No. 19-

IN THE

Supreme Court of the United States

AMEER SIDDIQUI,

Petitioner,

v.

NETJETS AVIATION, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are plaintiffs who bring retaliation claims under either Title VII or Section 1981 subjected to the strenuous "but for" test, or is a reasonable inference sufficient to proceed past summary judgment? And, are the standards different under each of these statutes?[1]

2. Must employees identify comparators who have "exact correlation" or are "nearly identical" to the plaintiff, under either Title VII or Section 1981, as required by the Eleventh Circuit, or is the definition more "flexible" as in the Seventh Circuit? Or, is it something completely different, as tried by other circuits?

3. Do employees bear the burden of definitively showing discrimination in order to establish pretext under either Title VII or Section 1981, or is a reasonable inference of discrimination sufficient to survive summary judgment?

4. Must courts evaluate each act of retaliation raised by plaintiffs under Title VII and/or Section 1981 to consider whether they are related to the action at issue, therefore creating a genuine issue of material

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1. Petitioner is aware of the pending consideration by this Court of *Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media*, No. 18-1171, regarding the applicability of the "but for" standard to claims brought under 42 U.S.C. § 1981. Petitioner respectfully requests the right, as applicable, to supplement any relevant briefing regarding the application of any ruling by this Court in the *Comcast Corp.* case to Petitioner's claims under Section 1981 in this matter.

fact, or may courts summarily dispose of retaliation claims merely by reference to an earlier discrimination analysis?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ameer Siddiqui was the Plaintiff in the United States District Court for the Southern District of Florida and the Appellant at the United States Court of Appeals for the Eleventh Circuit. Respondent NetJets Aviation, Inc., was the Defendant in the District Court and the Appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Ameer Siddiqui is an individual and brings the claims in this matter on his own behalf.

Respondent NetJets Aviation, Inc. is a subsidiary of Berkshire Hathaway, Inc.

RELATED CASES

There are no related cases other than the opinions identified below in this matter:

Siddiqui v. NetJets Aviation, Inc., No. 16-23924, United States District Court for the Southern District of Florida. Judgment entered July 23, 2018.

Siddiqui v. NetJets Aviation, Inc., No. 18-13463. United States Court of Appeals for the Eleventh Circuit. Judgment entered May 31, 2019. Rehearing denied July 18, 2019.

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OPINION AND ORDER BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit for which Petitioner respectfully petitions this Court for a writ of certiorari, *Siddiqui v. NetJets Aviation, Inc.*, No. 18-13463, is unpublished and marked with a "DO NOT PUBLISH" notation. It is viewable at *Siddiqui v. NetJets Aviation, Inc.*, 773 Fed. Appx. 562, 2019 U.S. App. LEXIS 16274, 2019 WL 2323785 (11th Cir. 2019). *See* Petitioner's Appendix ("Pet. App.") A, 1a – 11a.

The Opinion of the United States District Court for the Southern District of Florida, which was appealed to the United States Court of Appeals for the Eleventh Circuit, *Siddiqui v. NetJets Aviation, Inc.*, No. 16-23924, is unreported, but viewable at *Siddiqui v. NetJets Aviation, Inc.*, No. 16-23924, 2018 U.S. Dist. LEXIS 122589, 2018 WL 3541854 (S.D. Fla. July 23, 2018). *See* Pet. App. B, 12a – 52a.

The Opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing for *Siddiqui v. NetJets Aviation, Inc.*, No. 18-13463, is unreported. *See* Pet. App. C, 53a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 31, 2019, and the Petition for Rehearing denied on July 18, 2019. *See* Appendices A and C at 1a – 11a, 53a, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII"), provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . 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."

The Civil Rights Act of 1866, 42 U.S.C. § 1981(a) ("Section 1981") provides that "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 as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Six years ago, American Muslim pilot Ameer Siddiqui became the target of rumors and innuendo, which his employer believed was enough to suspend and eventually end his employment. This Petition seeks to challenge the rulings below which summarily dispose of Petitioner's claims of unlawful discrimination and retaliation, brought under Title VII and Section 1981.

