No. _____

In the Supreme Court of the United States

MARISOL MICHEO-ACEVEDO,
Petitioner,

v.

STERICYCLE OF PUERTO RICO, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the First Circuit deprived Petitioner of her constitutional right to a jury trial when it massaged the facts in violation of Rule 56 and , thus, dismissed her employment discrimination and retaliation claims.

B. Whether this Court should exercise its supervisory power and provide effective means to hold lower courts accountable by requiring them to spell out their analysis regarding whether genuine issues exist, as a prerequisite to granting summary judgment.

C. In the alternative, whether the First Circuit's massaging of the facts and misapprehension of the governing standard warrants summary reversal.

PARTIES TO THE PROCEEDING

Petitioner Marisol Micheo-Acevedo was Plaintiff - Appellant below. Respondent Stericycle of Puerto Rico, Inc. was Defendant - Appellee below.

Angel Rivera-Morales and Osvaldo Santana-Rivera were Defendants in the District Court.

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PETITION FOR WRIT OF CERTIORARI

Ms. Marisol Micheo-Acevedo ("Micheo") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals is reported at 897 F.3d 360 (1st Cir. 2018) and is reproduced in the Petition's Appendix ("Pet. App.") 1-15. The decision of the U.S. District Court for the District of Puerto Rico is not officially reported but is available at 2017 WL 5152173 and is reproduced in the Pet. App. 18-50. Micheo's timely petition for rehearing and rehearing *en banc* was denied on August 23, 2018. Pet. App. 52-53.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was issued on July 27, 2018. Pet. App. 16. The denial of the petition for rehearing was issued on August 23, 2018. Pet. App. 52-53. Justice Breyer extended the time for seeking certiorari until January 22, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56, in its pertinent parts, provides:

> (a) Motion for Summary Judgment or Partial Summary Judgment. … The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
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> (b) …
>
> (c) Procedures.
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> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:…
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> (e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it;…

STATEMENT OF THE CASE

INTRODUCTION

This case impacts the Seventh Amendment Right to jury trial in all civil cases and, thus, extends beyond Marisol Micheo and Stericycle of Puerto Rico, Inc. It concerns the silent siege of The Seventh Amendment's right to jury trial by the lower courts' recurrent "massaging" or "cherry picking" of the relevant facts at the summary judgment stage, in "clear misapprehension of the [] standards in light of [the Court's] precedents." *See, Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014).

> Massaging facts occurs when judges who possess the same information use it in different manners. Massaging facts can occur in a number of ways. It can occur when a court ignores relevant facts. It also can happen when courts do not consider different ways to view the facts. In other words, they do not take into account the reasonable inferences favoring the party not moving for summary judgment.

See, Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 Fordham L. Rev. (2018), p. 2252. Available at:https://ir.lawnet.fordham.edu/flr/vol86/iss5/16.

This attack of the Seventh Amendment Right to Jury Trial must be halted by the Court, because "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. U.S.,* 116 U.S. 616, 635 (1886).

The long-standing principles governing summary judgment were clearly discussed in detail in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). These are inextricably intertwined with the right to trial by jury and the preeminent role it is intended to play in the American democratic system. *Tolan*'s aftermath, however, attests to the continuing need for the Court to provide needed guidance and devise means for effective accountability to avoid the risk that lower courts assume that strict adherence to Rule 56's exacting standard is essentially voluntary.

The Opinion exemplifies the systemic national trend by lower courts applying a variation of the governing standard under Rule 56 that permits, *inter alia*, the dismissal of employment discrimination and retaliation claims, through the "massaging" or "cherry picking"[1] of the material facts. Massaging or cherry picking the relevant facts leading to the dismissal of claims through improper grants of summary judgment constitutes an affront to the people's Seventh Amendment Right to Jury Trial. *Reeves*, 530 U.S. 133 (2000).

The grant of summary judgment is the highest in civil rights cases and, primarily, in employment discrimination cases, notwithstanding that they are factually-intensive and intent-based. In 2010, Professor Schneider stated that "[r]ecent data suggests that 70% of summary judgment motions in civil rights cases and

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[1] *See, Suchanek v. Sturm Foods, Inc.* 764 F.3d 750, 762-763 (7th Cir. 2014) ("All that is visible are some cherry-picked facts adverse to the plaintiffs, with no mention of the evidence favoring the plaintiffs' claims.").

73% of summary judgment motions in employment discrimination cases are granted - the highest of any type of federal civil case." *See,* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 549 (2010) (reporting the Federal Judicial Center data); *see also,* Suja A. Thomas, *supra* p. 2243, n. 19 and articles cited therein; Richard L. Steagall, *The Recent Explosion in Summary Judgment Entered by the Federal Courts has Eliminated the Jury From the Judicial Power*, 33 Southern Illinois University Law Journal 469, 501 (2009); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution,* Suffolk University Law Review, Vol. XL:1, 67, 73-74 (footnotes omitted) ("In fact, the 'civil jury has all but disappeared.' … Echoing this reality, Judge Patricia Wald started her tribute to Professor Charles Alan Wright with this striking sentence: 'federal jurisprudence is largely the product of summary judgment.' Judge Wald is right – and note the compelling inference – that today we are more concerned intellectually with the procedural mechanism that blocks jury trials than we are with the trials themselves.")

The criticism about the courts' improper use of summary judgment has been harsh but, nonetheless, the practice continues. *See e.g.,* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. Law Review, 286 (2013). Professor Miller highlighted that:

> [a] motion [for summary judgment] designed simply for *identifying* trial-worthy issues has become, on occasion, a vehicle for *resolving* trial-worthy issues … The effect is to compromise the due process underpinnings of the day-in-court principle and the constitutional right to jury trial without any empirical basis for believing that systemic benefits are realized that offset these consequences.

Id., at p. 312 (emphasis in original) (footnotes omitted).

