No. _____

In the Supreme Court of the United States

SHANNON GLADDEN, AN INDIVIDUAL,
Petitioner,
v.
THE PROCTER & GAMBLE DISTRIBUTING, LLC,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW T. MOSLEY, II
Counsel of Record
DREW MOSLEY LLC
279 W. Crogan St.
Lawrenceville, GA 30046
(678) 225-0098
drew@mlawmail.com

Counsel for Petitioner

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QUESTIONS PRESENTED

The questions presented are:

1) **Does the but-for reasoning referenced in *Bostock* apply to *McDonnell Douglas* pretext analysis?**: In the decision below, the Eleventh Circuit appears to have ignored what this Court reinforced in *Bostock*, with regard to the issue of multiple versus sole causes or motivating factors. The problem is that the *McDonnell Douglas* pretext analysis can be a back door to avoid complying with a proper but-for or motivating factor analysis, if *Bostock*'s analysis, which does not mention pretext, is not clarified explicitly to apply to pretext analysis. Failure to answer this question in the affirmative "means a defendant *can*[] avoid liability just by citing some *other* factor[, the supposed pretext,] that contributed to its challenged employment decision" *Bostock,* 140 S. Ct. 1731, 1739 207 L. Ed. 2d 218 (2020) (emphasis to "can" added).

2) **Must the Eleventh Circuit's prejudicial characterization of Petitioner's evidence give way to the Seventh Circuit Rule that does not diminish or limit evidence?**: The Seventh Circuit has held, 'that district courts must stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards.' *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). 'We are instead concerned,' the Seventh Circuit has said, 'about the proposition that evidence must be sorted into different piles, labeled "direct" and "indirect," that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole.' *Id.*, at 766.

CORPORATE DISCLOSURE STATEMENT

Respondent The Procter & Gamble Distributing, LLC's parent corporation is The Procter & Gamble Company, publicly traded on the New York Stock Exchange under ticker, "PG."

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Northern District of Georgia, Atlanta Division, and the United States Court of Appeals for the Eleventh Circuit:

- *Shannon Gladden v. The Proctor & Gamble Distributing, LLC*, No. 1:19-CV-2938-CAP-JSA (GAND), order issued Sept. 8, 2021.
- *Shannon Gladden, an individual, v. The Procter & Gamble Co., An Ohio corporation, The Proctor & Gamble Distributing, LLC*, No. 21-13535 (C11), opinion issued July 27, 2022, panel rehearing denied Sept. 28, 2022.
- The "Proctor" rather than "Procter" spelling used by the District and Circuit Courts appears to be a typographical error of unknown origin. An Order at Docket Number 15 in the District Court indicates the "er" rather than "or" spelling is correct.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Shannon Gladden respectfully petitions for a writ of certiorari to review the Opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *infra*, App. 1, is not reported in Fed. Rptr., but may be found at 2022 WL 2974066. The Order of the United States District Court for the Northern District of Georgia, Atlanta Division, granting summary judgment against Gladden, App. 6, is not reported, but may be found at 2021 WL 4929913. The Final Report and Recommendation on a Motion for Summary Judgment adopted may be found at 2021 WL 4930535.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 27, 2022. Panel rehearing was denied September 28, 2022. On December 5, 2022, Justice Thomas extended the time for filing a certiorari petition to January 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2000e-2(a)

> **(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.

2. 42 U.S.C. § 2000e-3(a)

> **(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.

INTRODUCTION

Petitioner Gladden's case is simple. She contends that her sex was a motivating factor and but-for cause of the discrimination against her when she was terminated from her long-term successful employment at The Procter & Gamble Distributing, LLC (a subsidiary of The Procter & Gamble Company hereafter referred to simply as "P&G"). Because Respondent P&G can point to what it claims is another reason for the termination, the Eleventh Circuit allows the inquiry and analysis to end there, without exploring whether the multiple factors or but-for causes can coexist, which they of course can. Because the Eleventh Circuit practice conflicts with recent Supreme Court jurisprudence, Petitioner asks the Court to clarify that pretext is not always unitary, singular, and monolithic any more than motivation or causation are.

