No.

IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; AND KIM HOLLON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

WILLIAM L. FOUCHÉ, JR.
Counsel of Record
LAW OFFICE OF
WILLIAM FOUCHÉ
2001 Ross Ave., Suite 4600
Dallas, TX 75201
(214) 660-4858

Counsel for Petitioner

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QUESTIONS PRESENTED

This Court held in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), that a discrimination plaintiff survives a motion for judgment as a matter of law if he submits (i) evidence supporting a prima facie case, as described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and (ii) evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Furthermore, it held in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) that discriminatory animus, even if proved only indirectly, need only be "a motivating factor" in the adverse employment action, even if other legitimate factors also motivated the employer's decision.

The questions presented by this petition are:

1. Whether, contrary to *Reeves*, *Desert Palace* and the decisions of other circuits, the Fifth Circuit erred in holding that racial remarks made by the hospital manager principally responsible for summarily suspending a minority doctor could not support a jury inference of racial animus, merely because the remarks were not made at the time of the adverse action or in specific reference to the plaintiff?

2. Whether, contrary to *Reeves*, *Desert Palace* and the decisions of other circuits, the Fifth Circuit erred in failing to consider the evidence and inferences that established Plaintiff's prima facie case when considering the further questions of whether the defendants' explanation of their conduct was pretextual and whether Plaintiff's race was "a motivating factor" in the adverse action taken against him?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner G. Mark Jenkins, M.D., ("Dr. Jenkins") was the appellant in the Court of Appeals and the plaintiff in the district court.

Respondents Methodist Hospitals of Dallas, Inc., Howard Chase, John Haupert, Jack Barnett, Kelly Wolfe, Tim Meeks, and Kim Hollon (collectively "the hospital") were appellees in the Court of Appeals and defendants in the district court. Methodist Hospitals of Dallas, Inc., is a not-for-profit corporation organized under the Texas Non-Profit Corporation Act and as such has no owners. *See* TEX.REV.CIV.STAT.ANN. art. 1396-1.02(3) (West 2003) (forbidding members, directors, and officers of a non-profit corporation to share in its profits).

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Petitioner G. Mark Jenkins, M.D. ("Dr. Jenkins") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the district court granting Defendants' motion for summary judgment, which is unpublished, is available at 2004 WL 3393380 and is reprinted as Appendix B (pages B1-B46). The disposition of the Section 1981 claim appears at pages B39-B45.

The Fifth Circuit's opinion affirming the summary judgment is reported at 478 F.3d 255 and is reprinted as Appendix

A (pages A1-A15). The portion pertaining to the Section 1981 claim appears at pages A1-A9.[1]

JURISDICTION

The Fifth Circuit issued its opinion on January 31, 2007, and denied rehearing and rehearing *en banc* on March 19, 2007. App. C1-C2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1981(a) of Title 42 of the United States Code provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 2000e-2(m) of Title 42 of the United States Code provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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[1] The final part of the court of appeals' opinion resolves a separate appeal taken by Dr. Jenkins's lawyer in the district court, whom the district court had reprimanded for misquoting an affidavit in a brief. The district court did not sanction Dr. Jenkins and made clear that his fate should be based on a correct legal analysis of the record under FED. R. CIV. P. 56. (9 Tr. at 14.) The Fifth Circuit combined the two appeals prior to oral argument.

STATEMENT OF THE CASE

Dr. Jenkins appeals a summary judgment disposing of his § 1981 race-discrimination claim against Methodist Hospitals of Dallas, Inc., and six of its managerial employees (collectively, the hospital). The overarching question is whether he adduced sufficient evidence to warrant a trial on the question of discriminatory intent. The district court concluded that he did not. The Fifth Circuit affirmed.[2]

The facts, presented in the manner required by the standard of review,[3] are as follows:

Dr. Jenkins, an African-American, is a Johns-Hopkins-trained interventional cardiologist who is eminently qualified to practice his subspecialty, primary angioplasty. This is an emergency procedure in which individuals having heart attacks are expeditiously catheterized to clear their arterial blockage before heart tissue dies due to insufficient oxygen. He is one of only two black cardiologists ever to practice at the hospital and the only one ever to work in the cath lab.

On July 25, 2000, due principally to the efforts of the hospital's Chief of Internal Medicine, Dr. Jack Barnett, the hospital effected an immediate "summary suspension" of Dr. Jenkins's cath-lab privileges and reported this to the National Practitioners Data Bank (NPDB). Summary suspension is reserved for cases in which "a physician has committed some egregious act or omission (e.g., shown up for work clearly

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[2] Still pending in the district court is the hospital's motion to recover more than $335,000 in attorneys fees from Jenkins on grounds that his claims were "frivolous, unreasonable, and without foundation." The motion was heard more than two years ago, but remains unresolved due to the pendency of the appeal.