Massaging or cherry picking of the material facts also contravenes the Court's fundamental instruction that "a judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton,* 134 S. Ct., at 1866. As will be demonstrated, under the guise of sufficiency of the evidence, the First Circuit, ignored crucial pieces of evidence and adjudicated credibility in favor of the moving party. That is an *ultra vires* exercise of judicial power.

In contrast to the clear direction given by the Court in *Tolan*, the lower courts "did not credit clearly contradictory evidence," *Id.* at 1867, and "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id.* at 1868. If lower courts are allowed to massage the facts, by weighing the evidence without viewing the facts in the light most favorable to the non-moving party, employment discrimination and civil rights cases, some of the most factually intensive, will rarely reach trial.

And Congress's mandate to eradicate discrimination and retaliation in the workplace will be, irreparably, emasculated. *See e.g., McDonald v. Santa Fe Trail Transport Corp.,* 427 U.S. 273, 280 (1979).

This is precisely what happened in the instant case. Both courts ignored substantial portions of Micheo's evidence of material facts, mendacity and pretext, which, viewed through Rule 56's prism, created genuine issues that precluded summary judgment. Instead, they massaged the facts and found in favor of the moving party. They lacked the judicial power to stray from the settled summary judgment rule.

Review of the lower courts' dismissal of Micheo's claims is also necessary because Micheo provided much more than "thin evidence" in support of her claims that, coupled with the First Circuit's "conspicuous[] fail[ure] to apply a governing legal rule, …" deprived her of a jury trial and substantial justice. *See e.g., Salazar-Limón v. City of Houston, Texas*, ___ U.S. ___, 137 S. Ct. 1277, 1277-1278 (2017) (ALITO, J., in which THOMAS, J. joined, concurring in denial of *certiorari.*) As a matter of policy and fairness, victims of discrimination, very often out of work and without the resources available to employers, should not be forced to engage in extraordinary efforts before the Court to obtain the review inherent to Courts of Appeal. The Court should instruct lower courts to prioritize between competing interests and not employ Rule 56 as a weapon against plaintiffs, misguided by efforts to manage their dockets more effectively. *See,* Arthur R. Miller, *supra,* at pp. 310-311. This hierarchical policy inversion, in direct detriment of core democratic values and rights, deprives the people of substantial justice.

"In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction." *Rosales-Mireles v. United States*, —— U.S. ——, 138 S. Ct. 1897, 1908 (2018). Neutrality and fairness are the missing links when judges massage the facts and, thus, misapprehend the standard governing their duty, which precludes them from supplanting their judgment for that of the jury.

FACTS IN THE LIGHT MOST FAVORABLE TO MICHEO

Micheo claimed that Stericycle discriminated against her because of sex when it selected Mr. Jorge Rodríguez ("Rodríguez") over her for the position of Program Manager of the BioSystem Program ("PM"). Micheo met her burden under Rule 56 of creating an issue as to whether the PM position, *de facto,* existed. Micheo presented, *inter alia*, evidence of Stericycle's announcement of Rodríguez as PM to the sales force, that Stericycle gave him PM business cards, that he was allowed by upper management to send e-mails as PM and that he earned $2,700.00 more a month, than any other fellow Field Sales Representative, including Micheo.

Stericycle's sole claim was that Micheo did not meet her *prima facie* case because the PM position never existed. Accordingly, she did not suffer an adverse employment action.

The First Circuit concluded:

> The District Court, however, found that, because there was no basis for finding that the position of IWSS Program Manager existed, Micheo could not show that there was a genuine issue of material fact as to whether she had been denied a promotion to it. And we agree.[2]

The court added:

> Micheo also fails to identify any evidence that would contradict the sworn affidavit of Stericycle's Human Resources manager that, based on her own knowledge and review of Stericycle's payroll records, Stericycle at no point established such a position *on its payroll*.[3]

Micheo also claimed that she was retaliated against when she complained of sex discrimination. Among other things, the First Circuit agreed that Micheo met her *prima facie* case of retaliation on three independent adverse job actions.

Stericycle contended that it based its actions on Micheo's performance, as evidenced by the incidents in her Performance Improvement Plan ("PIP").[4]

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[2] Pet. App. 5.

[3] *Id.* (emphasis ours). This will be discussed in detail, *infra.*

[4] Her termination was triggered by the first and only incident after the PIP came into effect.

The First Circuit agreed:

> Micheo does assert in her brief to us that the incidents that the PIP itself identified as the basis for her placement on it were false. She fails, however, to identify anything in the record to support that assertion.[5]

The First Circuit's conclusion fails to take into account several instances of protected conduct by Micheo that triggered retaliatory acts against her by Stericycle and which the company included in the PIP to justify this disciplinary measure. While these were discussed by Micheo, neither opinion reflects that this evidence was considered. Additionally, the First Circuit did not recognize that, according to Stericycle's Policy, to dismiss an employee in Puerto Rico, she would have had to engage in "conduct or a pattern of conduct that amounted to gross misconduct" and that Stericycle conceded that Micheo's issues did not amount to gross misconduct. Nevertheless, the court adopted Stericycle's interpretation during oral argument and found: "[i]n particular, we note that Micheo does not point to anything in the PIP that would indicate that an employee on the PIP could only be terminated for 'gross misconduct,' rather than for any violation of the PIP." Pet. App. 12. Regardless of whether that was a plausible interpretation, the court was impeded from drawing it, because it was for the

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[5] Pet. App. 11. Micheo will discuss the numerous occasions she pointed both courts to the evidence of the falsity of the PIP incidents, contained in a Table in the Appendix on Appeal ("App."), pp. 1250-1253.

jury to determine among the competing interpretations.

Those results, in light of the evidence before the courts and the governing standard, could only be reached by massaging the facts in three of its variations: (1) ignoring relevant evidence;[6] (2) by choosing between competing versions of the same facts; and (3) failing to draw reasonable inferences in favor of the non-moving party. The First Circuit's improper molding of the established summary judgment standard offends Rule 56 and the Court's clear directive that they are not free to disregard the governing rule of law.

