No. 14-14596-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER CHAVEZ,

Plaintiff-Appellant,

v.

CREDIT NATION AUTO SALES, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia, Case No. 1:13-cv-00312-WSD/JCF

REPLY BRIEF OF APPELLANT JENNIFER CHAVEZ

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CERTIFICATE OF INTERESTED PARTIES

The Plaintiff-Appellant, Jennifer Chavez, relies on the previously filed Certificates of Interested Parties pursuant to 11th Circuit Local Rule 26.1-1.

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ARGUMENT

In Part I of its Brief, at 4–7, Appellee Credit Nation gives a highly partisan and disputed account of selected facts of this case, taking the benefit of all inferences for itself to describe Appellant Jennifer Chavez in the most unfavorable possible light, contrary to the requirement that all evidence and reasonable factual inferences be taken in the light most favorable to the non-moving party. *Rojas v. Fla. Dep't of Bus. & Prof'l Regulations Pari-Mutual*, 285 F.3d 1339, 1341–42 (11th Cir. 2002). This pointless recitation, which intentionally sneers at transgender people's valid concerns about restroom access—Credit Nation Brief at 6 ("Apparently, use of a particular restroom is a benchmark for transgender discrimination claims.")—provides little insight into the issues of law on this appeal, save one: that Credit Nation is wholly uncomfortable with transgender people and, adding to the dizzying array of pretextual justifications it proffers in its defense, it is desperately seeking to justify a termination that was plainly in contravention of Title VII's prohibition of sex discrimination. *See generally* Brief for Amici Curiae Lambda Legal and Transgender Law Center at 22–28 (exploring the inherent anti-transgender bias attendant to restroom panic arguments).

Even if this Court were to adopt Credit Nation's skewed version of the facts underlying this appeal, Credit Nation's defense fails on the merits. As explored at length *infra*, Credit Nation fails to directly confront the many issues raised by Ms.

Chavez on appeal, erroneously cites non-controlling case law that contravenes both the law of this Circuit and a bevy of binding Supreme Court precedents across a wide array of issues, and fundamentally misunderstands and/or misrepresents the basic parameters of Title VII liability. In addition to these serious faults in Credit Nation's attack on Ms. Chavez's case on the merits, Credit Nation also fundamentally misunderstands applicable Seventh Amendment precedents that clearly teach that the District Court's treatment of this case runs afoul of the U.S. Constitution. For the foregoing reasons, Credit Nation cannot prevail as a matter of law.

I. Credit Nation's Arguments Do Not Address the Issues Raised By Ms. Chavez

Credit Nation proffered many logically and legally suspect arguments in its Brief. However, most concerning of all is that Credit Nation failed to directly address the core arguments that Ms. Chavez brought to this Court's attention on appeal. Since Credit Nation failed to directly refute Ms. Chavez's arguments on the merits Credit Nation cannot as a matter of law prevail.

A. Credit Nation's Arguments Do Not Address Mixed-Motive Causation Issues Raised on Appeal

In her Brief Ms. Chavez argues that, on motion for summary judgment, *McDonnell Douglas* burden shifting does not apply to mixed-motive claims. Ms.

Chavez's argument is undergirded by a constellation of U.S. Supreme Court and 11th Circuit precedent as well as cases from sister circuits. Chavez Brief 10–22. Rather than addressing her argument head-on, Credit Nation curiously argues that this Court has already ruled on this issue despite never having been properly presented with it. Compounding its misapprehension of the applicable case law, Credit Nation also argues that, regardless of the applicability of *McDonnell Douglas* to mixed-motive claims at the summary judgment stage, Ms. Chavez has failed to point to evidence supporting her claim despite her pointing to both direct and circumstantial evidence of bias.

1. Credit Nation does not address the application of *McDonnell Douglas* burden-shifting to mixed motive claims.

This Court should not be swayed by Credit Nation's desperate attempt to falsely paint precedent to suit its needs. Contrary to Credit Nation's representations, this Court has *never* ruled that *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973) is the "law of the circuit" applicable to all Title VII cases at every stage of litigation. *See* Credit Nation Brief at 7–8.

As this Court and the U.S. Supreme Court have long recognized, *McDonnell Douglas* burden-shifting is but one tool in the Title VII toolbox to help discern whether actionable discrimination has occurred. Courts turn to *McDonnell Douglas* burden-shifting only in the sub-set of cases where there is either no direct evidence supporting a claim of discrimination of any type—*Lee v. Russell Cty. Bd. of Educ.*,

684 F.2d 769, 774 (1982) ("reliance on [*McDonnell Douglas*] is obviously unnecessary" in direct evidence case)—or where the employer can present evidence of nondiscrimination that will, as a logical matter, rule out the possibility of biased motivation for taking an adverse action, such in the case of single-motive claims. *Burstein v. Emtel, Inc.*,[1] 137 F.App'x 205, 209 n. 8 (11th Cir. 2005) (single-motive case); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) (same), *overruled on other grounds, Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457–58, 126 S.Ct. 1195, 1197–98 (2006).

