No. 10-

In The

SUPREME COURT OF THE UNITED STATES

TONYA MILLER-GOODWIN,

Petitioner,

v.

CITY OF PANAMA CITY BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prima facie case of intentional discrimination require a judicial finding that the defendant gave more favorable treatment to a "nearly identical" comparator?

PARTIES

The petitioner is Tonya Miller-Goodwin.

The respondent is the City of Panama City Beach, Florida.

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Petitioner Tonya Miller-Goodwin (hereinafter "Goodwin") respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 8, 2010.

OPINIONS BELOW

The July 8, 2010 opinion of the court of appeals, which is unofficially reported at 2010 WL 2689589 (11th Cir. 2010), and is set out at pp. 1a of the Appendix. The April 20, 2009 order of the district court is set out at pp. 19a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on July 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2000e of 42 U.S.C. provides in pertinent part:

(a) Employer practices

> It shall be an unlawful employment practice for an employer–
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case concerns the Eleventh Circuit's "nearly identical" rule for resolving claims of intentional discrimination. Plaintiff Goodwin alleged that she had been the victim of gender discrimination in employment, and adduced evidence that the City of Panama City Beach treated females differently than males who routinely engaged in policy and rule violations. The court of appeals nonetheless dismissed Goodwin's claim, reasoning that she had failed even to establish a prima facie case because she failed to show that other male employees in the Department engaged in misconduct that was "nearly identical" to hers but were treated more favorably.

Petitioner Goodwin was a female law enforcement officer for the City of Panama City Beach Police Department from January 2002 to February 2, 2007. She was terminated following an Internal Affairs (IA) investigation finding that she committed seven policy violations. App. 21a.

Prior to January, 2006, despite a number of inappropriate sexual incidents and issues, Goodwin enjoyed her work and excelled as an employee. She received a promotion in May, 2005, to the position of Corporal and became a Field Training Officer (FTO) around February, 2005. R 40, ¶ 10. Prior to January, 2006, the only disciplinary actions she received were for an "at fault" traffic accident and for speeding. She acknowledged fault for both. R 40, ¶7.

Goodwin's problems started in 2006, after she told Major David Humphreys, the second in command within the City of Panama City Police Department (hereinafter "Department") that she would sue him and the boys club within the Department so fast it would make his head spin if he ever spanked her on her bottom again. R 40, ¶ 11. That same year, on June 2, 2006, Goodwin told a friend and coworker that she was tired of how she was being harassed by superior officers and gave her a hypothetical about one worker joining another in a lawsuit. Goodwin's intention was to find out if the coworker would join her in a lawsuit against the Department alleging gender discrimination. R 40, ¶ 17. The coworker told Humphreys about this conversation. R 40, ¶ 18.

After these events, Goodwin's employment with the Department changed and after a series of incidents, [r. ¶s 18-31, 47-51], on January 3, 2007, she was notified that an IA investigation was being initiated. The allegations included Goodwin telling a male recruit, Sam Hoskins, that he would be under her supervision for the next phase of training in the Field Training Officer (FTO) program and it was her job to get him fired or make him quit. R 40, ¶53; R 28, ¶ 19. Major Humphreys initiated the investigation and was the decisionmaker with respect to matters relating to the outcome of the IA. R 40, ¶s 11, 53, 64, 110, 111. Humphreys also picked the employees to be interviewed during the IA investigation. R 40, ¶ 83.

Goodwin was fired for allegations that she gave false testimony about the incident with the male recruit referenced above, for being on an unapproved internship and sitting in the communications room too long, i.e., loafing. Doc 40, ¶ 73. She disputed these allegations. R 40, ¶ 75.

At the time of Goodwin's investigation, Humphreys was well-aware of officers loafing while on duty because they were spending time doing extracurricular activities at his home. While on duty, officers frequently went to Humphreys' home. Other officers also made questionable calls on the police radio. R 40, ¶ 74. Other officers, including Humphreys, however, who took time off work during a shift were never disciplined. In fact, in addition to the male officers who went to Humphreys' home while they were on duty, male

officers solicited one another to leave work to play poker. One night on Goodwin's shift on December 16, 2006, a lieutenant called Goodwin to tell her to let another officer, David Walker, off duty so he could go play poker with him. This time off was not put on Walker's time sheet and it was left as if he had worked the full day. This occurred numerous times with male officers. R 40, ¶ 78.

Goodwin was fired on contrived allegations and for an alleged conflict in a "he said/she said" situation that occurred frequently in the Department's workplace with other officers but there were never IA investigations into the same type of conduct Goodwin was accused of. R 40, ¶ 82. Inconsistencies in testimony during IA investigations were also common. R 40, ¶ 84.

Rather than just focusing on the specific charges against Goodwin, the IA investigation was directed to find "every problem" employees had ever had with her. R 40, ¶s 112-113. More than thirty five people were interviewed for what the Department falsely claimed was an inconsistency in statements between Goodwin and Hoskins. R 40, ¶ 114. Evidence was provided in the district court that the Department used IA investigations to get rid of employees within the City of Panama City Beach Police Department. R 40, ¶ 116. "[I]f it's in their mind that they want you gone, they will come up with something in order to start an Internal Investigation." R 40, ¶ 116; see also R 40, ¶ 117.

In opposition to summary judgment, Goodwin offered evidence male employees who were treated more favorably and not terminated for conduct equally or more serious to that she was charged. R 40-44-52.

In opposition to summary judgment, Goodwin also offered evidence that there were other females who were the victims of retaliation after reporting sexual harassment within the City of Panama City Beach Police Department. Patricia Bond was fired, just like Goodwin, on contrived allegations after she reported sexual harassment. R 40, ¶ 102. Another former female officer, Donna Land, had the same problems Bond had with females being treated as "pieces of meat" by male employees, including Humphreys. R 40, ¶ 102.