Sex Discrimination Claim

In the Spring of 2012, Micheo and Rodríguez began working for Stericycle as Field Sales Representatives ("FSR"), under the supervision of Osvaldo Santana, Stericycle's Sales & Marketing Director ("Santana"). App. 810, ¶1 and 815, ¶16-17. As FSRs, both earned an annual salary of $27,000.00. App. 276-283, ¶1, 2, 17 and 35.

Around March 2013, Stericycle launched a program called BioSystem ("BS"). In July 2013, Luis Barbero, Stericycle's General Manager (GM) at the time, told Micheo that she would be the PM. App. 279, ¶20; 862, ¶60-62. Barbero, however, was replaced as GM by Angel Rivera ("Rivera") in June 2013. App. 541, ¶1.

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[6] Or "cherry picking" of the evidence. *See, Suchanek, supra.*

In September 2013, Rivera brought Micheo back to sales. Santana met with Micheo and told her that the PM position would not exist, but that she would occupy a supervisor position and head the BS Program, effective immediately. App. 282, ¶30-31; ¶65-74. On September 23, 2013, Santana officially announced Micheo as Supervisor in an e-mail to the sales force. App. 664. But, on October 4, 2013, Santana backtracked and officially announced Rodríguez as PM. App. 866, ¶80. Micheo complained to Santana that this was a discriminatory demotion. App. 288, ¶58; 865-866, ¶75, 80; 874, ¶109. When Rodríguez came back to Sales as PM, he kept his higher salary as Transportation Supervisor ($29,700.00), while Micheo remained at $27,000.00, in her role as supervisor.

Micheo contended that Stericycle *de facto* created the PM position while the company asserted it was not *officially* created *in its payroll records*. Nevertheless, both courts adopted Stericycle's theory that Micheo and Rodríguez "held themselves out" as holding positions that did not exist, *i.e.* PM and Supervisor, without any factual support. *Compare*, App. 867, ¶87 and App. 281, ¶28.

On October 8, 2013, Stericycle reprimanded Micheo for her alleged "outburst" on October 4, 2013, when she complained that the official announcement of Rodríguez as PM was a discriminatory demotion.[7]

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[7] This is one of 11 "incidents" upon which Micheo's Performance Improvement Plan ("PIP") was predicated (the "PIP incidents"). Micheo produced evidence that these were false, which the courts did not consider. App. 1250-1253.

Retaliation Claim

Micheo retained counsel and, on October 22, 2013, her attorneys sent a letter via e-mail to Stericycle, Rivera, Santana and Rodríguez complaining of sex discrimination. App. 826, ¶59. On November 8, 2013, Micheo filed an administrative charge ("ADU charge") claiming, among other things, gender discrimination and retaliation. App. 678. Four days after filing the charge, Santana baselessly reprimanded Micheo for allegedly incurring in an unauthorized additional expense to Stericycle for purchasing some labels.[8] That afternoon, Santana called Micheo and started yelling at her. Micheo asserted that his attitude was disrespectful and in retaliation for having filed the ADU charge. App. 875, ¶115 and 119.

Beginning on November 19, 2013, a series of e-mails regarding Micheo were exchanged between Rodríguez, Santana, Rivera and Ms. Monica Bloomfield ("Bloomfield").[9] The initial ones reflected that Bloomfield asked Santana and Rivera to provide her with Micheo's performance information to "make sure the proper coaching, counseling and corrective action process has been followed as part of the performance management process[.]" App. 870-874, ¶100-104. As part of the process, Santana drafted a Team Member Counseling Report ("TMCR") and addressed it to

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[8] App. 1250-1253.

[9] Human Resources Manager at Stericycle, Inc., Stericycle's parent company, in Illinois. A Table cross-referencing the authors, recipients and contents of the different e-mails was presented to both courts, but there is no mention of Micheo's evidence in either opinion. App. 1243.

Micheo. The TMCR is intended to alert an employee that there is conduct that she needs to correct. App. 690.

But, forty-four (44) minutes after Bloomfield expressed her intention to engage in the progressive discipline process, things took a drastic turn when Santana told her that Micheo had sent another e-mail complaining of retaliation for having interfered with her duty of recruiting hospital technicians. App. 665 and 1250-1253. Bloomfield aborted the process and instructed Santana "NOT" to discuss the TMCR with Micheo.[10] Bloomfield's sudden change of mind, constitutes evidence of retaliation against Micheo. It was ignored by the First Circuit.

On November 22, 2013, Santana met with the sales staff at a restaurant and had a "farewell lunch" for Jordy Torres, another FSR. Micheo was the only Sales Team member who was excluded. Santana claimed that it was a routine sales force meeting and lunch. The First Circuit adopted Stericycle's position without even mentioning Ms. Merimar Estrella's testimony (a disinterested witness) that she was invited to the "farewell lunch." App. 869 and 879. The First Circuit should have inferred that Santana intentionally excluded Micheo from the sales force's activity for its departing member.

Micheo found about her exclusion and complained to Santana: "I am not going to resign. I will keep on

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[10] Micheo's TMCR, however, is one of three alleged "disciplinary memos" which form part of the PIP incidents, which Stericycle never issued or discussed with Micheo. App. 1250-1253.

defending my rights to no discrimination and to not being a retaliation victim." App. 693. Santana responded an hour and a half later. His rage was evident: "This letter is proof of your insubordination and lack of ethics with the duties you are performing in this company. I hope *these letters [i.e. retaliation e-mails] stop at once* and that you focus on tending to daily work task[s], the ones that benefit Stericycle." App. 692 (emphasis ours). Yet, there is not a scintilla of evidence regarding "lack of ethics" or "insubordination." Micheo's complaint to Santana constitutes protected conduct under Title VII and Santana's response amounted to retaliation because it was likely to dissuade Micheo from pursuing her discrimination and retaliation claims. *See, Burlington Northern & Santa Fe Railway v. White,* 548 U.S. 53, 69-70 (2006). But this issue was ignored by the First Circuit because it believed Stericycle's version about Micheo's performance, based on the PIP incidents, which Micheo claimed were false. App. 1250-1253.

