No. 08-163

In The Supreme Court of the United States

GEORGIA MCCANN,

Petitioner,

v.

SAM COCHRAN, et al.,

Respondents.

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

PETITIONER'S REPLY BRIEF

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

JERRY D. ROBERSON
ROBERSON & ROBERSON
P.O. Box 380487
Birmingham, AL 35238-0487
(205) 981-3906

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The Eleventh Circuit standard[1] applied in this case has three distinct elements:

> (1) a discrimination plaintiff must show that "her employer treated similarly situated [white] employees more favorably" (Pet. App. 6a; see *id*. at 7a n.4, 8a,),
>
> (2) the courts are to determine whether or not the more favorably treated comparator was "similarly situated" (Pet. App 6a),[2] and
>
> (3) a court may find that a plaintiff and a comparator are "similarly situated" only if

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[1] Since the filing of the certiorari petition, the Eleventh Circuit has applied its "nearly identical" standard in four additional cases; as with every previous application of that standard, the Eleventh Circuit held that the standard had not been satisfied. *Curtis v. Broward County*, 2008 WL 16551 at *2 (11th Cir., Sept. 16, 2008) (Title VII); *Greer v. Birmingham Beverage Co., Inc.*, 2008 WL 4061161 at *3 (11th Cir., Sept. 3, 2008) (Title VII); *Davis ex rel. J.D. v. Houston, AL Bd. of Educ.*, 2008 WL 3919400 at *1 (11th Cir., August 27, 2008) (Equal Protection claim); *Brillinger v. City of Lake Worth*, 2008 WL 3864384 at *4 (11th Cir., August 21, 2008) (ADEA).

[2] In order to *determine* whether other employees were similarly situated to McCann, *we evaluate* " 'whether the employees are involved in or accused of the same or similar conduct.... ' "

(emphasis added) (quoting *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006)).

> the circumstances of the two individuals are "nearly identical." (Pet. App. 6a, 7a n.4, 9a).

Respondents do not deny that there is a deeply entrenched inter-circuit conflict with regard to all of these elements of the Eleventh Circuit standard. They argue only that the instant case does not present an appropriate vehicle for resolving the Question Presented.

(1) In dismissing plaintiff's claim, the Eleventh Circuit expressly applied its requirement that any comparator be "nearly identical" to McCann.

> The comparators that McCann presents on appeal must ... satisfy the "nearly identical" test. (Pet. App. 7a n.4).
>
> While we recognize the difficulty McCann may face in meeting this standard, we are bound by precedent to adhere to the "nearly identical standard." (Pet. App. 7a n.4) (*quoting Burke-Fowler v. Orange County, Fla.* 447 F.3d 1319, 1323 (11th Cir. 2006)).
>
> As the district court correctly found, [proposed comparator] Coleman's misconduct is not "nearly identical" to McCann's, making Coleman an improper comparator. (Pet. App. 9a).
>
> As with Coleman, because [proposed comparator] Lindsey's misconduct is not "nearly identical" to that of McCann, it cannot be used as a comparator. (Pet. App. 9a).

The court of appeals opinion refers to the "nearly identical" standard nine times (Pet. App. 6a-9a), and pointedly includes an explanation of why the appellate court applied the "nearly identical" standard rather than some less stringent rule. (Pet. App. 7a n.4).

Respondents nonetheless contend that this case is not an appropriate vehicle for determining the correctness of that standard, arguing that they would prevail on remand even if this Court rejects the Eleventh Circuit requirement that comparators be nearly identical to a plaintiff. This argument is unavailing for several reasons.

The possibility that a respondent might ultimately prevail on remand even under a different standard does not preclude a grant of certiorari. It would ordinarily make little sense for the Court, in evaluating a petition for certiorari, to undertake the fact-bound effort required to assess which party might succeed under each of the possible legal standards the Court could adopt if it reached the merits. This Court has frequently granted review to determine the legal standard applicable to a particular set of circumstances, and then remanded the case to the lower courts to apply (if they failed to do so before) the proper standard.[3] In employment discrimination

[3] E.g., *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S.Ct. 2123, 2131 (2008); *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1065 (2007); *Merck KGaA v. Integra*

