No. 16-513

In the Supreme Court of the United States

DONNA TRASK, ET AL., PETITIONERS

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly determined that petitioners failed to establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 822 F.3d 1179. The opinion of the district court (Pet. App. 31a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2016. A petition for rehearing was denied on July 15, 2016 (Pet. App. 57a-58a). The petition for a writ of certiorari was filed on October 13, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As relevant here, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, protects fed-

eral employees from discrimination in personnel actions on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-16(a). The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, protects federal employees "who are at least 40 years of age" from discrimination in personnel actions on the basis of age. 29 U.S.C. 633a(a).

In determining whether a plaintiff has proven intentional discrimination in violation of Title VII or the ADEA, courts often apply the framework set out in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under that framework, a plaintiff alleging that she was not hired for a discriminatory reason must establish a prima facie case of discrimination by proving that: (1) she is a member of a protected class; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) she was rejected in spite of her qualifications; and (4) after her rejection, either the job remained open or the employer hired someone who was not a member of a protected class. *Id.* at 802; see also *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 (1993). After an employee establishes a prima facie case of discrimination, the burden shifts to the employer to produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *McDonnell Douglas Corp.*, 411 U.S. at 802. If an employer meets that burden, the plaintiff can survive summary judgment by demonstrating that a reasonable factfinder could conclude that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Id.* at 804; see *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

2. Petitioners are employed as pharmacists by the Department of Veterans Affairs (VA). Pet. App. 2a. In 2010, the VA announced a new nationwide treatment initiative that resulted in the reorganization of several VA facilities, including the Florida facility where petitioners worked. *Ibid.* The reorganization involved the creation of new pharmacist positions that required specific credentials, and the elimination of certain pre-existing positions, including those held by petitioners. *Id.* at 2a-3a. Petitioners applied, but were not selected, for the new positions. *Id.* at 3a. When their existing positions were eliminated, petitioners were reassigned to new jobs. *Ibid.* Although petitioners received the same pay in their new positions, they contend that the reassignments resulted in a loss of prestige and responsibility for them. *Ibid.* Petitioners, who are both women and both over the age of 40, contend that they were not selected for the new positions based on their gender and age, and that they were denied opportunity to train and qualify for the new positions on the same bases. *Ibid.*

Before the reorganization, petitioners were employed in "module pharmacist[]" positions—so called because each module pharmacist was assigned to one of the four modules of the VA facility that provided primary care. Pet. App. 4a. In that capacity, petitioners "never prescribed, managed, or monitored medications independent from a physician." *Id.* at 6a. Under the new treatment initiative, the VA created Patient Aligned Care Teams (PACTs) that utilized "PACT pharmacists" instead of module pharmacists. *Id.* at 8a-9a. The new PACT pharmacists are intended to function as mid-level health care providers, managing patients in-

dependent of a physician. *Id.* at 9a. Each PACT pharmacist was required to hold an "advanced scope" of practice that would permit him or her to independently prescribe certain medications without a doctor's approval. *Id.* at 6a-7a, 9a. A pharmacist who wished to obtain an advanced scope was required to obtain approval from the facility's Pharmacy Professional Standards Board (Board). *Id.* at 7a. The Board examined whether the pharmacist's job required an advanced scope and whether the pharmacist herself was qualified to hold an advanced scope. *Ibid.* (internal quotation marks omitted). Because the process for obtaining and maintaining an advanced scope was resource-intensive, the Board did "not grant advanced scopes unless they [were] a requirement of the job area and job description in which someone practices." *Ibid.* Petitioners were both module pharmacists holding jobs that did not require an advanced scope. *Id.* at 8a. Neither held an advanced scope when the reorganization was implemented. *Ibid.*

After initially planning to transition existing module pharmacists to PACT pharmacist positions, the VA employees who managed the pharmacy positions at the facility where petitioners worked decided to try to fill the PACT pharmacist positions with "pharmacists who already had experience providing mid-level care with advanced scopes" "in order to provide the best possible care to the patients." Pet. App. 11a; see *id.* at 10a-11a. Thus, rather than leaving module pharmacists in place and training them to become PACT pharmacists, the facility managers opted to permit existing module pharmacists (and others) to apply for PACT pharmacist positions. *Id.* at 11a. The module pharmacists were

informed that the reorganization would require reassignment of pharmacists, that the qualification standards for the new PACT pharmacist positions were established by the "Central Office," and that seven PACT pharmacist positions would be created. *Id.* at 11a-12a.