Petitioner actively worked for NetJets Aviation, Inc. ("NetJets") as a private pilot from 2006 until 2013; during that seven year period, Petitioner had an exemplary flying record.[1] In January of 2013, NetJets' Director of Aviation Security Joseph Dalton stated that he received an anonymous call from a crew member who expressed concerns over political statements that Petitioner had purportedly made.[2] Although Mr. Dalton did not contemporaneously document or preserve a record of this call, he reported it to Anthony Mosso, NetJets' Labor and Employee Relations Manager. Mr. Mosso reported the call to then-Chief Pilot David Hyman, and the two of them conducted follow-up interviews with other pilots later that month.[3] These interviews resulted in a finding by the Chief Pilot that "ultimately, all people interviewed felt that [Petitioner] is not a threat…the general sentiment [was] that he likes to hear himself talk, but quickly cuts off

1. Doc. 1. References herein to documents filed in the District Court are listed as "Doc. __" and references to documents filed in the Court of Appeals are listed by the title of the documents.

2. Doc. 42-1 at 1-2.

3. *Id.* at 2.

when asked to do so."[4] Regardless, on September 6, 2013, Petitioner received an e-mail from NetJets, requiring him to travel to its headquarters in Ohio for a meeting; prior to this e-mail, Petitioner had been given no notice of the allegations against him. Although Petitioner did not yet know this, NetJets' then Chief Operating Officer Bill Noe had already made the decision to place Petitioner on administrative leave, a full nine months after the initial phone call that prompted the investigation into Petitioner.[5] Purportedly, Mr. Noe had only recently learned of the investigation into Petitioner in August of 2013 (which in itself belies the purported urgency and degree of seriousness of the allegations).[6]

NetJets then called the Federal Bureau of Investigation ("FBI") and reported Petitioner as a possible terrorist sympathizer. After conducting its own inquiry, the FBI informed Petitioner via letter on February 24, 2014 that he had been cleared, and the file involving him would be closed; Petitioner remained on administrative leave, however, for over two more years.[7] On March 2, 2015, over two years after the initial phone call concerning Petitioner, NetJets notified Petitioner that he needed to appear in Ohio in front of a Crewmember Review Board ("CRB") relating to "inappropriate statements relating to owners and/or violations of [NetJets' policy regarding harassment], including, but not limited to, derogatory statements regarding different religions (anti-Semitic

4. Doc. 42 at 14; Doc. 42-2 at 89.

5. Doc. 42-2 at 2.

6. Appellee's Response Brief, at 8.

7. Doc. 42-1 at 3-4; Doc. 42-2 at 85.

comments) and national origins."[8] The CRB was only scheduled, even at this late date, after Petitioner's outside attorney contacted NetJets on his behalf. The comments that Petitioner was questioned about during the CRB dated back to 2012, three years prior to the CRB and over a year before the original anonymous complaint, and were presented to Petitioner only in very broad and conclusory terms which did not identify any context.[9] Petitioner stated at the CRB that he believed he was being discriminated and retaliated against for having contacted an attorney, and complained about the conclusory nature of the questions presented to him which presumed fault but without allowing him to address any underlying facts.[10]

Subsequent to the CRB, Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 29, 2015, alleging discrimination on the basis of religion, national origin and retaliation.[11] Petitioner remained on leave until he was later terminated via letter dated August 11, 2016, which was exactly 90 days after the EEOC had issued its Notice of

8. Doc. 42-2 at 105.

9. Doc. 42-2 at 110-111 (testimony of the Union Steward that Petitioner's CRB was highly unusual, in that the same questions were repeatedly asked, no identifying context was given for the accusations made, and in ten years as a Union Steward he has never known of anyone else being kept on leave for anywhere near as long).

10. *Id*. at 115-120 (questions prepared in advance and asked of Petitioner at the CRB included "Do you feel you are able to work effectively with other American co-workers and passengers when you have these feelings and have made these statements?").

11. *Id.* at 75-76.

Right to Sue regarding his Charge of Discrimination. The termination letter informed him that his employment with NetJets was terminated based on perceived dishonesty during the CRB process.[12] Petitioner subsequently received an additional termination letter, adding that NetJets determined he had made inappropriate yet still unidentified statements were made "on multiple occasions prior to [his] placement on administrative leave, including but not limited to duty tours in 2012," *four years* prior to his termination.[13]

Petitioner timely filed suit alleging discrimination and retaliation under Title VII and Section 1981.[14] The parties filed cross-motions for summary judgment in the District Court. The District Court granted NetJets' Motion for Summary Judgment on July 23, 2018.[15] The United States Court of Appeals for the Eleventh Circuit affirmed, by way of decision dated May 31, 2019.[16] Petitioner filed a Petition for Rehearing, which was denied on July 18, 2019.[17] Petitioner now seeks a writ of certiorari to the Eleventh Circuit, based on the improper application of several standards as to Petitioner's discrimination and retaliation claims under Title VII and Section 1981.