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cases the Court has repeatedly granted certiorari to correct an error in the legal standard utilized by the court of appeals, without deciding or even inquiring whether the petitioner would be entitled to prevail under the correct standard.[4]

Respondents' argument necessarily assumes, moreover, that this Court, upon granting review, will rule in their favor on the two other subsidiary issues raised by the petition, holding (as did the Eleventh Circuit) that any prima facie case must include evidence of a more favorably treated similarly situated comparator, and that there must be a judicial finding that any comparator is similarly situated. But were this Court instead to hold – as we urge – that a prima facie case need not include evidence of a similarly situated comparator, or that the trier of fact – not the courts – is to weigh such evidence, either such holding would require that the decision below be set aside, regardless of whether the lower courts believe that the plaintiff and the comparators in this case were similarly situated. The remand in which

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Lifesciences I, Ltd., 545 U.S. 193, 207 (2007); *Rapano v. United States*, 547 U.S. 715, 757 (2006).

[4] E.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993); *Furnco Constr. Corp. v. Waters*, 483 U.S. 567, 581 (1978); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259-60 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792, 806-07 (1973).

respondents assert they would prevail – for the lower courts to apply some other legal standard to the comparator evidence in order to decide if plaintiff established a prima facie case through proof of a similarly situated comparator – simply would not occur.

Respondents argue that "McCann's comparators were not 'similarly situated' to her under *any* standard." (Br. Opp. 4) (emphasis added). But it assuredly is not the case that respondents are certain to prevail "under any standard." All standards other than the "nearly identical" requirement deem comparators proper despite some non-trivial differences between the circumstances of the comparator and those of the plaintiff. It would clearly be possible to frame a standard under which the differences in this case (or, indeed, in any particular case) would not render the comparators improper.

Petitioner would succeed in establishing a prima facie case, for example, under the two-tier approach utilized in the Eighth, Ninth and Tenth Circuits. (Pet. 25-28). Those circuits do not consider at the prima facie case stage a defendant's proffered explanation for having treated the plaintiff differently than the comparators. In those three circuits the distinctions which respondents insist are so persuasive would not be considered in determining whether there was a prima facie case, but only in deciding whether the differing treatment of the comparators was sufficient (with any other relevant evidence) to support a finding of discrimination.

Petitioner would likely prevail as well under the "comparable seriousness" standard utilized in the Second, Fourth, Sixth and Seventh Circuits. (Pet. 20-23). In those circuits a comparator is appropriate if his or her conduct was comparable to or worse than the action for which the plaintiff received a harsher form of discipline.[5] In the instant case, one of the

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[5] Respondents assert that

> both the district court and the Eleventh Circuit dismissed McCann's claims because the comparators she identified were in fact "qualitatively different" and because McCann's conduct was "plainly ... more serious than that of her comparators." (App. 9-10a, 33a).

(Br. Opp. 4). The Eleventh Circuit's decision in fact contains no such statement that McCann's conduct was "more serious"; only the district court characterized the record in that manner.

Similarly respondents assert that

> the Eleventh Circuit noted that the comparators identified by McCann were in fact "qualitatively different" from her in the seriousness of their offenses.

(Br. Opp. 6-7). The phrase "in the seriousness of their offenses" does not appear in the Eleventh Circuit opinion.

Under the "nearly identical" rule a comparator is improper if his or her conduct is "qualitatively different" from that of the plaintiff, regardless of which is more serious. In common usage "qualitatively different" does not necessarily connote a difference in gravity of the conduct. The Sentencing Guidelines, for example, treat as equally serious (and assign the same base level to) crimes that obviously are qualitatively different. The offenses given the base level of 18 include crimes as varied as criminal sexual assault of a minor, stalking, embezzlement of between $100,000 and $200,000, extortion by force, trafficking in between 20 and 40 grams of heroin, obstruction of an election by force, and price fixing involving a volume of commerce between

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white comparators (who was not punished at all) had been arrested, prosecuted for and pled guilty to two misdemeanors. (Pet. App. 8a-9a, 30a-31a). The courts have recognized that criminal conduct is generally more serious than non-criminal conduct. Another proffered white comparator, who like petitioner was charged with conduct unbecoming an officer, had engaged in that action while on duty; that comparator (unlike plaintiff) was not suspended. (Pet. App. 9a-10a, 31a-32a). The Eleventh Circuit itself has held that on-the-job misconduct is more serious than actions, such as those of petitioner, which occurred when she was off duty.[6]

(2) Respondents do not question the appropriateness of this case as a vehicle for deciding if judges rather than juries should evaluate whether a more favorably treated comparator is sufficiently similar to a plaintiff. Far from denying that the decision below turned on this issue, respondents emphatically recognize and enthusiastically endorse the Eleventh Circuit rule that it is for judges to decide whether a comparator is similarly situated.

