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Reply Brief for Petitioner. Paske v. Fitzgerald, 136 S.Ct. 536 (2015) (No. 15-162), 2015 U.S. S. Ct. Briefs LEXIS 3941, 2015 WL 6748880

Eric Schnapper
University of Washington School of Law, schnapp@uw.edu

Margaret A. Harris

No. 15-162

In The
Supreme Court of the United States

PETER J. PASKE, JR.,

Petitioner,

v.

JOEL FITZGERALD, individually and in his official capacity as Chief of Police of the City of Missouri City, Texas; THE CITY OF MISSOURI CITY, TEXAS,

Respondents.

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

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARGARET A. HARRIS
BUTLER & HARRIS
1007 Heights Boulevard
Houston, TX 77008
(713) 526-5677

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATUTES

I. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER *AIKENS* APPLIES AT SUMMARY JUDGMENT

The existence of the circuit conflict regarding whether *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), applies at summary judgment is widely recognized. "[A]t least three circuits have applied *Aikens* in reviewing motions for summary judgment." *Wells v. Colorado Dept. of Transportation*, 325 F.3d 1205, 1228 (10th Cir. 2003) (separate opinion of Hartz, J.). On the other hand, as respondents themselves note, the Fourth, Fifth and Tenth Circuits have refused to apply *Aikens* to summary judgment. Br.Opp. 17-20. Indeed, those three circuits have expressly disagreed with the District of Columbia Circuit decision in *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490 (D.C.Cir. 2000). Pet. 23-25. Seven district court opinions have recognized this conflict. Pet. 25-26 n.16. Respondents' effort to dispute the existence of the circuit conflict is unpersuasive.

(1) Respondents assert that the District of Columbia Circuit applies the holding of *Brady* only "sometimes" and "sporadically." Br.Opp. 23, 24. But respondents do not identify any cases in which the District of Columbia Circuit has disavowed or questioned the rule in *Brady*. That Circuit has repeatedly

applied *Brady* (Pet. 17-18), and did so in three additional cases in July of 2015.[1]

Respondents claim that "even [the District of Columbia Circuit's] own district courts recognize the folly [of applying *Aikens*] at summary judgment." Br.Opp. 23. To the contrary, district courts in that circuit have applied *Brady* in a large number of cases; in the last twelve months alone there were 26 more such district court decisions. Reply App. 7a-9a. The three district court cases on which respondents rely merely hold that the rule in *Brady* – used to determine whether there is sufficient evidence of an unlawful motive – is of no relevance where an employer defends a lawsuit by asserting that the action complained of (regardless of its purpose) was not sufficiently adverse to be actionable at all.[2]

Respondents suggest that *Brady* only "leans" in favor of applying *Aikens* to summary judgment. Br.Opp. 23. "The expansive far-reaching command Petitioner seeks, that district courts 'need not – **and should not** – decide whether the plaintiff actually

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[1] *Allen v. Johnson*, 795 F.3d 34, 49 (D.C.Cir. 2015); *Coleman v. District of Columbia*, 794 F.3d 49, 68 (D.C.Cir. 2015); *Giles v. Transit Employees Federal Credit Union*, 794 F.3d 1, 6 (D.C.Cir. 2015).

[2] *Bright v. Copps*, 828 F.Supp.2d 130, 147 n.19 (D.D.C. 2011) (denial of a lateral transfer not an adverse action); *Adesalu v. Copps*, 606 F.Supp.2d 97, 103-04 (D.D.C. 2009) (dismissing promotion claim because there was no vacancy); *Turner v. Shinseki*, 824 F.Supp.2d 99, 114-16 (D.D.C. 2011) (criticism of job performance not an adverse action).

made out a prima facie case under *McDonnell Douglas*' is simply unsupportable under ... *Brady*." Br.Opp. 24 (emphasis in original). But the language to which respondents object is actually a quotation from the decision in *Brady* itself. Pet. 17 (quoting 520 F.3d at 494). This language in *Brady* that a court "need not and should not" inquire into the existence of a prima facie case once an employer has articulated a reason for its actions has been repeated by district court decisions in the District of Columbia Circuit in more than 180 cases.[3] That circuit's 2008 holding in *Brady* is clear, emphatic, and deeply entrenched.

