No. _____

In the
Supreme Court of the United States

KELLY VANDENBERG,
Petitioner,

v.

UNIVERSITY OF SAINT THOMAS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The basic tenet of *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), is that in an employment discrimination case, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* also eliminated the "pretext plus" standard formerly imposed on plaintiffs by circuit courts at the summary judgment stage.

In dicta, the *Reeves* Court referenced the existence of two exceptions to the general rule that a prima facie case combined with pretext allows a factfinder to infer that discrimination occurred. The first exception is "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision". *Id.* at 148. The second exception is "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue[,] and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* But *Reeves* was a Rule 50 case.

The Questions Presented in this case are twofold:

1. Do the exceptions in *Reeves* apply under Rule 56 identically as they do under Rule 50 when the Court prohibits judges from weighing evidence and determining credibility?
2. Whether imposing a burden on plaintiffs to show a "conflict in substantial evidence" on summary judgment is a disguised, impermissible "pretext plus" standard.

LIST OF PARTIES

Petitioner Kelly Vandenberg was the appellant in the court below. Respondent is the University of St. Thomas, also known as University of St. Thomas (Houston), and was the appellee in the court below.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no related cases or proceedings.

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The opinion of the court of appeals is unpublished, but it is reported as 2022 WL 2067834 and reprinted in the Appendix ("App.") at 1-14a. Similarly, the district court's opinion has not yet been published but is reported at 2020 WL 6822907 and reprinted at App. 15-40a.

JURISDICTION

The decision of the court of appeals was entered on June 8, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely, as it is being filed within 90 days from the date of entry of the lower court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2 states, in relevant part:

> (a)**Employer practices.** It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3 states, in relevant part:

> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 1981 states, in relevant part:

> (a) **Statement of equal rights.** 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…and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) **"Make and enforce contracts" defined.** For purposes of this section, the term "make and enforce contracts" includes the making,

> performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> ***

The Seventh Amendment to the United States Constitution provides in relevant part:

> In Suits at common law… the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

INTRODUCTION

This employment discrimination case is another account of the deeply entrenched conflict amongst lower courts regarding the application of *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), to Rule 56 of the Federal Rules of Civil Procedure.

It is inescapable that aggrieved employees constantly petition the Court with a recurring theme of criticizing the banned "pretext plus" still covertly imposed on plaintiffs by federal courts everywhere. Yet, no one can answer how a judge is able to look at summary judgment evidence without "weighing" it. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 266 (1986) (Brennan, J., dissenting).

A plunge into this recurring conflict over the impermissible usage of "pretext plus" shows that the circuit courts always circle back to the dicta in *Reeves*, where the Court noted an employer would be entitled to judgment as a matter of law under Rule 50 if either "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision," or "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

This nationwide confusion over the application of what will be referred to herein as "the narrow *Reeves* exceptions" was anticipated by the same Court.

> "[I]t may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond

> [establishing a prima facie case of discrimination and sufficient evidence that the employer's justification is false] in order to survive a motion for judgment as a matter of law."

Reeves, 530 U.S. at 154 (Ginsburg, J., concurring).

Unlike prior cases where petitions for writ of certiorari simply remind the Court that rampant, unfettered use of "pretext plus" continues, this particular case is the appropriate vehicle to reconcile the application of *Reeves* on summary judgment with the Court's other existing precedent. This will require the Court to give strict scrutiny to the differences between Rule 50 and Rule 56 of the Federal Rules of Civil Procedure, recognizing that their distinctions are more than just semantic. The reward will be resolving a twenty-year-old conflict amongst the circuits with a magnitude of national importance.

STATEMENT OF THE CASE

Legal Background

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established one of the multiple methods to evaluate evidence of discrimination in employment. If the plaintiff establishes a prima face case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the disputed employment action. The function of the prima facie case is to compel the employer to articulate such a reason. Once the employer does so, the burden returns to the plaintiff to establish that the proffered reason is a pretext for discrimination. Although the *McDonnell Douglas* approach originated in a Title VII case, it has been widely used in other types of cases involving claims of an unlawful motive.