[3] All reasonable inferences are drawn in favor of Dr. Jenkins and all evidence favoring the hospital that the jury is not required to believe has been disregarded. *See Reeves*, 530 U.S. at 150-151.

inebriated)."[4] Its purpose is "to protect patients from imminent danger, rather than for reasons that warrant routine professional review actions."[5]

In this case, no such egregious acts or omissions existed. In fact, though Dr. Jenkins requested that they do so, the hospital was unable to identify a single patient whom he had ever endangered. Rather, the hospital's purported reason for summarily suspending Dr. Jenkins was the claim that his rude and brusque "style" of communicating with cath lab employees was chiefly responsible for creating a "hostile environment" there – charges insufficient to warrant summary suspension even if they had been true.[6] Even so, such charges were in fact false, as unanimously determined months later by the "fair hearing" panel at which, for the first time, Dr. Jenkins was afforded the opportunity to hear and cross-examine the hospital's adverse witnesses. App. D1-D3. Moreover, so weak was the hospital's evidence against Dr. Jenkins that the factfinders fully exonerated him *at the conclusion of the hospital's case in chief*, at which time they insisted on bringing the hearing to an early close. His catheterization privileges were then reinstated seven months after they had been summarily suspended.

But Dr. Jenkins now lives with the professional consequences of having a summary suspension on his record. As one physician avowed, "every hospital will ask about suspension on every request for privileges. Willful, inappropriate

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[4] American Health Lawyers Assoc., PRACTICE GUIDE - PEER REVIEW GUIDEBOOK (1999) p. 42, *quoted in* Pl. App. at 597.

[5] U.S. Dept. of H.H.S., NATIONAL PRACTITIONER DATA BANK GUIDE-BOOK, E-20; Online at: http://www.npdb-hipdb.com/pubs/gb/NPDB_Guidebook_Chapter_E.pdf

[6] Given that primary angioplasty requires Dr. Jenkins to race the clock to complete the delicate procedure before his patient dies on the table before him, he would be derelict in failing to communicate with his support staff in a way that was less than direct, urgent, and intolerant of error.

actions of suspension or [a] listing on the [National Practitioner] Database is equatable to character and career assassination."[7] Dr. Jenkins has already been denied privileges at another hospital on at least one occasion because of that institution's concerns about the summary suspension.

Orchestrating these events was the hospital's chief of internal medicine, Dr. Jack Barnett, whom the Fifth Circuit's opinion describes as "obviously in a position to influence the decision to suspend Jenkins." App. A7. He is a bigot with a long history of mistreating minority doctors at the hospital. He once asked a Hispanic interviewee "why on earth would a minority think he would have the right to go to medical school at all."[8] Dr. Barnett told an African-American doctor that he "could teach a monkey" to practice medicine the way he did.[9] And a minority doctor who worked in Dr. Barnett's department for five years, and whose time at the hospital overlapped Dr. Jenkins's, avows:

> Within three months of my arrival at Methodist in 1994, it was clear to me that Dr. Barnett's racial animosity ran so deep that he would do or say anything in an attempt to force me to leave Methodist. His actions included everything from false accusations to racial insults. On one occasion, he referred to African-Americans as gun-toting, drug pushing spooks."
>
> Out of concern that Dr. Barnett would do to me what he ultimately did to Mark Jenkins, I left Methodist in 1999."[10]

The hospital has conceded that Dr. Barnett's description of blacks as "gun-toting, drug-pushing spooks" is a "slur [that], if made, would unquestionably demonstrate race-based ani-

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[7] Pl. App. at 629 ¶ 8.

[8] Pl. App. at 637.

[9] Pl. App. at 635.

[10] Pl. App., p. 637-638.

mus."[11] (One wonders, given that the standard of review *required* the court of appeals to accept that the slur had been made, why this admission did not end the matter in Dr. Jenkins's favor, given the Fifth Circuit's further conclusion that Dr. Barnett was "obviously in a position to influence the decision to suspend Jenkins." App. A7.) But this affidavit reveals more than a remark. It shows a pattern of conduct in which Dr. Barnett employs racially charged language in the presence of minority doctors, insults them, and falsely accuses them.

