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MOPPING UP THE MESS: A CALL TO ADOPT THE SEVENTH CIRCUIT'S STANDARD FOR ASSESSING COMPARATOR EVIDENCE IN TITLE VII DISCRIMINATION CLAIMS

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In McDonnell Douglas Corp. v. Green*, the U.S. Supreme Court developed a framework to assist courts in assessing individual disparate treatment claims based on circumstantial evidence. Under that test, plaintiffs alleging discrimination under Title VII must first show a prima facie case of discrimination. Since* McDonnell Douglas*, courts have modified the test by requiring plaintiffs to demonstrate that they were treated less favorably than a similarly situated comparator employee who is outside the plaintiff's protected class. Courts disagree, however, on what it means for employees to be similarly situated. Some courts strictly interpret the similarly situated requirement; others caution against an overly mechanical approach and employ a flexible standard instead. As a result, a plaintiff could successfully plead a prima facie case of discrimination in one federal circuit but fail in another. To resolve this disparity, this Note proposes that the U.S. Supreme Court adopt the Seventh Circuit's standard for comparator evidence due to its consistency with the Court's precedent, its cohesion with the purposes underlying Title VII, and its practical benefits for plaintiffs alleging a prima facie case of employment discrimination.*

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I. INTRODUCTION

Title VII of the Civil Rights Act prohibits employers from discriminating against their employees or job applicants based on "race, color, religion, sex, or national origin."[1] Before Title VII was enacted, many states allowed companies to lawfully discriminate against employees based on these traits,[2] so in the early days of Title VII litigation, plaintiffs could often use direct evidence to prove their allegations of discrimination.[3] However, as employers began to eliminate discriminatory policies, direct evidence of discrimination became less available.[4] As a result, plaintiffs began to rely on circumstantial evidence, or evidence that supports the inference of discrimination, rather than direct proof of discrimination.[5] In *McDonnell Douglas v. Green*,[6] the U.S. Supreme Court provided a three-part test to assist courts in evaluating claims of discrimination based on circumstantial evidence.[7] First, the plaintiff must show a prima facie case of

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[1] 42 U.S.C. § 2000e-2(a)(1)–(2) (2018).

[2] *See* Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SHRM (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx ("[B]efore Title VII, classified ads often spelled out which genders and races could apply for particular jobs.").

[3] *See* Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII*, 87 CALIF L. REV. 983, 997–98 (1999) ("In practice, while cases in the late '60s and early '70s often involved either facially discriminatory policies or otherwise 'smoking gun' evidence, these types of direct evidence became more scarce as employers became savvy with respect to Title VII.").

[4] *Id.* at 985 ("Changes in the nature of discrimination in the workforce since the enactment of the Civil Rights Act in 1964 . . . have made direct evidence of intentional discrimination hard to produce.").

[5] *Id.* at 1005 ("[M]ost plaintiffs seek to prove disparate treatment discrimination through circumstantial evidence and inferences.").

[6] 411 U.S. 792 (1973).

[7] Green, *supra* note 3, at 1014–15 (noting that the *McDonnell Douglas* test was intended "to aid parties and courts in litigating these less obvious claims of disparate treatment in the workplace"). While employment discrimination is this Note's sole focus, the *McDonnell Douglas* test covers nearly every aspect of anti-discrimination law. *See* Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 968 (2019) (stating that "[t]he *McDonnell Douglas* paradigm is ubiquitous in modern anti-discrimination law," as lower courts predominantly use the three-part test to evaluate "housing discrimination, public accommodations discrimination, discrimination in government programs, and even Equal Protection claims").

discrimination.[8] If the plaintiff is successful, the employer must then provide a "legitimate, nondiscriminatory reason" for the adverse employment outcome.[9] If the employer does so, then the plaintiff may respond by showing that the employer's proffered reason is pretext for discrimination by the employer.[10]

In *McDonnell Douglas*, the Court acknowledged that lower courts might need to adjust the requirements of a prima facie case since the facts of each employment discrimination case "will vary."[11] In response, lower courts have often required plaintiffs to establish that a "similarly situated" employee outside the plaintiff's protected class was "treated more favorably."[12] However, circuit courts are widely split on what constitutes a "similarly situated" comparator employee. Standards vary from "nearly identical"[13] to "flexible[and] common-sense"[14] to "similarly situated in all material respects."[15] Indeed, the standard for evaluating comparator evidence is perhaps best explained by the Eleventh Circuit's recent and eloquent summary: "It's a mess."[16]

In *Lewis v. City of Union City*, the Eleventh Circuit attempted "to clean up" the mess by developing a new test for evaluating comparator evidence presented during the plaintiff's initial burden of proof under the *McDonnell Douglas* test: whether the plaintiff and the proffered comparators are "similarly situated in all material respects."[17] In doing so, the court explicitly rejected both

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[8] *McDonnell Douglas*, 411 U.S. at 802 ("The complainant in a Title VII trial must carry the initial burden . . . of establishing a prima facie case of racial discrimination.").

[9] *Id.*

[10] *Id.* at 804 (stating that employers' stated rationales cannot be "pretext for the sort of discrimination prohibited by" Title VII). See *infra* Part II for a more extensive discussion of the *McDonnell Douglas* analysis.

[11] *Id.* at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.").

[12] Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1123 (9th Cir. 2000).

[13] Okoye v. Univ. of Tex. Hous. Health Sci. Ctr., 245 F.3d 507, 514 (5th Cir. 2001) ("[T]o establish disparate treatment a plaintiff must show that the employer 'gave preferential treatment to . . . [another] employee under "nearly identical" circumstances' . . . ." (second alteration in original) (quoting Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991))).

[14] Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (quoting Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007)).