On December 19, 2013, Micheo was given a PIP based on false premises, that did not constitute gross misconduct, and from which both courts should have inferred that the PIP was drafted to justify her termination. App. 1250-1253. That prompted Micheo's insistence to include in the PIP a comment (the "PIP Note"), permitted under Stericycle's policy,[11] that the disciplinary action was in retaliation for filing her ADU charge. App. 885-886, ¶164-167. Every time she intended to include her PIP Note, Santana and Rivera

[11] App. 1035.

would shred the PIP and give her a clean copy to sign.[12] *Id*. On the following day, Micheo was summarily suspended because she would not sign the PIP without the PIP Note.[13] Despite this evidence, the courts found that Micheo was suspended because she refused to sign the PIP, with no mention about the PIP Note or of the policy in effect that allowed it. Pet. App. 11; App. 1035.

Stericycle's Employee Performance and Conduct policy ("EPC") states the company's established procedure for the handling of Micheo's alleged performance issues. App. 850-857, ¶8-37. The First Circuit found that because the PIP did not mention "gross misconduct," Stericycle's policy that, *in Puerto Rico*, the company's discretion to "discipline and terminate without progressive discipline," *i.e.* skip steps, could be exercised *only* when there was a pattern of *gross misconduct*, did not apply. Pet. App. 12-13; App. 854, ¶¶18-21. At oral argument, Micheo provided the Panel with the specific reference to the policy, to no avail. App. 1017; Transcript of Oral Argument ("Tr. OA"), p. 28, lines 15-24.

The record also contains an e-mail from Bloomfield of January 3, 2014, the same day Micheo signed the PIP, asking Santana to be mindful about monitoring Micheo, giving her clear instructions and to document any "concrete and real information (evidence)" of errors, faults or bad behavior, but to be careful that it did not look like a "witch hunt." App. 888, ¶180.

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[12] Stericycle never addressed Micheo's version of the meeting and neither court mentioned it.

[13] App. 886, ¶169.

Bloomfield's assertions also supported the inference that the eleven (11) "PIP incidents" did not amount to "gross misconduct" and were not based on "concrete and real information (proof)."

Stericycle's "witch hunt" came to fruition on January 17, 2014, when Micheo was terminated. The only event between the beginning of Micheo's PIP on January 3 and her termination on January 17 was an alleged failure to follow Santana's instructions regarding Micheo's attendance to a hospital installation. Micheo's evidence, including a doctor's appointment of which Santana was fully aware, was sufficient to establish her contention, create an issue and defeat summary judgment. App. 889-890, ¶184-185.

PROCEDURAL TRACT

Micheo filed a lawsuit claiming gender discrimination and retaliation against Stericycle under Title VII and its Puerto Rico counterparts. Stericycle filed a Motion for Summary Judgment which Micheo opposed. The district court granted the motion and dismissed the federal claims with prejudice and the local ones without prejudice. Pet. App. 51. The First Circuit affirmed the summary judgment and Micheo filed a Petition for Rehearing with a Suggestion that Rehearing be *En Banc* ("Pet. Reh."). This request was also denied. Pet. App. 52-53.

REASONS FOR GRANTING OF THE WRIT

A. The First Circuit's decision demonstrates the lower courts' need for guidance in correctly applying the summary judgment standard.

Review of the opinion below by this Court is proper under its Rule 10 because it exemplifies the recurrent practice by lower courts of granting summary judgment in employment discrimination and retaliation cases by molding the strictures of Rule 56 and massaging the facts, in "clear misapprehension of the governing [] standard and the Court's precedents." *Tolan,* 134 U.S., at 1868. This course of action obviates consideration of the central role of the jury in the Constitution as the people's check on unelected judges and unconstitutionally deprives victims of unlawful discrimination and retaliation of their Seventh Amendment's right to jury trial. *See,* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, University of California, Davis, Vol. 28:1169 (1994) ("No idea was more central to our Bill of Rights – indeed, to America's distinctive regime of government of the people, by the people, and for the people – than the idea of the jury. Yet, no idea today has suffered more abuse…') *Id.*

The adverse effects of this practice particularly manifest themselves in civil rights cases, especially about employment discrimination and retaliation, because they are intent based and factually intensive. Their summary disposition deprives plaintiffs of the individual protections embodied in Title VII and Congress' mandate to eradicate discrimination and retaliation from the workplace. *McDonald, supra.*

The actual situation should trigger the Court's exercise of its supervisory power to ensure the fairness, integrity and public reputation of judicial proceedings and to set the parameters by which lower courts should be guided and held accountable. *Rosales, supra*. Thus, the Court should devise means, consonant with the courts' burden under Rule 56(a) to grant summary judgment *only* after determining that no genuine issues of material facts exist, requiring them to spell out their analysis as a prerequisite to granting of summary judgment. This would serve to extricate any contagious and epidemic tendency by lower courts to portray the appearance of compliance by correctly enunciating the governing standard, to be immediately followed by its conspicuous disregard. *See e.g., Kisela v. Hughes,* __ U.S. __, 138 S. Ct. 1148, 1155 (2018) (Justice SOTOMAYOR, joined by Justice GINSBURG, dissenting)(conspicuous omission of "several critical facts").

B. Only this Court can provide the necessary guidelines for harmonizing the constitutional and policy interests involved.

Massaging or cherry picking of the relevant facts by any court adjudicating a motion for summary judgment is contrary to the settled and governing standard that binds its task. In 2000, the Court reiterated the vitality and obligatory character of the inquiry, the scope of the evidentiary review, and the concomitant hurdle facing the moving party. *Reeves*, 530 U.S. 133, 150-151 (2000). The Court highlighted that the record must be reviewed "taken as a whole," *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) and explained the task in detail, as follows:

> … the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc*., 494 U.S. 545, 554–555, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990); *Liberty Lobby, Inc*., *supra*, at 254, 106 S.Ct. 2505; *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 696, n. 6, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, *supra*, at 255, 106 S.Ct. 2505. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *See* Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300.
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> 530 U.S., at 150-151.