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12. *Id.* at 136.

13. *Id.* at 143.

14. Petitioner also previously brought claims under the Age Discrimination in Employment Act after filing a second Charge of Discrimination, but voluntarily dismissed these prior to the District Court's ruling.

15. *See* Doc. 84; Pet. App. B at 51a – 52a.

16. Pet. App. A at 11a.

17. Pet. App. C at 53a.

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Wrongly Subjected to a Heightened Burden On His Retaliation Claims, Under Both Title VII and Section 1981

Both the District Court and the Court of Appeals wrongly applied the "but for" standard to the analyses they did devote to Petitioner's retaliation claims, sweepingly applying one standard to both the Title VII and Section 1981 claims. *See* Pet. App. A at 11a; Pet. App. B at 50a. These two separate claims warrant separate analyses. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 453-54 (2008); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 211-12 (1989) (internal citations omitted) (Brennan, J., concurring in part) (noting history that Title VII and Section 1981 are "separate, distinct, and independent"). The proper application of the burden-shifting approach embraced by this Court for these claims does not place nearly so high of a burden on plaintiffs. Petitioner is able to present indirect evidence of retaliation as an alternative to direct evidence under the "but for" standard. Under the indirect method, he must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to a "materially adverse" action even though he performed his job in a satisfactory manner. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006); c*f. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (approving a "but for" standard for analyzing retaliation claims brought under Title VII) with *CBOCS West, Inc.*, 553 U.S. at 457 (affirming the recognition of retaliation under Section 1981 by the Seventh Circuit in

Humphries v. CBOCS West, Inc., 474 F.3d 387, 406 (7th Cir. 2007), which held that "We need not decide whether Humphries has enough evidence under the direct method because he meets the requirements of the indirect method"); *Patterson,* 491 U.S. at 186-87; *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 802-03 (1973); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (internal citations omitted) (O'Connor, J., concurring) (observing that the but-for test "demands the impossible" at times).

Utilizing the proper standard to actually analyze Petitioner's separate claims demonstrate the errors of the lower courts in this matter. Petitioner asserts that "NetJets unreasonably extended his administrative leave in retaliation for the letter from his attorney alleging discrimination," which the Court of Appeals believed failed because he did not "point to any particular decisionmaker who was aware of the letter, and the record is unclear as to whether an affirmative decision to extend the leave was made."[18] Although the Appellate Court is correct that Petitioner does not identify a specific decisionmaker being made aware of the letter, logic allows the reasonable inference that a letter accusing a company of employment discrimination will reach the appropriate corporate personnel; this is particularly true when the employee in question has been the subject of significant internal discussion. In fact, NetJets' in-house counsel who directed the investigation responded back to his attorney's letter shortly after it was received.[19] And while the Court of

18. Pet. App. A at 10a.

19. Doc. 42-2 at 103.

Appeals concluded that "it is undisputed that NetJets was in the process of scheduling the [CRB] before it received the letter from [Petitioner's] attorney,"[20] this conclusion ignores the dramatic difference in NetJets' action toward Petitioner before versus after receiving that letter. The fact that NetJets eventually took action in scheduling the CRB might have been a compelling point were it not for the fact that NetJets had already delayed the scheduling of the CRB for well over a year prior to receiving the letter from Petitioner's counsel, and only ceased this delay after receipt of that letter. When the CRB did occur, it was replete with conclusory questions and did not afford Petitioner the same right to respond as others received. Next, the Court of Appeals concluded that NetJets' termination of Petitioner on the ninetieth day after the EEOC issued its right to sue letter cannot be evidence of discrimination, because receipt of a Notice of Right to Sue is not protected activity. As noted in Petitioner's previous filings, it is correct that the *receipt* of the Notice of Right to Sue does not constitute protected activity; Petitioner has never argued that it does. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (finding no connection between the receipt of a Notice of Right to Sue and the plaintiff's transfer three months later). Rather, the oddly identical timing between the expiration of the Notice of Right to Sue and Petitioner's termination creates the appearance, and reasonable inference, that NetJets intentionally waited until it thought it was safe from a lawsuit, then terminated Petitioner. These facts, combined with the disjointed and disorganized disciplinary process to which Petitioner was subjected throughout the three years he remained on administrative leave, are exactly