The district court granted summary judgment in favor of the defendant. The court held that under Eleventh Circuit precedent a plaintiff cannot establish a prima facie case unless she can identify a comparator who was treated more favorably despite circumstances that are "nearly identical" to those of the plaintiff. The district court stressed that the "nearly identical" standard for comparators requires the identification of at least one male officer who violated the exact same Department policies as Goodwin. App. 13a. In response to Goodwin's claim that she was singled out for investigation and then discipline, the court explained because the IA investigation concluded that Goodwin committed seven violations of Department policy, even though she provided a

litany of other officers who should have been investigated and/or were guilty of policy violations, she did not provide any evidence that any of these officers violated the exact same policies she was accused of committing. App. 15a. Finding that the male officers were not "nearly identical" to Goodwin, the district court concluded that Goodwin had failed even to establish a prima facie case. App. 15a.

The court of appeals applied the "nearly identical" standard, explaining that Goodwin "did not show that other male employees of the Department engaged in misconduct that was nearly identical to hers, but were treated more favorably." App. 15a. In order to show the existence of a legally sufficient comparator, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." App. 11a. (quoting Maniccia v. Brown, 171 F. 3d 1364, 1368 (11th Cir. 1999)).

The Eleventh Circuit found that "[a]lthough the comparators identified by Goodwin arguably violated some of the Department's Rules and Regulations, and perhaps even violated one or more of the same Rules and Regulations that she was found to have violated, there has been no showing that any of them violated all of the Rules and Regulations that resulted in her termination or that their alleged misconduct was nearly identical to her." App. 15a. Applying that standard, the court of appeals found that the males treated more

favorably than Goodwin were not "proper comparators" because their infractions were not "nearly identical" to the misconduct with which Goodwin was charged. App.15a.

Although Goodwin had argued multiple males employees had engaged in misconduct that was equally if not more serious than that she was accused of, the court of appeals did not address that contention finding that she failed to identify any similarly situated male employee who engaged in misconduct "nearly identical" to hers. App. 15a. In the absence of a proper comparator, the panel held, Goodwin failed to establish a prima facie case of discrimination with respect to her termination, and the burden was not shifted to the appellee to provide a legitimate, nondiscriminatory reason for its actions. App. 15a. In the absence of a "proper comparator," gender based discrimination simply is not actionable.

REASON FOR GRANTING THE WRIT

Repeated decisions of this Court have fashioned a now well-established method for organizing and evaluating claims of intentional discrimination. Once a plaintiff establishes a prima facie case, the defendant must articulate a non-discriminatory reason for the disputed adverse action; the burden then returns to the plaintiff to establish by a preponderance of the evidence that the defendant acted with a discriminatory motive. These shifting burdens are not intended to create substantial intermediate barriers, but are "meant

only to aid courts and litigants in arranging the presentation of evidence." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff's initial burden of proving a prima facie case is "not onerous." Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Watson, 487 U.S. at 986; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Despite this Court's disapproval of the imposition of any demanding evidentiary burden to establish a prima facie case, the Eleventh Circuit has created a standard that two decades of experience have shown to be virtually impossible to meet. In a long series of decisions, of which the instant case is typical, this circuit requires as an essential element of a prima facie case[1] that the plaintiff identify a specific individual outside the protected group in question whose circumstances were "nearly identical" to those of the plaintiff, and who nonetheless was treated more favorably. If, as here, a plaintiff has identified at least four males who committed the same and far worse violations, the plaintiff cannot establish a prima facie case, and the discrimination claim fails.

The Eleventh Circuit has applied the "nearly identical" requirement in more than 48

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1 In theory a plaintiff unable to identify a nearly identical comparator might be able to prove discrimination if he or she could produce "direct evidence" of discrimination. The Eleventh Circuit's "direct evidence" standard, however, is also virtually impossible to satisfy.

employment discrimination cases; no plaintiff has ever been able to meet that standard.[2] There are only few instances in which district courts in the Eleventh Circuit have found the plaintiff produced evidence sufficient to satisfy this exacting requirement.

The "nearly identical" rule utilized in the Eleventh Circuit, the only circuit to still use this rule, has three distinct elements. *First*, to establish a prima facie case of a discriminatory adverse action (e.g., a dismissal, demotion, or suspension), a plaintiff must demonstrate that he or she was treated less favorably than a similarly situated individual who is not a member of the protected group in question. *Second*, the individual with whom the plaintiff is compared is only similarly situated if the circumstances of that comparator and the plaintiff are "nearly identical". *Third*, the assessment of whether a comparator meets the "nearly identical" standard is a matter for the courts, not the trier of fact. In each of these respects the rule in the Eleventh Circuit has been expressly rejected by at least six other circuits.

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2 A list of Eleventh Circuit decisions applying the "nearly identical" standard is set out in an Appendix to this petition.

I. THE REQUIREMENT THAT ANY PRIMA FACIE CASE MUST INCLUDE PROOF THAT A SIMILARLY SITUATED COMPARATOR RECEIVED MORE FAVORABLE TREATMENT CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Applying well-established Eleventh Circuit precedent, the court of appeals held that to establish a prima facie case of discrimination the plaintiff was required to show that "her employer treated similarly situated [white] employees more favorably." (quoting EEOC v. Joe's Stone Crab, Inc., 220 F. 3d 1263, 1286 (11th Cir. 2000)). The Eleventh Circuit has for years required, as an essential element of a prima facie case, that the plaintiff prove that the employer accorded more favorable treatment to an individual outside the protected group of which the plaintiff was a member (e.g., in the instant case, to a male comparator).

In the absence of that (or any other) essential element of a prima facie case, a plaintiff's claim fails as a matter of law. As a result, once the court of appeals in the instant case concluded that because Goodwin had "failed to identify any similarly situated male employee who engaged in misconduct nearly identical to her, but who received less severe disciplinary sanctions" App, 15a.. her claim was dismissed without further inquiry. In the absence of a "proper comparator," under the decision below, the employer was entitled to prevail, regardless of whether Goodwin

identified males who committed far worse infractions.[3] "If two employees are not 'similarly situated,' the different application of workplace rules does not constitute illegal discrimination." Lathem v. Department of Children and Youth Services, 172 F.3d 786, 793 (11th Cir.1989); see Wright v. Sanders Lead Co., 217 Fed.Appx. 925, 928 (11th Cir. 2007)(same).