Dr. Barnett adhered to this pattern in his actions against Dr. Jenkins. He insulted Dr. Jenkins during the initial application process, before he had even commenced work at the hospital. He informed Dr. Jenkins then "that he wouldn't let me [Jenkins] treat his dog."[12] And by aggressively promoting Dr. Jenkins's summary suspension on the false grounds that he was chiefly responsible for causing a hostile environment in the cath lab, Dr. Barnett was acting in accordance with his racist *modus operandi* towards minorities in general.

Dr. Barnett played a key role in every stage of the proceedings against Dr. Jenkins except the final one, which cleared him. In fact, Dr. Barnett advocated summary suspension *before the peer-review investigation started, before an ad hoc investigating committee could even be formed*.[13] Thereafter, according to a doctor who attended the meeting at which Dr. Barnett took this surprising position, the "process appeared to take a pre-determined course," leading the doctor in question to suspect "a racial component" to Dr. Barnett's motivation.[14] Dr. Barnett also selected all the members of the *ad hoc* investigating committee. After his committee failed to recommend immediate suspension, Dr. Barnett became an advocate be-

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[11] Brief of Appellees, p. 47.

[12] Pl. App. at 702.

[13] Pl. App. at 654 ¶¶ 14-15.

[14] Pl. App. at 654 ¶¶ 14-15, 18.

fore the Corporate Medical Board (CMB), the hospital body that officially effected the summary suspension. In this capacity, he and another codefendant provided false information about Dr. Jenkins to the Board before they voted.[15] And Dr. Barnett is the only member of hospital management named in CMB minutes as "concur[ring] with" the decision to immediately suspend Dr. Jenkins.[16]

After Dr. Jenkins's ultimate vindication by the fairness hearing, a member of the CMB present when the decision to summarily suspend was officially made, avowed:

> In all my years of practicing medicine, I have never known a physician to be suspended with no effort to determine the accuracy of allegations as was done with Dr. Jenkins. I have also never seen a physician's career handled as carelessly by those who were bestowed the responsibility of granting and ultimately suspending Dr. Jenkins' privileges.[17]

* * *

Even if one did not know that the manager who was principally responsible for trying to push Dr. Jenkins out of the hospital was an intractable bigot, it would be possible to infer

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[15] One of the many examples of mendacity in the record is the following: A CMB member asked what a particular cath-lab supervisor, Shawn Tillman, had told the investigating committee. Tillman was the only witness Dr. Jenkins had specifically asked the investigating committee to interview, yet hers is also the only testimony that was not transcribed. The incomplete transcript then became the record that CMB members were urged to study before voting on what action to take against Dr. Jenkins. With Tillman's actual testimony unavailable to the CMB, it fell to Barnett and his hospital copresenter to fill in the gap. They did so falsely, making it seem as though Tillman had testified adversely to Jenkins, when, in fact, her affidavit makes clear that she contradicted many of the key facts on which the hospital's case for disciplining Jenkins depended. *C.f.* Pl. App. at 618 (Tillman affidavit) to Pl. App. at 533.

[16] Pl. App. at 536.

[17] Pl. App. at 644-645(¶¶4-5).

that Dr. Jenkins's race was "a motivating factor" in the hospital's decision-making from the grossly disparate treatment that Dr. Jenkins received, compared to other doctors similarly situated who were not black.

Summary suspension is both rare and extraordinarily harsh. "Of all the corrective actions taken against a physician, none carries with it such serious and immediate professional and legal repercussions as the summary suspension."[18] And summary suspension is procedurally unique in its susceptibility to manipulation: it is the only disciplinary alternative in which the penalty interrupts the doctor's ability to practice based only on a preliminary investigation. In all other peer-review investigations, even those in which ultimate termination of hospital privileges is under consideration, a full due-process hearing must precede any penalty. So if a hospital potentate were seeking to harm a doctor's career for any impermissible reason, summary suspension would be the vehicle of choice, because the target will endure a compulsory adverse NPDB report,[19] but has no right to hear the accusing witnesses, much less to cross-examine them, until a hearing months in the future, after irremediable professional damage has already been done to him.

Dr. Jenkins was treated far more severely than similarly situated doctors who were not African-Americans. The record contains no evidence that the hospital has ever summarily suspended any non-black physician for any reason. It does reveal that two non-black physicians, neither of them cardiologists, were subjected to run-of-the-mill peer review investigations for hostility toward employees, but both were accused of worse behavior than Dr. Jenkins, yet were treated

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[18] American Health Lawyers Assoc., PRACTICE GUIDE - PEER REVIEW GUIDEBOOK (1999) p. 42, *quoted in* Pl. App. at 597.