While the problem of which Petitioner complains presents simply, as a plausible error within a complex analysis, it must be viewed as a more sinister problem for justice because of the potential of such plausible errors to result in systematic denial of justice to plaintiffs. So, rather than an error in pretext analysis, the error complained of must be treated as a

complete denial of due process and equal protection.

The ruling by the Eleventh Circuit sounds innocuous enough:

> We hold that even if Gladden established a prima facie case of discriminatory or retaliatory discharge, both claims fail because she hasn't shown that P&G's stated reasons for firing her were pretextual.

Opinion at App. 3. But, the possibility of such a ruling means that any aggressive defendant who smears Plaintiff thoroughly enough can prevail by blocking out Plaintiff's motivating factor or but-for case.[1] In this problematic scenario, pretext analysis is used to avoid Plaintiff's case and displace it with the defense case by Defendant. As a result, summary judgment cuts short what should have led to Plaintiff's eventual jury trial. Plaintiff never receives due process, and equal protection of law is denied to parties subjected to overly simplistic pretext analysis.

The solution to the problem is simply to enforce the but-for analysis recited in *Bostock*, which logically contains motivating factor analysis as well, and to do

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[1] "Proof of [intentional] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible." *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987), quoted in part in *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1234 (11th Cir. 2019).

so at the pretext stage. There can be more than one reason at work at any moment. Therefore, the fact that the defendant has come up with a plausible reason to undermine pretext, does not mean that all of a sudden only one reason can exist at a time. If false dichotomy reasoning, of one or the other, cannot prevail at the motivation or cause analysis stage, allowing that same false dichotomy reasoning at the pretext analysis stage cannot be permissible either. Put another way, false dichotomy or oversimplification in pretext analysis corrupts the entire discrimination or retaliation analysis.

As a matter of course, a defendant will have a reason it gives to defend against a plaintiff's allegation, as here. But, if the Plaintiff's case is supposed to be analyzed in the light most favorable to Plaintiff (the non-moving party here), how does it end up being that it is the Defendant's explanation that receives the most favorable light, to the exclusion of Plaintiff's contention? Defendants' accounts can always be fore-fronted at the pretext analysis stage. Therefore, it is always a danger to plaintiffs' receiving justice. It is too much of a temptation for district courts to make a fact determination that should have been reserved for the jury. Here, the district court decided P&G and not Gladden was telling the truth. It did so in the name of pretext, which practice Gladden asks this Court to end. The practice is oversimple and even quaint in the more sophisticated present state of employment discrimination practice wherein it is obvious that even if there is some basis to Defendant's alleged good faith reason, it does not mean that the punishment was appropriate or that

the alleged good faith reason was not developed to facilitate discrimination against and retaliation against a perceived meddlesome woman.

The second dimension to Gladden's petition and its second question regards whether the evidence considered to arrive at the grant of summary judgment against Gladden was evenly analyzed or demeaned as indirect and otherwise "lesser" in its character. The Seventh Circuit's *Ortiz* case provides a superior and more just alternative to the analysis exhibited in Gladden's case by the Eleventh Circuit. Gladden's constellation of evidence should, in the light most favorable to her, have been sufficient to show that she had more than a sufficient case to show pretext and compete with P&G's alleged good faith reason for her termination.

STATEMENT

One can read the Eleventh Circuit's Opinion and never know that Shannon Gladden was an eighteen (18)-year employee of P&G and a recipient of "the Torch Carrier Award, given annually to one person in North America for 'their breakthrough work on diversity at P&G.'" Final Report and Recommendation on a Motion for Summary Judgment, App. at 37. Gladden's life at P&G, where she was in management and expected to be a lifer, was turned upside down when she did not do enough to distance herself from a woman who lost her job at P&G oral health sales vendor Promoveo.