The Eleventh Circuit is not alone in holding that a plaintiff a prima facie case of discrimination must include evidence that the defendant accorded

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3 The Eleventh Circuit has even held that when there is other evidence of discrimination like discriminatory remarks, that evidence is irrelevant if the plaintiff cannot also identify a proper comparator who received more favorable treatment, and thus is unable to establish a prima facie case. In Bell v. Capital Veneer Works, 2007 WL 245875 (11th Cir. 2007), the court of appeals held that the dismissal of the plaintiff's discriminatory dismissal/failure to rehire claim because, having failed to identify a "nearly identical" comparator, she was unable "to satisfy all elements of her prima facie case." 2007 WL 245875 at *2. The lack of a prima facie case was fatal to the plaintiff's claim, despite evidence that the decisionmaker had earlier remarked "[i]f I could run the mill myself, I would fire everyone [sic] of these niggers." 2007 WL 245875 at *2 n. 5. See Tomczyk v. Jocks & Jills Restaurants, LLC, 198 Fed. Appx. 804, 809 (11th Cir. 2006)(discrimination claim dismissed for want of a proper comparator despite "a slew of vulgar and harassing comments" by the plaintiff's supervisor "inflicted on [the plaintiff] because of race."); Mack v. ST Mobile Aerospace Engineering, Inc., 195 Fed. Appx. 829, 838, 841 (11th Cir. 2006)(discrimination claim dismissed for want of a proper comparator even though "management directed racial derogatory words and jokes, such as 'boy,' 'nigger,' and the statement that 'you're the wrong fucking color,' toward the plaintiff . . . . and supervisors continued to display the [Confederate] flag.")

more favorable treatment to a valid comparator. That same definition of a prima facie case is applied in the Fourth[4], Fifth[5] and Seventh Circuits.[6] The Sixth Circuit has adopted a variant of the Eleventh Circuit prima facie case rule.[7] The Sixth Circuit has explicitly disapproved the First Circuit rule that evidence of more favorable treatment of a comparator need only be considered in showing pretext, and not as an element of a prima facie case. Clayton v. Meijer, Inc., 281 F. 3d 605, 609-10 (6th Cir. 2002).

A majority of the courts of appeals, however, have rejected this prima face case requirement. The First Circuit has expressly disapproved the Eleventh Circuit's rule.

> [T]he district court . . . followed the lead of the Eleventh Circuit and construed the prima facie requirement to call for a "show[ing] that . . . the misconduct for which [the plaintiff] was discharged was nearly identical to that engaged in by an employee outside the protected class whom the employer retained." Conward [v.

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4 Ford v. General Electric Lighting, LLC, 121 Fed. Appx. 1, 5 (4th Cir. 2005); Cook v. CSX Transp. Corp., 988 F. 2d 507, 501 (4th Cir. 1993).

5 E.g., Culwell v. City of Fort Worth, 468 F. 3d 868, 873 (5th Cir. 2006).

6 E.g., Filar v. Board of Ed. of City of Chicago, 526 F. 3d 1054, 1060 (7th Cir. 2008).

7 E.g., Wright v. Murray Guard, Inc., 455 F. 3d 702, 707 (6th Cir. 2006).

> Cambridge School Committee, 1998 WL 151248] at *3 (quoting Nix v. WLCY Radio/Rahall Communications, 738 F. 2d 1181, 1185 (11th Cir. 1984)) . . . [T]he district court's sequencing determination was in error, for the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality *vel non* of the employer's articulated reason . . . .

Conward v. Cambridge School Committee, 171 F. 3d 12, 19 (1st Cir. 1999).8

The Second Circuit requires that a plaintiff, in order to establish a prima facie case, need only show that the disputed adverse action "occurred under circumstances giving rise to an inference of discrimination." Graham v. Long Island Rail Road, 230 F. 3d 34, 38 (2d Cir. 2000). "A plaintiff *may* raise such an inference by showing that the employer . . . treated him less favorably than a similarly situated employee outside his protected group," *id.* at 39 (emphasis added), but is not limited to that particular method of proof.

> Defendants are wrong in their contention that [a plaintiff] cannot

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8 Kosereis v. Rhode Island, 331 F. 3d 207, 211 (1st Cir. 2003)("in disparate treatment cases, comparative evidence is to be treated as part of the pretext analysis, and not as part of the plaintiff's prim facie case.").

> make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently....Although her case would be stronger had she provide...such evidence, there is no requirement that such evidence be adduced.

Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 121 (2d Cir. 2004)

The Third Circuit has also rejected the Eleventh Circuit prima facie case rule. In Marzano v. Computer Science Corp., Inc., 91 F. 3d 497 (3d Cir. 1996), the defendants argued that the standard for a prima facie case "encompasses the requirement that plaintiff show that *similarly situated* unprotected employees [were treated more favorably.]" 91 F. 3d at 510 (quoting brief for employer)(emphasis in opinion). The Third Circuit rejected that proposed requirement in language that aptly described the fatal flaw in the Eleventh Circuit "nearly identical" standard.

> [W]e reject Defendants' argument because it would seriously undermine legal protections against discrimination. Under their scheme, any employee whose employer can for some reason or other classify him or her as "unique" would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-

> impossible situation of having to offer direct proof of discrimination. . . .

91 F. 3d at 510-11.

In Bodett v. Coxcom, Inc., 366 F. 3d 736 (9th Cir. 2004),

> [t]he district court employed a *prima facie* test requiring [the plaintiff] to show that "other similarly situated employees outside of the protected class were treated more favorably.

366 F. 3d at 744.

The Ninth Circuit held that the district court had erred in limiting in that way the manner in which a plaintiff may establish a prima facie case.

> A plaintiff may show *either* that similarly situated individuals outside her protected class were treated differently *or* "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."

Id. (emphasis in original; quoting Peterson v. Hewlett-Packard Co., 358 F. 3d 599, 603 (9th Cir. 2004)).