But upon a motion prior to a jury hearing any and all of the evidence, a 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. FED. R. CIV. P. 56(a). A court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150.

Factual Background

I.

Kelly Vandenberg, white, began her employment as faculty at the University of St. Thomas in Houston, Texas in May of 2012. Vandenberg's supervisor was the School of Nursing's Associate Dean, Angelina Chambers. Chambers is Black. App. 2a, 17a.

The year after Vandenberg started teaching, St. Thomas hired another faculty member named Lucindra Campbell-Law, who is also Black. Vandenberg observed over the course of her employment that Chambers and Campbell-Law seemed to be "joined at the hip" as the only two black faculty members in the St. Thomas School of Nursing, so much so that Chambers gave Campbell-Law preferential treatment at Vandenberg's expense. App. 4a.

A primary example of this preferential treatment related to Vandenberg's ability to achieve tenure at St. Thomas by conducting research. Chambers and Campbell-Law decided together to stop Vandenberg's research to open up resources for accolades to Campbell-Law. App. 16a. As another example, Chambers and Lucindra Campbell-Law went together on a trip to Haiti with an exceptionally small number of students, but Chambers prevented Vandenberg from going on a study abroad trip to Italy. *Id.* Upon their return from Haiti, Chambers and Campbell-Law appeared to be on a team against Vandenberg and perhaps another white faculty member named Pamela Hodges Love. App. 17a.

On November 23, 2015—three days before Thanksgiving—Chambers surprised Vandenberg in an unexpected meeting, with Human Resources present, to write her up under a Performance Improvement Plan that she prepared. Even though Vandenberg in the years before was always considered "in good standing" and received praises for her performance from Chambers herself, Chambers backdated alleged performance deficiencies to 2013, the year Campbell-Law started teaching. App. 3a.

In the Performance Improvement Plan, Chambers accused Vandenberg of transgressions like "bad decision making," "failure to align with the School of Nursing's expectations," and "inability to resolve student conflict." App. 4a. Specific examples cited by Chambers to support these alleged issues, including the inability to resolve conflicts with students, were verifiably false. From Vandenberg's perspective, this Performance Improvement Plan was spawned by an unspoken alliance formed by a shared race because the falsity of the charges in the Performance Improvement Plan led to no other explanation for the injustice. *Id*.

Believing that she was a victim of reverse discrimination after reflecting on this Performance Improvement Plan, the evidence she had that the accusations by Chambers were false, and the timing of the Haiti trip, Vandenberg sent a letter on December 21, 2015—four days before Christmas—complaining that she believed the Performance Improvement Plan was racially motivated. App. 5a. Vandenberg sent this letter to Chambers, the St. Thomas Human Resources Manager, and the School of Nursing Dean, Poldi Tschirch. *Id*.

Upon receipt of the internal complaint that she was discriminating against her subordinates on the basis of race, Angelina Chambers wrote a response letter, with Human Resource's approval, back to Vandenberg that ended with:

> In conclusion, your allegations of racial biased behavior on my part towards you are totally false and unsubstantiated. Your written concerns are libelous and rise to the level of defamation of character.

This letter was dated January 13, 2016. App. 5a.

Nine days after the date of this letter, on January 22, 2015, when faculty and students had returned from the Christmas holiday, Chambers, Tschirch, and the University of St. Thomas's Vice President allegedly had a meeting where it was decided Vandenberg's contract would not be renewed, even though the Performance Improvement Plan scheduled Vandenberg to have a follow-up meeting to discuss the alleged poor performance she was supposed to be improving. App. 5a. Since Vandenberg was left in the dark on her complaint to Human Resources, she filed a Charge of Discrimination with the Equal Employment Opportunity Commission on February 23, 2016. *Id.*

On May 13, 2016, without any follow-up on the Performance Improvement Plan, her evaluation, or her discrimination complaint to Human Resources, Vandenberg was informed by Human Resources that she would not be returning to teach. On the university's "End of Employment" form, instead of checking one of the pre-printed boxes in the form for the reason Vandenberg was not returning, the phrase "contract not renewed" was handwritten on the form. App. 6a.