Respondents argue that petitioner failed to establish a prima facie case because "the lower courts'

$40 and $100 million. U.S. Sentencing Guidelines Manual, §§ 2A3.2, 2A6.2, 2B1.1, 2B3.2, 2D1.1, 2H2.1, 2R1.1 (2007).

[6] *Maniccia v. Brown*, 171 F.3d 1364, 1369 (11th Cir. 1999) (male comparator not a proper comparator because, unlike the plaintiff, "[h]is [misconduct] w[as] off-duty conduct, with which most employers understandably are not as concerned.").

decisions *found* the comparators' behavior too significantly and qualitatively different." (Br. Opp. i) (emphasis added). "[T]he lower courts' decisions turned on *factual determinations* that foreclose petitioner's claims even on lower standards." (Br. Opp. 6.) (emphasis added). But *whether* the lower courts should have made any such "f[i]nd[ings]" and "factual determinations," or should instead have referred the assessment of this evidence to the trier of fact, is part of the very issue in dispute. Six circuits do not permit the courts to make such findings, but insist that this issue be resolved by the jury. (Pet. 33-35). The Question Presented specifically encompasses the issue of whether the similarity of a plaintiff and a comparator – an issue which respondents rightly characterize as "factual" in nature – should be resolved by "judicial finding" rather than by the trier of fact. (Pet. i).

(3) Respondents also do not question the appropriateness of this case as a vehicle for resolving whether, as the Eleventh Circuit held, a prima facie case of discrimination must invariably include evidence that the employer treated more favorably a similarly situated comparator. Respondents acknowledge that that Eleventh Circuit requirement was the very basis of the decision below. "McCann's claims were dismissed because her comparators were not 'similarly situated' to her." (Br. Opp. 4). In six circuits the absence of a similarly situated comparator does not – as in the Eleventh Circuit – require dismissal of a claim. (Pet. 14-19).

This is an excellent case for deciding whether a plaintiff can establish a prima facie case of discrimination without evidence of such a similarly situated comparator. Even if the proffered comparators in the instant case were not sufficiently similar to the plaintiff, the plaintiff had other highly significant evidence, including testimony that the Sheriff who made the decision to discipline the plaintiff had earlier referred to African-Americans as "niggers." (Pet. App. 19a, 70a). A reasonable jury could surely infer that a public official who refers to African-Americans as "niggers" harbors racial animus and that that bigotry could have been a motivating factor in his decision to discipline a black subordinate. The courts below deemed that highly inculpatory evidence irrelevant solely because, under the Eleventh Circuit rule, even proof of racial prejudice may not even be considered in the absence of an appropriate comparator.

(4) Respondents describe in considerable detail the exculpatory evidence[7] on which they intend to rely

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[7] Much of the evidence relied on by respondents was controverted. For example, respondents argue that

> the event that prompted the discipline was the fact that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff's Office complaining about McCann's behavior.

(Br. Opp. 9). That letter, however, was written by Sheriff Wheat at express the request of the Mobile County Sheriff's Office. Transcript of Mobile County Personnel Board Hearing at 169

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if the courts were to hold that plaintiff had established a prima facie case, and the case were therefore to proceed to trial. (Br. Opp. 2-5, 9-12). That evidence, however, is of no relevance to the correctness of the legal standard applied by the Eleventh Circuit in concluding that plaintiff had failed to establish a prima facie case.

CONCLUSION

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

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

JERRY D. ROBERSON
ROBERSON & ROBERSON
P.O. Box 380487
Birmingham, AL 35238-0487

**Counsel of Record*

Counsel for Petitioner

(testimony of Michael Haley) ("the letter that Sheriff Wheat wrote in response to [Haley's] request.").