[19] *See* 45 C.F.R. § 60.9 (requiring that any professional review action that adversely affects the clinical privileges of a physician for longer than 30 days be reported to the Board of Medical Examiners).

more leniently.[20] And when one confines the comparison of the hospital's treatment of Dr. Jenkins to that of its other cardiologists, the disparity becomes even more glaring. Fourteen cath-lab nurses and technicians, the very individuals whom the hospital claimed to be protecting from Dr. Jenkins, gave affidavits avowing that he did not behave in a fashion more hostile than the other cardiologists in the lab.[21] They describe other cardiologists doing worse things: yelling, throwing furniture,[22] and in one instance, hurling an open blood-filled syringe that splashed blood into a nurse's face.[23] Despite committing in some cases actionable torts, none of the other cardiologists were suspended. None were disciplined. None were even formally investigated. Instead, hospital management instructed the employees in question to handle the dispute themselves, as a kind of personality conflict.[24]

* * *

The district court concluded that the foregoing evidence of racial animus and pretext was insufficient to warrant a trial. In so concluding, it determined that all of Barnett's racist remarks were non-probative because no single remark met all four prongs of the Fifth Circuit's improperly restrictive test of relevance for so called "stray remarks:"

> [I]n order for comments in the workplace to provide sufficient evidence of discrimination, they must be "(1) re-

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[20] Despite worse conduct, neither was summarily suspended. The action against one ("Dr. T.") was conditional: he was told to seek anger-management counseling or risk losing privileges in future, leading him to quietly withdraw without reputational harm. The other ("Dr. V.") was officially warned twice, then conditionally reappointed, and then probationarily reappointed in a subsequent year. *See* Reply Brief of Appellant, at 28-29.

[21] Pl. App. at 603(¶4), 604(¶6), 605(¶¶4-5), 606(¶4), 607(¶6), 608(¶6), 610(¶5-6), 611(¶¶8-10), 616(¶¶4-5, 9), 617(¶¶4-5, 10), 618(¶6), 619(¶6).

[22] Pl. App. at 611(¶9), 631.

[23] Pl. App. at 631.

[24] Pl. App. at 611, 622.

> lated [to the protected class of persons of which the plaintiff is a member]; (2) proximate in time to the [complained-of adverse employment decision]; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue."[25]

This test was also used to discard evidence that two cath-lab employees referred to Dr. Jenkins as a "nigger."[26]

Furthermore, the district court wholly ignored the circumstantial evidence of pretext, including that supporting Dr. Jenkins's prima facie case, and no inferences favorable to him were drawn from it. Rather than crediting such evidence and evaluating its impact on the questions of pretext or racial animus, the district court instead simply "assume[ed] *arguendo*" the existence of a prima facie case and then never even considered how such prima facie evidence bore on the question whether the hospital's proffered justification for its conduct was sufficient for summary judgment. App. B41.

This caused the district court to disregard some of the most damning evidence of pretext in the record, including the following evidence of grossly disparate treatment:

- that summary suspension is Draconian, instantly "adverse," bereft of procedural safeguards, susceptible to manipulation, and unwarranted by the hospital's accusations even if they had been true.

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[25] App. A7. The excerpted passage is lifted verbatim from the Fifth Circuit opinion. The district court applied the same test, but adapted the language to be specific to Dr. Jenkins. *See* App. B43.

[26] One of these individuals was chosen by the hospital to testify as a complaining witness before the ad hoc investigating committee. His testimony was placed in the transcript of investigating committee's proceedings, which CMB members were urged to study before voting. The other was one of a handful of prior complainants against Dr. Jenkins, whose complaint was, as were all the others, contemporaneously investigated and found to be meritless.

- that the hospital adduced no evidence of any non-black hospital doctor ever being summarily suspended for any reason;
- that the only non-black doctors previously investigated for alleged hostility toward employees were treated more leniently than Dr. Jenkins;
- that, despite being more responsible for causing a "hostile environment" than Dr. Jenkins – in fact, despite throwing furniture and hurling open syringes filled with blood – none of the other cath-lab cardiologists were suspended, disciplined, or even subjected to a collegial "peer review" investigation;

The district court also erroneously failed to attach any inferential weight to the following additional evidence of pretext:

- the gratuitous severity of the penalty imposed against Dr. Jenkins, compared to the accusations;
- that the hospital's "nondiscriminatory explanation" for its actions against Dr. Jenkins was unanimously found to be false at the only proceeding in which Dr. Jenkins was allowed to hear and cross-examine the accusing witnesses;
- that the hospital's evidence in support of its accusations was so thin that the factfinders terminated the hearing before Dr. Jenkins even put on witnesses of his own;
- that one of the three designated factfinders, Dr. Rochelle McKown, testified after the hearing that the hospital had been unable to marshal evidence supporting any of its accusations against Dr. Jenkins save one: that he was expecting more from the hospital's cath lab employees than he was receiving from them;
- that most of the very individuals whom the hospital claimed to be protecting from Dr. Jenkins offered affidavits *en masse* rebutting the hospital's accusations.