Because this woman was Gladden's neighbor, it was assumed, allegedly, that Gladden's efforts to address her situation, and even actions to address

ongoing issues with Promoveo, were improper rather than what Gladden would normally do and particularly what she would do for any woman who appeared to have been mistreated in terms of her employment in any connection with P&G. Gladden was smeared in being attributed with actions of this woman, which actions were not Gladden's. Gladden contends that the actions Gladden took, for which Gladden was terminated, were within bounds for her role at P&G and in the spirit of values she learned from P&G.

When Gladden noted that the terminated woman's emails, which certainly were the emails of a very upset person, should not be deleted, Gladden was referring to what she thought was an inviolable P&G policy not to delete emails, not trying to support disruption of P&G whatsoever. Nonetheless, Gladden was terminated. What Gladden saw as discriminatory and retaliatory termination of her based on sex, P&G vociferously contended was not, and the district and circuit courts sided with P&G, concluding that Gladden had not proven that P&G's stated reasons for terminating Gladden were pretextual.

The circuit court concluded Gladden's actions were in spite of "P&G's co-employment avoidance policy prohibiting interference with vendors' employment decisions." Opinion, at App. 3, notwithstanding that in the light most favorable to Gladden, P&G never established precisely what interactions the policy required that Gladden was supposed to avoid. It is not disputed that Gladden was responsible for managing P&G's relationship with Promoveo, which relationship included the subject

matter Gladden addressed. Thus, it is not as clear as presented by P&G and the courts below how Gladden could avoid these issues entirely and still perform her responsibilities.

So, to the circuit court finding, that "Gladden also notified several P&G managers about her concerns, but she didn't immediately contact the Purchases division, the P&G group responsible for ensuring and discussing contract compliance issues with vendors," Opinion at App. 3-4, Gladden responds that she has shown that in the light most favorable to her she acted as quickly as she could and within the bounds of P&G day-to-day practice. In the light most favorable to Gladden, the weak argument—not that she failed to do something, but that she failed to do it quickly enough—fits within the language, cited without irony in the magistrate judge's report and recommendation:

> Nevertheless, a plaintiff may establish pretext by presenting sufficient evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs* [*v. Plantation Patterns*], 106 F.3d [1519,] at 1538 [(11th Cir. 1997)](quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc)).

The supposed delay is very much a weakness in P&G's accepted position. Certainly, Gladden has made the

case that her eighteen (18)-year career would not have been abruptly cut short by termination if not for discrimination based on sex and in retaliation for protected complaints and oppositional statements and oppositional conduct.

All the Supreme Court must do to reach this same conclusion is to agree that multiple motivations and but-for causes can exist at the pretext stage. A sense that the Supreme Court has already signaled a receptiveness to this conclusion feels intuitive to Gladden and others from statements in prior cases, including the recent *Bostock* case. However, as evidenced by the Eleventh Circuit opinion in this case, the Eleventh Circuit does not agree and requires an explicit ruling and should so be reversed. Therefore, Gladden seeks a writ of certiorari toward that end.

Second, Gladden has provided another route to reversal for which she also seeks a writ of certiorari. The second path, rather than focusing on the pretext ruling made by the circuit court, looks more broadly at how Gladden's evidence was treated for a grant of summary judgment against Gladden to have been possible generally and specifically. Gladden's evidence was at many points discounted, diminished, and demeaned. It was said not to be direct, and at a point was even suggested effectively not to exist because it was not in the correct document. See Report and Recommendation at App. 79-81. Gladden therefore prays for help.

REASONS FOR GRANTING THE PETITION

I. The Rule of the Decision Below Leaves Plaintiffs Such as Petitioner without Remedy Far Too Often

The only remaining avenue of relief for Petitioner is with the Supreme Court of the United States, which can clarify the law for others.

A. The United States Court of Appeals for the Eleventh Circuit Performed an Overly Simplistic Pretext Analysis

"[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). Title VII is no more tolerant of sex discrimination such as in Gladden's case than it is of race discrimination as recited. Even if the discrimination was subtle, which Gladden contends it was not, the discrimination and retaliation must not be swept under the rug by means of legal process.