Proceedings Below

In February of 2018, after obtaining a Right to Sue letter from the EEOC, Vandenberg filed suit for claims of race discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. App. 7a.

The district court granted summary judgment on November 20, 2020, rejecting Vandenberg's cat's paw theory because the district court determined she could not prove Chambers had the proper animus. App. 15-40a. Vandenberg appealed with a focus on the retaliation claim. App. 7a.

The lower court affirmed summary judgment but skirted the question of whether Chambers's defamation threats constituted evidence of retaliatory animus. Instead, the lower court held that Vandenberg cannot establish "a conflict in substantial evidence" regarding whether Chambers used Tschirch to bring about the decision to terminate her. App. 13-14a.[1]

Notably, the Fifth Circuit acknowledged Vandenberg had established a prima facie case of retaliation and shown evidence of pretext, but the lower court, nonetheless, affirmed summary judgment against Vandenberg. App. 8a-14a. The lower court reasoned that "Vandenberg's evidence of pretext does not show a conflict in substantial evidence as to whether St. Thomas would have renewed Vandenberg's contract but for the HR Complaint or EEOC Charge." App. 14a. Nowhere in

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[1] The lower court cited *Rios v. Rossotti*, 252 F.3d 375 (5th Cir. 2001) to reason that Vandenberg could not use retaliatory animus under a cat's paw theory because Tschirch acted as [slightly more] than a "mere rubber stamp." App. 14a. However, this is not the cat's paw standard set by this Court. The Court elaborated on the contours of a cat's paw theory in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). There, the Court held that "if a supervisor performs an act motivated by animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable…" *Id.* at 422.

the Fifth Circuit's opinion does it cite or even reference *Reeves*.

The lower court also said there was evidence of Vandenberg's underperformance before the Human Resources complaint on December 21, 2015, and the EEOC Charge submitted on February 23, 2016. But, the Fifth Circuit completely disregarded the fact that there was no evidence of underperformance between the time that Vandenberg received the Performance Improvement Plan on November 23, 2015, and the alleged date that St. Thomas decided not to renew Vandenberg's contract.

By purposefully omitting the overwhelming evidence from Vandenberg, the Fifth Circuit impermissibly weighed evidence and decided for itself what to conclude from St. Thomas's story, which *Reeves* forbids.

REASONS FOR GRANTING THE PETITION

This writ of certiorari should be granted because there is a deep and mature conflict regarding whether the narrow *Reeves* exceptions apply to Rule 56 summary judgment. This question stemming from differences between Rule 50 and Rule 56 is of national importance, and the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. There Is a Deep and Mature Conflict Regarding Whether the Narrow *Reeves* Exceptions Apply to Rule 56

There is a 5-3 split amongst the lower courts on whether to apply the narrow *Reeves* exceptions to assess the merits of a motion for summary judgment under Rule 56. Panels in the Second, Third, Fourth, Tenth, and District of Columbia Circuits appear to give little regard to the narrow *Reeves* exceptions in a Rule 56 context.

Contrarily, in the Fifth, Seventh, and Eighth Circuits, appear to utilize the narrow *Reeves* exceptions under Rule 56 frequently to justify weighing evidence. In doing so, these circuits look to this particular sentence in *Reeves*:

> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, ***may permit*** the trier of fact to conclude that the employer unlawfully discriminated.

Reeves, 530 U.S. at 148 (emphasis added).

In application to Rule 56, reading this phrase "may permit" in *Reeves* to mean that courts can review evidence of pretext and then "take it or leave it,"

rather than reading it to mean "it is one of many equally valid options," employs an adolescent logic of "no one told us *not* to do it," forgetting the Court has already made it clear that "[s]ummary judgment *must* be denied when the court of first instance determines that a 'genuine dispute as to [a] material fact' precludes *immediate* entry of judgment as a matter of law." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (emphasis added) (brackets original). (citing FED. R. CIV. P. 56(a)).

