No. 16-533

IN THE

Supreme Court of the United States

JANET A. RILEY,

Petitioner,

v.

ELKHART COMMUNITY SCHOOLS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Can a plaintiff establish a prima facie case of discrimination in promotion or hiring under the *McDonnell Douglas* framework when the relevant position is filled by someone from the plaintiff's protected class?

(2) What is the proper description of the standard for inferring pretext from comparative qualifications in a case involving a failure to promote or hire?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are identified in the caption to the case.

No corporate disclosure statement is required because Respondent Elkhart Community Schools is a governmental entity.

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INTRODUCTION

Petitioner Janet Riley brought employment discrimination claims against Respondent Elkhart Community Schools ("Elkhart"). As to the claims relevant here, the courts below concluded that she either failed to make a prima facie showing or failed to produce evidence of pretext. These decisions were correct and do not warrant this Court's review.

Petitioner overstates the significance of both questions presented. The first question—whether a plaintiff can establish a prima facie case of discrimination in promotion or hiring under the *McDonnell Douglas* framework when the relevant position is filled by someone in the protected class—seldom if ever affects a plaintiff's ability to ultimately show discrimination. This is unsurprising. When an employer selects an applicant from the *same* protected class as the plaintiff, the employer is probably not discriminating against members of that class. Thus, plaintiffs who ultimately succeed in showing discrimination in such circumstances are vanishingly rare, even in the circuits that adopt Petitioner's preferred approach. Given this rarity, there is no reason to think that the opposite approach forecloses many—if any—meritorious claims. Indeed, both in the circuits that use Petitioner's preferred approach and in the circuits that do not, courts frequently affirm judgment for the employer on other grounds, such as an absence of pretext. Furthermore, Petitioner exaggerates the depth of any circuit split by counting decisions where the question was not presented, decisions that expressly rest on alternative grounds, and unpublished decisions.

Regarding the second question presented—how to describe the standard when a plaintiff seeks to show pretext using comparative qualifications—the circuits use different adjectives and adverbs but conduct essentially the same inquiry. This was equally true in 2006, when this Court rejected a particularly colorful description that broke radically from others already then in use. In doing so, this Court acknowledged the existence of "various other standards," but expressly declined to choose among them. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457–58 (2006) (per curiam). This was also equally true each of the numerous times that this Court has denied certiorari on this question during the past fifteen years. The Court's reluctance to take up this question is sensible: despite differences in articulation, the overwhelming majority of the circuits employ a functionally similar approach, requiring a non-trivial disparity in qualifications when a plaintiff presents no other significant evidence of pretext.

Finally, this case is a poor vehicle. Resolving either or both questions presented in Petitioner's favor would still require summary judgment for Elkhart. As to Petitioner's claims rejected at the prima facie stage because the successful applicant was a member of her protected class, the courts below have already rejected materially similar claims at the pretext stage. And as to her claims rejected at the pretext stage, her evidence of her purportedly superior qualifications is so thin that her claims would fail even under the law of the circuits she claims are more forgiving.

The petition for certiorari should be denied.

STATEMENT

A. Petitioner's Employment History

Elkhart has employed Petitioner as a teacher since 1980. Between 2005 and 2013, Petitioner, who is an African American female, unsuccessfully applied for various assistant principal positions. The first sought-after promotion that remains at issue here occurred in 2007, when Elkhart selected Cary Anderson, a white male. Pet. App. 2a–3a. In 2008, Elkhart selected Andrew Bridell, a white male. Pet. App. 3a. In the next year, Elkhart selected Mary Wisniewski, a white female, and Krista Hennings, an African American female. Pet. App. 3a. And in 2012, Elkhart selected JeNeva Adams, an African American female, and Jason Grasty, a white male. Pet. App. 3a. Petitioner applied for each of these six assistant principal positions, and Elkhart interviewed her for the 2012 positions. She performed worse than both Adams and Grasty in her interview, particularly with respect to specific suggestions of how to improve the schools in question. Pet. App. 3a, 12a–13a.