Under *Bostock v. Clayton County*, this Court has cautioned, 'Title VII's "because of" test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 133 S. Ct. 2517 (2013). That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross v. FBL Financial*

Services, Inc., 557 U.S. 167, 176, 129 S. Ct. 2343 (2009). In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218 (2020).

Anticipating that there might be resistance to this previously made point, the Supreme Court stressed, "This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U.S. at 350, 133 S. Ct. 2517." *Bostock,* 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218 (2020).

A question Gladden poses to the Supreme Court toward analysis of her first question presented is how can the Eleventh Circuit, given the above recited multiple causation theory, which is quite plainly stated and clear, ignore the principle in its pretext analysis in Gladden's case?

The ruling by the Eleventh Circuit is simplistic to the point of being dismissive:

> We hold that even if Gladden established a prima facie case of discriminatory or retaliatory discharge, both claims fail because she hasn't shown that P&G's stated reasons for firing her were pretextual.

Opinion at App. 3. But, Gladden never agreed that any actions she took were violative of company policy. She always contended that the accusations against her were untrue. She also always contended she was being discriminated against and retaliated against. As she put it in her objections to the magistrate judge's final report and recommendation, "After Collado discriminated against Gladden, P&G ratified, continued, and facilitated the sex discrimination when Gladden was unilaterally (and against P&G policy) removed from her daily course of business with Promoveo by Jen Sasse, P&G Oral Care Human Resources Manager" [Doc. 102, at 7]. It is certainly not the case that Gladden did not make a case for pretext. Rather, the district court concluded her claims were not true and that P&G's were.

So, while Gladden's case is simple, in that it is a formulaic woman-speaks-out-woman-gets-silenced/terminated scenario, the courts below complicated the situation by casting it as implausible in contrast with P&G's supposed good faith explanations. Though Gladden contended that her sex was a motivating factor and but-for cause of the discrimination against her when she was terminated, it is as if the courts below would not grant her that, even though she is entitled to have the case viewed from her perspective or in a light most favorable to

her. Gladden is no interloper, having worked at P&G almost eighteen (18) years. Her sudden termination after such a long tenure is in itself probative of a discriminatory situation.

It appears that because Respondent P&G can point to what it claims is another reason for the termination, the Eleventh Circuit allows the inquiry and analysis to end there, without exploring whether the multiple factors or but-for causes can coexist, which they of course can. The first scenario in which the factors are not found by the courts below to be mutually exclusive at the summary judgment stage is the one in which the trial court simply defers to the jury to find the facts of whether Gladden's account or P&G's is believed by them. The second scenario in which the factors are not founds by the courts below to be mutually exclusive is where the court finds the alleged faith good faith reason from P&G is truthful but that Gladden's alleged discriminatory and retaliatory reasons are also motivating or but-for reasons.

As above the but-for reasoning in *Bostock* seems to require the possibility of partial and non-dispositive pretext. It is for this reason that Gladden asks the Supreme Court to clarify that pretext is not always unitary, singular, and monolithic any more than motivation or causation are. What if the courts below found that while they believed P&G would have disciplined Gladden, they did not believe P&G would have terminated her without discriminatory motivation or but-for retaliatory causation? This possibility cannot be accounted for in all or nothing one-motivation/cause pretext analysis.

As presented introductorily, while the problem of which Gladden complains presents simply, as a plausible error within a complex analysis (pretext), it must be viewed as a more sinister problem for justice because of the potential of such plausible errors to result in systematic denial of justice to plaintiffs. So, rather than an error in pretext analysis, the error complained of must be treated as a complete denial of due process and equal protection. This is what results when the summary judgment procedure is not strictly adhered to.