A. Five Circuit Courts Have Disregarded the Narrow *Reeves* Exceptions Under Rule 56

The Second Circuit concluded in the same year this Court issued its opinion in *Reeves* that "*Reeves* prevents courts from imposing a *per se* rule requiring *in all instances* that an [employment discrimination claimant] offer more than a prima facie case and evidence of pretext." *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) (italics original). Yet, the Second Circuit could not find a way to unify the elimination of "pretext plus" and the narrow *Reeves* exceptions in future applications. The Second Circuit believes that *Reeves* "clearly mandates a case-by-case approach" on whether to apply the narrow *Reeves* exceptions on summary judgment under Rule 56. *Id.* This cannot go on.

The Third Circuit omits the narrow *Reeves* exceptions for Rule 56 purposes. "[I]f a plaintiff has come forward with sufficient evidence to allow a finder of fact to discredit the employer's proffered justification, she need not present additional evidence of discrimination beyond her prima facie case to survive summary judgment." *Burton v. Teleflex, Inc.*, 707 F.3d 417, 427 (3d Cir. 2013). This exclusion of the

narrow *Reeves* exceptions under Rule 56 is the most congruent with the Court.

The Fourth Circuit interprets that the narrow Reeves exceptions preclude it from granting summary judgment under Rule 56 "when a defendant has merely made a lesser evidentiary showing of *possible* alternatives" to discrimination. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 649 (4th Cir. 2002) (italics original). The Fourth Circuit rightfully noted, "[t]o grant judgment as a matter of law under such circumstances would be to intrude on the jury function by substituting our own judgment for that of the finder of fact. *Id*. at 650.

Consistent with *Reeves*, the Tenth Circuit has "definitively rejected a 'pretext plus' standard." *Jones v. Oklahoma City Pub. Sch.*, 617 F.3d 1273, 1280 (10th Cir. 2010) (quoting *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1168 (10th Cir. 2007)). The Tenth Circuit has acknowledged "the exceptions described in *Reeves* impose a heavy evidentiary burden on employers in showing an alternative source for the discrepancies in their reasons." *Hare v. Denver Merch. Mart, Inc.*, 255 F. App'x 298, 305 (10th Cir. 2007). In the absence of "'abundant and uncontroverted' evidence that no discrimination occurred," a plaintiff's "showing of inconsistencies in the defendant's reasons for discharging him are sufficient" to survive summary judgment. *Id*. at 306 (cleaned up).

The District of Columbia Circuit does not consider *Reeves* at all in the context of Rule 56; that circuit only focuses on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

> We do not endorse a reading of *Hicks* under which employment discrimination plaintiffs are presumptively required to submit evidence over and above [evidence of pretext] in order to avoid summary judgment…And we further noted "[t]he jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent."

Colbert v. Tapella, 649 F.3d 756, 759 (D.C. Cir. 2011) (brackets original) (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1292-93 (D.C. Cir. 1998)).

B. Three Circuit Courts Have Integrated the Narrow *Reeves* Exceptions into Rule 56 To Weigh Evidence

The Seventh Circuit requires a plaintiff to show that a defendant employer's evidence is insufficient to permit a reasonable jury to conclude these reasons were deliberately false in order to survive summary judgment. *See Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 666 (7th Cir. 2007). In other words, a judge has to find the weight of the evidence heavy enough to pass along to a jury.

The Fifth Circuit holds that the plaintiff "must produce sufficient evidence of implausibility to permit an inference of *discrimination*, not merely an inference that [the defendant's] proffered reason is false." *Owens v. Circassia Pharmaceuticals Inc.*, 33 F.4th 814, 831 (5th Cir. 2022) (emphasis in original). To show sufficient evidence of implausibility, the Fifth Circuit holds that a plaintiff must present "substantial evidence" that the employer's asserted reason for terminating her is pretext for discrimination. *Id.* at 826 (citing *Watkins v. Tregre*,

997 F.3d 275, 283 (5th Cir. 2021)). Out of the entire circuit split, this standard is the most deviated from *Reeves* as a disguised "pretext plus" burden.

