No. 13-1546

In The Supreme Court of the United States

DANIEL B. GRAVES,

Petitioner,

v.

DEUTSCHE BANK SECURITIES, INC.,

Respondent.

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

AMICUS CURIAE BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

[1] Pursuant to S.Ct. R. 37.6, *Amicus* submits that no counsel for any party participated in any way in the authoring of this Brief. In addition, no other person or entity, other than *Amicus*, has made any monetary contribution to the preparation and/or submission of this Brief. Counsel of record for all parties received timely notice of Amicus' intent to file this brief. Pursuant to S.Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Proving intentional discrimination is an inherently difficult task. Because there is rarely "smoking gun" evidence of discrimination, employment cases often are decided based on inferences that may be drawn from circumstantial evidence and assessments of the credibility of witnesses. According to the summary judgment standards that have been repeatedly affirmed by the Court, weighing the evidence, drawing inferences from facts, and making credibility determinations are tasks better left to juries, rather than judges.

A number of analytical shortcuts that in effect operate as evidentiary presumptions are being used with increasing frequency by courts in the context of evaluating motions for summary judgment in employment cases. Because applying these shortcuts involves weighing the evidence and drawing inferences against the plaintiff, their use distorts the standards governing summary judgment and leads to the dismissal of employment claims that should be resolved by juries. This Court should affirm the standards governing summary judgment and clarify when, if ever, it is appropriate for courts to apply the analytical shortcuts identified in the petition in evaluating motions for summary judgment in employment cases.

ARGUMENT

I. ABSENT CLARIFICATION FROM THIS COURT, THE ANALYTICAL SHORTCUTS IDENTIFIED IN THE PETITION WILL CONTINUE TO UNDERMINE THE INTEGRITY OF THE SUMMARY JUDGMENT PROCESS

The summary judgment process, as circumscribed by the Court, "is properly regarded not as a disfavored procedural shortcut." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). However, as the petition discusses in detail, the use of a variety of analytical shortcuts – such as the "same actor" and "same group" inferences – has become a regular feature of the summary judgment process in some courts. These analytical shortcuts distort the summary judgment standards, thwart the purposes of the summary judgment process, and undermine the enforcement of our employment laws.

If the summary judgment rules as articulated by the Court are heeded, many claims that now are being dismissed would be resolved by a jury trial. "The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors" cannot be replicated through "a trial by affidavit." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring). "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Id*. (quoting *Poller v. Columbia Broadcasting*, 368 U.S. 464,

473 (1962)). For these reasons, and because of the constitutional values[2] that are implicated, it is well-settled that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Further, to ensure that summary judgment is only granted when no genuine factual dispute exists, "'the inferences to be drawn from the underlying facts contained in such materials . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus., Inc. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Applying the analytical shortcuts at issue in this case requires courts to disregard these settled principles, and this Court should grant *certiorari* to determine what role, if any, these additional shortcuts should have in the summary judgment process.

It is particularly important for plaintiffs in employment cases that the appropriate standards governing summary judgment are faithfully applied, because proving intentional discrimination is an inherently difficult task, as there is rarely direct evidence of

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[2] "The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the *Seventh Amendment* provision for jury trials in civil cases." *Adickes*, 398 U.S. at 176 (Black, J., concurring).

discrimination.[3] Over 30 years ago, the Court recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Post. Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As a result, resolving employment claims often hinges on drawing inferences from circumstantial evidence and evaluating the credibility of witnesses.[4] It is therefore unsurprising that when the accepted standards governing inferences and credibility assessments at summary judgment are

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[3] *See Williams v. URS Corp.*, 124 Fed. Appx. 97, 101 (3d Cir. 2005) ("[S]ome forms of discrimination in the work place have taken on a new sophistication and subtlety as employers have come to profess less tolerance for bias."); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) ("Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind."); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible.").

[4] *Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, 633 (7th Cir. 2009) ("Employment discrimination cases often center on parties' intent and credibility, which must go to a jury unless 'no rational factfinder could draw the contrary inference.' ") (quoting *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 894 (7th Cir. 1996)).

disregarded, plaintiffs in employment cases bear a disproportionate share of the negative consequences.

II. THE APPLICATION OF THE ANALYTICAL SHORTCUTS IDENTIFIED IN THE PETITION, AND OTHERS LIKE THEM, IS BECOMING THE RULE, RATHER THAN THE EXCEPTION IN DECIDING SUMMARY JUDGMENT MOTIONS IN EMPLOYMENT CASES

The analytical shortcuts highlighted in the petition undermine the effective enforcement of workplace rights by distorting the operation of the summary judgment standards. Courts are relying on the "same actor," "same group," "age difference," and "token employee" inferences, and others like them, with increasing regularity. A recent search of LexisNexis for the use of the "same actor" inference in the context of summary judgment in employment discrimination cases, within the past five years, returned 250 citing references combined from both district and appellate courts. An even narrower search, limited to those cases in which "same actor" appeared in the same sentence as "summary judgment" in employment discrimination cases, returned 68 results.[5]

[5] The search terms used were, respectively, "'employ! discriminat!' & 'summary judgment' & 'same actor'" and "'employ! discriminat!' & 'summary judgment' /s 'same actor'."