As this Court and her sister circuits have long recognized, mixed-motive cases are logically distinct from "but-for" causation claims[2] under 42 U.S.C. 2000e-2(a) ("because of...sex"), and thus require different a different approach than that proposed by *McDonnell Douglas*. As Ms. Chavez argues at length in her Brief, all the circuits which have been presented with this exact issue, save one, have decided that full *McDonnell Douglas* burden-shifting should not be applied to mixed-motive circumstantial evidence cases at the summary judgment stage. Chavez Brief at 12–14.

Credit Nation failed to directly respond to Ms. Chavez's argument. Instead, it elected to misrepresent precedents, arguing that this Court has already foreclosed

[1] Credit Nation's reliance on *Burstein* and *Cooper* is unavailing, because neither explicitly addresses the issues raised by mixed-motive claims.
[2] *See Univ. of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2526 (2013) (explaining "but-for" causation).

the issue. Credit Nation Brief at 7 (arguing that *McDonnell Douglas* is the "law of the Circuit" and thereby applies to all Title VII cases). Curiously, though Credit Nation cites to "but-for" causation cases decided by this Court it has failed to acknowledge that the Court has reserved judgment on the applicability of *McDonnell Douglas* to mixed-motive cases at the summary judgment stage. *See, e.g.*, *EEOC v. TBC Corp.*, 532 F.App'x 901, 903 (11th Cir. 2013) (declining to decide the issue); *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (leaving the issue open: "[T]he *Desert Palace* holding was expressly limited to the context of **mixed-motive** discrimination cases under 42 U.S.C. § 2000e–2(m). . . . [T]his Court has continued to apply the *McDonnell Douglas* analysis in **non-mixed-motive** cases.") (emphasis added).

Most significantly, Credit Nation has not explained why it makes any logical sense to apply full *McDonnell Douglas* burden shifting to mixed-motive causation. As Ms. Chavez argued in her brief, full *McDonnell Douglas* burden-shifting is useful only when there is a need for the employee to prove the employer's proffered rationale is false, and a pretext for discrimination. *See* Chavez Brief at 12–14. However, in a mixed-motive case the employer's proffered reason for termination is **admitted**, which obviates the need for the employee to demonstrate that the proffered reason is false, as has been recognized by all but one of the six

Circuits that have directly addressed the issue. *Id.* Therefore, *McDonnell Douglas* burden-shifting should not apply to Ms. Chavez's mixed motive causation claim.

2. Ms. Chavez presented evidence that a reasonable jury could use to conclude that her gender, gender identity, and/or gender expression was a motivating factor in Credit Nation's decision to terminate.

Credit Nation argues that Ms. Chavez failed to point to evidence at summary judgment substantiating the fact the she endured gender discrimination. Credit Nation goes so far as to argue that Ms. Chavez's failure to point to such evidence means that her transgender status could not have served as a motivating factor in Credit Nation's decision to terminate her. Contrary to Credit Nation's representations Ms. Chavez did not just point to *some* evidence at summary judgment, she pointed to both direct evidence and multiple forms of circumstantial evidence. *See* Chavez Brief at 15–21. Rather than attempting to refute Ms. Chavez's evidence, Credit Nation spuriously argues that the evidence Ms. Chavez presented does not prove bias. Credit Nation is mistaken as to Ms. Chavez's burden as a matter of law. The nature of the mixed motive case under 42 U.S.C. 2000e-2(m) is that it does not require a showing that the employer's improper motivation caused (or that a reasonable jury could believe it caused) the termination, for that is the role of the "but-for" causation statute, 42 U.S.C. § 2000e-2(a). Rather, the improper motive need only have a played a role, even a minor one. In exchange for this limited-causation scheme, in which the employee

has not proven any injury-in-fact, the employee gives up the right to ask for damages, and is only allowed declaratory and injunctive relief, and attorney fees, as a means of addressing the problem of improper motivation. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) ("may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title").