As to each of these sought-after promotions for administrative positions, Petitioner's qualifications argument focused on her teaching experience and the length of her employment with Elkhart.

B. Petitioner's Lawsuit

Petitioner sued Elkhart, asserting a "bevy of claims" of discrimination based on race, sex, and age in the denial of promotions. Pet. App. 4a. Petitioner invoked Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and 42

U.S.C. § 1981 in challenging the six promotion decisions described above. She also asserted several other claims no longer at issue. The parties consented to the jurisdiction of a magistrate judge.

C. The Magistrate Judge Grants Summary Judgment To Elkhart

The magistrate judge rejected all of Petitioner's pre-2010 failure-to-promote claims as time-barred. Pet. App. 27a–28a. The magistrate judge then held that Petitioner's race- and sex-discrimination claims based on the 2012 promotions failed at the prima facie stage because JeNeva Adams, one of the successful applicants, is, like Petitioner, an African American woman. Pet. App. 34a.

Then, assuming that Petitioner had made a prima facie case of age discrimination as to the 2012 promotions, the magistrate judge rejected her claim of pretext, concluding that "the evidence showed that [Petitioner] was likely not the most qualified person for the job" and that in any event her "credentials were not so superior that no reasonable and impartial person could have chosen [the successful applicants] over her." Pet. App. 41a.

D. The Seventh Circuit Affirms Summary Judgment

The Seventh Circuit unanimously affirmed. It agreed that Petitioner's pre-2010 claims for sex or age discrimination were time-barred, but held that her claims for race discrimination under Section 1981 were timely as to promotions occurring in 2007, 2008, and 2009. As relevant here, the Seventh Circuit thus reached the merits on Petitioner's claims of race discrimination for the four assistant principal

positions awarded between 2007 and 2009 and of race, sex, and age discrimination for the two assistant principal positions awarded in 2012.

The Seventh Circuit held that Petitioner could not make a prima facie case on her race-discrimination claim relating to the 2009 selection of Krista Hennings because Hennings, like Petitioner, is African American. Pet. App. 8a–9a. It found similarly as to her race- and sex-discrimination claims relating to the 2012 selection of JeNeva Adams. Pet. App. 11a n.3.

The court then rejected Petitioner's attempt to show pretext based on her greater teaching experience and longer period of employment with Elkhart. As to Petitioner's claims relating to Grasty's position and her age claim relating to Adams's position, the court observed that teaching experience and length of service were the least significant factors Elkhart used to evaluate candidates. The court also found no basis to doubt evidence that Petitioner performed poorly on interview questions relevant to more important factors. Pet. App. 12a–13a. Likewise, as to the other three pre-2010 positions—those awarded to Anderson, Bridell, and Wisniewski—Petitioner relied on her greater *teaching* experience and longer period of service at Elkhart. But the court found these insufficient evidence of pretext because neither factor was of great importance for these *administrative* positions. Pet. App. 14a–15a.

REASONS FOR DENYING THE PETITION

Neither of the questions presented warrants this Court's consideration.

I. Petitioner urges this Court to consider whether a plaintiff can make a prima facie case under *McDonnell Douglas* in a failure-to-promote or failure-to-hire case when the successful applicant is a member of the plaintiff's protected class. But the relevant language in many of Petitioner's cases is dicta because the successful applicant was not, in fact, a member of plaintiff's protected class. Even in cases where the successful applicant and plaintiff were members of the same protected class, the issue often had no effect on the outcome because the claims failed for alternative reasons, such as a lack of pretext. Thus, while resolving the first question presented may determine the stage of analysis at which such cases are decided, it will seldom—if ever—affect the ultimate outcome. Although Petitioner asserts a 6-5 circuit split, the extent of any split narrows substantially when properly limited to published cases that actually present the question and rest on no alternative ground.

Moreover, it is vanishingly rare for a plaintiff passed over in favor of a member of his or her protected class to convince a factfinder that discrimination occurred using only the *McDonnell Douglas* framework—even in the circuits adopting Petitioner's preferred approach. Petitioner offers no reason to think the results would be different if all circuits adopted her preferred approach. An issue of such limited practical significance does not justify this Court's resources.

