No. 15-1144

In The Supreme Court of the United States

CHARLES FLOWERS,

Petitioner,

v.

TROUP COUNTY SCHOOL DISTRICT, *et al*.,

Respondents.

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

REPLY BRIEF

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(1) There is no dispute about the state of the law outside the Eleventh Circuit. Six circuits hold that a plaintiff who proves that an employer's explanation was untrue is never required to adduce additional evidence. Pet. 17-20. In five circuits such a plaintiff at least usually is not required to offer additional evidence. Pet. 20-21.

As the United States has correctly explained, on the other hand, the Eleventh Circuit requires such additional evidence in all Title VII cases. In a recently filed brief, the government spelled out with precision the legal standard that is applied in that Circuit. The Eleventh Circuit, the government notes, applies in Title VII cases "the pretext plus approach."[1]

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[1] "Pretext plus" is the phrase used by the lower courts to refer to the requirement that a plaintiff both prove that an employer's proffered reason is untrue (the "pretext" evidence) and offer "additional evidence" (the "plus") of discrimination. See *James v. New York Racing Ass'n*, 233 F.3d 149, 155 (2d Cir. 2000) ("On the Fifth Circuit's view in *Reeves*, under a rule often described as 'pretext plus,' some additional evidence is always required."); *Fasold v. Justice*, 409 F.3d 178, 186-87 (3d Cir. 2005) ("In *Reeves*, the Court rejected the view of those circuits that had granted summary judgment for the employer on the ground that the terminated employee had failed to prove more than employer pretext (the 'pretext plus' cases)."); *Leake v. Ryan's Family Steakhouse*, 5 Fed.Appx. 228, 232 (4th Cir. 2001) ("[under] the 'pretext-plus' standard ... , which was the law of this circuit at the time the district court rendered its decision, Leake was required to demonstrate that the explanation proffered by Ryan's was pretextual *and* produce evidence (beyond his prima facie case) that the real reason for his discharge was retaliation for his sexual harassment complaints. See *Vaughan v. Metrahealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998). Since the district court decided this case, however, the Supreme Court has rejected the pretext-plus standard.");

Secretary's Brief, *Mells v. Secretary, Department of Veterans Affairs*, No. 15-14251-GG (11th Cir.), at 31, available at 2016 WL 1295652 (Feb. 25, 2016) ("Department of Justice Brief").

> [T]his Court has interpreted *Reeves* [*v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)] to mean that the law no longer permits an inference of unlawful discrimination based solely on the plaintiff's proffer of evidence establishing a prima facie case and contradicting the employer's proffered reasons for the challenged action, and that the plaintiff now must ... not only [show] that the employer's proffered reason was a pretext, but also ... " ... produce additional evidence suggesting discrimination after contradicting their employer's stated reasons...." *Flowers* [*v. Troup County School Dist.*], 803 F.3d [1329], 1339 [(11th Cir. 2016)].

Department of Justice Brief, 37-38.

> The *Flowers* panel interpreted *Reeves* to mean that "[c]ontradicting the [employer's] asserted reason alone ... no longer supports an inference of unlawful discrimination." *Id.* Therefore, [plaintiff's] argument that the district court incorrectly required her to produce evidence of pretext and additional evidence of

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Cervantez v. KMGP Serv. Co., Inc., 349 F.3d 4, 10 (5th Cir. 2009) ("*Reeves* rejected the higher standard of 'pretext plus,' which 'require[d] a plaintiff not only to disprove an employer's proffered reasons for the discrimination but also to introduce additional evidence of discrimination.' ") (quoting *Kanida v. Gulf Coast Med. Pers., LP*, 363 F.3d 568, 574 (5th Cir. 2004)).

> discrimination ... ignores this Court's post-*Reeves* decisions regarding the manner in which *Reeves* ... modified this Court's decision in *Combs* [*v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000)].