[15] Lewis v. City of Union City, 918 F.3d 1213, 1218 (11th Cir. 2019).

[16] *Id.*

[17] *Id.* at 1218.

its own "nearly identical" standard and the Seventh Circuit's standard,[18] which finds a comparator sufficient as long as the distinctions between the plaintiff and the proposed comparators are not "so significant that they render the comparison effectively useless."[19] The Eleventh Circuit correctly recognized the need for a clear, uniform standard for comparator evidence; unfortunately, it chose the wrong one.

In Part II, this Note further discusses the *McDonnell Douglas* burden-shifting analysis of Title VII employment discrimination claims and the "similarly situated" requirement of a prima facie case. In Part III, this Note reviews the Seventh and Eleventh Circuit standards for evaluating comparator evidence at the first step of the *McDonnell Douglas* analysis. Finally, in Part IV, this Note argues that the Seventh Circuit standard is a better approach to comparator evidence because it is a more practical and consistent application of U.S. Supreme Court precedent regarding how courts should treat employment discrimination claims at the summary judgment stage.

II. THE EVOLUTION OF THE "SIMILARLY SITUATED" REQUIREMENT

A. INDIVIDUAL DISPARATE TREATMENT CLAIMS AND THE *MCDONNELL DOUGLAS* PARADIGM

Congress enacted Title VII to prohibit employers from discriminating against their employees on the basis of "race, color, religion, or national origin."[20] The law's purpose, according to the U.S. Supreme Court, is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[21] Accordingly, under Title VII, it is unlawful for an employer:

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[18] *Id.*

[19] Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)).

[20] H.R. REP. NO. 88-914, at 10 (1963).

[21] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288 (1987) (alteration in original) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

> (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.[22]

Employees can bring a Title VII discrimination claim under two different theories: disparate treatment or disparate impact.[23] These two categories of claims each impose different burdens on plaintiffs. In disparate impact (or non-intentional discrimination)[24] employment claims, plaintiffs must show that a facially neutral policy adversely affects a statutorily protected group of which the plaintiff is a member.[25] On the other hand, a plaintiff alleging disparate treatment "must show that the employer engaged in intentional discrimination."[26] Plaintiffs can prove intentional

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[22] 42 U.S.C. § 2000e-2(a)(1)–(2) (2018).

[23] *See* Amanda Berg, Note, *"An Allemande Worthy of the 16th Century:" A Call to Abolish the* McDonnell Douglas *Framework and Adopt Judge Wood's Proposed Flexible Standard*, 33 REV. LITIG. 639, 643 (2014) ("Under Title VII, a plaintiff may bring an employment discrimination claim on the basis of either disparate treatment or disparate impact."); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 833 (2002) ("Employment discrimination claims fall into two categories—disparate treatment . . . and disparate impact . . . .").

[24] Lidge, *supra* note 23, at 833 (describing disparate impact claims as "non-intentional discrimination" claims because "[t]he plaintiff does not have to prove that the employer intended to discriminate").

[25] Berg, *supra* note 23, at 643 ("A claim of discrimination based on disparate impact is established when a plaintiff establishes that facially neutral policies or practices disproportionately affect the members of the plaintiffs statutorily protected group.").

[26] Lidge, *supra* note 23, at 834. Many Title VII employment discrimination cases involve disparate treatment. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

discrimination "by producing direct evidence or circumstantial (indirect) evidence."[27] However, employment discrimination plaintiffs rarely can show intentional discrimination with direct evidence;[28] thus, the majority of plaintiffs rely on circumstantial evidence to prove intent.[29]

Recognizing this problem, the U.S. Supreme Court, in *McDonnell Douglas Corp. v. Green*,[30] developed a three-part burden-shifting analysis that plaintiffs could use to bring employment discrimination claims without direct evidence of discriminatory intent.[31] The first part of the analysis requires that plaintiffs plead a prima facie case of racial discrimination

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[32]

If the plaintiff establishes this prima facie case, the burden then shifts to the employer to produce a "legitimate, nondiscriminatory

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[27] Lidge, *supra* note 23, at 835.

[28] Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987) ("[E]mployment discrimination plaintiffs . . . rarely are fortunate enough to have access to direct evidence of intentional discrimination."); *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

[29] Lidge, *supra* note 23, at 835 (noting that the lack of direct evidence of intentional discrimination leads plaintiffs to "use circumstantial evidence to establish the employer's discriminatory intent").

[30] 411 U.S. 792 (1973). In *McDonnell Douglas*, the plaintiff was laid off and was later denied reemployment after participating in a protest against alleged racial discrimination by McDonnell Douglas Corporation. *Id.* at 794–96. Plaintiff claimed that McDonnell Douglas violated the Civil Rights Act by "refus[ing] to rehire him because of his race and persistent involvement in the civil rights movement." *Id.* at 796. The district court dismissed plaintiff's claim, but the Eighth Circuit reversed, and the U.S. Supreme Court affirmed, allowing the plaintiff to bring his claim of discrimination. *Id.* at 797–98, 807.

[31] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))).

[32] *McDonnell Douglas*, 411 U.S. at 802.

reason for the employee's rejection."[33] If the employer can articulate such a reason, the burden shifts back to the plaintiff "to demonstrate that [the employer's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application."[34]

B. THE DEVELOPMENT OF COMPARATOR EVIDENCE

While *McDonnell Douglas* contains language specific to claims of racial discrimination in the rejection of a job application,[35] the Court acknowledged that "facts necessarily will vary in Title VII" discrimination cases and that the prima facie requirements could be altered based on different situations.[36] This Note focuses on the test courts have used for cases involving alleged discrimination based on discharge.[37] Both the U.S. Supreme Court and lower courts have used comparators to evaluate claims of discrimination arising from discharge; this involves using evidence that a plaintiff was treated differently from a similarly situated employee outside the plaintiff's claimed protected group to infer a prima facie case of discrimination.[38] For many courts, comparator evidence has

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[33] *Id.*

[34] *Id.* at 807.