20. *Id.*

the kinds of circumstantial evidence sufficient to create a genuine issue of material fact of a causal connection. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *see also Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 147 (2000) (evidence that a defendant's proffered reason is "unworthy of credence" constitutes "one form of circumstantial evidence").

The coincidental timing of Petitioner's termination after the expiration of the Notice of Right to Sue, the extended delays in his administrative leave, and NetJets' rapid scheduling of the CRB after Petitioner's protected activity of hiring counsel to assert discrimination, satisfy the requirement that the protected activity and negative employment action are not "wholly unrelated." *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1271 (11th Cir. 2017) (internal citations omitted). And, neither court below even addressed that Petitioner also made a verbal complaint during the CRB, stating that the nature of the conclusory and presumptive questions, without ample opportunity to respond given any context, constituted discrimination and retaliation for having hired an attorney.[21] To survive summary judgment on his Section 1981 and Title VII retaliation claims, Petitioner's burden is not to prove his case as he would before a jury; rather, he need only demonstrate the existence of a genuine issue of material fact. His evidence and allegations do just that.

II. The Circuits Are Split on the Definition of a "Similarly Situated" Comparator

The Circuits are split on the definition of a "similarly situated" comparator employee, and the split is wide. As

21. Doc. 42-2 at 115-120.

most eloquently summarized recently by the Eleventh Circuit, "It's a mess." *Lewis v. City of Union City*, 918 F.3d 1213, 1218 (11th Cir. 2019). The range varies from "nearly identical"[22] to "same or similar"[23] to "flexible" and inherently "factual"[24] to "similarly situated in all material respects."[25]

In evaluating evidence of comparators, employees need not show an exact match in positions or even supervisors. "[W]hile a factor to consider in determining whether employees are 'similarly situated' may be whether they had the same supervisor…the facts of each case are unique and may require a different focus." *Radcliffe v. Darcy Hall Med. Inv'rs, LLC*, 09-81063-CIV, 2010 U.S. Dist. LEXIS 152792, at *7 (S.D. Fla. Mar. 22, 2010) (internal citations omitted). The method of inquiry established by *McDonnell*

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22. *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984) (internal citations omitted).

23. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

24. *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (internal citations omitted).

25. *Lewis*, 918 F.3d at 1226 (internal citations omitted). There are more, though without such catchy labels: the Eighth Circuit notes that "the low-threshold standard [for determining at the prima facie stage whether employees are similarly situated] 'more accurately reflects Supreme Court precedent.'" *Wimbley v. Cashion*, 588 F.3d 959, 962 (8th Cir. 2009) (internal citations omitted). Similarly, the Tenth Circuit held that "while evidence that a defendant treated a plaintiff differently than similarly-situated employees is certainly sufficient to establish a prima facie case, it is '[e]specially relevant' to show pretext if the defendant proffers a legitimate, nondiscriminatory reason for the adverse employment action." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) (internal citations omitted).

Douglas was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L.Ed.2d 957, 967 (1978); *see also Humphries*, 474 F.3d at 406, affirmed, *CBOCS West, Inc.*, 553 U.S. at 457.

As applied to this matter, although it may be one relevant factor, whether Mr. Noe was the decisionmaker in all relevant examples of similar alleged conduct does not end the comparator inquiry. And, although the law requires an appropriate comparator to be similarly situated in relevant aspects, "the law does not require that a 'similarly situated' individual be one who has engaged in the same or nearly identical conduct as the disciplined plaintiff." *Alexander v. Fulton Cty.*, 207 F.3d 1303, 1334 (11th Cir. 2000) (internal citations omitted). Rather, the relevant inquiry is whether the comparators engaged in sufficiently comparable conduct, and "the employer subjected them to different employment policies." *Thomas v. Kamtek, Inc.*, 143 F. Supp. 3d 1179, 1182 (N.D. Ala. 2015) (internal citations omitted). In this case, Petitioner's proffered comparators demonstrate that (1) he was subjected to a different disciplinary process than other similarly situated individuals; and (2) NetJets' claim that it was simply unable to conduct a CRB for Petitioner in a timely manner lacks credibility, and at a minimum creates a genuine issue of material fact.