Id. at 36. The United States pointed out that the decision below (and earlier Eleventh Circuit decisions on which it relied) were of particular importance because they established a more stringent requirement than had previously existed in that circuit.

> [In *Flowers*] this Court confirmed that although the law of this circuit (e.g., *Combs*) previously allowed plaintiffs to get their employment discrimination claims before a jury "after making a prima facie case and *merely contradicting* the [employer's] proffered legitimate, nondiscriminatory reason," *Reeves* had "closed this avenue for Title VII plaintiffs." *Flowers*, 803 F.3d at 1339 (emphasis added).

Id. at 35-36 (emphasis added in Department of Justice Brief).[2]

Florida correctly interprets Eleventh Circuit precedent in the same manner as the United States.

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[2] See *id*. at 37 ("[in] the post-*Reeves* decisions (*Chapman* [*v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000)], *Alvarez* [*v. Royal Atl. Developers, Inc.*, 610 F.3d 1253 (11th Cir. 2010)], and *Flowers*) this Court explained that the law no longer permits an inference of unlawful discrimination based solely on the plaintiff's showing of a prima facie case and evidence contradicting the employer's proffered reasons for the challenged action....").

> [A]lthough previously Plaintiff could have gotten her claims to a jury after making a *prima facie* case and undercutting [a defendant's] proffered legitimate non-discriminatory reason as pretext, "intervening precedent has since closed this avenue for Title VII plaintiffs." *Flowers*, [App. 23a]. Contradicting [a defendant's] asserted reason alone no longer supports an inference of unlawful discrimination.... Because Plaintiff has failed to put forth any *additional* evidence that would support an inference of unlawful discrimination, it is insufficient for Plaintiff merely to make a *prima facie* case and ... call into question [a defendant's] proffered, nondiscriminatory reason. The burden placed on Title VII plaintiffs to produce *additional* evidence is not great, but neither is it nothing.

Defendant's Motion for Final Summary Judgment, *Jiminez v. Florida Commission on Human Relations*, No. 4:15-cv-00103-RH-CAS (N.D.Fla.), available at 2015 WL 10354050 (emphasis added) ("Florida Brief").[3]

Within the Eleventh Circuit there simply is no dispute that that circuit requires "additional evidence" over and above proof that an employer gave a phony reason to justify a disputed adverse employment action. Plaintiffs and defendants alike agree that this is the rule in the Eleventh Circuit. *Compare* Answer

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[3] See Florida Commission on Human Relations' Trial Memorandum, *Jiminez v. Florida Commission on Human Relations*, No. 4:15-cv-00103-RH-CAS (N.D.Fla.), available at 2015 WL 10354046.

Brief of Appellee, *Holmes v. Jefferson County School District*, 2016 WL 1375998, No. 15-15198 (11th Cir.), at 21, available at 2016 WL 1375998 ("Contradicting the School District's asserted reason alone, ... no longer supports an inference of unlawful discrimination.") (quoting *Flowers*), *with* Appellant's Reply Brief, *Holmes v. Jefferson County School District*, No. 15-15198 (11th Cir.), at 6, available at 2016 WL 1375998 ("Defendant argues that [plaintiff] failed to meet the long-standing disavowed standard of 'pretext-plus' – claiming that she failed to present additional evidence outside of pretext and her prima facie case.... [Plaintiff] concedes that a panel of this Court recently held this to be the standard in *Flowers*.... [H]owever, [Plaintiff] argues that this case is in violation of *Reeves*....").

(2) The brief in opposition systematically ignores the language of the opinion below which the United States and Florida correctly understand to be the holding of that decision.