The Tenth Circuit has repeatedly rejected the Eleventh Circuit position that a plaintiff must

demonstrate the existence of a valid comparator in order to establish a prima facie case. In Nguyen v. Gambro BCT, Inc., 242 Fed. Appx. 483 (10th Cir. 2007), the district court had applied that Eleventh Circuit standard, requiring the plaintiff to show that she was "treated less favorably than a person outside the protected group." 242 Fed. Appx. at 487. The Tenth Circuit expressly disapproved that standard for establishing a prima facie case.

> The district court erred . . . in its articulation and application of prima facie case standards . . . . We held in Kendrick [v. Penske Transp. Servs., Inc., 220 F. 3d 1220 (10th Cir. 2000)] that the lower court committed error "in requiring [plaintiff] to show that [the employer] treated similarly-situated nonminority employees differently in order to [establish a prima facie case]." [220 F. 3d at 1229].

242 Fed. Appx. at 488.

The District of Columbia Circuit has also rejected the Eleventh Circuit rule. In Czekalski v. Peters, 475 F. 3d 360 (D.C.Cir. 2007), the district court had held that to establish a prima facie case a plaintiff "must demonstrate that she and a similarly situated person outside her protected class were treated disparately." 475 F. 3d at 365. The District of Columbia Circuit disapproved that standard. "As we said in George v. Leavitt [407 F.

3d 405 (D.C.Cir. 2005)], . . . '[t]his is not a correct statement of the law.' 407 F. 3d at 412." Id.

> One method by which a plaintiff can satisfy [the prima facie case standard] is by demonstrating that she was treated differently from similarly situated employees who are not part of the protected class. . . . But that is not the only way.

George v. Leavitt, 407 F. 3d at 412.

II. THE "NEARLY IDENTICAL" STANDARD CONFLICTS WITH THE STANDARDS IN EVERY OTHER CIRCUIT

A. The decision below applied the well-established Eleventh Circuit rule that comparative evidence is not sufficient to sustain a prima facie case unless the plaintiff and the proffered comparator are "nearly identical." As of 2009, the Fifth Circuit was the only other appeals court to use a "nearly identical" standard. But the Fifth Circuit has recently refined that standard to eliminate the "tension" with this Court's formulation of "comparable seriousness" in McDonald. In so doing, that court made a cogent observation:

> Each employee's track record at the company need not comprise the identical number of identical

> infractions, albeit these records must be comparable. As the Supreme Court has instructed, the similitude of employee violations may turn on the "comparable seriousness" of the offenses for which discipline was meted out and not necessarily on how a company codes an infraction under its rules and regulations. Otherwise, an employer could avoid liability for discriminatory practices simply by coding one employee's violation differently from another's.

Lee v. Kansas City Southern Ry. Co., 574 F.3d 253, 260-261 (5th Cir. 2009) (footnotes omitted).

This Court, in its recent opinion in Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008), also rejected in principle the use of a *per se* rule to decide the analogous question of use of evidence involving similar discrimination against others. The *per se* rule maintained by the Eleventh Circuit of keeping the comparator question from the jury on the strength of a "nearly-identical" standard should not pass muster under Mendelsohn. Certainly this would be true of the more extreme formulations of the standard such as the one here that requires identification of a comparator with the exact same seven allegations.

Precedent from this Court militates against placing comparator analysis in the *prima facie* stage rather than the pretext stage of the

McDonnell-Douglas burden-shifting analysis. This placement matters to the extent that some courts have refused evidence of employer mendacity in the excuses for firing on the ground that such an inquiry must await the pretext stage – a stage not to be reached for failure to show a nearly-identical comparator at the *prima facie* stage. McCann v. Tillman,526 F.3d 1370, 1375 n.6 (11th Cir. 2008), *cert. den. sub nom.*, McCann v. Cochran, 129 S.Ct.404 (2008). This is but another Catch-22. The McDonnell-Douglas shifting burdens are not to create substantial barriers to moving a case forward, but are "meant only to aid courts and litigants in arranging the presentation of evidence." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff 's initial burden of proving a *prima facie* case is "not onerous." Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Texas Dept. of CommunityAffairs v. Burdine, 450 U.S. 248, 253 (1981). But "onerous" is precisely the term for the Eleventh Circuit's "nearly identical" standard, a standard which no appellate litigant in an employment discrimination case in that circuit has been able to satisfy.

The instant case sharply illustrates the exactitude required by the "nearly identical" standard. The most obvious error in the court's comparator analysis is the Catch-22 of requiring a high degree of congruence ("nearly identical") between the charges against Goodwin and the behavior of those she used as comparators while allowing the employer to withhold the facts

supporting the charges. In the summary judgment motion, the employer finally came forward with some allegations of misconduct, all disputed but for the one about lingering in the communications room. But the employer has yet to identify which alleged conduct breaks which of the seven cited rules. This is a critical omission that could insulate any employer from any comparator-based retaliatory-discipline complaint because it makes the firing decision unreviewable even in theory, especially under the doctrine applied here. The trial court drew that doctrine from the holding of McCalister v. Hillsborough County Sheriff, 211 Fed. Appx. 883, 886 (11th Cir. 2006), that a plaintiff fired for violating six policies must produce a comparator who violated the exact same six policies without being fired. In affirming that decision, the Eleventh Circuit applied that same standard – an even more exacting standard than that court's published opinions had applied..

Under Eleventh Circuit cases, a plaintiff is similarly situated to another employee only if the quantity and quality of the comparator's misconduct are "nearly identical." Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir.2006) (*citing* Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir.1999). But in following, McCalister, the court moved beyond "nearly identical" to identical in announcing a rule that Goodwin must produce a male comparator who violated the exact same seven rules without being fired. The court went still one step further in holding that not only comparators with less serious offenses would be

disqualified from consideration, but also those with more serious offenses. R 78-14. The rule applied below goes far beyond that to establish a regimen in which an employer could create a unique list of alleged rule violations for each discrimination victim. In this case, for example, something like the offense of "idle conversation" could be added to or omitted from any list of charges to prevent the list from qualifying as "nearly identical" to any comparator.