In congruence with the Fifth Circuit's "conflict in substantial evidence" burden for plaintiffs, the Eighth Circuit utilizes the narrow *Reeves* exceptions at the summary judgment stage by holding that a plaintiff's burden to prove pretext merges with the ultimate burden of persuading the court that the plaintiff was a victim of intentional discrimination, so the plaintiff must do more than simply create a factual dispute as to the issue of pretext; he must offer sufficient evidence for a reasonable trier of fact to infer discrimination. *Canning v. Creighton Univ.*, 995 F.3d 603, 612 (8th Cir.), *cert. denied*, 142 S. Ct. 585, 211 L. Ed. 2d 364 (2021). The Fifth and Eight Circuits similarly reason that the courts of appeal are not designated as human resources or "super-personnel" departments that reexamine an employer's business decisions. *See id.*; *see also Owens*, 33 F.4th 814 at 826.

Clearly, the Circuits are split amongst each other and within themselves in a way that only this Court can resolve. To do so, the Court must acknowledge one point of error in *Reeves*: the differences between Rule 56 and Rule 50 *are* more real than semantic. *See Reeves*, 530 U.S. at 150.

II. The Issue in This Case Is of Great Importance

Reeves was a Rule 50 case. But lower courts have assumed *Reeves* applies to Rule 56 identically, without any deviation whatsoever. *See Schnabel*, 232 F.3d at 89; *see also Owens*, 33 F.4th 814, 820, n. 1 (5th Cir. 2022) ("Although *Reeves* considered a motion for judgment as a matter of law under Rule 50, we apply

it to summary judgment cases."); *Pratt v. City of Houston*, 247 F.3d 601, 606 n.3 (5th Cir. 2001) (same); *Dammen v. UniMed Med. Ctr.*, 236 F.3d 978, 981 (8th Cir. 2001) (same); *Chapman v. AI Transp.*, 229 F.3d 1012, 1025, n. 11 (11th Cir. 2000) (same).

The Court in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), acknowledged this usage without addressing whether this is legally sound.[2] But the Court's silence is deafening. The distinction between Rule 50 and Rule 56 is more than semantics; overlooking the Rules' distinctions has caused over twenty years of strife within the nation's legal community.

A. The Issue Is Recurring

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the Court noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard. "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Id.* at 251 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11 (1983)). "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a

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[2] Since the application of the narrow *Reeves* exceptions to Rule 56 is a recurring issue, it would not be a surprise to learn that a petition for writ of certiorari in *Owens v. Circassia Pharms., Inc.* is forthcoming. But answering the Questions Presented here is as equally outcome-determinative to *Owens* as they are in this case.

jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

The *Reeves* Court's dismissal of the differences between Rule 50 and Rule 56 as semantic is the root of this unresolved, nationwide conflict. *Anderson* alluded to the reason why Rule 50 and Rule 56 remain distinct and separate: summary judgment is decided *only* on documentary evidence. *See Anderson*, 477 U.S. at 251. There is no live testimony from witnesses to be considered for summary judgment like there is in deciding a motion for directed verdict. And "[w]here motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses [at trial] thicken the plot." *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 500 (1969).

B. The Issue Causes Serious Practical Problems

Even after the *Reeves* Court prohibited imposing a "pretext plus" standard under Rule 56, this Court has yet to fully explain how a trial judge is expected to determine whether evidence is of sufficient "caliber or quantity" without weighing the evidence. *See* David Sloss, *Using Reeves to Teach Summary Judgment*, 47 St. Louis U. L.J. 127, 130-131 (2003).

The serious practical problems with trying to apply the narrow *Reeves* exceptions to Rule 56 have previously been observed by the Second Circuit and the Fifth Circuit.