Finally, this case presents a poor vehicle. The record demonstrates that Petitioner's claims would fail even if she made a prima facie case because she cannot show pretext.

II. Nor should this Court review the second question presented, which involves the description of the standard for inferring pretext from comparative qualifications. This Court has consistently denied certiorari on this question. And even when the Court stepped in to eliminate a particularly extreme comparative-qualifications standard, *Ash*, 546 U.S. 454, it saw no reason to address the circuits' other articulations of the proper standard. This question is not cert-worthy today, just as it has not been cert-worthy for the past decade and a half.

Petitioner also overstates both the scope and importance of any split in how to describe the comparative-qualifications standard. Although courts use different wording to articulate the standard, they use an analysis that is functionally similar. The various phrasings of the standard thus have little real-world impact.

Moreover, this case is a poor vehicle for deciding this question. Petitioner's discrimination claims are so weak that they would fail under any circuit's formulation of the comparative-qualifications test.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW

The first question—whether a plaintiff can make a *McDonnell Douglas* prima facie showing of discrimination when the successful applicant belongs to the same protected class as the plaintiff—does not merit review. Petitioner relies on numerous cases that do not actually present this question. Moreover, this question is seldom outcome-determinative, was correctly decided below, and suffers from vehicle problems.

A. Many Of Petitioner's Cases Do Not Involve Successful Applicants From The Plaintiff's Protected Class

In almost two dozen of the cases Petitioner cites, there was no dispute that the successful applicant was outside the plaintiff's protected class. In those cases, any statements regarding the effect of the successful applicant's membership in the plaintiff's protected class are thus mere dicta.

For example, in multiple cases Petitioner cites from the Seventh Circuit, the successful applicant was outside the plaintiff's protected class. In one case, two white police officers alleged race discrimination based on the promotion of an African American officer. *Garofalo v. Vill. of Hazel Crest*, 754 F.3d 428 (7th Cir. 2014); *see also, e.g.*, *Johnson v. Nordstrom, Inc.*, 260 F.3d 727 (7th Cir. 2001) (African American plaintiff alleging race discrimination based on promotions of white employees); *Harrison v. Larue D. Carter Mem'l Hosp.*, No. 94-3775, 1995 WL 445691 (7th Cir. July 25, 1995) (female plaintiff alleging sex discrimination based on promotions of male applicants).

Likewise, in multiple cases that Petitioner cites from the Fifth Circuit, the successful applicant was not a member of the plaintiff's protected class. *Barrientos v. City of Eagle Pass*, 444 F. App'x 756 (5th Cir. 2011) (per curiam) (male plaintiff alleging sex discrimination based on hiring of female employees); *Thomas v. Trico Prods. Corp.*, 256 F. App'x 658 (5th Cir. 2007) (per curiam) (plaintiff of Indian descent alleging national-origin

discrimination based on hiring of applicant with a different national origin).

The same is true in the Eighth Circuit. *See, e.g.*, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (en banc) (female and Native American plaintiffs alleging, respectively, sex and national-origin discrimination based on hiring of non-Native American males); *Dixon v. Pulaski Cty. Special Sch. Dist.*, 578 F.3d 862 (8th Cir. 2009) (African American plaintiff alleging race discrimination based on promotion of non-African American applicant), *abrogated on other grounds by Torgerson*, 643 F.3d 1031. Indeed, in none of the cases Petitioner cites from the Eighth Circuit did the court affirm a grant of summary judgment on the ground that the successful applicant was a member of the plaintiff's protected class.