[35] *Id.* at 802 (articulating the burden-shifting test in the context of a claim concerning an "employee's rejection").

[36] *Id.* at 802 n.13 ("[T]he specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.").

[37] These are the most common employment discrimination claims under Title VII. *See Top 10 Employment Discrimination Claims*, INS. J. (Feb. 4, 2015) https://www.insurancejournal.com/news/national/2015/02/04/356405.htm ("Discharge continues to be the most common issue for all bases under Title VII . . . .").

[38] *See, e.g.*, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006) (per curiam) ("[Comparator] evidence may suffice, at least in some circumstances, to show pretext."); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996) (noting that "the fact that a replacement [employee] is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class"); Lewis v. City of Union City, 918 F.3d 1213, 1220–21 (11th Cir. 2019) ("[P]laintiff bears the initial burden of establishing a *prima facie* case of discrimination by showing . . . that her employer treated 'similarly situated' employees outside her class more favorably."); Morris v. Town of Indep., 827 F.3d 396, 400 (5th Cir. 2016) ("[A]n employee must demonstrate that she '. . . was treated less favorably than other similarly situated employees outside the protected group.'" (quoting Willis v. Cleco Corp., 749 F.3d 314, 320 (5th Cir. 2014))); Coleman v. Donahoe, 667 F.3d 835, 845 (7th Cir. 2012) ("[A] plaintiff must offer evidence that: '. . . another similarly situated individual who was not in the protected

become a threshold requirement for discrimination claims and is fundamental to the definition of discrimination.[39]

III. THE CIRCUIT SPLIT ON THE STANDARD FOR COMPARATOR EVIDENCE

Courts are split on just how similarly situated a comparator must be to establish a prima facie case of discrimination. Because comparator evidence has become crucial to proving a discrimination claim in many circuits, how a court defines a "comparator" and how similar it requires that comparator to be can control the outcome of a plaintiff's case. The differences between the Seventh and Eleventh Circuits' standards for comparator evidence illuminate the pressing need for review by the U.S. Supreme Court.

A. THE SEVENTH CIRCUIT'S "NOT USELESS" STANDARD

In *Coleman v. Donahoe*,[40] Denise Coleman, a black mail-processing clerk was fired from her job at the United States Postal Service (USPS) for expressing homicidal thoughts about her supervisor, William Berry, to a psychiatrist.[41] In 2005, Coleman sought psychiatric help for depression, anxiety, and insomnia.[42]

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class was treated more favorably than the plaintiff.'" (quoting Burks v. Wis. Dep't of Transp., 464 F.3d 744, 750–51 (7th Cir. 2006))).

[39] *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 (1999) (Thomas, J., dissenting) ("[A] finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute."). Some commentators warn that the pervasive requirement of comparator evidence in discrimination claims is an overly simplistic and insufficient method for evaluating discrimination claims, while others find comparator evidence itself to be an effective and appropriate metric for discrimination claims. *Compare* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 751, 772 (2011) (arguing that "[t]he judicial demand for comparators functions largely as a barrier to discrimination claims" and that courts should reconsider the use of comparators in their current form), *with* Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 197 (2009) (arguing that a more logical approach to discrimination claims is to allow juries to make an inference of discrimination if the plaintiff identifies a similarly situated comparator).

[40] 667 F.3d 835 (7th Cir. 2012).

[41] *Id.* at 840–41.

[42] *Id.* at 843.

While undergoing treatment, Coleman displayed extreme paranoia about harassment by her supervisor and raised homicidal thoughts about Berry.[43] Coleman was discharged less than a month later, and her psychiatrist described her "as a 'model patient' in 'stable' condition."[44] When Coleman was discharged, however, her psychiatrist informed Berry about Coleman's threats to his life.[45] Berry and two other managers immediately decided to put Coleman on "'emergency off-duty status' without pay" and started termination procedures.[46] After an internal investigation by USPS, Coleman was fired for "unacceptable conduct[] as evidenced by [her] expressed homicidal ideations toward a postal manager."[47] After Coleman was reinstated two years later following arbitration with USPS, she "filed . . . suit alleging that the Postal Service had discriminated against her on the basis of race, sex, and disability by placing her on off-duty status and terminating her."[48]

The district court granted USPS's motion for summary judgment, holding that "Coleman had failed to establish a prima facie case under the *McDonnell Douglas* 'indirect' method of proof because she had not identified any similarly situated employees outside of her protected classes who were treated more favorably."[49] On appeal to the Seventh Circuit, Coleman claimed that she had proffered two comparators who were similarly situated—Frank Arient and Robert Pelletier—"two white male employees . . . [who had] 'held a knife to the throat of a black male co-worker' 'while holding down his legs.'"[50] These employees' supervisors investigated the incident, concluded that the event was merely "horseplay," and suspended the two men for fourteen days without pay.[51] The district court concluded that while the incidents were somewhat similar, Arient and Pelletier were not

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[43] *Id.*

[44] *Id.*

[45] *Id.* (noting that Coleman's psychiatrist clarified to Mr. Berry that she would not discuss Coleman but did "consider[] [it] to be [her] responsibility . . . as the patient's physician to warn him that [her] patient had been expressing threats to his life").

[46] *Id.*

[47] *Id.* at 844.

[48] *Id.*

[49] *Id.* at 844–45.

[50] *Id.* at 847.