The use of analytical shortcuts at summary judgment in employment cases is not limited to the examples specified in the petition. In addition to those identified in the petition, there are others that are deployed in a similar fashion at summary judgment. A common one that leads to the unwarranted dismissal of employment claims involves so-called "stray remarks." "Stray remarks" are otherwise relevant statements from which discriminatory animus could be inferred, that courts nevertheless prevent plaintiffs from using to defeat summary judgment, unless the plaintiff can satisfy a series of special, elaborate tests. As with the shortcuts identified in the petition, applying the "stray remarks" criteria requires a court to weigh the plaintiff's evidence and draw a series of inferences against her, thereby resulting in otherwise admissible evidence of bias being disregarded. We highlight this additional example to demonstrate to the Court both how pervasive the use of analytical shortcuts currently is and the extent to which these shortcuts continue to persist, despite rulings from the Court that one would have expected to limit their influence.

In the Fifth Circuit, for example, if a plaintiff wishes to use a statement as direct evidence of age discrimination, the statement must be "1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). However, if the plaintiff

alleges that the statement is circumstantial evidence of discrimination, the statement "must demonstrate discriminatory animus; and be made by a person who has leverage over the decision maker, or is otherwise in a position to influence, the challenged decision." *Suggs v. Cent. Oil of Baton Rouge, LLC*, 2014 U.S. Dist. LEXIS 90825 at *25 (M.D. La. Jul. 3, 2014) (citing *Laxton v. Gap, Inc.*, 333 F.3d 572, 583 (5th Cir. 2003)).

As with the "same actor" inference, a LexisNexis search emphasizes how often "stray remarks" arises in the context of summary judgment in employment cases. Within the last five years alone, a broader search returned 747 citing references in federal district and appellate opinions, while a narrower search returned 122 references over the same time span.[6]

That "stray remarks" continues to be invoked regularly, in spite of this Court's decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006), supports our assertion that the proper role of analytical shortcuts at summary judgment must be clarified. In *Ash*, the plaintiffs argued that a supervisor's repeated use of the word "boy" to describe African-American employees who were subsequently denied promotions was evidence of bias. The jury found in favor of the

[6] As with the "same actor" search, the search terms used were "'employ! discriminat!' & 'summary judgment' & 'stray remarks'" and "'employ! discriminat!' & 'summary judgment' /s 'stray remarks'."

plaintiffs, and awarded them substantial compensatory and punitive damages. The defendant moved for, and the district court granted, judgment as a matter of law. The Eleventh Circuit Court of Appeals affirmed the district court's ruling, holding in part that the word "boy," unless it was modified by another word such as "black" or "white," could not, as a matter of law, constitute evidence of discrimination. 129 Fed. Appx. 529, 533 (11th Cir. 2005) (*per curiam*).

In a *per curiam* opinion rendered without argument, the Court reversed, holding that it was inappropriate for the court of appeals to infer that certain words are "always benign." *Ash*, 546 U.S. at 456. The Court reasoned that "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous." *Id*. These are precisely the type of factors that are best analyzed on a case-by-case basis by juries, rather than through the application of analytical shortcuts by judges at summary judgment.

Even if the comment at issue in *Ash* was not specifically labeled as a "stray remark," in light of the Court's reasoning, one would have expected lower courts to refrain from continuing to place artificial limits on what types of statements may be probative of bias. Unfortunately, lower courts continue to use the "stray remarks" doctrine to disregard as a matter of law statements from which a jury could infer

unlawful discrimination. For example, the Fifth Circuit Court of Appeals held in *Moss v. BMC Software, Inc.*, that "[i]n order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee." 610 F.3d 917, 929 (5th Cir. 2010) (quoting *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996)).