When the VA formally announced vacancies for six of the seven new PACT pharmacist positions in July 2011, petitioners applied for the positions, along with ten other pharmacists from the same facility. Pet. App. 12a. In September 2011, the VA selected six pharmacists to become PACT pharmacists. *Id.* at 13a. Each of the six selectees held an advanced scope in disease state management at the time he or she applied for the PACT pharmacist positions. *Ibid.* Petitioners and one other applicant were the only applicants who lacked an advanced scope—and none of them was selected to become a PACT pharmacist. *Id.* at 13a-14a. One of the selectees (Dr. Brian Steele) had previously participated in a 2010 pilot program that preceded (and was intended to test) the implementation of the PACT initiative. *Id.* at 9a-10a. Although Dr. Steele did not hold an advanced scope when he joined the pilot program, the facility trained him in disease management and he received his advanced scope in January 2011 (six months before the PACT pharmacist vacancies were announced) on the ground that his participation in the pilot program required him to hold an advanced scope. *Id.* at 10a, 12a.

Two of the six people hired for the new positions were women. Pet. App. 13a-14a. In addition, a third woman (Dr. Linda Rolston) was offered a PACT pharmacist position, but turned it down. *Id.* at 12a-13a. Dr. Rolston was 54 years old; all of the other pharmacists

who were offered PACT pharmacist positions were under the age of 40. *Id.* at 12a-14a. According to the selecting official with ultimate responsibility, petitioners were not selected "primarily because they did not have advanced scopes, and they did not have experience prescribing medicine under an advanced scope." *Id.* at 13a. Petitioners were subsequently reassigned to work as float pharmacists, positions that paid the same salary but that petitioners perceived to be less prestigious. *Id.* at 17a.

Petitioners had both previously attempted to obtain advanced scopes. Pet. App. 14a-16a. For instance, in April 2011, petitioner Trask sought an advanced scope at the request of a primary care physician with whom she worked, but management denied Trask's request to begin the process because the requesting physician already had access to pharmacists with advanced scopes. *Id.* at 14a-15a. In July 2011, both petitioners submitted advanced scope applications, but the Standards Board did not act on their applications until after the PACT pharmacist positions had been filled. *Id.* at 15a-16a. The Board later denied both applications because the positions petitioners held did not require advanced scopes. *Id.* at 16a.

In August 2011, petitioners contacted an Equal Employment Opportunity Counselor and asserted that they had been subjected to age and gender discrimination. Pet. App. 16a-17a. In October 2011, after petitioners' reassignments, they filed formal claims of discrimination with the VA. *Id.* at 17a.

3. In August 2013, petitioners brought this action, alleging (as relevant here) gender and age discrimination in their non-selection as PACT pharmacists and in the denial of their requests for the training necessary

to hold advanced scopes. Pet. App. 17a-19a. The district court granted summary judgment to the government on all of petitioners' claims. *Id.* at 31a-56a. The court held that petitioners failed to establish a prima facie case of discrimination because "they cannot identify a similarly situated comparator who was treated more favorably than they were." *Id.* at 41a. The court rejected petitioners' argument that Dr. Steele was similarly situated, noting that he had already obtained an advanced scope by the time he applied to become a PACT pharmacist. *Id.* at 43a; see *id.* at 41a-43a. In the district court's view, the "most valid comparator" to petitioners was Dr. Ebert, who had completed more advanced training than petitioners but had not received an advanced scope and, like petitioners, was not selected for a PACT position. *Ibid.* The court remarked that petitioners' claims of discrimination were "further undermined by the fact that an individual within their protected class—fifty-four year-old Dr. Linda Rolston—was chosen for the PACT positions." *Id.* at 43a. The district court went on to hold that, "even if [petitioners] could make out a *prima facie* case, their claims would still fail" because the VA had proffered a legitimate nondiscriminatory reason for not selecting them and they had failed to point to any evidence that that reason was "pretextual." *Id.* at 44a-45a.

4. The court of appeals affirmed. Pet. App. 1a-30a.

The court of appeals first held that petitioners failed to establish a prima facie case of discrimination with respect to their non-selection as PACT pharmacists because they could not demonstrate that they were qualified for the positions. Pet. App. 19a-20a. The court explained that it was "undisputed that one of the objective hiring criteria for the PACT pharmacist positions

was the possession of an advanced scope," which neither petitioner held. *Id.* at 19a; see *id.* at 20a (noting that petitioners "did not have advanced scopes and had no experience providing mid-level care with independent prescription authority").