[51] *Id.*

sufficient comparators because they both had different jobs and answered to a different supervisor than Coleman.[52]

The Seventh Circuit reversed the decision, finding that the comparators were "similar enough to permit a reasonable inference of discrimination."[53] The court held that the similarly situated question is a "flexible, common-sense" one;[54] while the employees need to be similar and comparable "in all material respects," comparators do not need to be "identical in every conceivable way."[55] Thus, the court stated, "So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied."[56]

The court recognized that the similarly situated standard should not be a "mechanical" or "magic formula."[57] Accordingly, the court held that a plaintiff must at least show that the comparators "(1) 'dealt with the same supervisor,' (2) 'were subject to the same standards,' and (3) 'engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.'"[58]

Applying this standard, the court found that Coleman's comparators were sufficiently similarly situated.[59] While Coleman and her comparators did not share a direct supervisor, they did share "a common decision-maker."[60] The court found it immaterial that Coleman and her comparators had different job titles; rather, the relevant question was whether they were subject to different employment policies, which was not the case.[61] Lastly, the court held that a jury could conclude that the comparators' conduct of holding a knife to another employee's throat was just as serious as,

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[52] *Id.*

[53] *Id.* at 852.

[54] *Id.* at 846 (quoting Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007)).

[55] *Id.* (quoting Patterson v. Ind. Newspapers, Inc., 589 F.3d 357, 365–66 (7th Cir. 2009)).

[56] *Id.* (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)).

[57] *Id.* at 847 (quoting *Humphries*, 474 F.3d at 405).

[58] *Id.* (quoting Gates v. Caterpillar, Inc., 513 F.3d 680, 690 (7th Cir. 2008)).

[59] *Id.* at 852 ("Coleman's proposed comparators . . . are similar enough to permit a reasonable inference of discrimination, and that is all *McDonnell Douglas* requires.").

[60] *Id.* at 848.

[61] *See id.* at 849 ("Their different titles and duties do not defeat, as a matter of law, the probative value of their different disciplinary treatment.").

if not more than, Coleman's indirect threat to Berry.[62] Because Coleman's proposed comparators dealt with the same supervisor, were subject to the same employment policies, and engaged in similar threatening conduct, they were "similar enough to permit a reasonable inference of discrimination, and that is all *McDonnell Douglas* requires."[63]

B. THE ELEVENTH CIRCUIT'S "MATERIAL RESPECTS" STANDARD

The Eleventh Circuit took *Lewis v. City of Union City* en banc "to clarify once and for all the proper standard for comparator evidence in intentional-discrimination cases."[64] After explicitly rejecting the standard articulated in *Donahoe*, the Eleventh Circuit set forth its "similarly situated in all material respects" standard for assessing comparator evidence.[65] Jacqueline Lewis was a black female detective with the Union City Police Department.[66] In 2009, "[s]he suffered a heart attack . . . but was cleared to return to work without any restrictions."[67] The next year, however, the police department adopted a new policy requiring all officers to carry tasers; and "[a]s part of the training associated with the new policy, officers had to receive a five-second Taser shock."[68] Lewis's doctor recommended that Lewis, because of her heart attack, be exempted from the taser shock and that pepper spray should not be used "on or near" her.[69] Consequently, then-Police Chief Charles Odom "concluded that the restrictions described by Lewis's doctor prevented her from performing the essential duties of her job," and he placed Lewis on unpaid administrative leave "until such time [as her doctor] release[d]

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[62] *Id.* at 851 ("By directly threatening another employee with a knife in the workplace, Arient and Pelletier engaged in conduct that appears, at least for purposes of summary judgment, at least as serious as Coleman's indirect 'threat' against Berry . . . ."). The court ultimately reversed the district court's grant of summary judgment to USPS and "remanded for further proceedings." *Id.* at 862.

[63] *Id.* at 852.

[64] 918 F.3d 1213, 1218 (11th Cir. 2019).

[65] *Id.* at 1224.

[66] *Id.* at 1218.

[67] *Id.*

[68] *Id.* Lewis, along with other officers, also had to complete a "separate pepper-spray training." *Id.* at 1219.

[69] *Id.*

[her] to return to full and active duty."[70] Lewis was directed to complete paperwork about her absence and to use her accrued paid leave.[71] When the paid leave ran out, Lewis had not completed the necessary paperwork and was terminated pursuant to a personnel policy stating that "[a]ny unapproved leave of absence [is] cause for dismissal."[72]

Lewis alleged race and gender discrimination in violation of Title VII in an action against Union City.[73] She identified two white police officers as comparators who, she alleged, were treated more favorably: Cliff McClure, a white male sergeant who failed part of the officer physical-fitness test but was given ninety days of unpaid leave to pass; and Walker Heard, a white male officer who also partially failed the physical-fitness test but "was also placed on unpaid administrative leave for [ninety] days" and was later offered a position as a dispatcher.[74] The district court granted the City's motion for summary judgment, holding that the two comparators failed to satisfy the "nearly identical" or "same or similar" standard.[75]

The Eleventh Circuit, recognizing its inconsistent caselaw on whether comparators had to be "nearly identical" to or the "same or similar" as the plaintiff, "took [the] case en banc to clarify the proper standard for comparator evidence in intentional-discrimination cases."[76] Lewis urged the court to adopt the Seventh Circuit's standard, which requires plaintiffs to show that their differences with the comparators are not "so significant that they render the comparison effectively useless."[77] On the other

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[70] *Id.* (alterations in original).

[71] *Id.*

[72] *Id.* (alterations in original).