This case presents the additional issue of the comparators outside the protected class not being charged in the first place. So there is no list of charges to compare and no investigations of the misconduct of the favored class. In requiring Goodwin to show a comparator who committed the same seven offenses charged against her and acquitted, the court presumed an absence of discrimination in the charging process before even allowing consideration of discrimination in outcomes of charges. The trial court claims that Goodwin failed to show that the Department's high officials were aware of the offenses of the comparators, but a review of Goodwin's summary judgment fact statement (R-40) shows a painstaking documentation of who in the chain of command knew about the comparator offenses. Moreover, by permitting the Department to list seven rules allegedly violated without matching each rule with an act that violates it, the court makes it impossible to construct a matrix for comparison with treatment of those outside the protected class. The combination of characteristics

is so unique that it is unlikely that any officer in the entire state of Florida, other than the plaintiff herself, would fit that description.

This is not an issue of second-guessing employers' judgments or becoming a super-personnel board intruding on business judgment. It is an issue of testing the truthfulness – not the good faith – of an employer's excuse for a firing. The court below applied a standard that makes it impossible for this Plaintiff or any other to prove pretext by comparator evidence. That does not comport with this Court's comparator jurisprudence.

Ten circuits have rejected this avowedly stringent standard. Under the standard applied in a majority of the circuits, unlike the Eleventh Circuit, the sufficiency of comparative evidence is routinely upheld.

B. Six circuits, applying the same standard at both the prima facie case stage and in evaluating evidence of pretext, utilize a standard demonstrably different from and manifestly less restrictive than the "nearly identical" standard.

Four circuits utilize in discriminatory discipline claims a requirement that the action of a proffered comparator need only be of "comparable seriousness" to that for which the plaintiff was punished. That standard is applied in the Second[9],

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9 Graham v. Long Island Rail Road, 230 F. 3d 34, 40 (2d Cir. 2000).

Fourth[10], Sixth[11] and Seventh Circuits.[12] Plaintiffs are routinely able to satisfy this less stringent requirement.

Applying the "comparable seriousness" standard, for example, the Second Circuit has held that excessive absenteeism and engaging in the prohibited use of alcohol might reasonable be deemed of comparable seriousness, even though those infractions manifestly would not satisfy the "nearly identical" test.[13] The Second Circuit has expressly refused to require proof that the plaintiff and comparator had engaged in the same offense, reasoning that under such a requirement a plaintiff could not rely on evidence of more favorable treatment of a comparator whose record was worse (and thus different) than that of the plaintiff.[14]

The Fourth Circuit has made clear that the comparable seriousness standard can be satisfied even where the asserted infractions of a plaintiff are different than those of a proposed comparator.

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10 Featherstone v. United Parcel Services, Inc., 1995 WL 318596 at *4-*5 (4th Cir. 1995)(applying comparable seriousness standard); Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th Cir. 1993) (applying comparable seriousness standard.

11 Perry v. McGinnis, 209 F. 3d 597, 602 (6th Cir. 2000)(applying comparable seriousness standard).

12 Pierick v. Indiana University-Purdue University Athletics Dept., 510 F. 3d 681, 690 (7th Cir. 2007).

13 Graham, 230 F. 3d at 43.

14 Id. at 40.

> [T]he district court found that "although . . . there were [not] any white employees charged with the same combination of offenses as plaintiff," several white employees had violated [a particular rule], "the primary offense which had led to plaintiff's dismissal," and therefore had engaged in conduct of "comparable seriousness" to that of Cook. That finding commendably reflects an understanding . . . of the reality that the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances.

Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th Cir. 1993).

Decisions in the Seventh Circuit, in addition to at times using the "comparable seriousness" standard, have also articulated alternative tests. Panels in that circuit have required that a plaintiff control for "confounding variables,"[15] or demonstrate enough similarities to permit a "meaningful comparison,"[16] or held that the courts in deciding this issue should consider all "material" factors[17] or examine a particular list of

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15 Filar, 526 F. 3d at 1061.

16 Keys v. Foamex, L.P., 264 Fed. Appx. 507, 512 (7th Cir. 2008).

17 Henry at 564.

considerations.[18] Decisions in the Seventh Circuit have held a plaintiff's evidence sufficient under every one of these standards. The general tenor of these decisions is reflected in a recent opinion stressing that "a plaintiff need not present a doppelganger,"[19] and in several opinions emphasizing that the "similarly situated" requirement should be applied in a "flexible" rather than a "mechanica[l]", "unduly rigid" or "narrow" manner.[20] In Ezell v. Potter, 400 F. 3d 1041 (7th Cir. 2005), for example, the Seventh Circuit held that a postal worker disciplined for claiming pay for a period he did not work could be compared to other workers who had lost certified mail or altered records, even though these clearly were not "the same infraction." 400 F. 3d at 1049-50.

The Third Circuit does not utilize any specific standard for evaluating comparative evidence. Most frequently decisions in that circuit merely inquire whether the circumstances of the plaintiff and the proposed comparator are "similar," or simply comparing those circumstances at issue. E.g., Goosby v. Johnson & Johnson Medical, Inc., 228 F. 3d 313, 321 (3d Cir. 2000)(evidence sufficient to support finding that plaintiff and comparators had "similar weaknesses")(opinion by Alito, J.). Under both approaches the Third Circuit has

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18 Ezell v. Potter, 400 F. 3d 1041, 1049 (7th Cir. 2005) (plaintiff and comparator must be "similarly situated with respect to performance, qualifications and conduct).

19 Filar, 526 F. 3d at 1061.

20 Atanus, 520 F. 3d at 673; Keys, 264 Fed. Appx. at 512; Henry v. Jones, 507 F. 3d 558, 564 (7th Cir. 2007); Pierick, 510 F. 3d at 688.

repeatedly found comparative evidence sufficient to support an inference of discrimination.21 In Bennun v. Rutgers State University, 941 F. 2d 154 (3d Cir. 1991), for example, that circuit upheld the use of evidence comparing the treatment of a white and a Hispanic candidate for tenure, even though their particular strengths and weaknesses were somewhat different.