In the Eleventh Circuit, the plaintiff in the only published case that Petitioner cites was a white employee alleging race discrimination based on promotions of black employees. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763 (11th Cir. 2005) (per curiam); *see also Daniel v. Dekalb Cty. Sch. Dist.*, 600 F. App'x 632 (11th Cir. 2014) (per curiam) (female plaintiff alleging sex discrimination based on promotion of male employee). Likewise, the question is irrelevant in multiple cases that Petitioner cites from the Fourth and Sixth Circuits. *E.g.*, *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998) (African American plaintiffs alleging race discrimination based on promotions of white employees), *vacated on other grounds*, 527 U.S. 1031 (1999); *Williams v. Henderson*, 129 F. App'x 806 (4th Cir. 2005) (per curiam) (African American plaintiffs

alleging race discrimination based on promotions of white employees); *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232 (6th Cir. 2005) (female plaintiff alleging sex discrimination based on promotion of male applicant); *Culver v. CCI Label, Inc.*, 455 F. App'x 625 (6th Cir. 2012) (female plaintiff alleging sex discrimination based on promotion of male employee).

Similarly, in the only case that Petitioner cites from the First Circuit, although the court noted that plaintiffs can make a *McDonnell Douglas* prima facie case even if the successful applicants are members of the plaintiffs' protected classes, there was no dispute that the successful applicants were in fact outside these classes. *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In short, Petitioner's alleged split rests in significant part on dicta. Such statements provide no basis for this Court's review. *See California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'"); *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari) ("We sit . . . not to correct errors in dicta . . . .").

B. Cases With Successful Applicants Who Are Members Of the Plaintiff's Protected Class Often Present Alternate Grounds For Judgment For The Employer

Even in cases where the successful applicant is a member of the plaintiff's protected class, alternative grounds often justify judgment for the employer regardless of the answer to the first question presented. On the one hand, courts that impose an "outside the protected class" requirement often also rest their decisions on alternative grounds such as an absence of evidence of pretext. And on the other hand, courts that do not impose such a requirement often reject plaintiff's claims on pretext or other grounds anyway.

For example, in each of the Eleventh Circuit cases that Petitioner cites that rejects a claim based on the successful applicant's membership in the plaintiff's protected class, the court also rested its ruling on other grounds. *Suarez v. Sch. Bd. of Hillsborough Cty.*, 638 F. App'x 897, 900–03 (11th Cir. 2016) (per curiam) (relying on the alternative grounds that the plaintiff failed to show he met the minimum qualifications for some positions and failed to offer sufficient evidence of pretext as to other positions); *Revere v. McHugh*, 362 F. App'x 993, 997 (11th Cir. 2010) (per curiam) (relying on the alternative ground that the plaintiff failed to show she met the minimum qualifications for the sought-after position).

Conversely, in several of Petitioner's cases in which a court concluded that the successful applicant's membership in the plaintiff's protected

class did not foreclose the plaintiff's claim, the court nonetheless affirmed summary judgment for the defendant on other grounds. For example, the D.C. Circuit affirmed summary judgment on the alternative ground that the plaintiff failed to show she was minimally qualified for the position she sought, *Carter v. George Washington Univ.*, 387 F.3d 872, 883 (D.C. Cir. 2004); the Tenth Circuit affirmed summary judgment on the alternative ground that the plaintiff failed to present evidence of other elements of his prima facie case, *Amro v. Boeing Co.*, 232 F.3d 790, 797–98 (10th Cir. 2000); and the Ninth Circuit affirmed summary judgment on the alternative ground of lack of evidence of pretext, *Caldwell v. Washington*, 278 F. App'x 773, 776 (9th Cir. 2008).

Thus, Petitioner's alleged 6-5 split shrinks to a 2-3 split after excluding cases in which (1) the successful applicant was outside the protected class, (2) the decision expressly also rested on an alternative ground, or (3) the decision was unpublished and thus non-precedential. *Compare* Pet. App. 1a–15a, *and Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980), *with Chappell-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006), *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), *and Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313 (3d Cir. 2000).

And even in cases that fall into this shallow split, the difference in the circuit courts' approaches has little impact. The difficulties of establishing that an employer discriminated by hiring or promoting a member of the plaintiff's protected class are obvious. For example, if an employer selects an African

American woman for a given position, it is unlikely that its decision not to select a different African American woman for that *same* position is based on race or sex. The extreme scarcity of plaintiffs who persuaded a factfinder that discrimination had occurred in such circumstances—even in the circuits using Petitioner's preferred approach—is thus unsurprising.