[73] *Id.* Lewis also brought claims under the Equal Protection Clause and 42 U.S.C. § 1981. *Id.*

[74] *Id.*

[75] *Id.* The district court stated that "Eleventh Circuit caselaw provides that a plaintiff seeking to establish a *prima facie* case of discrimination must show that she and the comparator are 'nearly identical'" and that "[a] reasonable jury could not . . . conclude that Plaintiff is 'similarly situated in all relevant respects.'" Lewis v. City of Union City, No. 1:12-CV-4038-RWS-JFK, 2014 WL 12796415, at *16–17 (N.D. Ga. Nov. 26, 2014) (first quoting Burke-Fowler v. Orange Cty., 447 F.3d 1319, 1323 (11th Cir. 2006); and then quoting Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998)).

[76] *Lewis*, 918 F.3d at 1220.

[77] *Id.* at 1224 (quoting Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012)).

hand, the City argued that the court should retain its "nearly-identical standard."[78]

The en banc court "conclude[d] that neither party's proposal quite fit[] the bill."[79] Instead, the court held that a plaintiff "must show that she and her comparators are 'similarly situated in all material respects.'"[80] According to the court, this standard most fairly executes federal protections against discrimination, balances employee needs with deference to employer discretion, and encourages judicial efficiency through sensible application of summary judgment.[81] While acknowledging that the precision of the material respects standard "will have to be worked out on a case-by-case basis, in the context of individual circumstances,"[82] the court identified some similarities that typically will trigger a valid comparison:

> Ordinarily, for instance, a similarly situated comparator—
> - will have engaged in the same basic conduct (or misconduct) as the plaintiff;
> - will have been subject to the same employment policy, guideline, or rule as the plaintiff;
> - will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff; and
> - will share the plaintiff's employment or disciplinary history.[83]

Applying its new standard, the Eleventh Circuit found that Lewis's proffered comparators were not similarly situated in all material respects.[84] The court reasoned that Lewis and her comparators "were placed on leave years apart and pursuant to altogether different personnel policies and . . . for altogether

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1224–25.

[82] *Id.* at 1227.

[83] *Id.* at 1227–28 (footnote omitted) (citations omitted).

[84] *Id.* at 1230 (noting that Lewis's "broad-brush summary" of her and her comparators' situations "glosse[d] over critical differences").

different conditions."[85] For example, while the two comparator officers were placed on leave pursuant to a department physical fitness examination policy, Lewis was instead placed on leave under the department's personnel policy.[86] Moreover, the court noted that the comparator officers' physical fitness failures were far different from Lewis's heart condition; while the officers' balance and agility problems "were at least theoretically . . . remediable," Lewis suffered from a heart condition that was permanent and, therefore, might never have been able to take part in the required training.[87] Because Lewis's proposed comparators were put on leave for different circumstances and were not subject to the same personnel policies, the court found that they were not similar "in all material respects" and thus were not sufficient comparators for a prima facie case under *McDonnell Douglas*.[88]

C. DIFFERENT APPLICATIONS OF "MATERIAL RESPECTS"

At first blush, it may seem that the Seventh and Eleventh Circuits' standards are similar. Both courts mention "material respects" and list similar factors for considering comparator evidence, such as being subject to the same employment standards, reporting to the same supervisor, and engaging in similar misconduct.[89] However, the policies underlying each court's reasoning are considerably different. For example, the Seventh Circuit held that the purpose of the similarly situated prong is "to eliminate other possible explanatory variables" so that the court can isolate whether the employer had discriminatory animus.[90] Accordingly, a comparator is sufficiently similar as long as the differences between the plaintiff and comparator are not substantial enough to make the comparison pointless.[91] The court

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1231.

[89] *Compare* Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) ("Similarly situated employees 'must be "directly comparable" to the plaintiff "in all material respects"' . . . ." (quoting Patterson v. Ind. Newspapers, Inc., 589 F.3d 357, 365–66 (7th Cir. 2009))), *with Lewis*, 918 F.3d at 1224 ("[A] plaintiff must show that she and her comparators are 'similarly situated in all material respects'").

[90] *Coleman*, 667 F.3d at 846.

[91] *Id.* (citing Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)).

argued that "[t]his flexible standard" is more consistent with the U.S. Supreme Court's view of Title VII,[92] since the Court neither planned to impose a burdensome standard on plaintiffs alleging discrimination[93] nor intended to impose "rigid, mechanized, or ritualistic" requirements for a prima facie case of alleged discrimination.[94] Thus, the Seventh Circuit concluded that the question of whether a comparator is sufficiently similar should be reserved for the fact-finder and that summary judgment is only permissible when "no reasonable fact-finder could find that plaintiffs have met their burden on the issue."[95]

By contrast, the Eleventh Circuit held that its "material respects" standard more closely adheres to the ordinary meaning of discrimination: "the act of 'treating *like* cases differently.'"[96] Moreover, the court held that its standard realistically reflects the two aims that the U.S. Supreme Court intended to achieve with the prima facie case requirement: "(1) to eliminate 'the most common nondiscriminatory reasons' for an employer's conduct, and (2) to provide a sound basis for an 'inference of unlawful discrimination.'"[97] The court added that its standard "leaves employers the necessary breathing space to make appropriate business judgments."[98] Finally, the court reasoned that its standard promotes judicial efficiency by only granting summary judgment "in *appropriate* cases—namely, where the comparators are simply too dissimilar to permit a valid inference that invidious discrimination is afoot."[99]

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[92] *See, e.g.*, *supra* note 21 and accompanying text.

[93] *Coleman*, 667 F.3d at 846 ("To offer a prima facie case of discrimination under the [*McDonnell Douglas*] indirect method, the plaintiff's burden is 'not onerous.'" (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))).

[94] *Id.* (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[95] *Id.* at 846–47 (quoting Srail v. Vill. of Lisle, 588 F.3d 940, 945 (7th Cir. 2009)).