In his dissent *in Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), Justice BRENNAN warned that the opinion was "full of language which could surely be understood as an invitation – if not an instruction - to trial courts to assess and weigh the evidence" … and expressed his fear that it "will transform what is meant to provide an expedited 'summary' procedure into a full blown paper trial on the merits." *Id.*, at 266. Massaging or cherry picking the material evidence are some of the

anticipated manifestations of Justice BRENNAN's concern.

Fairness, Integrity and Public Reputation of the Judicial System

The massaging of the facts by the First Circuit cannot be said to have been "neutral, accurate, consistent, trustworthy and fair" and exemplifies the recurrent trend where courts mold the summary judgment standard to reach an ostensibly sound, but legally unacceptable, result. *Rosales, supra.* The First Circuit compounded the initial error by the district court when it failed in its principal function of affording Micheo a meaningful opportunity for its correction. *Id.*

Unsubstantiated Determinations Against Micheo

Pretext and Retaliation

Micheo fulfilled her retaliation *prima facie* case as to: (1) her placement on the PIP; (2) her suspension for allegedly refusing to sign the PIP; and (3) her termination. Pet. App. 9-10. To dismiss all three instances of retaliation, the courts massaged the facts, *i.e.,* ignored Micheo's evidence that the PIP incidents were false,[14] and found, that "Micheo's misconduct - that which prompted her placement on the PIP - was the basis for the adverse job actions and thus she failed to establish pretext." Pet. App. 10. That conclusion places Rule 56 on its head.

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[14] App. 1250-1253.

Neither court analyzed the evidence of pretext propounded by Micheo: that the "PIP incidents" were false. Review of that material evidence was essential under the governing standard. Notwithstanding *Reeves,* the First Circuit concluded:

> Micheo does assert in her brief to us that the incidents that the PIP itself identified as the basis for her placement on it were false. She fails, however, to identify anything in the record to support that assertion.
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> Pet. App. 11.

The court's failure to consider Micheo's evidence of pretext effectively deformed or amended the standard under Rule 56 to the point where judges utilizing it, in spite of the Court's precedents, can select the evidence from the record that will guide their analysis to the desired result. The record contradicts the First Circuit's assertion that Micheo did not produce evidence of pretext. Brief on Appeal, pp. 13, n. 13; 16, n.15; 42, n. 28; and 43; *see also,* Memorandum In Opposition to Summary Judgment. App. 1250-1253. The previous First Circuit decision from a different Panel with the identical issue, reveals that more than enunciating the standard is required for the right to a jury trial to be preserved and substantial justice delivered. *See, Tang v. Citizens Bank, N.A.,* 821 F.3d 206, 222 (1st Cir. 2016) ("*Tang I*").[15]

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[15] "The most logical inference is that human resources had compiled these emails to investigate whether there was any basis for Tang's claim that her PIP was false. But, as Tang suggests, another inference is available: that, upon receiving Tang's complaint, Citizens had realized she posed a problem and was

Micheo referred the First Circuit, on *three separate occasions*, to the specific evidence it asserted she had not produced. The first instance is at page 13. Micheo argued that "*she was going to sign the PIP*, but was going to include a note that she: 'd[id] not agree with this PIP, it is an act of retaliation against me.' (the PIP Note)." Footnote 13 made it clear that she had argued to the district court that the incidents in the PIP were false. Although mendacity plays a key role when it comes to determining pretext and an inference of intentional retaliation, both courts ignored the evidence presented by Micheo. *Reeves,* 530 U.S., at 147; Ap. 1250-1253 (3rd column).

Micheo referred the district court and the First Circuit to pp. 1250-1253 of the Appendix. This contained part of her argument on the issue of pretext and a table discussing each PIP incident in detail, which she contended were false and provided a specific record citation, as required by Rule 56(e). This evidence was also utilized in a separate section of her opposition in which she attacked the PIP as a sham and a pretext for her termination. Main Brief, p. 16, n. 15. Again, Micheo pointed the court to the discussion in the section titled: "The Placement on the Non-Compliant PIP" as part of her pretext evidence. Main Brief, p. 42, n. 28; *see also*, p. 43. Micheo also noted that her "challenge of Stericycle's evidence was

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beginning to collect information for her termination." The First Circuit's failure to review the entire record deprived Micheo of the inference that warranted reversal and the resolution of her claim before a jury, not a judge. By failing to draw this inference, the court massaged the facts. Moreover, the decision in *Tang I* was a mandatory precedent for the district court.

completely ignored by the [district] court." Reply Brief, p. 6, n. 6.[16] Micheo also stressed to the First Circuit *en banc* of the Panel's failure to consider her evidence of pretext anent the PIP. Pet. Reh., p. 16. She also emphasized that: there is *no record evidence* for this court's conclusion that, prior to being placed on the PIP, Micheo "was repeatedly absent from work and meetings." *Id.*[17]

Accordingly, the First Circuit's assertion that Micheo failed to point to evidence about the false PIP incidents is contrary to the record. Other than its conclusion against Micheo, there is no mention or analysis by the First Circuit as to her evidence of pretext and mendacity by Stericycle. These were central to the First Circuit's decision that deprived Micheo of the right to a jury trial by altering the governing standard.

Since Micheo met her *prima facie* case of retaliation on three separate adverse employment actions, the First Circuit's application of the wrong standard provided the only means to deprive her of the trial to which she is constitutionally entitled. Thus, the First Circuit did not heed the Court's long-standing proposition that "[t]he purpose of [Rule 56] is not to cut

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[16] Notwithstanding this properly produced evidence, Micheo's counsel was asked during oral argument if he would concede that the PIP incidents occurred. He did not. Tr.OA, p. 6, line 7; compare App. 1250-1253.