III. THE SHIFT TO SUMMARY JUDGMENT, THROUGH THE USE OF ANALYTICAL SHORTCUTS, UNDERMINES THE EFFECTIVE ENFORCEMENT OF EMPLOYMENT LAWS

A recent survey conducted under the auspices of the American Bar Association (ABA) found that 50% of plaintiffs' lawyers, 47% of defense lawyers, and 44% of mixed-practice lawyers believed that "discovery is used more to develop evidence for summary judgment than it is to understand the other parties' claims and defenses for trial."[7] District Judge D. Brock Hornby recognized as much when he asserted in a recent article that the term "summary judgment" is a "near oxymoron," and that "[f]or most cases judges, magistrate judges, and their law clerks collectively

[7] Am. Bar Ass'n Section of Litig. Member Survey on Civil Prac.: Full Rpt. at 71, tbl. 6.11 (Dec. 11, 2009).

spend more time resolving summary judgment disputes and the ancillary motions they spawn than they would handling the trials." D. Brock Hornby, *Summary Judgment Without Illusions*, 13 Green Bag 2d 273, 274 (2010).

While the increased role of summary judgment affects all litigants, plaintiffs in employment cases feel it more acutely than any other group. Research conducted by the Federal Judicial Center indicates that summary judgment is more likely both to be sought[8] and granted[9] against plaintiffs in employment discrimination cases than against plaintiffs in any other type of civil case. As discussed, this is no doubt because employees bear the difficult burden of proving intent through circumstantial evidence.[10] The increasingly prominent role of summary judgment, combined with the regular application of analytical shortcuts like those identified in the petition, has turned our federal court system into one in which

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[8] Joe Cecil and George Cort, The Federal Judicial Center, *Report on Summary Judgment Across Districts with Variations in Local Rules* at 12, tbl. 7 (Aug. 13, 2008), available at https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf (last accessed July 14, 2014).

[9] *Id*. at 15-16, tbls. 10-11.

[10] *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) ("The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the factfinder to disbelieve an employer's account of its own motive.").

"pretrial adjudication particularly disfavors employment discrimination plaintiffs."[11]

IV. THIS COURT SHOULD CLARIFY THE APPROPRIATE ROLE, IF ANY, THAT THESE ANALYTICAL SHORTCUTS SHOULD PLAY IN RESOLVING MOTIONS FOR SUMMARY JUDGMENT

In *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), the Court has provided specific guidance about the manner in which evidence of employment discrimination should be evaluated in the context of summary judgment. *Reeves* was an age discrimination case in which the defendant fired the 57-year-old plaintiff, allegedly because of irregularities and improprieties with the plaintiff's timesheets. In overturning a jury verdict in the plaintiff's favor, the Fifth Circuit Court of Appeals disregarded comments indicative of age-based bias made by the plaintiff's supervisor, and relied in part on the fact that a number of managers over the age of 50 were retained by the defendant. 197 F.3d 688, 694 (5th Cir. 1999).

In reversing the decision of the court of appeals, the Court re-affirmed the principle that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are

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[11] Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127 (2009).

jury functions, not those of a judge." *Reeves*, 530 U.S. at 152 (quoting *Liberty Lobby*, 477 U.S. at 255). Because the court of appeals "disregarded critical evidence favorable to petitioner" and "failed to draw all reasonable inferences in favor of petitioner," it "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id*. at 152-53.

Applying the analytical shortcuts identified in the petition requires doing precisely what the Court in *Reeves* admonished district courts to avoid at summary judgment: weighing the evidence, drawing an inference or inferences against the plaintiff, and disregarding the plaintiff's conflicting evidence. As this Court recently held in a *per curiam* reversal, doing so "reflects a clear misapprehension of summary judgment standards in light of [Supreme Court] precedents," *Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014), and demonstrates a failure "to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id*. Detailed guidance, like that provided in *Reeves* and *Tolan*, is necessary to clarify whether and to what extent the application of these shortcuts is compatible with the summary judgment standards.

Indeed in other cases, the Court has already addressed the reasoning underlying a number of these shortcuts and indicated that they should not play a meaningful role in determining whether unlawful discrimination has occurred. However, as in the case of "stray remarks," discussed above, the fact

that they continue to be used by courts in evaluating employment discrimination claims indicates that this Court should provide more detailed guidance about when, if ever, they may be applied.

For example, the Court has held, in the context of race and gender discrimination, that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). This reasoning should also foreclose the use of the "same group" inference in other contexts. If it is inappropriate for a court to presume that members of the same ethnicity or gender cannot discriminate against other people from the same group, there is no compelling reason to presume that a worker over the age of 40 cannot possibly discriminate against another worker over 40. Yet, courts continue to apply this inference.

Similarly, the Court has also held that the fact that an employer maintains a workforce containing a "disproportionately high level of minority employees" is one fact that may be considered in deciding whether an individual employee has been unlawfully discriminated against, but that "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction*

Corp. v. Waters, 438 U.S. 567, 579-80 (1978).[12] One would expect this reasoning to preclude the use of the "token employee exception" in the age discrimination context as well, but this exception also persists.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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[12] This reasoning was re-affirmed by the Court in *Conn. v. Teal*, 457 U.S. 440, 454 (1982).