Yes, there are circumstances where, "the trial judge must direct a verdict." But, this is only where, "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). It cannot be said that no reasonable conclusion could include that sex discrimination or retaliation was a motivating factor or but-for cause of Gladden's termination. In fact, it is not a reasonable conclusion that believing P&G's alleged good faith reason for termination would preclude that sex discrimination or retaliation was a motivating factor or but-for cause of Gladden's termination. Multiple causes mean there is much more opportunity for reasonable minds to differ. And, "[i]f reasonable minds could differ as to the import of the evidence, … verdict should not be directed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). To reach the point of a summary judgment grant, the conclusion would need to be reached not just that Gladden did not show pretext, but also that she did

not show that her sex was a motivating factor or but-for cause. The Eleventh Circuit did not do this.

As above, when courts proceed as the Eleventh Circuit has here, any aggressive defendant who smears a plaintiff thoroughly enough can prevail by blocking out Plaintiff's motivating factor or but-for case.[2] In this problematic scenario, pretext analysis is used to avoid Plaintiff's case and displace it with the defense case by Defendant. As a result, summary judgment cuts short what should have led to Plaintiff's eventual jury trial. Plaintiff never receives due process, and equal protection of law is denied to parties subjected to overly simplistic pretext analysis.

The solution to the problem of pretext jamming is simply to rigorously enforce the but-for analysis recited in *Bostock* that does not exclude the possibility of multiple causation. Of course, multiple but-for cause reasoning works just like multiple motivating factor reasoning. There can be more than one reason at work at any moment. Nothing about the pretext stage exempts it from this truth. Therefore, the fact that the defendant has come up with a plausible reason to undermine pretext, does not mean that all of a sudden only one reason can exist at a time. If false dichotomy reasoning, of one but not the other, cannot prevail at the motivation or cause analysis stage, allowing that same false dichotomy reasoning at the pretext analysis stage cannot be permissible either. Put another way, false dichotomy or oversimplification in pretext analysis corrupts the

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[2] See footnote 1 above.

entire discrimination or retaliation analysis. Put yet one more way, a defendant can always claim as their motivation a reason why they were mad at a plaintiff. That anger can be true while it is not also the reason for termination. So, in practice defendants can win pretext with a strawman argument. A plausible sentiment can be exaggerated, and when plaintiff cannot succeed in persuading the court of the impossibility of the sentiment, that plaintiff's entire case is lost, even with a prevailing discrimination or retaliation claim.

As a matter of course, a defendant will have a reason it gives to defend against a plaintiff's allegation, as here. But, if the Plaintiff's case is supposed to be analyzed in the light most favorable to Plaintiff (the non-moving party here), how does it end up being that it is the Defendant's explanation that receives the most favorable light, to the exclusion of Plaintiff's contention? Defendants' accounts can always be fore-fronted at the pretext analysis stage. Therefore, this is always a danger to plaintiffs' receiving justice. It is too much of a temptation for district courts to make a fact determination that should have been reserved for the jury. Here, the district court decided P&G and not Gladden was telling the truth. It did so in the name of pretext, which practice Gladden asks this Court to end. The practice is oversimple and even quaint in the more sophisticated present state of employment discrimination practice wherein it is obvious that even if there is some basis to Defendant's alleged good faith reason, it does not mean that the punishment was appropriate or that the alleged good faith reason was

not developed to facilitate discrimination against and retaliation against a perceived meddlesome woman.

In the district court order, the district court notes that Gladden "makes the argument that '[i]f P&G is worried about the pay of the US Women's soccer team, it tends to prove that the allegation that Gladden was legitimately fired for addressing compliance issues on a contract that P&G had agency on is pretextual." Order at App. 17. In a footnote, the district court explains, "Gladden references a contribution of $529,000 made by Secret deodorant, a P&G product, to the U.S. Women's National Soccer Team to help address gender disparity in compensation. She also included this in her statement of material facts. The magistrate judge deemed it to be "immaterial" and "hav[ing] no bearing on the issue of whether P&G discriminated or retaliated against Plaintiff when it terminated her employment." *Id*.