The court of appeals also held that petitioners had failed to establish a prima facie case of discrimination with respect to the denials of their requests to obtain advanced scopes because they had not "show[n] that a similarly-situated individual outside of their protected class applied for an advanced scope and received it." Pet. App. 21a; see *id.* at 20a-23a. The court stated that petitioners were required to identify a comparator "similarly situated in all relevant respects," or "nearly identical" and rejected petitioners' contention that Dr. Steele was such a comparator. *Id.* at 21a-22a (citation omitted). The court explained that Dr. Steele was not a valid comparator because he received an advanced scope and related training in connection with his selection for the pilot program—a selection that was based on the fact that he already worked at the pilot-program location, which petitioners did not. *Ibid.* In addition, the court noted that petitioners had not produced evidence that any other pharmacist was permitted to obtain an advanced scope when his or her current job did not require it. *Id.* at 22a.

The court of appeals further held that, even if petitioners had established a prima facie case of discrimination with respect to either of their claims, they had failed to point to any evidence that the VA's proffered nondiscriminatory reasons for not selecting them as PACT pharmacists and for not training them to hold advanced scopes were pretexts for unlawful discrimination. Pet. App. 22a n.3.

ARGUMENT

Petitioners seek review (Pet. 18-38) of the court of appeals' holding that they failed to establish intentional discrimination on the basis of gender and age. In particular, petitioners seek review of the court of appeals' conclusion that they failed to establish a prima facie case of discrimination. Review of that conclusion is unwarranted because the question whether a plaintiff has established a prima facie case of discrimination ceases to be relevant when an employer articulates a legitimate nondiscriminatory reason for its actions and the plaintiffs fail to prove that that reason was pretextual. The court of appeals correctly affirmed the district court's holding that petitioners failed to rebut the VA's legitimate nondiscriminatory reasons for the challenged employment actions and that holding does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner asks (Pet. i) this Court to address two questions with respect to the showing a plaintiff must make to establish a prima facie case of discrimination. Resolution of those questions is not appropriate in this case, however, because both the district court and the court of appeals held that, even if petitioners had made out a prima facie case of discrimination, their claims must fail because petitioners did not carry their burden of identifying evidence that would show that the legitimate and nondiscriminatory reasons proffered by the VA to justify the challenged employment actions were pretextual. Pet. App. 22a n.3, 44a-47a. This Court has explained that "[t]he 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff,'" and that "[t]he prima facie case method established in *McDonnell Douglas*" *Corp.* v.

Green, 411 U.S. 792 (1973), is only one means of conducting that inquiry. *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978)). When a plaintiff establishes a prima facie case, she establishes "a rebuttable 'presumption that the employer unlawfully discriminated,'" and the defendant is then required to introduce evidence of a legitimate, nondiscriminatory reason for the challenged employment action. *Id.* at 714 (quoting *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981)). But once a defendant does that, the "presumption" created by the prima facie case "drops from the case." *Id.* at 715 (quoting *Burdine*, 450 U.S. at 255 n.10). In other words, when a "defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the" challenged employment action, the prima facie case is no longer relevant because the factfinder must then decide whether the challenged employment action "was discriminatory within the meaning of Title VII." *Id.* at 714-715 (footnote omitted). Because the ADEA is modeled on Title VII, see *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005), the same framework is used to evaluate claims under the ADEA.

In this case, the VA offered proof of its legitimate, nondiscriminatory reasons for failing to select petitioners as PACT pharmacists and for declining to train them to hold advanced scopes. See Pet. App. 44a; see *id.* at 22a n.3. Because the case proceeded to that point, questions about whether petitioners did or did not establish a prima facie case of discrimination—which is not a substantive element of proving a Title VII or ADEA violation, but "is merely a sensible, orderly way

to evaluate the evidence," *Aikens*, 460 U.S. at 715 (citation omitted)—are not relevant to the ultimate question of whether petitioners identified evidence that would show that the VA intentionally discriminated against them on the basis of gender and age. Petitioners are correct (Pet. 15-17) that the district court concluded that petitioners had not established a prima facie case "[b]ased on [their] inability to identify a similarly situated comparator who was treated more favorably than they were," Pet. App. 44a, and that the court of appeals agreed with that determination, at least as applied to their failure-to-train claims, *id.* at 21a-23a. Whether those conclusions were correct or not is irrelevant now because both courts went on to assess the validity of the VA's proffered nondiscriminatory reasons for the challenged employment actions as well as whether petitioners had proven that the proffered reasons were pretextual. *Id.* at 22a n.3, 44a-47a.