[17] The First Circuit did not apply to Stericycle its rule that it was "not obliged to accept as true or to deem as a disputed material fact, each and every unsupported, subjective, conclusory, or imaginative statement made to the Court by a party." 897 F.3d at pp. 362-363.

litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp*., 321 U.S. 620, 627 (1944). Micheo, still, has issues to try.

The First Circuit's Refusal to Draw Reasonable Inferences *vis-à-vis Tang I* Reflects a Unilateral Deformation of the Settled Summary Judgment Standard.

Tang I had already been decided when the district court dismissed Micheo's claims. The malleability with which the First Circuit treated its prior ruling from another Panel, but with a common judge, to reach two diametrically opposed results, through the disparate application of the same rule of law to identical issues of fact, potentially erodes the foundations of the judicial system and the citizenry's trust in it. Massaging the facts or conspicuously failing to consider pivotal evidence has permitted courts to exercise a discretion which they lack and, at times, is an *ultra vires* exercise of their constitutional power with considerable consequences to an individual's rights.

Like the case at bar, the Fifth Circuit's decision in *Wheat v. Florida Parish Juvenile Justice Com'n,* 811 F.3d 702 (5th Cir. 2016) provides an example of the disparate application of a settled standard by different panels within the same Circuit and highlights the urgent need for the Court to implement effective means to hold, primarily, courts of appeals accountable, for their erratic, irreconcilable and inconsistent intra-circuit decisions as a result of the pliant application of a clear standard of law. In *Wheat*, Jolly, J. subscribed the 2-1 opinion. In his partial dissent, the Hon. Carlton W. Reeves, from the Southern District of Mississippi,

sitting by designation, attributed the majority with two fundamental errors: disregarding record evidence and ignoring an important concession by defendant. Judge Reeves could not reconcile Judge Jolly's previous position in *Wilson v. Monarch Paper Company,* 939 F.2d 1138 (5th Cir. 1991), where he refused to remand a $3.4 million verdict in favor of an executive's pre-termination claim, such as the one he faced in *Wheat*, although both are from the Fifth Circuit and the major difference was the status of the plaintiff, *i.e.* white collar v. blue collar. *Wheat,* 811 F.3d at 715.

To illustrate his point, Judge Reeves emphasized Judge Jolly's dissent from a denial of rehearing *en banc* in *Thompson v. City of Waco, Tex.,* 779 F.3d 343, 345 (5th Cir.2015) where he complain[ed] that "a particular panel can find language, and indeed even legal principles, that likely will support any conclusion that it may reach' as to whether an adverse employment action has occurred." *Wheat,* 811 F.3d at 715. Judge Reeves was puzzled and concluded: "Why [the unequal treatment of the plaintiffs] makes sense in a system predicated upon equal justice under law is beyond me." *Id.* (citation omitted). Permitting courts to massage or cherry pick the evidence, without any accountability, explains why irreconcilable decisions are, simultaneously, "good" law within a circuit. *See e.g., Tang I and Micheo, supra.*

The First Circuit's decisions in *Tang I* and Micheo[18] present the exact same paradigm. Whether it is the

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[18] Judge Torruella authored the majority opinion in *Tang I* and was part of the Panel in *Micheo*.

"massaging of the facts,"[19] "cherry picking" of the evidence,[20] or the "finding of language, and indeed even legal principles, that likely will support any conclusion that it may reach …,"[21] the practice that makes it possible cannot be sanctioned by the Court under Rule 56 and its precedents. *Tolan*, *supra*.

The First Circuit's Opinion improperly limits the issue of pretext to Micheo's performance, *i.e.,* the eleven PIP incidents, which she disputed with competent record evidence that the court did not consider; and to its reasoning at Stericycle's request that, because the PIP did not mention gross misconduct, Stericycle's "Puerto Rico gross misconduct" exception in its Employee Performance and Conduct policy did not apply to Micheo's PIP.

To defeat summary judgment, Ms. Tang claimed that the incidents in her PIP were false. In *Tang I*, the First Circuit strictly followed the established summary judgment standard. Accordingly, it drew a series of inferences and discarded competing, albeit more plausible, ones favoring the moving party which led to reversal of the judgment. Conversely, Micheo produced much stronger evidence than Ms. Tang and claimed similar inferences. In Micheo's case, the First Circuit applied a deformed standard when it massaged the facts, *i.e.,* ignored Micheo's evidence, and failed to draw the type of inference it afforded Ms. Tang. Instead, it

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[19] Suja A. Thomas, *supra,* at p. 2243.

[20] *See, Suchanek,* n. 5, *supra.*

[21] *Thompson,* 779 F.3d at p. 345.

drew them in favor of the moving party. *Compare, Reeves,* 530 U.S. at 151. In so doing, it deprived Micheo of equal justice under law and a jury trial. Notwithstanding the grave repercussions of the decision for Micheo, the e*n banc* First Circuit remained unmoved. *See*, Pet. Reh., pp. 2 and 5.

This is another instance where the First Circuit's decision deprived Micheo of her right to jury trial.

The Incomplete, Selective and Improper Review of the Evidence

Micheo's evidence, viewed under the proper standard, created a genuine issue on the existence of the PM position. With this reasonable inference, she would have fulfilled the sex discrimination *prima facie* case and activated the bursting bubble inference of discrimination. *Texas Dept. of Commun. Affairs v. Burdine*, 450 U.S. 248 (1981). In the absence of a non-retaliatory reason by Stericycle, since it exclusively relied on the inexistence of the position, the court was required to deny summary judgment and order a jury trial. *Id.*, at 254.