The circuit court found, "After Promoveo fired one of its sales associates who was Gladden's neighbor, Gladden started questioning a Promoveo executive and other Promoveo sales associates about how much Promoveo paid its employees relative to how much P&G paid Promoveo for each salesperson who sold P&G products to dental offices. She did so despite P&G's co-employment avoidance policy prohibiting interference with vendors' employment decisions." Opinion, at App. 3. So, in essence, the courts below cannot make the leap from seeing P&G taking an interest in women being paid fairly on a soccer to team to the issue of women being paid fairly on a sales team that P&G was by contract proving funds for payment to. Yet, the same courts can leap from Gladden

making inquiries to Gladden interfering with employment decisions. In the light most favorable to Gladden, inquiry is not always interference.

This tension is actually the courts below making all inferences against Gladden. They assume it cannot be true that P&G convinced Gladden it cared about women's pay issues and then punished her when she took them at their word. They also assume Gladden cannot in good faith ask questions without forcing a decision. If Gladden was so powerful that her mere inquiry effected an employment decision, how was she so powerless to be fired for working on investigating subject matter in a relationship it was her job to manage? In the light most favorable to Gladden, she was acting in line with P&G's expressed policies and values and did not interfere with anyone's employment decision. No employment decision that Gladden altered is alleged. Nor does P&G deny or could it deny that externally it made a huge show of prioritizing fair pay for women, while internally it punished Gladden for even inquiring about women's pay.

B. The United States Court of Appeals for the Seventh Circuit's Approach to Evidence Supporting a Claim for Employment Discrimination in *Ortiz* is Superior to the Eleventh's Circuit's Approach

In contrast to how the Eleventh Circuit adopted the moving employer's (P&G's) account of the evidence in Gladden, the Seventh Circuit uses the non-moving employee's: "We recount Ortiz's version, because we

must view the evidence in the light most favorable to the party opposing a motion for summary judgment." *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 762 (7th Cir. 2016). The Seventh Circuit remained consistent to this principle as it moved through its opinion. "[O]n all of these issues we must look at the evidence from Ortiz's perspective," the Seventh Circuit continued. *Id.*, at 763.

The Seventh Circuit critiqued its district court judge for treatment of evidence of the type accepted in the Eleventh Circuit: "The judge looked at the evidence through the "direct" and "indirect" methods that courts often discuss in employment-discrimination cases." *Id.* The Eleventh Circuit went on: "Admissions of culpability and smoking-gun evidence were assigned to the "direct" method (the judge found no such evidence), while suspicious circumstances that might allow an inference of discrimination were assigned to the "indirect" method. The court did not try to aggregate the possibilities to find an overall likelihood of discrimination." *Id.* The same can be said of what the Eleventh Circuit did and accepted in the Gladden case at bar.

The problem was, as the Seventh Circuit described the matter, that: "The district court treated each method as having its own elements and rules, even though we have held that they are just means to consider whether one fact (here, ethnicity) caused another (here, discharge) and therefore are not "elements" of any claim." *Id.* The study aide, as it were, was given priority over the underlying material, the evidence, the facts. Put another way, the artifice obscured the structure behind it. The Seventh Circuit

said, 'Pursuing two "methods" instead of a unified inquiry, the district court elaborated by saying that Ortiz could prevail only by coming up with "evidence that creates 'a convincing mosaic of discrimination' "." *Id*. Gladden is not here taking issue with the convincing mosaic concept. Rather, she is endorsing the focus on underlying evidence as opposed to an ordering template. The convincing mosaic remains an essential tool for helping to think about non-comparator evidentiary configurations. But, it should not, as the Seventh Circuit ruled, become a separate criterion in its own right, just a direct or indirect evidence classification should not make or break a case.

What the district court did in the Seventh Circuit *Ortiz* case was this: "It concluded that Ortiz had failed to present a "convincing mosaic" under the direct method because Lass's racial slurs did not have anything to do with Ortiz's discharge. The court also ruled that there was not enough of a "mosaic" under the indirect method because, by removing his name from the records and changing the rates, he fell short of Werner's expectations." *Id*. This sort of disjointed slicing and dicing is similar to what happened to Gladden in the case at bar.