Credit Nation's arguments are neither grounded in precedent nor logic. For example, among the more interesting arguments Credit Nation proffers is that the multiple statements of bias by Mr. Torchia, Credit Nation's decision-maker, are not direct evidence since Mr. Torchia otherwise expressed "unreserved support" for Ms. Chavez's transition. Credit Nation Brief at 11. Firstly, *Desert Palace* teaches that direct evidence is not required for a mixed motive claim. *Desert Palace, Inc. v Costa*, 539 U.S. 90, 98–99, 123 S.Ct. 2148, 2153–54 (2003). What Credit Nation also conveniently ignores is that the U.S. Supreme Court has held that statements of animus are not cleansed of their bias simply by being coupled with positive remarks. Indeed, the U.S. Supreme Court recognized this very basic principle over twenty-five years ago in *Price Waterhouse*. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 257, 109 S.Ct. 1775, 1794 (1989) (Brennan, J., plurality) (negative comments in a generally favorable review are nevertheless direct evidence); *Price Waterhouse*, 490 U.S. at 271, 109 S.Ct. at 1801–02 (O'Connor,

J., concurring) (noting the evidence identified by the plurality opinion constitutes "direct evidence of discriminatory animus"). Thus, it is inapposite whether Mr. Torchia otherwise expressed "support" for Ms. Chavez—Mr. Torchia's biased remarks constitute direct evidence of bias. For lengthy discussion of Mr. Torchia's remarks and the applicable standard for direct evidence see Chavez Brief at 15–21.

Rather than attempting to explain away Mr. Torchia's biased statements, Credit Nation curiously argues that these statements are not properly considered direct evidence because a reasonable juror would need to infer bias to conclude that Mr. Torchia's statements reflect animus against transgender people or Ms. Chavez specifically. Credit Nation Brief at 11–12. This problematic (and wholly erroneous) framing of the direct evidence standard conveniently ignores this Court's well articulated precedents concerning direct evidence. As this Court has held generally, all favorable inferences are to be given to the non-moving plaintiff in Title VII cases. *Rojas*, 285 F.3d at 1341–42. Thus, it is of no matter whether an alternative inference which favors Credit Nation can be drawn from Mr. Torchia's statements, as the most favorable inference must be given to Ms. Chavez. What is more, the precedents of this Court do not limit direct evidence to only that evidence which is not subject to *any* alternative interpretation *or* evidence that expressly declares that an adverse action was taken in derogation of Title VII's nondiscrimination mandate. *See generally* Chavez Brief at 15–21.

Though many of Credit Nation's arguments depart wholly from established precedent, the most concerning argument it sets forth is its misapprehension of the clear law that the burden of proof shifts, in a mixed motive causation claim, to the *employer* to show that it would have taken the same action anyway. Credit Nation Brief at 9–12. Title VII, as amended by the Civil Rights Act of 1991, clearly holds employers to a much higher standard. Where an employee brings a mixed motive claims arising under §2000e-2(m), the employer must proffer an affirmative defense that rules out the possibility that animus motivated the adverse action. 42 U.S.C. 2000e-5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title *and a respondent demonstrates* that the respondent would have taken the same action in the absence of the impermissible motivating factor") (emphasis added). The plain text of §2000e-5(g)(2)(B) does not permit the rule Credit Nation proffers. Rather, the text makes clear that the burden lies *on the employer to prove* it would have made the same decision even absent the taint of bias. Indeed, the decisions of this Court reflect exactly how high §2000e-5(g)(2)(B)'s burden is on employers. *See, e.g.*, *Hall v. Alabama Ass'n of Sch. Boards*, 326 F.3d 1157, 1167 (11th Cir. 2003) ("to avoid the full array of remedies, the employer must demonstrate[ ] that [it] would have taken the same action in the absence of the impermissible motivating factor'.") citing §2000e-5(g)(2)(B).

Thus, the employee need not show anything beyond pointing to evidence in the summary judgment record of a *prima facie* case and some evidence that a reasonable jury could believe showed an impermissible motivation. Ms. Chavez has done so. Where, as was done here, the employee has pointed to both direct evidence *and* additional circumstantial evidence proving her *prima facie* case, the employee need not do more.

Rather than confront the damning bevy of circumstantial evidence Ms. Chavez presented, Credit Nation baldly asserts that all of Ms. Chavez's evidence is "unreasonable." Credit Nation Brief at 11. In essence, Credit Nation revises the same refrain it lodged at Ms. Chavez's direct evidence, and claims all the circumstantial evidence is mooted by the "fact" that Mr. Torchia was otherwise "unreversedly supportive" of Ms. Chavez's transition. That point, it should be noted, is supported by no evidence in the record. Rather, Credit Nation relies wholly on an unsubstantiated conclusion of the District Court judge that erroneously attributes purportedly "supportive" actions taken by Credit Nation's managers, not Mr. Torchia the sole decision-maker. Chavez Brief at 45–46. Under *Price Waterhouse some* positive treatment of Ms. Chavez by Credit Nation's managers does not prove "unreserved" support by Credit Nation, let alone by Mr. Torchia personally. *Price Waterhouse v. Hopkins*, 490 U.S. at 257, 109 S.Ct. at 1794. Moreover, Credit Nation's attempt to distract from the damning record of

discrimination before this Court does not explain away Mr. Torchia's animus-ridden statements against Ms. Chavez.