[96] Lewis v. City of Union City, 918 F.3d 1213, 1225 (11th Cir. 2019) (quoting NLRB v. Collier, 553 F.2d 425, 428 (5th Cir. 1977)). When "adopting a comparator standard," the court expressed its intent to avoid "stray[ing] too far from paradigmatic notions of discrimination, lest [the court] sanction a regime in which treating *different* things differently violates Title VII, which clearly it does not." *Id.*

[97] *Id.* (quoting *Burdine*, 450 U.S. at 253–54).

[98] *Id.* at 1228. The court noted that employers may "accord different treatment to employees who are differently situated in 'material respects'—*e.g.*, who engaged in different conduct, who were subject to different policies, or who have different work histories." *Id.*

[99] *Id.* at 1229.

These differences are more than mere semantics. While the two circuits may both use the word "material" and investigate the same facts, they fundamentally disagree on the role that comparator evidence plays in a prima facie case of employment discrimination. For example, imagine two identical plaintiffs, who both worked in sales for the same large company, bring a charge of employment discrimination in the Seventh and Eleventh Circuits. Both plaintiffs are women who belong to a protected minority class, and both were allegedly fired due to insufficient performance. However, the plaintiffs claim that they were fired based on intentional discrimination from their employer. To prove their prima facie cases, they each point to a white, male coworker who works for the same employer. Each comparator had similar performance reviews and sales records, and each comparator was subject to the same personnel policies as the plaintiffs. However, the plaintiffs and their respective comparators worked in different roles within different sales groups at the company, and they each answered to a different supervisor.

In this hypothetical, both the Seventh and the Eleventh Circuits would ask whether the comparator was materially similar to the plaintiff, and both would evaluate the same facts. However, the Seventh Circuit's "not-useless" standard[100] asks whether the differences are so substantial that it makes the comparison pointless.[101] Accordingly, the court could find that while the two employees were subject to different supervisors, the fact that they had identical roles and performance reviews is enough to conclude that the two were "similar enough to permit a reasonable inference of discrimination."[102] However, the Eleventh Circuit's "material respects" standard asks whether the plaintiff and comparator are "similarly situated in *all* material respects" and prioritizes not only employee protection but also the employer's "rational business judgments" as well as judicial efficiency.[103] Thus, the Eleventh Circuit is more likely to find that, since the plaintiff and comparator worked in different roles under different supervisors,

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[100] *Id.* at 1224 (describing the plaintiff's preferred Seventh Circuit standard as the "not-useless standard").

[101] *See Coleman*, 667 F.3d at 846.

[102] *Id.* at 852.

[103] Lewis v. City of Union City, 918 F.3d 1213, 1224–25 (11th Cir. 2019) (emphasis added).

they are not sufficiently similar to make a prima facie case.[104] Thus, the standards are quite different and in practice can have significant consequences for plaintiffs depending on where a discrimination claim is filed.

IV. THE CASE FOR THE SEVENTH CIRCUIT'S STANDARD FOR COMPARATOR EVIDENCE

While both the Seventh and Eleventh Circuits address comparator evidence using a material respects standard, the courts differ in how they apply that standard, and they disagree on the policies underlying the requirement of comparator evidence at the prima facie stage of the *McDonnell Douglas* analysis. As illustrated by the above hypothetical, plaintiffs claiming employment discrimination in the Seventh and Eleventh Circuits will be subject to far different standards depending on which court hears their case. To remedy this issue, the U.S. Supreme Court should adopt the Seventh Circuit's standard for comparator evidence. It is more consistent with the Court's precedent, and the burden it imposes on plaintiffs in these cases is more logical, given that plaintiffs are required to show only a prima facie case of discrimination.

A. CONSISTENCY WITH U.S. SUPREME COURT PRECEDENT

The Seventh Circuit's not-useless standard is more consistent with the U.S. Supreme Court's analysis of the similarly situated requirement and with the policy concerns underlying it. This consistency is evident from the Court's holding in *Young v. United Parcel Service, Inc.*[105] In that case, Young, a UPS driver, became pregnant and was unable to lift more than twenty pounds, which violated a UPS policy requiring employees to be able to lift up to seventy pounds.[106] Young was told that she could not work until

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[104] For a more detailed discussion of how the Eleventh Circuit applied its standard in *Lewis*, see *supra* notes 84–88 and accompanying text.

[105] 575 U.S. 206 (2015).

[106] *Id.* at 211. *Young* involved the Pregnancy Discrimination Act, which forbids disparate treatment of pregnant workers that are similar to nonpregnant workers "in their ability or inability to work." 42 U.S.C. § 2000e(k) (2018); *see also Young*, 575 U.S. at 210 (summarizing the Pregnancy Discrimination Act). However, the Court applied the

she was able to lift the required weight.[107] Young sued UPS, alleging discrimination on the basis of her pregnancy.[108] She proffered several comparators in her allegation, including non-pregnant employees who could not drive because they lacked the qualifications, non-pregnant employees whose disabilities rendered them physically unfit to drive, and non-pregnant employees who could not lift seventy pounds at all.[109] The Court held that "there [was] a genuine dispute as to whether UPS provided more favorable treatment to . . . some employees whose situation cannot reasonably be distinguished from Young's," and remanded the case to the district court to conduct the pretext inquiry under *McDonnell Douglas*.[110] Therefore, the Court found that Young and her alleged comparators were at least similar enough to proceed past the "similarly situated" inquiry of the prima facie stage.[111]

If one were to plug these same facts into the Seventh and Eleventh Circuits' standards for similarly situated employees, Young's claim likely would only survive in the Seventh Circuit. In *Lewis*, Lewis and her comparators were all placed on administrative leave "because they were not fit for duty[,] and . . . they could not return to duty until they were fit to do so."[112] Yet the Eleventh Circuit found that Lewis was not similar to her comparators in all material respects because they were placed on leave for different reasons and were subject to different policies.[113]

McDonnell Douglas analysis in the same manner as in Title VII cases. *See Young*, 575 U.S. at 212–13.