(2) Respondents assert that the Seventh Circuit holds that courts must always decide whether there was a prima facie case unless (1) the prima facie case issue is "a close question" and "more difficult" than the issue of pretext and (2) the court concludes that there was no showing of pretext. Br.Opp. 21. But respondents do not even attempt to explain the repeated contrary holdings in Seventh Circuit cases (quoted at Pet. 19-20) that a court need *not* decide whether there was a prima facie case once the employer has articulated a justification for its actions.

Respondents base their account of the Seventh Circuit standard on the 1996 decision in *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996).

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[3] That list can be generated by searching among district court decisions in the District of Columbia Circuit for the phrase "need not and should not" and the term "Brady" appearing in the same opinion.

Br.Opp. 21. But *Grottkau* itself quoted the holding in *Aikens* that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." 79 F.3d at 73. The Seventh Circuit standard is established by the post-*Grottkau* decisions in *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290 (7th Cir. 1998), *Smith v. American Federation of State, County and Municipal Employees, Illinois Council 31*, 247 Fed.Appx. 804, 808 (7th Cir. 2007) (applying *Lindemann*), and *Isbell v. Allstate Ins. Co.* 418 F.3d 788, 796 (7th Cir. 2005) (applying *Lindemann*). In the Seventh Circuit today, district courts treat *Lindemann* as establishing the controlling rule (Reply App. 6a), routinely skip the prima facie case issue when the employer gives a reason for its action, and will rule for the plaintiff (without regard to the existence of a prima facie case) where there is evidence of pretext. E.g., *Nauman v. Abbott Laboratories*, 2008 WL 4773135 at *8-13 (N.D.Ill. July 10, 2008).

(3) Respondents' account of the rule in the Sixth Circuit simply ignores that circuit's decision in *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164 (6th Cir. 1996), quoted at page 19 of the petition, that courts are to apply at summary judgment "the same rules" established by *Aikens* for cases that go to trial. "*Aikens* discussed the respective burdens of the parties and the task of the trial court where there is a full-dress trial. Our task is to apply the same rules in a case where there has been no trial because the

district court granted summary judgment." 87 F.3d at 170.

Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000), respondents insist, "found *only* that the district court erred by 'improperly conflating the distinct stages of the *McDonnell Douglas* inquiry.'" Br.Opp. 20 (quoting *Cline*, 206 F.3d at 661) (emphasis added). But respondents make no effort to explain how this quoted portion of the decision can be described as the "only" holding in *Cline*, in light of the detailed separate holding (quoted at page 18 of the petition) that *Aikens* applies to summary judgment. See 206 F.3d at 661.

(4) Respondents assert that "the Eighth Circuit requires an employee who claims discrimination in the workplace to establish a *prima facie* case in summary judgment proceedings." Br.Opp. 22. But respondents fail to address the contrary four Eighth Circuit cases – quoted in the petition – that expressly apply *Aikens* at summary judgment and hold that a court need not decide whether there was a prima facie case once the employer has articulated a justification for its actions. Pet.20-21.

The opinions on which respondents rely are actually inconsistent with their assertion. *Schaffhauser v. United Parcel Service*, 794 F.3d 899, 904 (8th Cir. 2015), never decided whether there was a prima facie case, but instead held that "because [the defendant] articulates a legitimate nondiscriminatory reason, the burden shifts to [the plaintiff] to show

that the 'proffered justification is merely a pretext for discrimination.'" (quoting *Davis v. KARK-TC, Inc.*, 421 F.3d 699, 681 (8th Cir. 2015)). *Wagner v. Gallup, Inc.*, 788 F.3d 877 (8th Cir. 2015), quotes the holdings in two earlier Sixth Circuit cases that a showing of a prima facie case is not necessary when a defendant offers a reason for its action. 788 F.3d at 885-86 (quoting *Riser v. Target Corp.*, 458 F.3d 817, 820-21 (8th Cir. 2006) and *Stewart v. Independent School Dist. No. 196*, 481 F.3d 1034, 1043 (8th Cir. 2007)).