Ultimately, in failing to discuss any of the evidence of discriminatory motive set forth in Ms. Chavez's Brief at 15–21, Credit Nation has left unsupported its argument that there was insufficient evidence of discriminatory motive to support Ms. Chavez's mixed-motive claim.

B. The District Court Erred in Subjecting Ms. Chavez's Direct Evidence to *McDonnell Douglas* Burden-Shifting

This Court should not be swayed by Credit Nation's haphazard attack on Ms. Chavez's direct evidence. Contrary to Credit Nation's representations, Ms. Chavez pointed to direct evidence at summary judgment that falls well in line with this Court's and the U.S. Supreme Court's jurisprudence on direct evidence in Title VII actions. For fuller discussion of governing direct evidence precedents see Chavez Brief at 22–24.

1. The preponderance of the evidence standard, not the "Dictionary Definition," governs direct evidence.

Because Credit Nation cannot point to precedents that push Ms. Chavez's direct evidence over the line into circumstantial evidence, it proffers a self-serving definition of direct evidence which conveniently excludes the evidence Ms. Chavez presented. As Judge Tjoflat points out in *Wright v. Southland Corporation*,

187 F.3d 1287, 1294 (11th Cir. 1999)[3] that direct evidence should be judged by the "preponderance of the evidence standard," Credit Nation argues that it should instead be subjected to the "without inference or presumption" standard first articulated in *Rollins v. TechSouth, Inc.,* 833 F.2d 1525 (11th Cir. 1987). The *Rollins* position, named in the literature as the "dictionary definition" because the *only* authority for the position is a single citation to *Black's Law Dictionary*, makes no logical sense and is wholly divorced from the statutory text and precedents that bind this Court. *See* R. Joseph Barton, *Determining the Meaning of "Direct Evidence" in Discrimination Cases Within The 11th Circuit: Why Judge Tjoflat was (W)right*, 77 FLA. BAR J. 42, 48 (2003).

As recognized by Judge Tjoflat in *Wright*, *Rollins*' "dictionary definition" does not control in Title VII cases since the preponderance standard predates the "dictionary definition" by several years. *Wright*, 187 F.3d at 1295–98 (citing and discussing representative earlier cases, including *Lindsey v. American Cast Iron Pipe Co.,* 772 F.2d 799 (11th Cir.1985), *Buckley v. Hospital Corp. of America, Inc.*, 758 F.2d 1525 (11th Cir. 1985), *Thompkins v. Morris Brown College,* 752 F.2d 558 (11th Cir. 1985), *Bell v. Birmingham Linen Service,* 715 F.2d 1552 (11th Cir. 1983),

[3] While *Wright* itself is not binding precedent because it is a split decision in which two judges did not join the opinion of Judge Tjoflat, it should still be considered highly persuasive, because it sets out the earlier Circuit precedent in great detail, carefully illustrating the problem caused by the *Rollins* Court's ignoring binding precedent.

Lee v. Russell County Board of Educ., 684 F.2d 769 (11th Cir. 1982), and *Ramirez v. Sloss,* 615 F.2d 163 (Former 5th Cir. 1980)). Because the Circuit is internally bound by prior decisions of three-member panels up and until an *en banc* panel overrules the prior decision, neither this Court nor any other three-member panel may displace the preponderance standard. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("The old Fifth followed the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc. The Eleventh Circuit decides in this case that it chooses, and will follow, this rule."); *Walker v. Jefferson Cty. Bd. of Educ.*, 771 F.3d 748, 752 (11th Cir. 2014) citing *United States v. Sneed,* 600 F.3d 1326, 1332 (11th Cir. 2010) ("Once a panel of this court decides an issue, its holding on that issue is binding on all subsequent panels, 'unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc'."). Thus, reliance on the later introduced *dictionary definition*, which ignoring the earlier introduced "preponderance" standard, flouts the "law of the earlier decision" principle which binds this Court. *Fiat justitia ruat cœlum.*

Conveniently, Credit Nation also wholly ignores prior Supreme Court precedents, which teach that the preponderance standard governs direct evidence in Title VII cases. For example, *Desert Palace* clearly instructs that direct evidence must be proved by the preponderance standard rather than the "dictionary

definition" rule favored by Credit Nation. As Justice Thomas observed, the text of Title VII,

> [D]oes not mention, much less require [any] heightened showing through direct evidence[, particularly since] Congress explicitly defined [the term] demonstrates as to 'mee[t] the burdens of production and persuasion' . . . . Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." **That rule requires a plaintiff to prove his case "by a preponderance of the evidence," using "direct or circumstantial evidence,"** *Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714, n. 3, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Desert Palace, 539 U.S. at 98–99, 123 S.Ct. at 2153–54 (emphasis added).