In *Schnabel*, the Second Circuit pointed out that the *Reeves* Court sought to decide "whether a defendant is entitled to judgment as a matter of law

when the plaintiff's case consists *exclusively* of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action," but that it cannot be answered by a simple "yes" or "no". *Schnabel*, 232 F.3d at 90 (italics original)(quoting *Reeves*, 530 U.S. at 135) (emphasis original)). Through the distinction between Rule 50 and Rule 56, perhaps the Court *could* simply answer "yes" without disregarding the rights of persons opposing claims and defenses to demonstrate, prior to trial, that the claims have no factual basis." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

In *Pace v. Livingston Par. Sch. Bd.*, 578 F. App'x 369, 375 (5th Cir. 2014) the Fifth Circuit recognized that it is impossible for a judge to determine what all reasonable, fair-minded people in the exercise of impartial judgment would conclude when they are deprived of seeing and hearing witness testimony. "*Reeves v. Sanderson Plumbing Products, Inc.* addressed 'the kind and amount of evidence necessary **to *sustain* a jury's verdict that an employer unlawfully discriminated.**'" *Pace v. Livingston Par. Sch. Bd.*, 578 F. App'x 369, 375 (5th Cir. 2014) (emphasis added) (citing *Reeves*, 530 U.S. at 137).

The standard for a directed verdict or judgment as a matter of law under Rule 50 is different from the standard for summary judgment under Rule 56 ipso facto. Under Rule 50, a judge is deciding whether to ***sustain*** a jury's findings that have already occurred,[3]

[3] It is notable that the operation of Rule 50, deciding whether to sustain a jury finding, seems more analogous to the mechanics of the appellate review of fact-finding in arbitration than it is to

but the decision to deny a Rule 56 motion for summary judgment turns on whether there is even a single genuine dispute of material fact that must be left to a jury. *See Ortiz v. Jordan*, 562 U.S. at 188.

This overlooked nuance stems from how the *Reeves* Court in dicta harnessed its past holding in *Matsushita* to form the narrow *Reeves* exceptions. "In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record 'taken as a whole.'" *Reeves*, 530 U.S. at 150 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)). Within the purview of the narrow *Reeves* exceptions, the most logical way to harmonize courts' requirement to "take the record as a whole" for Rule 56 is to acknowledge that the "whole record" in a motion for summary judgment would only consist of evidence of a prima facie case and pretext presented by the nonmovant. This is because Rule 56 does not require a movant or nonmovant to marshal its evidence; the nonmovant need only show one genuine dispute of material fact to proceed to a jury. *See Ortiz v. Jordan*, 562 U.S. at 188 (2011) (citing FED. R. CIV. P. 56(a)).

Under this logic, if there is a complete lack of evidence of either a prima facie case or evidence of pretext, then the record would be "whole," permitting courts to fairly grant summary judgment with a regard to the rights of parties defending against

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Rule 56. *See generally First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). When reviewing a finding of facts that has already occurred, there is a "clearly erroneous" standard. *Id*. at 948. It makes sense to deduct from plain meaning that "clearly erroneous" is the opposite of "rational".

claims lacking any factual basis. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

C. The Issue Is of Societal Significance

This recurring issue is more than just the legal community quibbling over convoluted interpretations of procedural rules. This issue, stemming from the overlooked distinction between Rule 50 and Rule 56, causes forum shopping and politicizing of the government's compelling interest to protect and enforce civil rights. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Because of the decline of public's perception of equal opportunity, even fear of some judges,[4] the legal community perceives state courts as the forum for plaintiffs and federal courts as the forum for defendants. 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, 522 (2010) (Thomson Reuters 2021).

"The results of such litigation tend to arouse the emotions of all concerned, and frequently the attorneys who bring these cases are the subjects of prolonged and vitriolic hostility." *Gay Lesbian Bisexual All. v. Sessions*, 930 F. Supp. 1492, 1497 (M.D. Ala. 1996).

D. The Issue Is of Fundamental Legal Significance

There is a need for consistent, objective, and mechanical application of *Reeves* under Rule 56. The ability of plaintiffs to be heard by their peers is a constitutional right under the Seventh Amendment.

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[4] *See e.g. Miller v. Sam Houston State Univ.*, 986 F.3d 880, 892 (5th Cir. 2021).

Indeed, the lower courts have "consistently" applied *Reeves* to review motions for summary judgment in the sense that they have repeatedly used *Reeves* to justify granting summary judgment through its narrow exceptions, but the circuit courts have yet to apply *Reeves* in a uniform and cohesive manner that avoids an inseparable use of the "pretext plus" standard.