> Rutgers contends that they are not similarly situated because [the white candidate] was rated in outstanding in two [particular] categories . . . and [the Hispanic candidate] was not rated as highly in those categories. We cannot accept Rutgers' position. It would change "similarly situated" to "identically situated."

941 F. 2d at 178.

The First Circuit holds that comparative evidence is probative so long as the circumstances of the plaintiff and the comparator are "roughly equivalent." That Circuit has repeatedly found

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21 Messina v. E.I. DuPont de Nemours & Co., Inc., 141 Fed. Appx. 57, 59 (3d Cir. 2005)(comparative evidence sufficient to support prima facie case, even though misconduct of plaintiff was worse than that of comparator); Goosby, 228 F. 3d at 321 (sufficient evidence of preferential treatment of white males "with similar weaknesses"); Hopp v. City of Pittsburgh, 194 F. 3d 434, 439 (3d Cir. 1999)(finding of discrimination supported by evidence of more favorable treatment of "similarly situated" comparators)(opinion by Alito, J.).

plaintiffs' comparative evidence sufficient to meet this less stringent standard.[22]

C. Three circuits utilize a two tier standard for analyzing comparative evidence, applying a decidedly less demanding standard in determining whether that evidence is sufficient to establish a prima facie case.

The Eighth Circuit is particularly explicit in recognizing two different standards.

> At the prima facie case stage . . . , we choose to follow the low-threshold standard for determining whether employees are similarly situated . . . . Using a more rigorous standard at the prima facie stage would "conflate the prima facie case with the ultimate issue of discrimination . . ."

Rogers v. U.S. Bank, N.A., 417 F. 3d 845, 852 (8th Cir. 2005)(quoting Williams v. Ford Motor Co., 14 F. 3d 1305, 1308 (8th Cir. 1994). Under this avowedly "not onerous" standard a plaintiff and comparator need only have engaged in "similar" conduct. Rogers, 417 F. 3d at 851; see also Wheeler v. Aventis Pharmaceuticals, 360 F. 3d 853, 857-58 (8th Cir. 2004)(circumstances need only be "arguable . . . comparable"). "[D]ifferences in the

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22 Carey v. Mt. Desert Island Hospital, 156 F. 3d 31, 37 (1st Cir. 1998); Molloy v. Blanchard, 115 F. 3d 86, 92 (1st Cir. 1997).

severity and frequency of their violations and the surrounding circumstances" are irrelevant at the prima facie case stage, but should be considered only in determining whether the plaintiff has shown pretext. Rogers, 417 F. 3d at 52.

In evaluating whether comparative evidence would support a finding of pretext, the Eighth Circuit requires proof of infractions of "comparable seriousness. Even under that standard, however, the Eighth Circuit has expressly refused to require that the plaintiff and the comparator have committed the same infractions

> To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.

Lynn v. Deaconess Medical Center-West Campus, 160 F. 3d 484, 488 (8th Cir. 1998). The Eighth Circuit has repeatedly upheld the sufficiency of evidence under this comparable seriousness standard.[23]

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23 Ledbetter v. Alltel Corp. Services, Inc., 437 F. 3d 717, 723 (8th Cir. 2006); EEOC v. Kohler Co., 335 F. 3d 766, 776 (8th Cir. 2003).

The Tenth Circuit also takes a different approach in assessing whether comparative evidence supports a prima facie case and whether that evidence would support a finding of discrimination. At the prima facie case stage, the standard is avowedly "not onerous." Smith v. Oklahoma ex rel. Tulsa County District Attorney, 245 Fed. Appx. 807, 812 (10th Cir. 2007). That circuit does not consider at that stage an employer's explanation for differing treatment of seemingly similar employees.

> Although the district court concluded that th[e] . . . male employees were not similarly situated, its analysis turned on an assessment of the reasons offered by the [employer] for [the plaintiff's] termination. . . . However, at the prima facie case stage . . . "the employer's reasons for the adverse action are not appropriately brought as a challenge to the sufficiency of the plaintiff's prima facie case . . . ."

Id. (quoting Kenworthy v. Conoco, Inc., 979 F. 2d 1462, 1469-70 (10th Cir. 1992). At the pretext stage, on the other hand, the Tenth Circuit does consider the defendant's proffered explanation, applying the "comparable seriousness" standard in evaluating the comparative evidence. In McAlester v. United Air Lines, Inc., 851 F. 2d 1249 (10th Cir. 1988), that court of appeals upheld a jury verdict based on comparative evidence, despite the fact

that the plaintiff and the comparators had committed "different rule violations."

> The fact that these other employees did not commit the exact same offense as [the plaintiff] does not prohibit consideration of their testimony. It is sufficient if those employees did acts of comparable seriousness.

851 F. 2d at 1261; see EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d 476, 489-90 (10th Cir. 2006)(despite "factual differences" between the incidents, "[t]hey are similar enough"), cert. dismissed 127 S.Ct. 1931 (2007).

The Ninth Circuit uses the "comparable seriousness" standard to determine whether comparative evidence is probative of pretext.[24] At the prima facie case stage, however, that circuit appears in practice to use a less demanding standard, emphasizing that plaintiffs need provide "very little" evidence to establish a prima facie case.[25]

D. The existence of this inter-circuit conflict reflects quite deliberate decisions by the various circuits to reject standards applied in other circuits.

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24 Beck v. United Food and Commercial Workers Union, Local 99, 506 F. 3d 874, 885 (9th Cir. 2007).

25 Fields v. Riverside Cement Co., 226 Fed. Appx. 719, 722 (9th Cir. 2007); see Cornwell v. Electra Central Credit Union, 439 F. 3d 1018, 1031 (9th Cir. 2006).