Unsurprisingly, Justice Thomas' instruction in *Desert Palace* falls clearly in line with prior Supreme Court ruminations on direct evidence. For example, in *Aikens,* cited in the quotation above, the Court held that testimony pointed to by the employee showing "that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular" constitutes direct evidence. *Postal Service Bd. of Governors v. Aikens,*460 U.S. 711, 713–14, n.2, 103 S.Ct. 1478, 1481, n.2 (1983). Nowhere to be found in the discussion in either *Desert Palace* or *Aikens* is the "dictionary definition" standard. Indeed, there is no Supreme Court case that adopts the "dictionary definition" position, but there are three Supreme Court decisions that adopt the preponderance standard and expressly recognize that the preponderance

standard applied in *Aikens*, adopted by reference in *Desert Palace*, governs. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S. Ct. 1775, 1801 (1989) (O'Connor, J., concurring) ("The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 713–714, n. 2, 103 S.Ct. 1478, 1481, n. 2, 75 L.Ed.2d 403 (1983).") Additionally, many of this Court's sister circuits plainly recognize that the preponderance standard governs.[4]

Though Credit Nation points to this Court's decision in *Trotter v. Bd. of Trustees of Univ. of Ala.,* 91 F.3d 1449, 1453–54 (11th Cir. 1996) as authority for adopting the "dictionary definition," this Court should not rely on *Trotter* as it was expressly abrogated by *Desert Palace*. *Desert Palace*, 539 U.S. at 95, 123 S. Ct. at 2152 citing *Trotter,* 91 F.3d at 1453 and going on to adopt the alternative formulation of direct evidence proposed by the Ninth Circuit). The Supreme Court made its disavowal of this Court's position in *Trotter* absolutely clear—it expressly

[4] *See, e.g.*, *DiCarlo v. Potter*, 358 F.3d 408, 415-416 (6th Cir. 2004), abrogated on other grounds, *Scheick v. Tecumseh Pub. Sch.*, 766 F.3d 523, 530 (6th Cir. 2014) (holding direct evidence in ADEA context permits "no inferences," distinguished from Title VII); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 951 (8th Cir. 1990); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853 (9th Cir. 2003*) aff'd* 539 U.S. 90, 123 S.Ct. 2148 (2003) ("the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.'"); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1217 (10th Cir. 2013) (expressed view that women have inferior knowledge of tools is direct evidence).

cited *Trotter's* infamous discussion of Justice O'Connor's analysis of stray remarks and decision makers, and abrogated it, signaling that "direct evidence" is not to be placed within the narrow constraints that had been placed upon it by Justice O'Connor's concurrence in *Price Waterhouse* which *Trotter* had erroneously adopted. Those constraints were "stray remarks in the workplace . . . statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process itself" *Price Waterhouse,* 490 U.S. at 277, 109 S.Ct. at 1804–05 (O'Connor, J., concurring). Thus, those 11th Circuit panels that have required that statements by decision maker be explicitly related by their own terms to the decisional process contravene the teachings of *Desert Palace*.

Much akin to Credit Nation's erroneous reliance on *Trotter*, Credit Nation dubiously cites to *East v. Clayton County, Ga.*, 436 F.App'x 904 (11th Cir. 2011) and *Cobb v. City of Roswell*, 533 F.App'x 888 (11th Cir. 2013) *cert. denied sub nom. Cobb v. City of Roswell, Ga.*, 134 S. Ct. 1546 (2014) claiming that these two *unpublished* decisions require use of the "dictionary definition." *See* Credit Nation Brief at 12–13. However, examination of the text of these decisions plainly reveals that this Court does not apply the dictionary definition. For example, *Cobb* does refer to the dictionary definition, but only as a means of explaining that under either the preponderance or the dictionary standard the litigant fails:

> Even if we apply the preponderance standard in *Wright*, Cobb has failed to submit evidence that, more probable than not, establishes a causal link between the adverse employment action and his age.

Cobb, 533 F.App'x at 893. Indeed, neither *Cobb* nor *East* even approach express abrogation of the earlier decisions cited above. For good reason—even if *Cobb* or *East* had expressly attempted to abrogate those decisions, the three-member panels that authored those opinions were not so empowered. Under the law of this Circuit only an *en banc* panel has the power to abrogate an earlier opinion of the Court. *Sneed*, 600 F.3d at 1332.

2. Credit Nation's argument that Chavez's direct evidence fails even under the preponderance standard is unavailing.

Since it is clear that the preponderance standard governs, it is unsurprising that Credit Nation proffers an alternative argument that purports to prove that Ms. Chavez's direct evidence, judged under the preponderance standard, still fails. As per Credit Nation, it does not matter whether the preponderance or the "dictionary definition" standard is applied since "no reasonable jury could find that Ms. Chavez was terminated for being transgender when the undisputed evidence proves that she was asleep on the clock for forty minutes." Credit Nation Brief at 13–14. Credit Nation's argument is unavailing.

