionmaker that the plaintiff was "too damn old to do the job" because of a number of factors that should at most have gone to its weight.

First, the court of appeals held that this and another age-related remark were not probative because "these comments were not made in the direct context of Reeves's termination." Pet. 9a. If they had been made in such a context, it would have been direct evidence of discrimination under the standards of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In the absence of any evidence that a decisionmaker

had undergone a substantial change of heart in the intervening months, the lower court's willingness to indulge in a conclusive legal presumption of a change of heart merely because of the passage of a few months bespeaks both a great reluctance to find discrimination and the height of the evidentiary bar the court has erected for plaintiffs.

Nor is this an isolated or extreme example of the Fifth Circuit's approach to judicial factfinding under Rules 50 and 56. In *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434–35 (5th Cir. 1995), the court affirmed the grant of summary judgment to the defendant, holding that the plaintiff's supervisor's remark, four years prior to her discharge, that he was going to get rid of the "cunt in the office," his scheduling of a lunch meeting at Hooter's, and a remark by another supervisor that the plaintiff was not the "best man for the job," did not combine to support an inference of sex discrimination.[15] The panel did not pause to explain why a jury should be barred from inferring that the "leopard had not changed its spots," or that the fact that it took him four years to make good on his promise did not disprove his declared motivation. Instead, *Ray* raised the evidentiary bar by holding that such remarks must be made repeatedly before they can be considered probative. *Id.* at 434.

Second, the lower court held that no reasonable jury could find Chesnut's remarks probative because there was no proof of discriminatory remarks by all others involved in the decision. This raising of the evidentiary bar would have prevented Ann Hopkins from proceeding with her case if this Court had followed such a standard in *Price Waterhouse v. Hopkins*. The plurality did not find that all partners had engaged in stereotyping, but only that "a number of the partners' comments showed sex stereotyping at work," and that the defendant, like the respondent here, had taken no steps to prevent reliance on sex-linked evaluations. 490 U.S. at 251. Justice O'Connor concurred, stating that such evidence must be adequate to shift the burden of persuasion to the defendant, if Title VII's promise of nondiscrimination is to be enforced. *Id.* at 272–73. Juries should be free to reason as this Court did in *Hopkins*.

Third, the lower court held that no reasonable jury could find Chesnut's remarks probative because some of the decision-makers were in their 50's or 60's. This raising of the evidentiary bar would have prevented Rodrigo Partida from proceeding with his habeas corpus petition challenging jury discrimination if this Court had followed such a standard in *Castaneda v. Partida*, 430 U.S. 482, 499–501 (1977). Instead, this Court rejected the argument "that human beings would not discriminate against their own kind." *Id.* at 500. Juries should be free to reason as this Court did in *Castaneda*.

Fourth, the lower court effectively held that no reasonable jury could find Chesnut's remarks probative because there was a conclusive presumption that the defendant's officials told

[15] *Sreeram v. Louisiana State Univ. Medical Center- Shreveport*, 188 F.3d 314, 321 (5th Cir. 1999), suggested that any evidence less than that in *Ray v. Tandem Computers* would automatically be insufficient to show discrimination or to prevent the entry of summary judgment for the defendant.

the truth in saying that the younger Oswalt would have been treated as harshly as the plaintiff if he had still been employed. The court was willing to indulge the presumption even though it itself stated that Oswalt had been treated more favorably than the plaintiff the last time there had been problems in the Hinge Room. This raising of the evidentiary bar placed an insuperable obstacle in the plaintiff's path. No plaintiff could prevail in any civil rights case if the court is willing to indulge such presumptions in favor of the defendant. Particularly where there is evidence of prior disparate treatment, and even more so where the court concedes that a jury could reasonably find the defendant's reasons bogus, a jury should be free to determine for itself the credibility of exculpatory testimony.

The lower court simply ignored the evidence that the plaintiff was treated less favorably than a comparable younger employee. If this Court had followed a similar approach in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282–83 (1976), L.N. McDonald's claim would have been blocked. So, too, for Percy Green's claim in *McDonnell Douglas* itself. Juries should be free to use the same reasoning this Court used in *McDonald* and in *McDonnell Douglas*.

Other Circuits have similarly invaded the province of the jury, to the significant detriment of justice. Space permits a single detailed example here.[16] *Indurante v. Local 705,*

[16] *See generally*, Seymour & Brown, Chapter 17 (Direct Proof and Stray Remarks) in the Summer 1996, Spring 1998, and Spring 1999 editions; I Lindemann & Grossman at 28–29.