Young v. Builders Steel Co., 754 F.3d 573 (8th Cir. 2014), on which respondents also rely, holds that a plaintiff can establish a prima facie case by showing that an employer's proffered justification was a pretext for discrimination. "[P]retext can ... establish the inference-of-discrimination element of the prima facie case." 754 F.3d at 578.[4] This rule assures that a plaintiff with sufficient proof of pretext will not have his or her claim dismissed for lack of a prima facie

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[4] The Eighth Circuit decision in *Young* is one of a series of decisions in that circuit holding that proof of pretext can establish a prima facie case. *Lake v. Yellow Transportation, Inc.*, 596 F.3d 871, 874 (8th Cir. 2010); *Doucette v. Morrison County, Minn.*, 763 F.3d 978, 982 (8th Cir. 2014); *Putnam v. Unity Health System*, 348 F.3d 732, 736 (8th Cir. 2003); *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010); *Young v. Warner-Jenkinson Company, Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998).

case. The Fifth Circuit in the instant case expressly rejected that rule.[5]

Respondents assert, in the alternative, that "[t]he Eighth Circuit Court ... permits courts reviewing motions for summary judgment to either bypass the question of the *prima facie* case or presume its showing has been made but *only* when the summary judgment record otherwise establishes that an employee's claim of pretext is insupportable under the evidence." Br.Opp. 22 (citing *Riser*) (emphasis added). But *Riser* actually made clear that the circumstance in which a court may bypass the prima facie case issue is when the employer has articulated a reason for its action, not when (or "only when") the court has found that reason to be non-pretextual. "'[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case ... ' ... we need not ... [decide] whether Riser met his burden of establishing a prima face case...." *Riser v. Target Corp.*, 458 F.3d 817, 820-21 (quoting *Aikens*). Respondents' account of Eighth Circuit law is belied by that circuit's decision in *Hilde v. City of Eveleth*, 777 F.3d 998, 1004-08 (8th Cir. 2015), which bypassed the prima facie case issue even though the court found there *was* sufficient evidence of pretext.

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[5] "Paske argues that he can establish the fourth element of his prima facie claim by showing that Fitzgerald's stated reasons for firing him were pretextual. That is not the law." App. 14a n.8.

II. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER A PLAINTIFF MUST SHOW THAT THE DEFENDANT TREATED MORE FAVORABLY A NEARLY IDENTICAL SIMILARLY SITUATED COMPARATOR

Respondents do not deny or even address the existence of a circuit split regarding whether a prima facie case requires proof that the plaintiff was treated less favorably than a nearly identical similarly situated worker outside the protected group at issue. Pet. 28-33. Respondents correctly describe the case law in the Fourth, Fifth, Sixth, Seventh and Eleventh Circuits imposing that requirement. Br.Opp. 31-34; see Pet. 27-29. But, as the petition explains, that requirement has been expressly rejected by decisions in the First, Second, Third, Ninth, Tenth and District of Columbia Circuits. Pet. 28-33. The brief in opposition simply does not mention any of these circuit court decisions rejecting this requirement, and does not dispute the existence of a circuit conflict on the issue.

III. PETITIONER DID NOT WAIVE THE QUESTIONS PRESENTED

Respondents object that Paske did not ask the district court or court of appeals to apply *Aikens* in this case, and argue that he is thus precluded from raising that issue here. But, given the well-established state of the law in the Fifth Circuit,

raising this argument below would have clearly been futile.

In 2010 and 2012 the Fifth Circuit expressly rejected the rule in *Brady*. *Atterberry v. City of Laurel*, 410 Fed.Appx. 869, 871 n.1 (5th Cir. 2010); *Stallworth v. Singing River Health System*, 469 F.3d 369, 372 (5th Cir. 2012). In 2014 the Fifth Circuit expressly refused to apply *Aikens* at summary judgment. *Hague v. University of Texas Health Science Center at San Antonio*, 650 Fed.Appx. 328, 334-35 (5th Cir. 2014).

In addition, there are 19 officially reported decisions in the Fifth Circuit which specifically hold that in summary judgment cases a plaintiff must establish a prima facie case in order to avoid dismissal. Reply App. 1a-5a. The court of appeals opinion in the instant case began its analysis with the explanation that "[b]ecause Paske attempted to prove race discrimination through circumstantial evidence, the *McDonnell Douglas* burden-shifting framework governs his claim," (App. 13a), quoting a reported Fifth Circuit summary judgment opinion. App. 13a-14a (quoting *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253 (5th Cir. 2009)). The district court opinion rested on that same reported Fifth Circuit summary judgment decision. App. 45a-48a (quoting and citing *Lee*).