[107] *Young*, 575 U.S. at 211 ("UPS told Young she could not work while under a lifting restriction.").

[108] *Id.* (describing Young's "claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction").

[109] *Id.* at 215–17 (stating the conditions under which UPS would accommodate its workers with replacement "inside" jobs).

[110] *Id.* at 231.

[111] *Id.* at 230 (stating that Young could satisfy the prima facie showing under *McDonnell Douglas* because, "if the facts are as [she] says they are, [then] she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations").

[112] Lewis v. City of Union City, 918 F.3d 1213, 1257 (11th Cir. 2019) (Rosenbaum, J., concurring in part and dissenting in part).

[113] *Id.* at 1230 (majority opinion) ("Lewis and her comparators were placed on leave years apart and pursuant to altogether different personnel policies and, perhaps even more importantly, for altogether different conditions.").

Under the Eleventh Circuit's material respects standard, Young likely would not be sufficiently similarly situated to her comparators to pass the prima facie stage of *McDonnell Douglas*. In *Young*, the U.S. Supreme Court found that Young was sufficiently similarly situated to her alleged comparators for the prima facie stage even though they were placed on leave for different reasons.[114] However, the Eleventh Circuit held that Lewis's inability to receive a taser shock and participate in pepper spray training and her comparators' inability to pass a physical fitness test were "simply too dissimilar to permit a valid inference that invidious discrimination [was] afoot."[115]

If Lewis and her comparators—who worked in similar roles and who were all placed on leave for being physically unfit for duty under the same supervisor—were not similarly situated in all material respects,[116] then Young and her comparators—some of whom were placed on leave for completely different reasons than Young[117]—likely could not be "similarly situated in all material respects" under the Eleventh Circuit's standard.[118] Thus, in the Eleventh Circuit, Young's claim would likely not have passed the prima facie phase of *McDonnell Douglas*, demonstrating that the Eleventh Circuit's material respects standards may be a significant departure from the U.S. Supreme Court's approach to comparator evidence.

The Seventh Circuit's standard, however, is consistent with *Young*. In *Coleman*, the Seventh Circuit stated that its "flexible standard" precludes the imposition of an onerous burden on plaintiffs during the prima facie stage of an employment discrimination claim.[119] Instead, the court held that "summary judgment is appropriate only when 'no reasonable fact-finder could

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[114] *See supra* notes 109–111 and accompanying text. These comparators were given accommodations for noticeably different reasons than an inability to lift seventy pounds due to pregnancy, such as on- and off-the-job injuries, permanent disabilities, lost driver's licenses, lost Department of Transportation certificates, and failed medical exams. *See Lewis*, 918 F.3d at 1247, 1257 (Rosenbaum, J., concurring in part and dissenting in part) (citing *Young*, 575 U.S. at 214–218).

[115] *Lewis*, 918 F.3d at 1229 (majority opinion).

[116] *See id.* at 1256 (Rosenbaum, J., concurring in part and dissenting in part).

[117] *See supra* note 109 and accompanying text.

[118] *Lewis*, 918 F.3d at 1218.

[119] Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

find that plaintiffs have met their burden,'" requiring only that "the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless.'"[120] This standard, in contrast to the Eleventh Circuit's, is far more consistent with *Young*. Young's comparators received accommodations for considerably different circumstances and under different policies.[121] Even so, the Court found them sufficiently similar to move past the prima facie stage of the *McDonnell Douglas* analysis since "there [was] a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation [could not] reasonably be distinguished from Young's."[122] This analysis better reflects the Seventh Circuit's "flexible, common-sense" standard for comparator evidence at the prima facie stage than the Eleventh Circuit's standard.[123] Therefore, if given the opportunity, the U.S. Supreme Court should affirm the Seventh Circuit's approach as the appropriate standard for evaluating comparator evidence at the prima facie stage of the *McDonnell Douglas* analysis.

B. PRACTICAL BENEFITS OF THE SEVENTH CIRCUIT'S STANDARD

Apart from its consistency with U.S. Supreme Court precedent, the Seventh Circuit's standard is a reasonable and practical approach to evaluating comparator evidence at the prima facie stage of the *McDonnell Douglas* analysis. However, the Eleventh Circuit criticized the Seventh Circuit's standard as "too lax."[124] It argued that the Seventh Circuit "departs too dramatically from the essential sameness that is necessary to a preliminary determination that the plaintiff's employer has engaged in unlawful 'discrimination'" and "risks giving courts too much leeway to upset employers' valid business judgments."[125] Nonetheless, there are several policy reasons why the Court

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[120] *Id.* at 846–47 (first quoting Srail v. Vill. of Lisle, 588 F.3d 940, 945 (7th Cir. 2009); then quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)).

[121] *See supra* note 109 and accompanying text.

[122] Young v. United Parcel Serv., Inc., 575 U.S. 206, 231 (2015).

[123] *Coleman,* 667 F.3d at 841.

[124] Lewis v. City of Union City, 918 F.3d 1213, 1224 (11th Cir. 2019).

[125] *Id.* at 1225.

should adopt the Seventh Circuit's approach for assessing comparator evidence in discrimination cases.