In San Filippo v. Bongiovanni, 30 F. 3d 424 (3d Cir. 1994), the district court had applied a definition of "similarly situated" similar to the Eleventh Circuit "nearly identical" standard, requiring in a discipline case that the comparator's infractions be of the same "kind, number and scope" of the plaintiff. 30 F. 3d at 432; The Third Circuit reversed. "[T]he district court's definition of 'similarly situated' was too narrow. . . . ['P]recise equivalence in culpability between employees is not the question.[']" 30 F. 3d at 433 (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n. 11 (1976)).

In Jackson v. Fedex Corporate Services, Inc., 518 F. 3d 388 (6th Cir. 2008), the district court had applied an avowedly "high standard,"[26] 518 F. 3d at 391, 392, holding that the plaintiff had failed to identify a valid comparator, and thus had not made out a prima facie case, because "to be similarly situated [the comparator] with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct without differentials or mitigation." 518 F. 3d at 391. The Sixth Circuit rejected that standard.

> The district court's formulation of the similarly situated standard is exceedingly narrow. . . . The *prima*

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26 "High standard" is precisely the phrase used by district courts in the Eleventh Circuit to characterize the "nearly identical" rule. E.g., Zedeck v. Target Corp., 2008 WL 2225661 at *7 (S.D.Fla. 2008).

> *facie* case requirement is not onerous . . . . [T]he district court impermissibly placed a burden of producing a significant amount of evidence in order to establish a *prima facie* case. The purpose[s] of Title VII and 1981 are not served by an overly narrow application of the similarly situated standard.

518 F. 3d at 396-97.

In Josephs v. Pacific Bell, 443 F. 3d 1050 (9th Cir. 2005), the Ninth Circuit expressly rejected the "nearly identical standard." The employer, relying on Fifth Circuit precedent, argued that comparative evidence is inadmissible unless the comparator is "nearly identical" to the plaintiff[27]. The court of appeals held that to be admissible such evidence need only involve "similar conduct." 443 F. 3d at 1065.

In Cuevas v. American Express Travel Related Services Co., Inc., 256 Fed. Appx. 241 (11th Cir. 2007), the Eleventh Circuit expressly rejected the plaintiff's contention that comparative evidence should be evaluated under the "comparable seriousness" standard utilized in seven other circuits. The court of appeals cases supporting use of that standard were "contradict[ed]" by controlling Eleventh Circuit precedent. 256 Fed. Appx. at 243.

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[27] Brief of Defendant-Appellant, 2004 WL 5367149 at *47.

In 2000 and 2001, in a brief departure from Eleventh Circuit precedent, two panels in that circuit held that "the law only requires 'similar' misconduct from the similarly situated comparator," not "nearly identical conduct." Anderson v. WBMG-42, 253 F. 3d 561, 565 (11th Cir. 2001); Alexander v. Fulton County, 207 F. 3d 1303, 1334-35 (11th Cir. 2000. Judges in the Eleventh Circuit squarely recognized that the standard in these decisions was inconsistent with that circuit's "nearly identical" standard.[28] In Burke-Fowler v. Orange County, Fla., 447 F. 3d 11319 (11th Cir. 2006), the Eleventh Circuit reaffirmed its commitment to the "nearly identical" standard, explaining that the decisions in these cases "contradict[]" prior Eleventh Circuit precedent, and invoking that circuit's "'earliest case' rule to resolve intra-circuit splits." 447 F. 3d at 1322, n. 2. The *inter*-circuit split, however, remains.

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28 Dawson v. Henry County Police Dept., 238 Fed. Appx. 545, 548 n.2 (11th Cir. 2007)(Anderson and Alexander standard "less exacting" than the "nearly identical" rule); Wright v. Sanders Lead Co., Inc., 2006 WL 905336 at *8 (M.D. Ala. 2006) (Anderson and Alexander standard "less stringent" than the "nearly identical" rule).

III. THE REQUIREMENT THAT A PRIMA FACIE CASE MUST REST ON A JUDICIAL FINDING OF A LEGALLY SUFFICIENT COMPARATOR CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Proceeding in a manner consistent with longstanding Eleventh Circuit practice, the panel in this case made its own determination as to whether the proffered comparators were sufficiently similar to the plaintiff, rather than treating those circumstances as evidence to be evaluated by the trier of fact. The Fourth[29], Fifth[30], and Seventh[31] Circuits also deem that determination the province of the courts, as if it were some sort of question of law, rather than according to a jury the responsibility for deciding whether or not a proffered comparison is persuasive. Six other circuits, however, properly regard the trier of fact as responsible for determining whether the plaintiff and a proffered comparator are sufficiently similar that dissimilar treatment raises an inference of discrimination.

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29 E.g., Ray v. CSX Transp., Inc., 189 Fed. Appx. 154, 160 (4th Cir. 2006)("the coworkers . . . were not engaged in conduct of comparable seriousness").

30 E.g., Bouie v. Equistar Chamicals L.P., 188 Fed. Appx. 233. 237 (5th Cir. 2006)(plaintiff's "situation is not nearly identical to that of the white employees who were not fired").

31 E.g., Fischer v. Avanade, Inc., 519 F. 3d 393, 402 (7th Cir 2008)("we find these two individuals were similarly situated").

The Second Circuit has repeatedly held that "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." Graham v. Long Island Rail Road, 230 F. 3d 34, 39 (2d Cir. 2000).32 The District of Columbia Circuit also treats this as a matter for resolution by the trier of fact. George v. Leavitt, 407 F. 3d 405, 414 (D.C.Cir. 2005)(quoting Graham).

> [I]t should be resolved in the first instance by a jury, whose decision should be disturbed on appeal only if it could not reasonably be based upon the evidence properly received.

Barbour v. Browner, 181 F. 3d 1342, 1345 (D.C.Cir. 1999). The Tenth Circuit as well treats this issue as a question of fact for the jury. Riggs v. Airtran Airways, Inc., 497 F. 3d 1108, 1117 (10th Cir. 2007)(quoting George). The Ninth Circuit "agree[s] with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact." Beck v. United Food and Commercial Workers Union, Local,*99*, 506 F. 3d 874, 885 n. 5 (9th Cir. 2007)(citing decisions in the Second, Tenth and District of Columbia Circuits).