- indications that the hospital's procedures against him were dishonestly manipulated by hospital management in an effort to maximize the harm done to him.

The court of appeals affirmed for the reasons stated in the district court's opinion. App. A7. It again set forth the Fifth Circuit's peculiar "stray remark" test and used it to discard all of the evidence of Barnett's racism and his prior mistreatment of other minority doctors. *Id.* It also assumed away all the evidence supporting Dr. Jenkins's prima facie case, again refusing to evaluate such evidence for its impact on the issues of pretext and racial animus. *Id.* Going further than the district court, however, the Fifth Circuit explicitly discarded additional circumstantial evidence of pretext on the basis that it supposedly failed to show that race was the hospital's true motivation, despite Dr. Jenkins's having concededly established his prima facie case of discrimination. App. A8-A9. In short, it is clear that nothing short of direct evidence that racial animus was the sole cause of the summary suspension would have satisfied the Fifth Circuit. All other ordinarily relevant circumstantial evidence on the questions of pretext and racial animus was simply ignored or excluded by the court's application of a highly restrictive standard of relevance unknown in any other area of the law.

Dr. Jenkins petitioned both the panel and the *en banc* court for rehearing, pointing out the opinion's incompatibility with *Reeves*, and assailing the "stray remark" doctrine in particular on this basis. Both petitions were summarily denied.

Because the Fifth Circuit decision is starkly at odds with longstanding decisions of this Court, including *Reeves* and *Desert Palace*, and with those of other courts of appeals, Dr. Jenkins petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *REEVES* AND *DESERT PALACE* AND WITH THE DECISIONS OF OTHER CIRCUITS.

In *Reeves*, this Court held that the Fifth Circuit "impermissibly substituted its judgment concerning the weight of the evidence for the jury's[]" when, in deciding a motion for judgment as matter of law, it refused to consider a manager's age-related comments "on the ground that they 'were not made in the direct context of Reeves's termination.'" *Reeves*, 530 U.S. at 152-153. Such evidence, even if indirect, was plainly probative of the question of discriminatory intent, this Court held, and when considering the relevance of evidence and inferences therefrom, "trial courts should not 'treat discrimination differently from other ultimate questions of fact,'" *id.*, 530 U.S. at 148 *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993). In so holding, this Court in *Reeves* repudiated the Fifth Circuit's so-called "stray remarks" doctrine, whereby it ignored circumstantial evidence of discriminatory intent on the improper ground that it was insufficiently direct evidence of discriminatory animus.

The Fifth Circuit's application of the stray remark doctrine in the present case does precisely what *Reeves* forbids. By imposing its peculiar four-part test on all discriminatory remarks, the Fifth Circuit raises the admissibility bar far beyond simple relevance for this class of evidence, but no other. Rather than attaching inferential value to racial remarks that have "any tendency to make the existence [of racial animus] more probable … than it would be without the evidence," FED. R. EVID. 401, the Fifth Circuit is requiring trial courts in Texas, Louisiana, and Mississippi to throw them out, unless they meet a test so stringent that only remarks virtually dispo-

sitive of racial animus could ever pass it.[27] All other remarks demonstrating racial animus by a key decision-maker – which would plainly be relevant under any ordinary application of Rule 401 – are simply ignored, leading Civil Rights cases in this part of the country to be thrown out in alarming numbers. *See, e.g., Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400 (5th Cir. 2001); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000) (same); *Ginn v. Texas Wired Music, Inc.*, 2001 WL 361044 (5th Cir. 2001); *Patel v. Midland Memorial Hosp.*, 298 F.3d 333 (5th Cir. 2002); *Wallace v. Methodist Hosp. System*, 271 F.3d 212 (5th Cir. 2001); *Moore v. United Parcel Service, Inc.*, 2005 WL 2436922 (5th Cir. 2005); *Trotter v. BPB America, Inc.*, 2004 WL 1746363 (5th Cir. 2004); *Read v. BT Alex. Brown, Inc.,* 2002 WL 22060 (N.D. Tex. 2002) (unpublished); *Ricketts v. Champion Chevrolet*, 2005 WL 1924372 (S.D. Tex. 2005) (unpublished); *Cantu v. Nocona Hills Owners Ass'n*, 2002 WL 67974 (N.D.Tex. 2002); *Brown v. Texas Saddlebags Industries, Ltd.*, 2001 WL 1636458 (N.D. Tex. 2001); and *Thompson v. Origin Technology In Business, Inc.*, 2001 WL 1018748 (N.D. Tex. 2001).[28]