International Brotherhood of Teamsters, 160 F.3d 364, 366–67 (7th Cir. 1998), affirmed the grant of summary judgment to the defendant in a Title VII national origin case notwithstanding statements by decisionmakers that "all the Italians were going to be fired," that "all the Italians were nothing but mobsters and gangsters," that "the plans were 'to get rid of all the Italians,'" and that "the days of the goombahs are over," because the statements were made from sixteen months before the plaintiff was fired to five months thereafter, and did not specifically refer to the plaintiff's termination or, in the "goombah" incident, to employment. *But see* the dissent by Judge Rovner, *id.* at 369: "The fact is, some plans take a good while to carry out." The court described a series of distinctions it had previously adopted, allowing it to ignore express manifestations of bias by decisionmakers ("comments about discrimination in *hiring* may not suffice if the case involves a *discharge*," *id.* at 367 (emphasis in original); comments may have to refer to the plaintiff specifically, *id.*). The court stated that the plaintiff had not adequately raised the argument that these statements constituted direct evidence, but held that they were not substantial enough evidence of pretext to require a trial. *Id.*

D. Setting the Evidentiary Bar Too High Frustrates the Purposes of the Fair-Employment Laws

It is obvious that the intent of Congress in enacting the civil rights laws can be frustrated by setting the evidentiary bar too high for persons with meritorious claims. Victims cannot receive make-whole relief, discriminators cannot be deterred, and discrimination will continue, if court-imposed limitations on

proof bar substantial numbers of victims from establishing the merit of their claims. In deciding on the approach to be followed in the future, we urge the Court to consider an intensely practical problem that affects many persons with meritorious claims: unequal ability to gather the relevant facts.

In most employment discrimination cases, the plaintiffs cannot file suit already in possession of the facts with which they can prove the merit of their claims. Usually, only the employer knows the true basis for its actions. Because of the press of numerous charges of discrimination and inadequate funding, the investigation of such charges by government agencies is often superficial, leaving the charging party with few additional facts.[17] In addition, pre-Complaint investigations by counsel are often necessarily incomplete, because State ethics rules frequently bar plaintiffs' counsel from interviewing the decisionmakers. Thus, plaintiffs are ordinarily dependent on discovery to learn the defendant's reasons for the challenged action, to discover whether there are reasonably comparable employees of a different race or gender or age who were treated more favorably, to determine whether there are factors that affect their comparability or explain the differences in treatment, to explore the bases of each nondiscriminatory reason the defendant will proffer, and to look for evidence to rebut those

[17] *See*, for example, the findings in *New York State National Organization for Women v. Pataki*, 189 F.R.D. 286, 305–11 (S.D. N.Y. 1999) (holding that the defendant officials violated the Due Process Clause of the Fourteenth Amendment by the New York State Human Rights Division's problematic intake and processing of complaints).

reasons.

It is very difficult to accomplish these tasks, mounting an effective case under the traditional *McDonnell Douglas* model, let alone meet the demands of heightened evidentiary hurdles like those imposed below. Accomplishing these tasks is far harder than it might seem because, even if the additional evidence demanded by the heightened evidentiary hurdles actually exists, the plaintiff may not be able to learn of such evidence because of the increasingly restrictive presumptive limits on discovery.[18] A much earlier Fifth Circuit highlighted the problems limitations on discovery cause to employment-discrimination plaintiffs in *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306–07 (Former 5th Cir. 1973). Discussing the lengthy exculpatory testimony of Charles Babcock, the company's Personnel Manager, the court stated:

> On cross-examination of Babcock, Burns' counsel was obviously unable to ask intelligent, informed questions relating to any specifics. Perhaps the information sought by their interrogatories would have served to bolster Babcock's exculpatory testimony in behalf of the Company. Then again, it might have allowed plaintiff's

[18] *See generally* the 1993 Amendments to the Discovery Rules, 146 F.R.D. 401 and the further restrictions now under consideration by this Court. Both the current and the proposed presumptive limits on discovery facially apply to all parties alike, but in practice impose far more severe problems on plaintiffs because they take no account of the parties' disparate access to the probative facts, and ignore the allocation of the burden of persuasion.

> counsel to pin the witness down to some unexplainable particulars. We do not know. The point is that open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules. In this case, that focal point has been ignored.

The court observed that, without the relevant background information in a racial discrimination case, justice "could not — as she *must* — be color blind." *Id.* at 307 (emphasis in original).

We urge that the evidentiary bar be set no higher than ordinary victims can reasonably be expected to reach, in light of their original lack of access to the facts and constraints on their ability to obtain evidence from their adversaries. Setting an accessible standard was the intent of this Court in handing down *McDonnell Douglas* and its progeny, and the lower courts should be directed to return to that functional standard.