The district court explained that the VA had "articulated a legitimate, non-discriminatory reason for not selecting [petitioners] for the PACT positions—specifically that management followed [the] recommendation that only pharmacists who practiced disease state management under an advanced scope should be selected for a PACT position, and the positions were filled accordingly." Pet. App. 44a. The district court concluded that, although petitioners "quarrel[ed] with" the wisdom of using that selection criterion, they did "not point to any evidence creating a material issue of fact as to whether [the VA's] reason for the PACT selections is pretextual." *Id.* at 46a; see *id.* at 47a (noting that petitioners had "failed to show that [the VA's] proffered reason for preferring candidates with ad-

vanced scopes was false" and that they had "not presented any evidence suggesting that the real reason for preferring candidates with advanced scopes was to prevent older female pharmacists from being chosen for the PACT positions").

The court of appeals agreed with the district court that petitioners had failed to establish a prima facie case of discrimination—because their lack of advanced scopes made them unqualified for the PACT-pharmacist positions and because they did not identify a similarly situated comparator with respect to their failure-to-train claims. Pet. App. 19a-23a. But that court *also* held that, "[e]ven if [petitioners] had established a prima facie case of age and gender discrimination, * * * they certainly failed to demonstrate that [the VA's] reasons for not selecting them for the PACT positions and denying their advanced scope applications were pretexts for unlawful discrimination." *Id.* at 22a n.3.

Because both the district court and the court of appeals considered the VA's proffered reason for not selecting petitioners as PACT pharmacists and for not approving their request for advanced-scope training, it is no longer relevant whether petitioners established a prima facie case of discrimination. But both of the questions petitioners would have this Court address (see Pet. i) concern the establishment of a prima facie case. Even if this Court were to agree with petitioners that they established a prima facie case of discrimination, such a holding would have no effect on the outcome of petitioners' case—because the district court and court of appeals both held that petitioners failed to establish that the VA's proffered reasons for the challenged employment actions were pretextual, a showing

that is a prerequisite to proving intentional discrimination in a case like this. Although petitioners suggest (Pet. 21-24) that *other* decisions in the Eleventh Circuit have erred in analyzing whether a plaintiff has met its burden of proving pretext, they point to nothing in the decision in this case that would suggest a legal error in the court of appeals' analysis of that issue. To the extent petitioners disagree with the lower courts' ultimate assessment of the evidence on the issue of pretext, that fact-bound question does not merit further review. Review of the questions presented in the petition is therefore unwarranted.

2. Petitioners contend (Pet. 25, 28-32, 35-38) that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals addressing the requirements for establishing a prima facie case of employment discrimination. Even if that were true, it is irrelevant to petitioners' case at this stage. As explained, whether or not they established a prima facie case of discrimination has no bearing on whether they successfully rebutted their employer's proffered nondiscriminatory reasons for the challenged employment actions. If there were any conflict between the Eleventh Circuit's approach to assessing the adequacy of an employment discrimination plaintiff's prima facie showing and other courts' approach to that question, it should be addressed in a case in which the adequacy of a plaintiff's prima facie case actually matters (*i.e.*, when a defendant has not proffered a legitimate nondiscriminatory explanation and the case is nonetheless dismissed for failure to establish a prima facie case).

Courts of appeals agree, consistent with *Aikens* and *Hicks*, that the ultimate inquiry in this type of case is

whether an employer's asserted reasons for a challenged employment action are pretextual—and that, once an employer proffers a nondiscriminatory reason for the challenged employment action, the question whether the plaintiff established a prima facie case drops out. See, *e.g.*, *Vélez-Ramírez* v. *Puerto Rico Through Sec'y of Justice*, 827 F.3d 154, 157 (1st Cir. 2016); *Wheeler* v. *Georgetown Univ. Hosp.*, 812 F.3d 1109, 1114 (D.C. Cir. 2016); *Flowers* v. *Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1336 (11th Cir. 2015), cert. denied, 136 S. Ct. 2510 (2016); *Littlejohn* v. *City of N.Y.*, 795 F.3d 297, 307-308 (2d Cir. 2015); *Reyazuddin* v. *Montgomery Cnty.*, 789 F.3d 407, 419 (4th Cir. 2015); *Barrett* v. *Salt Lake Cnty.*, 754 F.3d 864, 867 (10th Cir. 2014); *Hague* v. *University of Tex. Health Sci. Ctr.*, 560 Fed. Appx. 328, 340-341 (5th Cir. 2014). Petitioners make no effort to explain why, in light of that rule, the lower courts' consideration of the VA's proffered reasons for the challenged employment actions does not eliminate the need to consider whether petitioners established a prima facie case of discrimination. Petitioners' vague contentions (*e.g.*, Pet. 20) that the district court and court of appeals' approach to the prima facie showing somehow diluted the strength of petitioners' arguments on pretext find no support in either of the decisions below and do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2017