Respondents insist that the Eleventh Circuit does not impose an additional evidence requirement. "The Eleventh Circuit does not always require additional evidence where evidence suggests that an employer's explanation is false. It simply confirmed *Reeves*'s own statement that there are *some* circumstances where what little evidence of pretext the plaintiff has put forward simply cannot withstand summary judgment." Br. Opp. 12 (emphasis added and omitted). But the critical limitation "some" does not appear anywhere in the opinion below. Instead, the Eleventh Circuit insisted

without limitation that "[t]he burden [is] placed on Title VII plaintiffs to produce additional evidence after contradicting their employer's stated reasons...." App. 24a.[4] This definitive statement of the Eleventh Circuit standard, specifically relied on by the Department of Justice and quoted in the petition, is never mentioned in the brief in opposition. See Department of Justice Brief, 37; Pet. 15, 33.

Respondents point to older Eleventh Circuit decisions from 2001 to 2005 under which plaintiffs previously were not required to adduce additional evidence, and insist that the decision below does not "clash with that court's prior precedents." Br. Opp. 9.[5] But the opinion below was emphatic in explaining that such precedents are no longer good law in the Eleventh Circuit. "Contradicting the School District's asserted reason alone ... no longer supports an inference of unlawful discrimination." App. 23a. "At one time under this Circuit's law, Flowers could have gotten his claims before a jury after making a prima facie case and

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[4] See App. 23a ("[c]ontradicting the [defendant's] asserted reason alone ... no longer supports an inference of unlawful discrimination"; discrediting an employer's proffered reason "is sometimes enough *when combined with other evidence*...." (quoting *Kragor v. Takeda Pharm. A., Inc.*, 702 F.3d 1304, 1307 (11th Cir. 2012)) (emphasis in opinion below), 23a-24a ("Because ... Flowers has failed to put forth any additional evidence that would support an inference of unlawful discrimination, it is insufficient for Flowers merely to make a prima facie case and ... call into question the School District's proffered legitimate, nondiscriminatory reason.").

[5] See Br. Opp. 1 (the panel decision "did not overturn those decisions").

merely contradicting the [defendant's] proffered legitimate, nondiscriminatory reason.... Intervening precedent has since closed this avenue for Title VII plaintiffs." App. 22a-23a. The latter passage makes clear that the requirement of additional evidence applies to "Title VII plaintiffs" generally, not just to some narrow subset of cases. These definitive statements, specifically cited by the Department of Justice and the state of Florida as setting out the Eleventh Circuit rule, and repeatedly quoted in the petition, are never mentioned in the brief in opposition. See Department of Justice Brief, 36; Florida Brief; Pet. 13, 14, 16, 33.

Respondents insist that "[t]he panel in no way suggested that a plaintiff must negate every conceivable nondiscriminatory reason for the adverse action taken against him. It noted *only*, and correctly, that 'Flowers has the burden of persuasion on this point, and it is his responsibility to advance sufficient evidence of racial discrimination to create a triable factual dispute.' " Br. Opp. 13 (quoting Pet. App. 21a) (emphasis in brief). The adverb "only" is incorrect. The sentence from the opinion quoted in the brief in opposition ("Flowers has the burden....") is preceded on page 21a by an entire paragraph of the panel opinion specifically devoted to the failure of the plaintiff to rule out the "virtually limitless possible nondiscriminatory reasons" that might have prompted the employer's action. App. 21a. The court of appeals reasoned that proof an employer's proffered justification is a lie only eliminates one possible nondiscriminatory reason for the disputed

employment action; "additional evidence" of discrimination is required because so many other "possible" reasons remain. This pivotal explanation for the Eleventh Circuit's "additional evidence" requirement, repeatedly quoted in the petition, is never mentioned in the brief in opposition. See Pet. 14, 16, 17, 28, 34.