1. Imposing Practical Burdens on Plaintiff-Employees. The Seventh Circuit standard is a far more practical burden to place on plaintiffs at the prima facie stage of the *McDonnell Douglas* analysis. The question of whether a comparator is similarly situated is usually reserved for the fact-finder; accordingly, summary judgment should only be granted when "no reasonable fact-finder could find that plaintiffs have met their burden on the issue."[126] Thus, at the prima facie stage, the standard for similarly situated comparators should be flexible, and comparators should only be found insufficient if, as the Seventh Circuit held, the differences between the comparator and the plaintiff are so evident that any comparison would be meaningless.[127]

2. Reserving Discretion for Employers' Business Decisions. The Seventh Circuit's standard does not afford courts too much leeway to upset employers' business decisions because the prima facie stage is only the first part of the *McDonnell Douglas* analysis. If a plaintiff adequately shoulders the burden of a prima facie showing of discrimination, then the case does not immediately go to trial; rather, the employer is given a chance to produce a "legitimate, nondiscriminatory reason" for the employment action.[128] Thus, even if an employer fails to show that the proffered comparators are not similarly situated, it still has the opportunity to explain why it was engaging in a "valid" business decision rather than discrimination.[129] To be sure, reducing the required amount of similarity between comparators likely will result in a higher volume of discrimination claims that succeed at the prima facie stage.[130] Nevertheless, the second stage of the *McDonnell Douglas* analysis affords the employer the opportunity to explain the

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[126] *Coleman*, 667 F.3d at 846–47 (quoting Srail v. Vill. of Lisle, 588 F.3d 940, 945 (7th Cir. 2009)).

[127] *See id.* at 848 ("Comparators need only be similar enough to enable 'a meaningful comparison.'" (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007))).

[128] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[129] *Contra Lewis*, 918 F.3d at 1225–26.

[130] *Cf. Lewis*, 918 F.3d at 1242 (Rosenbaum, J., concurring in part and dissenting in part) (stating that the Eleventh Circuit standard "ensures that at least some plaintiffs with potentially valid claims of discrimination will never get the opportunity to show that the employer's offered reason is a cover for discrimination").

apparent discrimination.[131] Thus, the Seventh Circuit's standard does not risk giving courts too much leeway to interfere with business decisions because it preserves an opportunity for employers to justify their actions.[132] Rather, the standard simply increases the likelihood that an employer will have to give a legitimate, nondiscriminatory reason for the alleged disparate treatment of the plaintiff.[133]

3. Allowing for Flexible Review of Dissimilar Fact Patterns. The Eleventh Circuit argues that the Seventh Circuit's standard strays from the "essential sameness" that is required for an initial determination of unlawful discrimination.[134] While a comparator may be similar enough that a comparison would not be "irrelevant or crazy," the court argued that comparators must provide "a sound basis for an 'inference of unlawful discrimination.'"[135]

But the U.S. Supreme Court has rejected arguments for a "rigid, mechanized, or ritualistic" application of the *McDonnell Douglas* test[136] and has cautioned against requiring "precise equivalence" between comparators.[137] Rather, the similarly situated inquiry simply requires a showing that the proffered employees are "comparable."[138] A standard that emphasizes

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[131] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981) (detailing the employer's burden under the second step of *McDonnell Douglas*).

[132] *See* Benjamin D. McAninch, Commentary, *Removing the Thumb from the Scale: The Eleventh Circuit Summary Judgment Standard for Disparate Treatment Cases in the Wake of* Chapman v. A1 Transport, 53 ALA. L. REV. 949, 954 (2002) ("The [U.S. Supreme] Court recognized that Title VII was not designed to limit traditional management techniques, and that this goal is furthered by a scheme whereby defendants only bear the burden of a clear and specific explanation of their nondiscriminatory motives.").

[133] It is worth emphasizing that even if the Seventh Circuit standard causes a greater number of business decisions to be scrutinized for invidious discrimination, such a result is appropriate under Title VII. *See Lewis*, 918 F.3d at 1243 (Rosenbaum, J., concurring in part and dissenting in part) ("[C]ontrary to what *McDonnell Douglas* and its progeny anticipated, by focusing on the employer's interests, the Majority Opinion naturally winds up with a system decidedly weighted towards the employer instead of delicately balanced between the interests of both parties.").

[134] *Id.* at 1225 (majority opinion).

[135] *Id.* (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981)).

[136] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

[137] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976).

[138] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

flexibility and only rejects comparators at the prima facie stage when they are so different such that any comparison would be useless is far more consistent with the Court's language on comparator evidence than one that requires "essential sameness" at the prima facie stage.[139]

V. CONCLUSION

Between 2010 and 2017, more than one million American workers have claimed that their employers violated federal law because of employment discrimination.[140] As the use of comparator evidence has become a key component of employment discrimination law, which standard a court uses when assessing comparator evidence has tremendous implications for the potential success of hundreds of thousands of discrimination claims. Since circuits are divided on the standards for comparator evidence, the success of many discrimination claims will likely hinge on the jurisdiction in which they are filed. The Seventh Circuit's standard is the most logical approach to assessing comparator evidence because of its alignment with the policies underlying the *McDonnell Douglas* paradigm, its consistency with U.S. Supreme Court precedent, and its practicality at the prima facie stage of *McDonnell Douglas*. Therefore, the Court should clarify the proper standard for similarly situated comparators by adopting the Seventh Circuit's not-useless standard for comparators in employment discrimination cases.

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[139] *Compare Lewis*, 918 F.3d at 1225 (stating that the Seventh Circuit's standard "departs too dramatically from the essential sameness that is necessary to a preliminary determination that the plaintiff's employer has engaged in unlawful 'discrimination'"), *with* Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) ("So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied." (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007))).

[140] *See* Maryam Jameel, Leslie Shapiro & Joe Yerardi, *More than 1 Million Employment Discrimination Complaints Have Been Filed with the Government Since 2010*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/graphics/2019/business/discrimination-complaint-outcomes/ (providing a breakdown—including of relief sought and obtained and of the type of discrimination alleged—of cases filed with the Equal Employment Opportunity Commission between 2010 and 2017).