By addressing the Questions Presented in this particular case, judges will be free from feeling like they have no choice but to weigh evidence of discrimination that the public eye might weigh differently.

Keeping the narrow *Reeves* exceptions out of Rule 56 upholds *stare decisis* when the changing times use a relative metric of weighing the evidence of discrimination based on a protected characteristic or activity. Whether the pendulum of society swings right or left is not the Court's concern. This is the intent of the Seventh Amendment.

E. The Issue Is National in Scope

A nationwide answer to the first issue here is needed now. Countless petitions from employment discrimination cases submitted to the Court focus on how the lower courts are undermining *Reeves* and its prohibition of the "pretext plus" standard. *See Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (*per curium*) (Alito and Scalia, J.J., concurring) ("In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment."). But apparently, while petitioners and the lower courts are aware that

something is wrong with the application of *Reeves* to Rule 56, no one can seem to sew together how to distinguish "weighing" evidence and "giving credence to" evidence harmoniously.

It is true that "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring), but answering the Questions Presented in this case will not only outcome-determinative here; answering the questions presented in the affirmative would significantly reduce the requests to the Court to review summary judgment for employment discrimination cases and ensure that Rule 50 and Rule 56 are separately "construed, administered, and employed by the court[s] and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

Finally, once the Court answers the first question presented in this case—clarifying that courts must not apply the narrow *Reeves* exceptions on summary judgment because they are reserved for addressing whether a judge should *sustain* a jury's findings of fact—judges everywhere will be absolved from constant charges of wrongfully utilizing "pretext plus" to dismiss employment discrimination cases.

This holding would unequivocally reconcile *Anderson*, *Celotex*, *Hicks*, *Matsushita*, and *Reeves* together without overturning each precedent set by the Court. It would also automatically answer the second question presented in this case: that Fifth Circuit's latest Rule 56 burden is incorrect and a disguised "pretext plus" standard disallowed by *Reeves*.

III. The Application of *Reeves* by the Fifth Circuit on Summary Judgment Is Incorrect.

A. The Fifth Circuit's "Conflict in Substantial Evidence" Standard Is A "Pretext Plus" Standard in Disguise

There is no question that the Fifth Circuit's latest summary judgment standard is an onerous burden opposing *Reeves*. The Fifth Circuit's standard that a plaintiff employee must show a "conflict substantial evidence" to survive summary judgment seems to echo the Eleventh Circuit's repudiated "slap you in the face" evidentiary standard struck down by the Court in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456–57 (2006).

To establish pretext through comparing qualifications, the Eleventh Circuit initially held that the disparity in qualifications must be "so apparent as virtually to jump off the page and slap you in the face." *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005), *vacated and remanded*, 546 U.S. 454 (2006).[5] This Court disagreed, stating, "The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext…" *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006).

Requiring plaintiffs to show "a conflict in substantial evidence" in order to be blessed with a jury trial is contradicted by *Reeves, Anderson*, *Ortiz*,

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[5] Prior to *Ash*, the Fifth Circuit also imposed the Eleventh Circuit's "slap you in the face" evidentiary burden on Plaintiffs. *Deines v. Texas Dep't of Protective & Regul. Servs.*, 164 F.3d 277, 279 (5th Cir. 1999).

and Rule 56 of the Federal Rules of Civil Procedure, going so far as to deprive plaintiffs of a constitutional right to a jury trial.

Any hypothetical circumstance where a lower court attempts to apply either narrow *Reeves* exceptions under Rule 56 results in either the forbidden "pretext plus" standard and/or the impermissible weighing of evidence by a judge. Thus, the only time that the narrow *Reeves* exceptions should apply is under Rule 50.

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To reconcile the Court's past holdings in a way that goes beyond simply sending each Circuit back to the drawing board to interpret Rule 56 and stops the legal community in various circuits from feuding over the political nature of evidence in civil rights cases, the first Question Presented here should be answered with a resounding no.

By applying what should be the first holding in this case to the second Question Presented in this case, the answer will automatically be yes.

CONCLUSION

The petition for writ of certiorari should be granted.

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