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[27] Routinely disregarding all remark-based evidence simply because it is indirect or falls somewhat short of "smoking gun" status is also contrary to *Desert Palace*, which teaches that evidence need not be "direct" to be convincing, and that indirect evidence of animus is sufficient to warrant returning a verdict for the plaintiff if race was "a motivating factor" in the adverse decision, even if other legitimate factors also played a role in the employer's decision-making. *Desert Palace, Inc., v. Costa,* 539 U.S. 90 (2003) (unanimous).

[28] The Fifth Circuit does get it right on occasion, most notably in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000) (suggesting that the Fifth Circuit's stray remark jurisprudence should be viewed cautiously in the aftermath of *Reeves*). Numerous Fifth Circuit panels, however, refuse to follow *Russell* because of a prior case, *Rubinstein v. Adm'rs of the Tulane Educ. Fund,* 218 F.3d 392, 400-401 (5th Cir. 2000), which they contend is "binding" because it was decided before *Russell*. *See, e.g., Auguster v. Vermilion Parish School Bd.,* 249 F.3d 400 (5th Cir. 2001). The Fifth Circuit has steadfastly refused to reconsider its stray remarks doc-

Some of the Fifth Circuit "stray remarks" cases must be read to be believed. In *Auguster*, for example, the Fifth Circuit discarded as irrelevant the school superintendent's statement one year before firing a black coach that the school had "a problem ... with past black coaches, and if there was another problem, no matter what it was, that he would do his best to get rid of [the plaintiff] from day one," as well as the superintendent's earlier comment that "he had bad luck with black men working in Abbeville." 249 F.3d at 401, 405. Similarly, in *Ginn*, the Fifth Circuit discarded a manager's remark that he wanted "young blood," purportedly because "it shows only that [the manager who made the comment] had a preference for hiring someone young and fresh from school, but not that he had animus toward Ginn based on her age." 2001 WL 361044. And then there is *Patel*, which is cited by the decision below as the basis for disregarding all Dr. Barnett's racial remarks and prior discriminatory conduct. In *Patel* the Fifth Circuit disregarded comments made by hospital doctors who had pressed management to oust the plaintiff, an Indian cardiologist, including these: their reference to Dr. Patel as a "sand nigger," their statement that he was "probably parking his camel," and their assertion that he "is nothing but a god damn Indian quack and I want him out of here. I want his ass out of here." 298 F.3d at 343-344. All of these cases are clearly contrary to both *Reeves* and *Desert Palace*, which require that the trier of fact be *permitted* to find from such comments either that racial animus was "a motivating factor" in the adverse treatment of these plaintiffs or, alternatively, that the "nondiscriminatory reasons" furnished by the defendants are unworthy of belief.

In Dr. Jenkins's case, no less than in *Reeves*, the extensive remarks and conduct proffered by Dr. Jenkins, particularly those by Dr. Barnett, are probative of racial animus. Because

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trine *en banc*, despite repeated requests that it do so, including, most recently, in this case.

he played a leading role in the hospital's adverse action against Dr. Jenkins, Dr. Barnett's belief that minorities have no proper place in medical school, his description of African-Americans as "gun-toting, drug pushing spooks," his remark to a black doctor that he practiced medicine like "a monkey," his statement to Dr. Jenkins that he wouldn't let him "treat his dog," deserve consideration. As indirect or circumstantial evidence of animus, these remarks have a tendency to make the existence of racial animus more probable than it would be without such evidence, particularly now that "mixed motives" suffices. *See Desert Palace, supra.* And this is the only threshold test such remarks are properly required to meet to deserve consideration.

Moreover, by analyzing the remarks one at a time and only after stripping them from their factual context, the Fifth Circuit improperly disregarded evidence that Dr. Barnett has mistreated minority doctors often enough for it to be considered habitual, as at least one affiant has averred. And it disregarded evidence from two other minority doctors that Dr. Barnett has mistreated them for racial reasons. Such evidence indicates that his *modus operandi* is to insult and falsely accuse in order to cause them to leave the hospital on their own.[29] And there are ample indications that Dr. Jenkins also fell victim to Dr. Barnett's preferred method of ridding his hospital of minority doctors.