Each comparator's disciplinary issue arose during the time relevant to Petitioner's claims. Each time, the comparator's issue was addressed quickly, sent to a CRB and fully resolved in under five months, and resulted only in a brief suspension. By comparison, Petitioner's case (1) went unresolved for nearly three years, (2) involved

a report to the FBI of possible terrorist sympathies, (3) still involved no action for a lengthy time even after NetJets knew the FBI closed its inquiry, and (4) ultimately resulted in Petitioner's termination for reasons unrelated to purported security concerns. Although Petitioner's comparators were accused of substantially similar misconduct, including making inappropriate statements on the job and creating safety concerns for those flying with them, their matters were subjected to an entirely different process. In those cases, NetJets took action promptly to efficiently report and resolve the comparators' disciplinary incidents, which stands in stark contrast to the inexplicably drawn out and cumbersome process to which Petitioner was subjected. In addition to these demonstrated inconsistencies, the drastic difference in the timeline and outcome of Petitioner's matter compared to the comparators substantially undercuts the credibility of NetJets' assertion that it simply could not find time to conduct a CRB for Petitioner at any point over three years. *See Reeves*, 530 U.S. at 146-48 ("[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence"). Each comparator's disciplinary proceedings took place during the same span of time that Petitioner was on administrative leave, waiting for his own CRB to occur. Accordingly, contrary to the Court of Appeals' finding that Petitioner failed to adequately support his assertion "that NetJets['s] proffered reasons for the delay are disingenuous," Petitioner's comparator evidence demonstrates the simple fact that, despite those 'contentious negotiations,' NetJets remained quite capable of conducting CRBs and resolving disciplinary matters during the same timeframe, on matters it wanted to

address.[26] The Court of Appeals' assertion that although "evidence indicates that NetJets held [CRBs] for Siddiqui's comparators more quickly, Siddiqui has not created a genuine issue of fact as to whether NetJets' delay occurred in a discriminatory manner" subjects Petitioner to a higher burden than the law requires, and is inconsistent with the authority of this Court.

III. Petitioner Need Only Show an Inference of Pretext to Proceed, As Set Forth in *St. Mary's Honor Center*

In employment discrimination cases involving circumstantial evidence, courts employ the burden-shifting framework established in *McDonnell Douglas*, 411 U.S. at 802-05. Under that framework, plaintiffs must first present a *prima facie* case of discrimination. *Id.* The burden then shifts to the employer to articulate one or more legitimate, nondiscriminatory reasons for its actions. *Id.* If it does, the burden shifts back to the plaintiff, to produce evidence that the employer's proffered reasons are pretext for unlawful discrimination. *Id*. The Court of Appeals held that Petitioner here failed to carry his burden to establish pretext, because he failed to show both that the offered reason was false, "*and* that discrimination was the real reason" for his employer's actions.[27] Petitioner respectfully submits that the Court of Appeals erred in requiring this higher showing of pretext which is unmerited at the summary judgment stage.

The Court of Appeals was correct that, to prevail at *trial*, a plaintiff must successfully convince a jury that the employer acted pursuant to discriminatory motives.

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26. Pet. App. A at 7a – 8a.

27. *Id.* at 3a – 4a.