Gender Discrimination and the Inexistence of the PM: A Trial on the Merits on Stericycle's Human Resources Director's Affidavit

To dismiss the gender discrimination claim, the First Circuit relied, exclusively, on the affidavit by Ms. Bloomfield, the moving party's Human Resources Manager, and an interested witness and decision-maker and Micheo's alleged inability to contradict its contents. *Reeves*, 530 U.S. at 151. Both courts adopted Stericycle's version and concluded that Micheo did not

suffer an adverse employment action because, to be passed over for promotion, the PM position had to exist in *the payroll records*.

> Micheo also fails to identify any evidence that would contradict the sworn affidavit of Stericycle's Human Resources manager that, based on her own knowledge and review of Stericycle's payroll records, Stericycle at no point established such a position on its payroll.

Pet. App. 5 (emphasis ours).

Micheo propounded the following specific evidence about the *de facto* existence of the PM, at Stericycle, regardless of whether the payroll records did not reflect this reality.

a. Santana brought Rodríguez back to sales as PM; App. 866, ¶80; 929 and 942.

b. …

c. Santana officially presented Rodríguez as PM on October 4, 2013; App. 1330-1331; 866, ¶80.

d. Stericycle provided Rodríguez with business cards as its PM; App. 867, ¶87; App. 928, line 2.[22]

e. Rodríguez sent official emails using the PM title; App. 674-675.

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[22] Stericycle never addresses this evidence.

f. General Manager Ángel Rivera ("Rivera") and Santana received copies of Rodríguez's e-mails as PM; *Id*.

g. Rodríguez was not reprimanded by Santana for signing his e-mails as the PM; App. 865, ¶78.

h. In June or July 2014 the personnel records of Rodríguez showed that his last official position was Transportation Supervisor. App. 935, line 15.

i. Rivera and Santana did not inform Bloomfield about the creation of the Supervisor and PM positions in September and October of 2013.[23]

j. From Rodríguez's testimony about his meeting with Bloomfield in the summer of 2014, the district court should have inferred that the salary adjustment down came after Bloomfield found out that Stericycle gave Rodríguez the PM title while, according to the HR records, he was still, "officially," the Transportation Supervisor. App. 935, line 18.

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[23] This is a reasonable inference from Rodríguez's testimony that when he met Bloomfield in the summer of 2014, the personnel records reflected that he was the Transportation Supervisor. A. 935, lines 11-21; *see also*, items (h) – (l).

k. Rodríguez was being paid $29,700.00, the salary of Transportation Supervisor while he was the PM.[24]

l. Rivera and Santana knew about the PM position and approved it.[25]

m. Rodríguez began supervising Micheo. App. 291, ¶68.

The First Circuit refused to draw a reasonable inference: that the PM position, *de facto,* existed. Stericycle's top officials had appointed Rodríguez as PM and continued to pay him the higher salary of Transportation Supervisor, until Bloomfield found out, five months after Micheo's departure. That explains Bloomfield's surprise when Rodríguez offered to give her one of the PM business cards which Stericycle gave him. *See,* (h)-(l), *supra*. App. Hence, the *payroll records* reflected that, in the summer of 2014, Rodríguez held the position of Transportation Supervisor. APP. 935, lines 11-21. *Reeves, supra*. App. This also fell on deaf ears before the First Circuit *en banc*:

> Micheo cannot help but be perplexed that these facts are not mentioned in the Opinion, particularly because, at oral argument, the court pressed Stericycle's counsel on this very point. Oral Argument, 13:00-16:00. ("Doesn't this all raise issues of fact?" and "Why isn't that enough to get to the jury?").

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[24] This is a reasonable inference from the immediately preceding testimony. *See, Tolan,* 134 S. Ct. 186.

[25] *See,* n. 7; *Tolan,* 134 S. Ct., 1867-1868.

Pet. Reh. p. 11; Tr. OA, p. 15, last line, and p. 18, last two lines.

Stericycle did not provide any specific and competent piece of evidence to conclusively establish that the PM did not exist at Stericycle. It exclusively relied on the payroll records, and the affidavits of two interested parties and decision-makers: Bloomfield and Rivera, which the jury was not required to believe and the court was precluded from basing its decision on that evidence. *Compare, Reeves,* 530 U.S., at 151.

On her Petition for Rehearing, Micheo emphasized:

> The only way to harmonize the Opinion with the record evidence would be to believe that Rivera and Santana went through all these efforts to name Rodríguez as PM *knowing that the position did not exist*. That is not only absurd but also defies logic and common sense. *Pippin v. Boulevard Motel, Inc.,* 835 F.3d 180, 186 (1st Cir. 2016) *citing, United States v. Smith,* 680 F.2d 255, 260 (1st Cir. 1982) ("Neither juries nor judges are required to divorce themselves of common sense....").

Pet. Reh., p. 10.

Again, this case is not about the court's failure to view in a particular way differing versions of the facts. It is about the prospects of any panel's claim of a power it does not possess: shaping the governing standard by ignoring crucial pieces of evidence and "'finding language, and indeed even legal principles, that likely will support any conclusion that it may reach' as to whether an adverse employment action has occurred." *Wheat,* 811 F.3d at 715, *citing, Thompson*, 779 F.3d at

p. 345 (Reeves, D.J., dissenting). This practice cannot be sanctioned because it carries with it the loss of fundamental rights to fairness in judicial proceedings and the Founders' determination that a jury of peers would solve factual disputes. *See, Amar, supra.*

C. Requiring courts to spell out their analysis in summary judgment opinions is exceptionally important

When courts are not accountable for their analysis leading to a grant of summary judgment, experience has established that they have sufficient leeway to write opinions by stating the summary judgment standard and proceeding to "cherry pick" or "massage" the facts to give the appearance of compliance, but reach the desired result, even if totally divorced from the evidence. Throughout its lifetime, summary judgment has been the subject of attacks because the potential for the wrongful deprivation of a party's substantive rights is ever present. Regardless of whether summary judgment is an effective management tool, a defendant's weapon, or results in more expensive and protracted litigation, its influence permeates all areas of civil litigation. As such, its application cannot result in the systemic deprivation of equal justice under law and access to the courts.