Neither this Court's precedents nor the Supreme Court's precedents teach the rule Credit Nation proffers. Indeed, the precedents say the opposite. The purported "wisdom" of the employer's rationale for termination cannot be divorced

from the context. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000) (plaintiff may establish that she was the victim of discrimination by showing that employer's proffered rationale is unworthy of credence). *See also* Chavez Brief at 50. Put another way, the issue here is not what a jury would or would not believe where the nondiscriminatory rationale is viewed in isolation, but rather, whether this is direct evidence or not. If it constitutes direct evidence, then it goes to the jury without *McDonnell Douglas* burden-shifting.

C. Credit Nation's Arguments Challenging Pretext Give Rise to Disputes of Fact Which Should Be Resolved by a Jury

Rather than directly contesting Ms. Chavez's substantive legal argument concerning pretext, Credit Nation attempts to dispute the facts pointed to by Chavez. Even if these arguments were availing, Credit Nation should have raised these concerns at the trial level rather than on appeal. However, at this late stage, Credit Nation's attacks on Ms. Chavez's version of the pertinent facts reveal that, as Ms. Chavez argued at summary judgment, genuine disputes of material fact existed below and that, as a result, these issues should have been resolved by a jury. *See* Chavez Brief 48–55.

Credit Nation disputes many important facts pointed to by Ms. Chavez at summary judgment, including, but not limited to:

1. Purported contradictions in Ms. Chavez's testimony.[5] Credit Nation Brief at 17–18 (arguing that Chavez's recollection of events is "hazy at best" and thus unreliable). *But see* Doc. 78 at 6-8 *and* Doc. 78-2 (Chavez's sworn statements explaining why her testimony did not contradict itself).

2. Ms. Chavez's testimony that she experienced additional scrutiny after she transitioned on the job. Credit Nation Brief at 18 (arguing Ms. Chavez lied). *But see* Chavez Brief at 32–33 (pointing to multiple documents that evidence heightened discipline post-transition).

3. The emails between Ms. Weston and Mr. McManus (Credit Nation's manager and counsel, respectively) implying that Ms. Chavez be written up until things "get to the breaking point" really mean that Ms. Chavez was conducting a scam. Credit Nation Brief at 19–20 (arguing that Chavez's request to use an alternative restroom was part of her scheme to drum up grounds for a lawsuit).

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[5] Credit Nation refers to the Magistrate's improper and surprising finding that Ms. Chavez's testimony contradicted itself, and then speculates that her recollection is "hazy at best." Credit Nation Brief at 17–18. Ms. Chavez submitted a declaration with her Rule 72 Objections that explained in detail how and why the Magistrate was in error. *See* Doc. 78 at 6-8; Doc. 78-2. *Credit Nation discusses none of this*. Apparently, the District Court agreed with Ms. Chavez's argument as the "contradiction" refrain appears nowhere in the District Court's opinion. Because Credit Nation did not appeal the District Court's declination to adopt this finding, it is not ripe for appeal. *See* 28 U.S.C § 636 ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."). *See also Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1255 (11th Cir. 2014) ("Because this argument is outside the scope of Plaintiffs' brief and was not raised by Defendants on cross-appeal, we find that the argument is not properly raised. As we have previously explained, a party who has not appealed may not bring an argument in opposition to a judgment or attack the judgment in any respect, or hitch a ride on his adversary's notice of appeal to enlarge his rights under the judgment or diminish those of the opposing party.") (citations and quotations omitted).

But see Chavez Brief at 34–35 (arguing the emails evidence heightened scrutiny post-transition).

4. Mr. Nuhibian's statement that "[I] know for a fact that you were run out of credit nation" does not mean what it plainly says. Credit Nation Brief at 20 (arguing that later contradicting testimony should be relied upon). *But see* Chavez Brief at 36–37 (arguing that, taken in light most favorable to non-moving plaintiff, later contradicting testimony gives rise to inference of discrimination).

5. The inference from the choice of the shop foreman Mr. Nuhibian to leave Ms. Chavez to sleep for 40 minutes after taking a picture of her, despite Credit Nation's contention that there was a zero-tolerance policy for the very serious offense of sleeping, suggests that sleeping was seen as a pretext for termination. Credit Nation Brief at 21 (dubiously arguing that this is not evidence of pretext because Nuhibian could not have known it was "pretext under the *McDonnell Douglas* burden-shifting framework"). *But see* Chavez Brief at 38–39 (arguing that, logically, if Credit Nation had had a zero-tolerance policy for sleeping its managers would have taken swift action to discipline Chavez rather than letting her sleep).