Even if the panel opinion did announce an "additional evidence" requirement, respondents assert, that would just have been dicta, because the court of appeals in any event concluded that plaintiff had failed to call into question the veracity of the defendants' explanation. Respondents state that "[t]he panel simply rejected Flowers's showing of pretext." Br. Opp. 9 (citing Pet. App. 22a).[6] To the contrary, the panel actually concluded that the evidence would "support an inference that the School District's investigation into Flowers's potential recruiting violations may have been pretext of something." App. 19a-20a (emphasis omitted). Respondents claim that "[t]he Eleventh Circuit ... simply affirmed the District Court's conclusion that Flowers did not set forth sufficient evidence to suggest that the School District's proffered legitimate, nondiscriminatory reason was false." Br. Opp. 1. To the contrary, the panel held that the evidence did call into

[6] See Br. Opp. 7 ("The court of appeals [held] there was no showing of pretext...."), 8 ("The Eleventh Circuit ... conclude[ed] that [plaintiff] had failed to produce sufficient evidence suggesting that the School District's proffered reason for terminating him was pretext."), 11 ("the Eleventh Circuit ... *held* that Flowers did not sufficiently rebut the School District's proffered reason....") (emphasis in brief in opposition).

question the veracity of the School District's story, reasoning that"[t]he School District's ham-handed investigation and actions singling out Flowers could lead a reasonable jury to conclude that Pugh had it in for Flowers from the beginning." App. 20a. The court of appeals' holdings that there was indeed evidence of pretext, quoted in the petition, are never mentioned in the brief in opposition. See Pet. 12, 13.

In sum, this is not a case in which the respondents discuss the meaning of the relevant portions of the court of appeals opinion. Rather, respondents make no effort to explain and never even refer to the pivotal passages in the opinion below. Respondents do not disagree with the interpretation of those passages set out in the briefs of the Department of Justice and the state of Florida, and in the petition; instead, respondents simply choose to ignore those operative portions of the Eleventh Circuit opinion. Such studied silence is no substitute for a reasoned analysis.

(3) Having prevailed in the court below by persuading the Eleventh Circuit to adopt a clear and emphatic "additional evidence" requirement, respondents now seek to avoid review in this Court by insisting that there was no such holding. But that tactical disavowal of the Eleventh Circuit's landmark decision is operative in this Court only; in the lower courts the additional evidence requirement mandated by the court of appeals is obviously the law. No judge in that circuit would today hold that a plaintiff can "g[et] his claims before a jury [by] making a prima facie case and ... contradicting the [defendant's] legitimate,

nondiscriminatory reason," in light of the Eleventh Circuit's emphatic decision that "precedent has ... closed this avenue for Title VII plaintiffs." App. 22a-23a. In order to assure that this additional evidence requirement would control future litigation in the Eleventh Circuit, the panel went out of its way to designate its opinion for publication. In that circuit, most appellate opinions in employment cases are unpublished.

The decision of the Eleventh Circuit imposing an additional evidence requirement in this Title VII case warrants review for the reasons that led this Court to grant review when the Fifth Circuit imposed such a requirement under the ADEA. *Reeves*, 530 U.S. at 140-41. Both decisions conflict with the law in other circuits, and both requirements pose an often insurmountable and always unjustified obstacle to the enforcement of the statute at issue. As the United States explained in its brief in *Reeves*, the removal of such obstacles is necessary "[t]o overcome the scarcity of direct proof of discriminatory motive, and to ensure that the 'important national policy' embodied in the fair employment laws is achieved." Brief for the United States and The Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioner, *Reeves v. Sanderson Plumbing Products, Inc.*, 11 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

This case presents the ideal vehicle for resolving this issue. The court of appeals set out a clear additional evidence requirement and offered a

full-throated explanation for its holding that a Title VII plaintiff cannot demonstrate the existence of a discriminatory motive "merely" by proving that an employer's proffered reason for its actions is a lie. App. 22a. Respondents contend that rejection of this legal standard would not affect the outcome in this case because there was no evidence that its explanation was untrue. Br. Opp. 11. But the court of appeals held that there was indeed such evidence, and dismissed Flowers' claim only because under controlling Eleventh Circuit precedent – unlike the rule in all other circuits – such proof is legally insufficient.

CONCLUSION

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

Respectfully submitted,

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