Post-remand proceedings confirm that the issue is seldom—if ever—outcome-determinative. For instance, on remand after summary judgment was reversed in *Chappell-Johnson*, 440 F.3d 484, the district court granted summary judgment based on the absence of evidence of pretext, *Chappell-Johnson v. Bair*, 636 F. Supp. 2d 135 (D.D.C. 2009). The appellate court summarily affirmed. *Chappell-Johnson v. Bair*, No. 09-5321, 2010 WL 605160 (D.C. Cir. Jan. 27, 2010) (per curiam). And after the D.C. Circuit remanded for further proceedings in *Stella v. Mineta*, 284 F.3d 135 (D.C. Cir. 2002), the district court eventually dismissed the case under Rule 41(b), *Stella v. Mineta*, 231 F.R.D. 44 (D.D.C. 2005). In two other cases, the parties settled after remand, once for $60,000, *see Lyons*, 307 F.3d 1092; *Lyons v. Dalton*, No. 98-690, Dkt. Nos. 45–46 (S.D. Cal. Dec. 15, 2004), and once for an undisclosed amount, *Goosby*, 228 F.3d 313; *Goosby v. Johnson & Johnson*, No. 98-97, Dkt. No. 34 (W.D. Pa. Nov. 22, 2000).[1] This is hardly the profile of an issue of great practical importance.

[1] Records of post-remand proceedings in one additional case, *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356 (9th Cir. 1985), are marked as "destroyed" in the relevant district court clerk's office, and do not appear to be available elsewhere.

C. The Seventh Circuit's Position Is Correct

The Seventh Circuit's refusal to allow use of the *McDonnell Douglas* inference in such circumstances is correct. A prima facie case establishes a "legally mandatory, rebuttable presumption" that, "if the employer is silent in the face of the presumption," requires the court to "enter judgment for the plaintiff because no issue of fact remains in the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 & n.7 (1981). Such a presumption is unwarranted—as a matter of precedent and common sense—when the employer hires an applicant from the *same* protected class as the plaintiff.

To begin with, imposing the presumption in such circumstances is inconsistent with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). There, this Court explained how to apply the *McDonnell Douglas* framework to age-discrimination claims (assuming without deciding that the framework applied at all). After explaining that "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion,'" *id.* at 312 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)), this Court held that "such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger," *id.* at 313; *see also id.* at 312 (clarifying that a prima facie case can be established when the successful applicant is over 40, but only if the successful applicant is significantly younger). In other words, it makes no sense to infer that an employer who hires an

applicant of roughly the same age as the unsuccessful applicant is discriminating based on age.

It is no more logical to impose a presumption of race or sex discrimination when an employer selects an applicant of the plaintiff's race or sex. Indeed, doing so would produce bizarre results. To take just one example, assume two qualified applicants of the same race and sex seek the same position, and the unsuccessful applicant sues for race and sex discrimination, demonstrating only that he or she was qualified and had applied. A district court would have no choice but to conclude that the company had discriminated on the basis of *both* race *and* sex if the employer was unable to explain the reason for its choice, despite the reality that neither likely played any role.

Critically, the Seventh Circuit's holding does not foreclose meritorious discrimination claims. Plaintiffs may prove a discrimination case without relying on the *McDonnell Douglas* framework by, for example, presenting direct evidence of discrimination. *E.g.*, Pet. App. 7a ("To proceed to trial on a failure to promote claim, a plaintiff must produce sufficient direct or circumstantial evidence that the employer's promotion decisions were intentionally discriminatory or make an indirect case of discrimination under the burden-shifting method of *McDonnell Douglas Corp. v. Green*." (alterations omitted)); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000); *see also Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (holding in the context of the ADEA that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). For example, in *Ortiz v.*

Werner Enterprises, Inc., 834 F.3d 760 (7th Cir. 2016), the Seventh Circuit reversed a grant of summary judgment in a termination case without using the *McDonnell Douglas* framework. *Id.* at 766; *see also Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 286–87 & n.2 (7th Cir. 2015) (denying summary judgment on an ADEA termination claim despite noting that plaintiff's attempt to show discrimination through the *McDonnell Douglas* framework would have failed). But in the mine run of cases where the employer chooses one of multiple qualified applicants from the same protected class and there is no additional evidence, there is no basis to infer discrimination and impose a "legally mandatory, rebuttable presumption." *See Burdine*, 450 U.S. at 254 n.7.