6. Credit Nation's Employee Handbook's statement that "these steps will normally be followed" should not be read as meaning that they will normally be followed. Credit Nation Brief at 21–22 (arguing that the progressive disciplinary policy was binding but need not be followed in all circumstances; declining to identify circumstances when the policy does and does not apply). *But see* Chavez Brief at 39–40 (arguing that the plain text of the policy suggests it was applied in nearly all circumstances and that Credit Nation has failed to explain *why* it was not applied in this case the failure of which gives rise to evidence of pretext).

7. Credit Nation's prior representation that it fired Ms. Chavez for violation of a non-existent zero-tolerance policy *and* for the violation of a over dozen different policies should now be ignored as if they never existed. Credit Nation Brief at 22–23 (claiming no change in rationale). *But see* Chavez Brief at 40–43 (pointing to 5 distinct sets of rationales proffered by Credit Nation since Chavez's termination).

8. Credit Nation's evidence that it fired another employee for sleeping proves that bias did not factor into the decision to fire Ms. Chavez for a similar offense, although Credit Nation utterly failed to sustain its burden of showing that its comparator was "nearly identical." Chavez Brief at 45.

9. Although Ms. Chavez was disciplined for standing up to co-worker harassment based on her gender, she is merely an "instigator," and that Mr. Torchia really was "unreservedly supportive," and despite his multiple blatant remarks about Ms. Chavez ruining his business Credit Nation Brief at 23. *But see* Chavez Brief at 43 (recounting gender-based discipline); *id.* at 20 and 45–46 (pointing out that Torchia expressed no direct support for Chavez and all evidence of "support" pointed to by the District Court were actions taken by Credit Nation's managers); *id.* at 15–17 (pointing to multiple discriminatory remarks made by Mr. Torchia).

Credit Nation's above referenced arguments do nothing except suggest that genuine disputes of material fact existed below. *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288–89, 88 S.Ct. 1575, 1598 (1968) ("It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.").

Curiously, in the same breath that Credit Nation quarrels with Chavez's recitation of material of facts, it argues that no disputes of material fact exist. *See* Credit Nation Brief at 25–26 ("Accordingly, the district court did not err in

granting summary judgment because a material fact was not in dispute."). The facts Ms. Chavez pointed to supporting her claim of pretext must either *not* be in dispute *or* the facts Ms. Chavez pointed to are in dispute and she must have been improperly deprived of a jury trial. *Credit Nation cannot have it both ways*.

D. Credit Nation's Confusion as to the Difference Between the Wisdom of an Employer's Decision and the Veracity of an Nondiscriminatory Rationale Underscore that this Court Needs to Clarify the Applicable Rule

Credit Nation argues that, in arguing there is a difference between the wisdom of an employer's decision and the veracity of the employer's decision, Ms. Chavez is "recasting" the employer's decision. This misconceives Ms. Chavez's true argument, which is that the District Court should not have ignored the evidence pointed to by Ms. Chavez to show that Mr. Torchia did not himself actually believe that Ms. Chavez was being fired for sleeping. Chavez Brief at 48–51. Though this Court's precedents draw a line between the wisdom of an employer's decision and veracity, Credit Nation's argument and the equivocation of the District Court below clearly illustrate a problem with the case law—it is confusing even to experienced counsel and judges. If every plaintiff's rebuttal of a proffered reason can be seen as merely questioning its wisdom—and given the high rate of summary judgment in these cases discussed *infra* Part II this seems to be the case—there is very little room for a plaintiff to ever show discrimination.

That plainly thwarts the broad remedial purpose of Title VII. This Court should thus clarify the distinction between impermissible quarrelling with the employer's proffered rationale and permissible questioning of the veracity of the proffered rationale.

Credit Nation also argues that *Chapman v. AI Transport,* 229 F.3d 1012 (11th Cir. 2000) says that if the employer proffers a reason that might motivate a reasonable employer, the employer is automatically entitled to summary judgment. Credit Nation Brief at 25. Credit Nation misconstrues *Chapman*. *Chapman* teaches a far different principle: "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it . . . ." *Chapman,* 229 F.3d at 1030. *Chapman* does not say that the employer is entitled to summary judgment merely because it proffers a reason that might motivate a reasonable employer, but that the proffered reason shifts the burden to the employee to prove pretext. Thus, only if the employee fails to point to evidence in the record, upon which a reasonable jury could find pretext, is the employer entitled to summary judgment.

II. The District Court's Decision Runs Afoul of the Seventh Amendment

Credit Nation's retort to Ms. Chavez's Seventh Amendment argument is also unavailing. Credit Nation does not argue that this issue is improper, deceptive or jurisdictionally inadequate in any way. Rather it relies on the admonition in *Garvie v.*

City of Ft. Walton Beach, Fla., 366 F.3d 1186, 1190 (11th Cir. 2004) that the "true focus" of the argument should be on whether a material fact was in dispute.