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32 Brown v. City of Syracuse, 2006 WL 2091206 at *3 (2d Cir. 2006)(quoting Graham); Feingold v. New York, 366 F. 3d 138, 154 (2d Cir. 2004)("whether or not the non-disciplined [comparators] were similarly situated is a matter of factual dispute which is best resolved by a finder-of-fact"); Mandell v. County of Suffolk, 316 F. 3d 368, 379 (2d Cir. 2003)("Ordinarily, the question whether two employees are similarly situated is a question of fact for the jury.")

In Molloy v. Blanchard, 115 F. 3d 86 (1st Cir. 1997), the First Circuit upheld a jury's finding of discrimination reasoning, in part, that the plaintiff had "presented evidence sufficient for the jury to have found that . . . 'similarly situated' males had received dissimilar treatment." 115 F. 3d at 92. In a series of decisions the Third Circuit has insisted that the trier of fact is responsible for evaluating whether a comparator is similarly situated with the plaintiff.[33] The most recent Sixth Circuit decision insists that the evaluation of comparative evidence should be made by the trier of fact, so long as "a reasonable jury could infer that [the comparator's] conduct was of comparable seriousness." Macy v. Hopkins County School Bd. of Educ., 484 F. 3d 357, 369-71 and n. 8 (6th Cir. 2007).

IV. THE ELEVENTH CIRCUIT'S "NEARLY IDENTICAL" RULE CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Eleventh Circuit's insistence that a prima facie case must include evidence of differing treatment of a similarly situated (however defined) comparator is inconsistent with the decisions of this Court. "The *prima facie* case method established in McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic.'" United States Postal Service Board of Governors v.

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33 Messina v. E.I. DuPont de Nemours & Co., Inc., 141 Fed. Appx. 57, 59 (3d Cir. 2005)(comparative evidence "sufficient . . . at the prima facie stage for a reasonable fact finder to conclude that [the defendant] treated [plaintiff] less favorably than others because of his race").

Aikens, 460 U.S. 711, 715 (1983)(quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)). Johnson v. California, 545 U.S. 162 (2005), explained that

> a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose."

545 U.S. at 169 (quoting Batson, 476 U.S. at 94)(footnote omitted). The application of any fixed formulation as to the elements of a prima facie case are inconsistent with Johnson and Aikens.

The particular rigid prima facie case rule established by the Eleventh Circuit--requiring (at least in discipline and dismissal cases) proof of a similarly situated comparator--is inconsistent with this Court's decision in United States v. Armstrong, 517 U.S. 456 (1996). In Armstrong this Court held that in the special circumstances of a claim of race-based selective prosecution, the defendant asserting that claim must as part of his prima facie case identify individuals of a different race who had engaged in the same conduct but not been prosecuted. That decision, however, was expressly limited to selective prosecution claims, which touch upon the unique discretion of the Executive Branch, and which unless carefully limited could chill law enforcement. 517 U.S. at 464-66. Armstrong made clear that this rule did not apply

to ordinary discrimination claims, such as a Batson claim, 517 U.S. at 467.

B. The "nearly identical" standard utilized by the Eleventh Circuits is also inconsistent with the decisions of this Court. This Court has repeatedly held that the standard for establishing a prima facie case is "not onerous." (See p. 9, supra). "Onerous" is precisely the term for the Eleventh Circuit's "nearly identical standard," a standard which no appellate litigant in that circuit has been able to satisfy.

Any distinction between "nearly identical" and "identical" in Eleventh Circuit cases exists only in theory. Years of experience demonstrate that the "nearly identical" standard is almost impossible to meet; in practice the "nearly identical" standard is indistinguishable from a requirement that the comparator actually be identical to the plaintiff. That is a requirement which this Court has expressly rejected.

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals is identical in all respects, and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El v. Dretke, 545 U.S. 231, 247 n. 6 (2005). "Inoperable" is precisely what the federal prohibitions against discrimination become when subject to the "nearly identical" rule.

Decisions in the Eleventh Circuit have emphatically rejected suggestions that a plaintiff could rely on evidence of more favorable treatment of a comparator who was merely "similar," or whose misconduct was of "comparable seriousness" to that of the plaintiff. See supra. But those are precisely the standards approved by this Court. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court emphasized that in evaluating Green's discrimination

> [e]specially relevant . . . would be evidence that white employees involved in acts against [the employer] of *comparable seriousness* to [the actions of the plaintiff] were nevertheless retained or rehired.

411 U.S. at 804 (emphasis added). McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), reiterated that standard.

> Of course, precise equivalence in culpability between employees is not the ultimate question . . . . [T]hat other "employees involved in acts [against the employer's rules] of comparable seriousness . . . were

> nevertheless retained . . . " is adequate
> . . . .

427 U.S. at 283 n. 11 (quoting McDonnell Douglas).

In Miller-El v. Dtreke, 545 U.S. 231 (2005), the standard applied by this Court was whether white and black prospective jurors were "similarly situated." 545 U.S. at 247 n. 6. The Court found probative comparisons of white and black jurors were not "nearly identical" but merely "much [a]like" or "comparable", 545 U.S. at 248, 250 n. 8, noting as to one pair of jurors that there were "strong similarities as well as some differences." 545 U.S. at 247. That evidence was relied on to support, not a mere prima facie case, but a determination by this Court that the trial court's failure to find intentional discrimination was "wrong to a clear and convincing degree."

This Court rejected the Eleventh Circuit's variation on this same theme in establishing a requirement that, to overcome qualified immunity, a plaintiff must demonstrate so closely similar a precedent for an offending official's illegal conduct that handcuffing a prisoner to a hitching post could not serve as precedent for handcuffing a prisoner to a fence post. Hope v. Pelzer, 536 U.S. 730, 743 (2002). That holding is but a variation on the theme of this case – the requirement of a degree of congruence so exacting that no plaintiff can satisfy it.

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,

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