D. This Case Is A Poor Vehicle

In any event, this case is a poor vehicle to decide the first question presented. As in most of the cases that Petitioner cites, the question presented is unlikely to affect the outcome here. The Seventh Circuit rejected three of Petitioner's claims—her race- and sex-discrimination claims relating to JeNeva Adams's assistant principal position and her race-discrimination claim relating to Krista Hennings's—on the ground that, like Petitioner, Adams and Hennings are both African American females. Pet. App. 8a–9a (Hennings), 11a n.3 (Adams). But even assuming for the sake of argument that Petitioner made a prima facie case on these claims, the Seventh Circuit has already signaled that she failed to show pretext.

As to Adams, because the Seventh Circuit concluded that Petitioner had made a prima facie case of age discrimination, it reviewed Petitioner's claim that Elkhart's nondiscriminatory justification for promoting Adams—namely, that Adams's superior interview performance demonstrated that she was better qualified than Petitioner—was pretextual. Pet. App. 10a–11a. The court concluded that Petitioner had failed to produce sufficient evidence of pretext for her age-discrimination claim to survive summary judgment. Pet. App. 11a–14a. There is no reason to think this conclusion would differ with respect to her race- and sex-discrimination claims.

Similarly, although the Seventh Circuit did not expressly analyze Petitioner's claim of pretext with respect to Hennings, it did reject Petitioner's attempts to show pretext as to three other assistant principal positions Elkhart filled before 2010—those it awarded to Anderson, Bridell, and Wisniewski. Pet. App. 14a–15a. Petitioner asserted essentially the same pretext arguments for the Hennings position as she did for the other three, *cf.* Br. of Pl-Appellant 23–24 (7th Cir. Dkt. No. 13), and there is no reason to think the Seventh Circuit would find them any more persuasive with respect to Hennings, who is a member of Petitioner's protected class, than with respect to the three others, who are not.

II. THIS COURT HAS REPEATEDLY DECLINED TO RESOLVE THE SECOND QUESTION PRESENTED, WHICH HAS LITTLE OR NO PRACTICAL SIGNIFICANCE

This Court's review of the second question presented—the precise words describing the standard for inferring pretext from comparative qualifications—is also unwarranted. This Court has repeatedly denied petitions on this question because courts articulate gradations of the same approach and engage in functionally similar analysis. In any event, this case is a flawed vehicle for analyzing this question.

A. This Court Has Repeatedly Declined To Address This Question

Over the last fifteen years, this Court has denied at least seven petitions on the second question presented here. *See* Pet. for Writ of Cert., *Akers v. Hinds Cmty. Coll.*, 133 S. Ct. 617 (2012) (No. 12-326), 2012 WL 4083731; Pet. for Writ of Cert., *Powercomm, LLC v. Holyoke Gas & Elec. Dep't*, 132 S. Ct. 1800 (2012) (No. 11-906), 2012 WL 201823; Pet. for Writ of Cert., *Torgerson v. City of Rochester*, 132 S. Ct. 513 (2011) (No. 11-273), 2011 WL 3860774; Pet. for Writ of Cert., *Baxter Healthcare Corp. v. White*, 556 U.S. 1235 (2009) (No. 08-960), 2009 WL 217349; Pet. for Writ of Cert., *Ash v. Tyson Foods, Inc.*, 549 U.S. 1181 (2007) (No. 06-706), 2006 WL 3379563; Pet. for Writ of Cert., *Shakir v. Prairie View A&M Univ.*, 549 U.S. 1077 (2006) (No. 06-139), 2006 WL 2136226; Pet. for Writ of Cert., *Millbrook v. IBP, Inc.*, 537 U.S. 884 (2002) (No. 02-120), 2002 WL 32134837.