Although constrained by that controlling Fifth Circuit precedent, Paske did attempt to persuade the court of appeals to adopt the Eighth Circuit variant, which treats proof of pretext as sufficient to support a

prima facie case; adoption of that rule would have had the effect of assuring that proof of pretext would prevent dismissal of a discrimination claim. But the court of appeals below, in rejecting that argument, explained with palpable exasperation that under controlling Fifth Circuit precedent a prima facie case can be established only by identifying a nearly identical similarly situated comparator, not by showing pretext. App. 14a n.8. Respondents acknowledge (indeed insist) that the requirement of a similarly situated comparator is established by longstanding Fifth Circuit precedent (Br.Opp. 31-33), and do not suggest that Paske was obligated to ask the panel or district court to disregard that controlling authority.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTIONS PRESENTED

This case presents an excellent vehicle for deciding the questions presented.

There is no dispute that the Fifth Circuit decided both questions. As respondents correctly state, "[the Fifth Circuit] requir[ed] Petitioner to satisfy a prima facie case showing by identifying evidence of a similarly situated employee who is not white that received more favorable treatment...." Br.Opp. 27.

This appeal presents a quintessential example of a case in which it mattered that the courts below decided only the prima facie case issue, and that those courts emphatically did not decide if there was

evidence that the defendants' explanations were only a pretext for discrimination. Respondents proffer a highly exculpatory account of the events giving rise to this action, and insist that their account reveals no evidence of discrimination (an issue which the courts below, of course, never decided). But a comparison of the Statement in the Brief in Opposition and the Statement in the Petition makes palpably clear that the witnesses to the underlying events testified to sharply divergent accounts of what occurred. The court of appeals itself noted the conflict among those accounts. App. 7a & n.4.

Respondents acknowledge that the evidence might support the conclusion that the defendants had engaged in "a crusade to terminate" Paske. Br.Opp. 39. But even if there was such a crusade, respondents insist, the animus behind it was only "personally motivated," and was not related to race. *Id.* Respondents thus concede that there may be evidence that the city's reasons for firing Paske were pretextual, but maintain that at worst those reasons were only pretexts to cover up some unexplained "personal[ ]" grudge, not pretexts to hide racial discrimination. It is difficult to understand, and respondents do not explain, why a jury which discredited the testimony of city officials and found pretext would have to conclude that the covert animus motivating those officials was entirely personal and not at all racial.

Because the courts below ended their analysis merely upon concluding there was no prima facie case, neither court below ever decided whether there

was sufficient evidence of pretext. As the court of appeals made emphatically clear, under Fifth Circuit precedents, in the absence of a prima facie case established by identifying a nearly identical similarly situated comparator, it is literally irrelevant whether a defendant's explanation for its actions is a pretext, even a series of bald-faced lies, to cover up racial discrimination.

Respondents argue that there are other grounds on which summary judgment might have been granted.[6] But neither court below addressed those contentions, and this Court would have no occasion to do so if review were granted. Should the decision of the Fifth

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[6] Respondents contend that the decision of the administrative law judge who resolved a state-law challenge to Paske's dismissal should be accorded res judicata effect. But state agency findings cannot have such preclusive effect in a Title VII action. *University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986). In this case, moreover, the administrative law judge expressly did not rule on the subjective motivation for the dismissal. R. 1166, p. 8.

Respondents argue that the Chief's decision to fire Paske was upheld by the City Manager. But in such circumstances the city would still be liable if the Chief himself acted with a discriminatory purpose. *Staub v. Proctor Hospital*, 562 U.S. 411 (2011).

Respondents contend that, even if Paske established a prima facie case, he could only demonstrate pretext by showing that a nearly identical similarly situated non-black comparator was treated more favorably. But respondents do not explain why pretext could only be proven in that particular manner. Any such limitation would itself present a circuit conflict. See *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010).

Circuit be overturned here, respondents would be free on remand to pursue any other properly preserved contentions that the lower courts have not yet resolved.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARGARET A. HARRIS
BUTLER & HARRIS
1007 Heights Boulevard
Houston, TX 77008
(713) 526-5677

Counsel for Petitioner

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