The Seventh Circuit's corrective is a workable rule: "The district court's effort to shoehorn all evidence into two "methods," and its insistence *764 that either method be implemented by looking for a "convincing mosaic," detracted attention from the sole question that matters: Whether a reasonable juror could conclude that Ortiz would have kept his job if he had a different ethnicity, and everything else had

remained the same." *Id*. at 763–64. Had the analysis's of Gladden's case followed this rule, the outcome would have been different. In the light most favorable to Gladden, without arcane manipulation of evidence, the evidence easily could have led a reasonable juror to conclude that Gladden would have kept her job if she had a different sex or did not speak up and everything else had remained the same.

The situation the Seventh Circuit was correcting certainly obtains in the Eleventh Circuit: "The use of disparate methods and the search for elusive mosaics has complicated and sidetracked employment-discrimination litigation for many years." *Id*. at 764. Again, however, Gladden is not complaining about the convincing mosaic as a tool, but rather, the use of organizational tools as criteria and the use of classification as indirect or another descriptor to undermine and minimize evidence.

Without belaboring Seventh Circuit history, the *Ortiz* decision highlighted the importance of the principles that 1) "courts should not try to differentiate between direct and indirect evidence," *Id*. at 764, 2) "all evidence is inferential and cannot be sorted into boxes," *Id*. and 3) "[a]ll evidence should be considered together to understand the pattern it reveals." *Id*.

After some circuit housekeeping, the Seventh Circuit articulated its proper standard: 'That legal standard, to repeat what we wrote in *Achor* and many later cases, is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other

proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."' *Id*. at 765. The is a good standard. The Eleventh Circuit has it wrong, and the Seventh Circuit standard is correct.

The Seventh Circuit's reasoning is clear: "[T]he direct-and-indirect framework does nothing to simplify the analysis. Instead it complicates matters by forcing parties to consider the same evidence in multiple ways (and sometimes to disregard evidence that does not seem to fit one method rather than the other)." *Id*. The Seventh Circuit's conclusion is valid: " Accordingly, we hold that district courts must stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards." *Id*.

The Seventh Circuit makes clear its "decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand." The Seventh Circuit is 'concerned about the proposition that evidence must be sorted into different piles, labeled "direct" and "indirect," that are evaluated differently.' "Instead," the Seventh Circuit holds, "all evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its

successors." *Id*. at 766. Indeed, the Seventh Circuit is correct that its holding need not be considered to conflict with *McDonnell Douglas*.

The Eleventh Circuit is not entirely unaware of the Seventh Circuit *Ortiz* case. For instance, it appears in a footnote in *Key v. Cent. Georgia Kidney Specialists PC*:

> On appeal, Plaintiff argues that this Court -- instead of using the "convincing mosaic" standard -- should analyze Plaintiff's discrimination claim under the "evidence as a whole" standard described in the Seventh Circuit's decision in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016). Plaintiff, however, relied expressly on the "convincing mosaic" standard before the district court. Because Plaintiff now argues for the first time that a different standard should apply, that argument is not properly before us.

Key v. Cent. Georgia Kidney Specialists PC, No. 20-14351, 2021 WL 5321892, at *3 (11th Cir. Nov. 16, 2021). The problem with the Eleventh Circuit's treatment in *Key* is that it has itself elsewhere noted that the convincing mosaic is not a standard, and conversely "evidence as a whole" is not a standard, but the evidence itself.