In addition to being contrary to this Court's holdings in *Reeves* and *Desert Palace*, the Fifth Circuit decision below conflicts with the decisions of numerous other circuit courts. *See, e.g., Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d

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[29] This issue is remarkably similar to the one presented in a case this Court recently agreed to decide, *Sprint/United Management v. Mendelson*, 06-1221. For that reason, Dr. Jenkins's petition should be held by this Court until *Mendelson* is decided and then this case should be remanded to the Fifth Circuit for reconsideration in light of *Mendelson*, if appropriate, even if this Court ultimately opts not to decide Dr. Jenkins's case on the merits.

111, 115 (2d Cir. 2007) (reversing summary judgment granted in favor of employer because, although the plaintiff's prima facie case and circumstantial evidence of pretext may have been too weak to permit an inference of animus, the district court improperly threw out remarks after classifying them as "stray," whereas "the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff's favor."); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 428 (7th Cir. 2000) ("the Supreme Court's recent decision in *Reeves* was a cautionary note not to grant summary judgment too readily … and not to dismiss as irrelevant damaging remarks like … Goetz's proclaimed desire to hire people under the age of 45."); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922-923 (8th Cir. 2000) (concluding that, even if age-related comments by certain managerial employees were "stray remarks," when considered along with the plaintiff's prima facie case and showing of pretext, they gave rise to an inference of intentional discrimination even if such an inference would not have been possible from the other evidence of pretext alone); *Dunaway v. International Broth. of Teamsters*, 310 F.3d 758 (D.C. Cir. 2002) (reversing summary judgment on grounds that the district court, by rejecting various discriminatory comments made by management as mere "stray remarks," had erroneously injected itself into the weighing of evidence that, after *Reeves*, was the sole province of the factfinder).

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The Fifth Circuit's decision below also conflicts with *Reeves* in an even more fundamental way: This Court in *Reeves* also held that, once the defendant proffers a supposedly nondiscriminatory reason for treating the plaintiff as it did, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual,'" *Reeves*, 530 U.S. at 143, *quoting*

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n.10 (1981). Yet the Fifth Circuit gave absolutely no consideration to the evidence supporting Dr. Jenkins's prima facie case, drew none of the obvious inferences of pretext that naturally flow from his grossly disparate treatment compared to nonblack hospital physicians similarly situated, and instead simply *assumed* the existence of the prima facie case in order to then ignore all the evidence establishing that case. That was plain error, as *Reeves* explicitly holds:

> In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review … [by] disregard[ing] critical evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory reason. [Citation omitted.] The court also failed to draw all reasonable inferences in favor of petitioner."

Reeves, 530 U.S. at 152.

Because the decision below conflicts with this Court's holdings in *Reeves* and conflicts with the decisions of at least four other circuits, Dr. Jenkins's petition for certiorari should be granted. In the alternative, because his petition raises issues nearly identical to those in No. 06-1221, *Sprint/United Management v. Mendelson*, which this Court has recently taken for full review, this Court should at a minimum hold Dr. Jenkins's petition until the disposition of No. 06-1221, which disposition could well clarify the error in this case and be dispositive on remand.

II. SUMMARY REVERSAL MAY BE WARRANTED.

The Fifth Circuit's decision below shows signs that its manifest disregard of *Reeves* is not the result of mere oversight, but is a refusal to follow this Court's clear directives. The court of appeals could not prudently have failed to study *Reeves* before deciding this case, given the central role that it played in the parties' briefing, to say nothing of the petitions for rehearing which cited *Reeves* on virtually every page.[30] Both parties understood *Reeves* to be potentially dispositive. But despite its importance, the Fifth Circuit essentially ignored *Reeves*, giving it mere lip service. Its opinion devotes a mere two sentences to it, and even those ignored the dispositive aspects of *Reeves* in order to convey the false impression that it heightened, rather than leveled, the burden discrimination plaintiffs must bear when faced with dispositive motions. The Fifth Circuit decision below describes *Reeves* thusly:

> To meet the motivating-factor prong, Dr. Jenkins had to show his race "'actually played a role in [the Hospital's decision-making] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)). Throughout the burden shifting, Dr. Jenkins had the ultimate burden of showing a genuine issue of material fact on whether the Hospital intentionally discriminated against him on the basis of race. *See id*. at 143, 120 S.Ct. 2097.[31]

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[30] Dr. Jenkins's original appellate brief cites *Reeves* at least 15 times, the hospital's brief cites it at least 20 times, and Dr. Jenkins's reply brief cites it four additional times. *Reeves* was also the centerpiece of both Dr. Jenkins's petition for rehearing *en banc* and his petition for panel rehearing.