E. In the Absence of Compelling Circumstances, the Jury Should Be Allowed to Draw an Inference of Discrimination or Retaliation from Evidence that the Proffered Nondiscriminatory Reason Was Not the True Reason for the Challenged Action

There is an undeniable tension between safeguarding the proper role of the jury under the Seventh Amendment to the Constitution and safeguarding litigants from arbitrary decisions by particular juries. It is essential that there be some review of the jury's decision to draw — or not to draw — the inference of discrimination from evidence that the employer's proffered

reason is not the real reason for the challenged action. *Hicks* made clear that there would be review of the jury's decision. 509 U.S. at 524. At the same time, it is equally clear that the "adequacy of the evidence" standard has too often led to judges substituting their own weighing of the evidence for that of the jury, while indulging every possible inference in favor of the defendant. The heightened review of jury findings and inferences drawn by juries in employment discrimination cases, without giving weight to all permissible inferences in favor of the verdict-winner, needs to be scaled back to the traditional limited but constitutionally permissible review of such findings and inferences in other cases, as exemplified by *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944), and comparable cases.

In balancing these competing concerns, it is important to bear in mind that the constitutional role of the jury reinforces the decision of Congress that juries, not judges, should perform the primary tasks of determining credibility and weighing the evidence. 29 U.S.C. § 626(c)(2) (ADEA); 42 U.S.C. § 1981a(c) (Title VII and certain claims under the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 794a, where common-law damages are sought). There are sound policy reasons for Congress's allocation of roles. Juries are immersed in the workaday world; they know how offices and factories operate, and bring to their evaluations of the evidence a common sense rooted in the experience of their everyday lives.

Judges are far better equipped than juries to declare and apply the law, but it is no disrespect to the judiciary to draw the

conclusion that they may be less well-equipped than juries to understand the real dynamics of a workplace. *See Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) ("Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications"). These considerations are not consistent with the "plenary review" in which the lower court indulged.

We suggest the following workable test for review of the jury's determination whether to draw the inference of discrimination. Where there is enough evidence to justify a jury in discrediting the defendant's proffered nondiscriminatory reasons for the employment action in question, the jury should be free to decide whether to draw the further inference of discrimination. Its decision should be overturned only in rare cases, for compelling reasons not involving a re-weighing of evidence or a presumption as to the credibility of any witness. For example, an inference of discrimination could justly be overturned where the plaintiff discredited the defendant's proffered reason by showing the defendant's true reason, which was also nondiscriminatory, *e.g.*, *Newton v. Cadwell Laboratories*, 156 F.3d 880, 882 (8th Cir. 1998) (the court found there was no pretext where the plaintiff admitted in her deposition that the defendant's employment decisions were motivated not by gender, "but by whether a prospective employee could sell Cadwell's products effectively"), or that the defendant took

reasonable steps to be well-informed but based its decision on a good-faith but mistaken view of the facts, *e.g.*, *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289 (7th Cir. 1999); *Roberts v. Separators, Inc.*, 172 F.3d 448, 452 (7th Cir. 1999), or that the defendant has shown that reasonably comparable employees of the allegedly favored group were treated identically to the plaintiff so that there was no disparate treatment to be explained, *e.g.*, *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 446 (7th Cir. 1997). This test is consistent with *Tennant* and the Seventh Amendment jurisprudence of this Court, and would curb the heightened review of jury findings and inferences in which some Circuits have engaged.

Absent such extraordinary circumstances, the defendant's proffer of an incorrect explanation should justify a jury's inference of discrimination. We submit that it would do no good to clarify the proper role of a court under Rule 50 if the case will never reach the jury because the same errors will be committed under Rule 56 to an even greater extent than they now are committed. To safeguard the ability of a jury to exercise its discretion whether to draw the further inference of discrimination, we urge that the opinion of this Court emphasize that summary judgment should be denied wherever the evidence is sufficient to justify a jury inference that the defendant has presented a "nondiscriminatory reason" for the challenged action that is not the defendant's actual reason.

Finally, we urge the Court to provide guidance to the lower courts, to ensure that they give due regard to the Seventh Amendment and not "search the record for conflicting circum-

stantial evidence in order to take the case away from the jury," a practice this Court forbade in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. at 35, but which has too often become the norm. Eric Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237 (1989). Such guidance will do much to assuage the fears of "many attorneys" that "disfavored plaintiffs are apt to be hustled out of the courthouse," and that "this is often the fate of employment discrimination plaintiffs." Hon. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1938–39 (1998) (citing the findings of three Circuits' task forces on perceptions of race and gender bias in the courts). She, too, urged that a reassessment of summary-judgment practice was in order, "lest it develop too casually into a stealth weapon for clearing calendars." *Id.* at 1898.

CONCLUSION

Amici pray that the decision below be reversed, that the Court provide further guidance as suggested herein, and that the Congressionally-ordained role for civil rights juries be restored.

Respectfully submitted,

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