In the Gladden Opinion, the Eleventh Circuit states, "Without direct evidence of sex-based discrimination, a plaintiff may show discrimination through circumstantial evidence by satisfying the

burden-shifting *McDonnell Douglas* framework." Opinion, at App. 2. *Inter alia*, it cites, *Smith v. Lockheed-Martin Corp*., which held:

> [T]he plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. *See Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir.1997) (declaring that, in cases where a plaintiff cannot establish a prima facie case, summary judgment only will be "appropriate where no other evidence of discrimination is present." (citations omitted)); *Silverman v. Bd. of Educ.,* 637 F.3d 729, 733 (7th Cir.2011) ("To avoid summary judgment ... the plaintiff must produce sufficient evidence, either direct or circumstantial, to create a triable question of intentional discrimination in the employer's decision."). A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Silverman,* 637 F.3d at 734 (citations and internal quotation marks omitted); *see also James v. N.Y. Racing Ass'n,* 233 F.3d 149, 157 (2d Cir.2000) ("[T]he way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the

> particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove—particularly discrimination.").

Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011). *Smith* repeatedly cites to the *Silverman* case that *Ortiz* expressly overturned.

In any event, the instant *Gladden* opinion and order it affirms show that the Eleventh Circuit has not learned the lessons of *Ortiz* and affirms repeated references to Gladden's lack of direct evidence, in a manner derogatory to her case. The following examples show the derogatory treatment as well as Gladden's objection to it:

> 'The magistrate judge determined that Gladden fails to demonstrate that the evidence presented "constitutes direct evidence that P&G harbored a discriminatory animus against Plaintiff because she is female, or that it terminated her employment because she is a woman."' Order, at App. 14.
>
> "The magistrate judge concluded that the evidence cited by Gladden was circumstantial, not direct, thus she must present a *prima facie* case of gender discrimination in order to defeat P&G's motion for summary judgment." Order, at App. 14-15.
>
> 'Gladden also objects to the R&R on the basis that it "errs in not classifying

Gladden's presented direct evidence as direct evidence.'" Order, at App. 20.

"Furthermore, '"only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor' constitute direct evidence of discrimination." *Akouri v. Fla. Dep't of Transp.*, 408 F.3d 1338, 1347 (11th Cir. 2005) (quoting *Rojas v. Florida*, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (per curiam))." Order, at App. 20.

"The magistrate judge thoroughly analyzed the evidence and found that: In sum, Plaintiff does not allege, nor has she cited to any record evidence, that anyone at P&G ever made any comment to her that reflected a discriminatory animus against her because she is a woman, nor does she allege that anyone at P&G said anything to her that could be construed as direct evidence that P&G terminated her employment because she is a woman. Thus, the Court finds that Plaintiff has not presented direct evidence of sex discrimination and her case rests solely on circumstantial evidence. [Doc. No. 98 at 57]. Having reviewed the magistrate judge's analysis, this court agrees." Order, at App. 20-21.

> "The magistrate judge found that Gladden had not presented direct evidence to establish her sex discrimination and retaliation claims against P&G. He also found that she had not presented sufficient circumstantial evidence to establish the claims." Order, at App. 28.

Clearly, Gladden's case was tenderized by demeaning discounting of its evidence before summary judgment was granted against her. The neutral, non-discriminatory (between "better" and "lesser" evidence) approach of *Ortiz* is superior to the Eleventh Circuit's approach. The *Ortiz* approach should be clarified by the Supreme Court to be the law of the land.

II. This Case Presents an Ideal Vehicle for Articulating Proper Application of Motivation/Causation Analysis to Pretext and Articulating Proper Treatment of Evidence in Cases Such as Petitioner's, A Common but Often Hard to Reach Situation

Petitioner is not the first individual to have her case ended in summary judgment. Some such cases are properly resolved in summary fashion. Others, like Petitioner's are not. Analytical devices, though perhaps well intended, distract courts from the issues before them. Here, pretext analysis, by lending itself to oversimplification of multi-factor/multi-cause cases, results in a denial to Petitioner of her case ever being properly considered by a jury. The same can be said

of demeaning evidence treatment. This case, therefore, allows an opportunity to address these vexatious and unresolved issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW T. MOSLEY, II
Counsel of Record
DREW MOSLEY LLC
279 W. Crogan St.
Lawrenceville, GA 30046
(678) 225-0098
drew@mlawmail.com

Counsel for Petitioner

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