[31] App. A6.

By choosing this unrepresentative quotation without further elaboration, the Fifth Circuit presented *Reeves* as supporting the notion that a discrimination plaintiff cannot survive summary judgment without adducing direct evidence of discriminatory animus. Because this is very nearly the opposite of what *Reeves* holds, as the very next sentence of *Reeves* makes clear,[32] this Court should consider simply summarily reversing the decision below in order to make clear that *Reeves* is in fact binding on the Fifth Circuit and may not be so blithely ignored.

While it may be unusual for a lower court to actively disregard this Court's precedents, it is not entirely unheard of from the Fifth Circuit. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), this Court was required repeatedly to correct the Fifth Circuit for its having effectively ignored evidence relevant to a *Batson* claim regarding racial discrimination in a prosecutor's use of preemptory strikes. *Batson* claims, of course, are similar to all other discrimination claims, in that the aggrieved party must establish a prima facie case of discrimination, the opposing party is allowed to proffer a supposedly nondiscriminatory justification, and the court must then determine whether such justification is pretextual or otherwise fails to rebut racial motivation. In *Miller-El*, this Court, having already twice sent the case back to the Fifth Circuit, finally reversed the New Orleans court on the

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[32] The sentence in *Reeves* that immediately follows the two reproduced in the Fifth Circuit's opinion is as follows:

> Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," [citation omitted,] the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence."

Reeves, 530 U.S. at 141.

ultimate merits of the *Batson* claim. In so doing, this Court held that, in evaluating the State's supposedly nondiscriminatory justification for its conduct, the Fifth Circuit had failed to allow the defendant to rely on "'all relevant circumstances' to raise an inference of purposeful discrimination." *Id*. at 240. Indeed, *Miller-El* cites *Reeves* in support of its holding that a court must consider circumstantial evidence of racial motivation, including evidence of disparate treatment and the pretextual nature of the proffered nondiscriminatory justification. *Id*. at 241 (citing and quoting *Reeves*, 530 U.S. at 147). The Fifth Circuit's analysis was described as "unsupportable" and constituting a "rationalization [that] was erroneous as a matter of fact and as a matter of law." 545 U.S. at 246, 250. This Court then proceeded to rely upon evidence of disparate treatment of black and white jurors and the State's *modus operandi* and general policy and history of excluding black jurors in other cases, *id*. at 252-53, 263, 266. Such evidence is obviously analogous to Dr. Jenkins's evidence of disparate treatment, pretext, and the past discriminatory conduct and racial remarks uttered by Dr. Barnett, all of which was ignored by the Fifth Circuit below, just as it ignored the evidence in *Miller-El*.[33]

In Dr. Jenkins's case, the Fifth Circuit has proceeded "along a distinctly different track" than that commanded by *Reeves*.[34] Summary reversal may therefore be appropriate to bring home the point that the Fifth Circuit will not be permit-

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[33] Indeed, the evidence relied upon by this Court in *Miller-El* would still today be excluded by the Fifth Circuit in a *civil* case because much of it involved circumstantial evidence of discriminatory conduct (*i.e.*, a history of discrimination in other cases) not *directly* involving the adverse decision at issue in the present case.

[34] *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (describing the Fifth Circuit's approach to deciding the relevance of certain evidence in death penalty cases as paying mere "lip service" to the proper prthat has "no basis in our precedents."). The Fifth Circuit's unduly restrictive view of what evidence is relevant in race discrimination cases is similar.

ted to exempt district courts in Texas, Louisiana, and Mississippi from applying this Court's unusually clear and unanimous dictates in *Reeves*.

CONCLUSION

Because of the glaring conflict between the decision below and this Court's decision in *Reeves* and the decisions of other circuits, this Court should grant the petition for certiorari and should even consider summary reversal. The evidence of pretext and of pervasive racial animus by a key decisionmaker was more than sufficient to send this case to a jury, and the Fifth Circuit's decision to the contrary is indefensible.

In the alternative, and at the very least, this Court should hold Dr. Jenkins's case, pending its decision next term in *Sprint/United Management v. Mendelson* (06-1221), which raises a similar issue. *See* p. 16, 18, *supra*.

Respectfully submitted,

WILLIAM L. FOUCHÉ, JR.
Counsel of Record
LAW OFFICE OF
WILLIAM FOUCHÉ
2001 Ross Ave., Suite 4600
Dallas, TX 75201
(214) 660-4858

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

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