In *Garvie*, the appellant made no specific arguments regarding the existence of genuine disputes of material fact in its brief, but instead relied on a broad claim that any summary judgment in its case was automatically a violation of the Seventh Amendment. By contrast, the true focus of Ms. Chavez's arguments, comprising approximately 24 pages of her brief, Chavez Brief at 24–48, are arguments regarding the existence of genuine disputes of material fact. She does not rely on the type of broad Seventh Amendment argument employed in *Garvie*. Rather, Ms. Chavez argues that this case contains discrete, clearly identifiable Seventh Amendment violations sown by the District Court impermissibly overstepping its limited role as trier-of-law and crossing over the line into resolving questions of fact. In essence, Ms. Chavez argues that the District Court made it easier for Credit Nation, the movant, to prevail by giving it the benefit of burdens and inferences due to Ms. Chavez as non-movant, and discounted genuine issues of material fact. Both of these errors result in constitutional deprivations if not reversed. *See generally* Chavez Brief at 51–55.

This argument is important because of the confluence of four doctrinal holdings regarding Title VII. These have limited the judicial understanding of the requirement of a "genuine dispute of material fact" under Rule 56 in regard to

Title VII cases. The first of these is the recognition that Title VII cases are unusually fact-intensive, and not generally appropriate for summary judgment. *See*, *e.g., Delgado v. Lockheed–Georgia Co.,* 815 F.2d 641, 644 (11th Cir. 1987); *Batey v. Stone,* 24 F.3d 1330, 1336 (11th Cir. 1994) ("summary judgment in employment discrimination cases . . . is especially questionable") (internal quotation and citation omitted). *But cf. Chapman v. AI Transp*, 229 F.3d 1012, 1025 (11th Cir. 2000). The second is that direct evidence includes statements of animus against the protected class by the decision-maker, which would operate to create a genuine dispute of material fact. Nonetheless, some appellate panels only permit specific and blatant statements at the time of termination that the protected class is the reason for termination. The effect is to impermissibly narrow the scope of disputes of material fact, in derogation of the Seventh Amendment. *See Oglesby v. Terminal Transport Co., Inc.*, 543 F.2d 1111, 1113 (Former 5th Cir. 1976). The third doctrine is the burden on the employee to disprove the employer's proffered reason in a mixed motive causation claim before the Court will consider genuine disputes regarding discriminatory motive. The Court below used this reasoning to ignore the disputed evidence regarding Credit Nation's discriminatory statements and motive, saying that Ms. Chavez's admitted sleeping made the dispute immaterial. However, Ms. Chavez's admission of the employer's proffered rationale cannot obviate the unrelated dispute regarding Credit Nation's

discriminatory motive, which under the 7th Amendment must be decided by a jury. Again, this impermissibly narrows the scope of genuine disputes of material fact. The fourth doctrine is the doctrine that courts will not consider the wisdom of the employer's proffered rationale. This has been considerably broadened to the point where any evidence casting doubt on the employer's veracity is routinely ignored. This makes it impossible for the employee to show discrimination in the absence of "nearly identical" comparators. Taken together, these four doctrines come together to narrow the universe of "genuine disputes of material fact" so as to result in an overwhelming percentage of summary judgment in favor of employers. *See* Chavez Brief at 52 (citing statistics for employment discrimination claims in the Northern District of Georgia of 95% partial summary judgment dismissal, and 81% in full, compared to 74–77% rate for the nation).

At this point, and in this case, the narrowing of Rule 56's "genuine disputes of material fact" conflict with the Seventh Amendment's strictures. Arguing the doctrinal specifics becomes at some point unavailing in the absence of some overriding and countervailing general principle, such as that contained in the Seventh Amendment. This Court in *Garvie* suggested that a better focus in summary judgment appeals is on Rule 56. Ms. Chavez heartily agrees. However, to the extent that the four doctrines referenced above come together to deny Ms. Chavez the ability to raise a genuine dispute of material fact, when one really

exists, the District Court opinion ran afoul of the Seventh Amendment right to a jury trial when there is a genuine dispute of material fact.

III. CONCLUSION

For all the foregoing reasons, Appellant Jennifer Chavez respectfully requests that the District Court opinion be reversed, and the case be remanded to the District Court for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains **6828** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to FRAP 25 and the Circuit Rules and IOP of the Eleventh Circuit, I certify that on this 5th day of January 2015, a true and correct copy of the foregoing Reply Brief of Appellant Jennifer Chavez was served to all counsel of record who have appeared in this appeal via filing with the Court's CM/ECF system, including the following:

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