When the Congress amended Rule 56(a) in 2010, it intended to have courts *spell out* the reasons for their rulings on a motion for summary judgment. Specifically, the following language was added to subdivision (a): "The court should state on the record the reasons for granting or denying the motion." As noted by the Advisory Committee on the Federal Rules of Civil Procedure,

> Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment.[26]

It appears evident that the policy consideration here was to ensure that, consonant with their right to equal justice, all litigants receive notice of the bases for the court's ruling. As an added benefit to that, appellate courts could also receive the lower court's detailed factual findings, derived from the parties' submissions under Rule 56(c).

The district court's duty under Rule 56(a) to state "the reasons" should carry with it an obligation to set forth the *factual findings* upon which those "reasons" are predicated. This is buttressed by section (a)'s limitation on a court's lack of discretion to grant summary judgment *only* to instances in which it determines that "the movant show[ed] that there is no genuine dispute as to any material fact." *Id.* Thus, under Rule 56, the court, the moving party and the non-moving party have their respective burdens. It is from the parties' fulfilment of their respective burdens under section (a) for the moving party and section (c) and (e) for the non-moving party, that they present their complete submissions to the court. Rule 56(c). That provides the court the factual predicate to fulfil its principal duty of determining "if there is no genuine

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[26] As noted by the Court in *Liberty Lobby, Inc.*, 477 U.S., at 249 and n. 6: while the court is not required to make findings of fact, "[i]n many cases, however, findings are extremely helpful to a reviewing court."

dispute as to any material fact." *Id.,* 56(a); *see also, Miller*, *supra*, N.Y. Law Review, at p. 312.

Taking this framework as the foundation and consonant with Rule 56(a) and (c), this Court should provide that, when setting forth "the reasons for granting or denying [a] motion" under Rule 56, a lower court *must*, if it is going to deem as "undisputed" facts that the non-movant attempted to dispute, expressly state why the non-movant failed to dispute it and/or *why* the evidence which she submitted is insufficient to create a genuine issue over each disputed material fact arising from the parties submissions under Section (c). This exercise is inevitable if the court fulfils its obligation to determine that no genuine issue exists, before granting summary judgment. By requiring courts to spell out the results of their responsibility under the Rule 56, they will be precluded from "massaging" or "cherry picking" of the facts to determine if the non-movant's evidence creates a genuine issue as to any material fact, like Micheo's proof that the PIP incidents were false and that pretext was at issue.

Moreover, requiring courts to spell out their analysis would simplify the principal purpose of summary judgment: identifying if trial worthy issues existed and the broader and fundamental value that the determination of the parties' differing versions be resolved by a jury of their peers. An added benefit of this approach is the simplification for courts of appeal of their review of district courts' grants of summary judgment. While it appears to be a simple proposal, Micheo is well aware of its importance and its

ramifications across the entire spectrum of federal civil litigation.

D. In the alternative, the First Circuit's decision warrants summary reversal.

Pursuant to Rule 16.1 of the Rules of the Supreme Court, after a party files its petition for a writ of certiorari, "the Court will enter an appropriate order. The order may be a summary disposition on the merits." Summary reversal is appropriate where "the lower court result is so clearly erroneous . . . that full briefing and argument" is unnecessary. Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12, at 345 (10th ed. 2013); *see also*, *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (*per curiam*) (summary reversal is appropriate where the decision below is legally erroneous and the error is obvious). For the reasons stated above, this is such a case.

The First Circuit's unilateral amendment of the settled summary judgment standard by massaging the facts and cherry picking the evidence is an attribution of power it lacks and, if left unattended, puts at risk core rights of the individuals and the legitimacy of the judicial system. *Rosales, supra*. It is undoubtedly more important for the Court's intervention to impact the broader interests at stake which surpass Micheo's, but not less worthy, rights and guarantees. In the alternative, however, she requests that her right to a jury trial be protected and that she be allowed to try her claims before a jury of her peers.

This Court has previously "exercise[d] [its] summary reversal procedure … to correct a clear misapprehension of the [controlling legal] standard."

Brosseau v. Haugen, 543 U.S. 194, 198, n. 3 (2004) (*per curiam*), cited in *Tolan,* at p. 1868 to support a similar situation. Indeed, "[t]he Court has used this procedure to correct even mundane errors on matters of little continuing public importance." *Supreme Court Practice*, *supra*, §4.17 at p. 280, *citing*, *Dye v. Hofbauer*, 546 U.S. 1 (2005).

Justice Breyer has expressed the view that such a summary reversal would be appropriate even where certiorari would not otherwise be granted:

> Because the Court has already answered the basic legal question presented in this case, I would not grant certiorari for the purpose of hearing that question argued once again. I would, however, summarily reverse the decision below. I realize that we cannot act as a court of simple error correction and that the decision below lacks significant value as precedent. Nonetheless, the … possibility [that this case is not unique], along with the clarity of the constitutional error, convinces me that the appropriate disposition of this case is a summary reversal.

Overton v. Ohio, 534 U.S. 982, 985-986 (2001).

Here, the First Circuit opinion reflects a "clear misapprehension" of the controlling standard which the Court reiterated in, *inter alia, Reeves* and which provided the *ratio decidendi* for the reversal of the summary judgment in *Tolan, supra*. The First Circuit's error deprived Micheo of her constitutional right to a jury trial. The decision conspicuously omits consideration of some of Micheo's crucial evidence from

their respective analyses and constitute a "clearly erroneous" and unwarranted molding of the applicable standard under Rule 56. This warrants a summary reversal.

CONCLUSION

The substantial departures from the governing standards are evident. This is irreconcilable with Rule 56 and can only be understood in light of the unconstitutional deformation of the summary judgment standard by massaging and cherry picking relevant facts in clear disregard of the Court's rationale in *Tolan*. This fundamental infirmity needs a cure.

Respectfully Submitted,

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