This Court did step in once, in *Ash v. Tyson Foods*, 546 U.S. at 456–57, to reject a particularly colorful and extreme standard—that pretext could only be inferred when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." This Court concluded that this "visual image" was "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." *Id.* at 457. But this Court also noted the existence of "various other standards" the circuits were already using and expressly declined to "define more precisely what standard should govern pretext claims based on superior qualifications." *Id.* at 457–58. Indeed, when a follow-on petition was filed after the decision on remand, this Court again declined to resolve that question. *See* Pet. for Writ of Cert., *Ash*, 549 U.S. 1181 (2007) (No. 06-706), 2006 WL 3379563.

Thus, Petitioner's argument that the second question "warrants review . . . for the same reason that it warranted review . . . in *Ash*," Pet. 35, is odd. On the contrary, for the same reasons this Court declined to resolve the question in *Ash*—and in numerous petitions over the past fifteen years—the second question is not cert-worthy today.

B. The Circuit Courts' Differences In Wording Remain Unimportant

What was true the last several times this Court denied certiorari on this question remains true: while courts articulate the standard for inferring pretext from comparative qualifications using different adjectives and adverbs, their analysis is materially the same.

Petitioner asserts a five-way split in authority—specifically that (1) the First, Fourth, Eighth, and Ninth Circuits treat any difference in qualifications as sufficient to show pretext; (2) the D.C. Circuit treats only a "significant[]" difference in qualifications as sufficient; (3) the Tenth Circuit requires an "overwhelming" disparity; (4) the Second, Fifth, Sixth, and Eleventh Circuits require the qualifications to be disparate enough to make the employer's decision "irrational"; and (5) the Seventh Circuit requires a disparity "so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position." Pet. App. 26a–34a. Petitioner's assertion overlooks that despite differences in word choice, the circuits are in substance applying an approach that is quite uniform.

To begin with, there is no meaningful difference in the analysis employed by courts in the last four of Petitioner's categories. All require, in the absence of other significant evidence of discrimination, a non-trivial difference in qualifications to prevent a court from acting as a "super-personnel department that reexamines an entity's business decisions" rather than a forum to redress intentional discrimination. Pet. App. 15a; *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1207 (11th Cir. 2013); *Santana v. City and Cty. of Denver*, 488 F.3d 860, 865 (10th Cir. 2007); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627 (6th Cir. 2006); *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006); *McLendon v. Ingalls Shipbuilding, Inc.*, 260 F.3d 622, 2001 WL 650487, at *4 (5th Cir. 2001) (per curiam) (table); *Byrnie v. Town of Cromwell Bd. of*

Educ., 243 F.3d 93, 103 (2d Cir. 2001), *superseded on other grounds by* Fed. R. Civ. P. 37(e).

Indeed, the courts in Petitioner's last four categories themselves consider their approaches to be fundamentally similar. The Sixth Circuit, in articulating its standard that when the plaintiff offers "little or no other probative evidence of discrimination . . . the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former," noted that this standard "accords with several of our sister court's standards," specifically mentioning those used by the Seventh and D.C. Circuits. *Bender*, 455 F.3d at 627. This standard also clearly "accords with" those of the Second, Fifth, and Eleventh Circuits, which even Petitioner treats as materially identical. Pet. 30–33. And the Seventh Circuit views its standard as "essentially the same as" that of the Second, Fifth, Sixth, and Eleventh Circuits. *Mlynczak v. Bodman*, 442 F.3d 1050, 1060 (7th Cir. 2006).

Similarly, the Tenth Circuit describes its "overwhelming disparity" test as simply the method by which it determines whether "the facts assure us that the plaintiff is better qualified than the other candidates for the position." *Santana*, 488 F.3d at 865. Like the other courts in Petitioner's last four categories, the Tenth Circuit's focus is not on the precise articulation of the standard, but on ensuring through the presence of a non-trivial qualifications disparity that courts are not thrust into the role of a "super personnel department." *Id.*

Importantly, in each of the circuits that falls within one of these categories, where plaintiffs offer significant evidence of pretext beyond comparative qualifications, plaintiffs may use marginal differences in qualifications as further evidence. *E.g.*, *Hamilton v. Geithner*, 666 F.3d 1344, 1351–57 (D.C. Cir. 2012); *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 815 (6th Cir. 2011); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 404–08 (7th Cir. 2008); *Vessels*, 408 F.3d at 772; *Voltz v. Coca-Cola Enters., Inc.*, 91 F. App'x 63, 73 (10th Cir. 2004); *Byrnie*, 243 F.3d at 102–07; *Rutherford v. Harris Cty.*, 197 F.3d 173, 182–83 & n.9 (5th Cir. 1999). It is, therefore, clear that there is no real difference in the standards applied by the courts in Petitioner's second, third, fourth, and fifth categories.

Petitioner asserts that the circuits included in her first category—the First, Fourth, Eighth, and Ninth—apply a more lenient test under which *any* difference in qualifications is enough to show pretext. Not so. In fact, all of these circuits except the Ninth have clarified—in cases Petitioner cites—that not just any difference will do. For example, the First Circuit has noted that "subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong-headed, was anything more than 'a garden variety mistake in corporate judgment.'" *Hicks v. Johnson*, 755 F.3d 738, 746 (1st Cir. 2014). Even when the plaintiff and the successful applicant were each stronger in certain areas, the First Circuit has affirmed summary judgment for the employer, concluding that "*no reasonable jury* could conclude that [the plaintiff's]

qualifications *so outweighed* those of [the successful applicant] . . . that it was more likely than not, discriminatory animus provided the job clincher." *Id.* (emphasis added); *cf. Rathbun v. Autozone, Inc.*, 361 F.3d 62, 74 (1st Cir. 2004) ("[I]n the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext.").

Likewise, the Eighth Circuit has rejected the idea that a plaintiff shows pretext by demonstrating "similar[]" or "relatively similar" qualifications, *Cox v. First Nat'l Bank*, 792 F.3d 936, 939 (8th Cir. 2015), or "comparable qualifications," even when the plaintiff has "specific strengths as a candidate," *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 793 (8th Cir. 2011).

So too in the Fourth Circuit, which requires a plaintiff to show that he or she was "discernibly better qualified" or had qualifications that were "demonstrably superior," not merely "similar or only slightly superior" to those of the successful applicant. *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 261–62 (4th Cir. 2006).

Finally, as to the Ninth Circuit, the only three published opinions that Petitioner cites also found significant additional evidence of discrimination beyond a bare showing of superior qualifications. *Shelley v. Geren*, 666 F.3d 599, 609–10 (9th Cir. 2012); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991). In the presence of such evidence, all circuits allow a lesser measure of

superiority in qualifications to provide additional evidence of pretext. *See supra* at 22.

In short, Petitioner overstates both the scope and importance of any split on the second question presented. As has long been the case, although the circuits use different wording to describe the standard for when comparative-qualifications evidence demonstrates pretext, these differences in wording have little practical import.

C. This Case Is A Flawed Vehicle

Even if there were a meaningful split in authority, this case would be a poor vehicle to resolve it. Petitioner's comparative-qualifications evidence focused on her greater teaching experience and her longer period of employment with Elkhart. Pet. App. 11a–15a. But the Seventh Circuit noted that these factors were relatively unimportant in determining who was best qualified to serve as an assistant principal, especially as compared to Petitioner's poor interview performance. Pet. App. 11a–15a. Even most of the circuits that Petitioner claims apply the more plaintiff-friendly rule have rejected pretext arguments based on the plaintiff's "specific strengths as a candidate," *Barber*, 656 F.3d at 793, or qualifications that were "superior in some respects," *Hicks*, 755 F.3d at 746. Accordingly, even resolving the second question presented in Petitioner's favor would merely result in affirmance under her preferred standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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