However, the Supreme Court case cited by the Appellate Court for the proposition that Petitioner must prove both falsity and intentional discrimination "[does] not address a plaintiff's burden at the summary judgment stage." *Gilmore v. Jasper Cty. Sch. Dist.*, No. 5:11-CV-21 (MTT), 2012 U.S. Dist. LEXIS 91348, at *8 n.5 (M.D. Ga. July 2, 2012). Instead, *St. Mary's Honor Center* addresses whether an employee is "entitled to judgment as a matter of law when the factfinder has concluded that the employer's nondiscriminatory reason is false, but nevertheless found that the employer did not intentionally discriminate against the plaintiff." *Id.*; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517, 113 S. Ct. 2742, 2752, 125 L. Ed. 2d 407, 423 (1993). To survive a motion for summary judgment, "the ultimate question is whether the employer intentionally discriminated ... it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S at 148; *see also Burdine*, 450 U.S. at 256 (although conclusory allegations of discrimination, without more, are insufficient, plaintiffs may prove pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer[,] or indirectly by showing that the employer's proffered explanation is unworthy of credence"). A plaintiff survives summary judgment if he "presents a convincing mosaic of circumstantial evidence that creates a triable issue" from which a jury could infer intentional discrimination. *Hester v. Univ. of Ala. Birmingham Hosp.*, No. 2:16-cv-1899-JEO, 2018 U.S. Dist. LEXIS 202876, at *15-16 (N.D. Ala. Nov. 30, 2018); *see also Cole v. Illinois*, 562 F.3d 812, 815 (7th Cir. 2009) (internal citations omitted) (stating that an employee may prevail "either by 'showing an admission of discrimination" or by "constructing a convincing mosaic of circumstantial evidence that allows a jury to

infer intentional discrimination by the decisionmaker"); *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993) (burden at summary judgment "is not to show by a preponderance of the evidence that the reasons stated were pretext [;] rather, [his] burden…is met by introducing evidence that could form the basis for a finding of facts, which…could allow a jury to find" he had established pretext); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 77 (2d Cir. 2005) ("the law does not equate 'knowledge' with certitude, nor does it demand direct proof of knowledge. A jury may reasonably infer a defendant's knowledge from the totality of circumstantial evidence"); *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 882 (D.C. Cir. 1997) ("a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions").

Although Petitioner must demonstrate the existence of a triable issue, his burden to produce additional evidence establishing discrimination is not high at the summary judgment stage: "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Reeves*, 530 U.S. at 150 (internal citations omitted); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (whatever form it takes, if circumstantial evidence is sufficient to raise a reasonable inference that the employer discriminated, summary judgment is improper).

Following Petitioner's showing of a prima facie case, NetJets asserted three purportedly legitimate, nondiscriminatory reasons for the adverse actions taken

against Petitioner: (1) it placed Petitioner on leave because of 'security concerns' regarding comments he allegedly made years earlier, which had not been previously reported; (2) it kept him on leave for an extended and unprecedented amount of time, at first because it was awaiting the FBI's conclusion (which came only months into Petitioner's three year leave), and later because it was busy with changing management and union negotiations; and (3) it terminated Petitioner because it determined he lied during his CRB, when he was vaguely questioned about comments he allegedly made years beforehand in still unidentified circumstances, and he had therefore violated NetJets' policies.[28] Petitioner placed the veracity of NetJets' explanations at issue, pointing both to substantial inconsistencies and weaknesses in each of the proffered reasons, as well as circumstantial evidence of intentional discrimination. *See Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (internal citations omitted) (a plaintiff may show that an employer's decisions were pretextual by revealing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence"); *see also Reeves,* 530 U.S. at 143; *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 221 (1st Cir. 2016) (internal citations omitted) (in the retaliation context, pretext may be shown "through 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence'"); *Olson v. GE Astrospace,* 101 F.3d 947, 951-52 (3d. Cir. 1994) (a

28. Doc. 44 at 10-13.

reasonable factfinder can infer pretext if the factfinder can "infer that the employer did not act for the asserted non-discriminatory reasons"); *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005) (internal citations omitted) ("to avoid summary judgment … plaintiff's evidence … must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons … was either a post hoc fabrication or otherwise did not actually motivate the employment action").

The relevant evidence shows the following:

- Despite alleging that its actions were in response to serious security concerns, NetJets failed to ground Petitioner for a full nine months after receiving the initial complaint. Petitioner continued flying, and was even scheduled by NetJets for international flights during this time.[29]

- NetJets' President/CEO was not notified of any purported security concerns about Petitioner until nine months after the initial complaint.[30]

- Once the relevant decision makers were notified of the anonymous complaint about Petitioner, they reported him to the FBI. None of the statements that Petitioner is accused of making, regardless of how distasteful the Court may find them, were violent or threatening or evidenced support of any terrorist organization. Petitioner was not removed from administrative leave, however, even after

29. Doc. 42 at 14; Doc. 42-2 at 89.

30. *See* Appellee's Answer Brief, at 27-28.

he was cleared by the FBI and the FBI closed its inquiry into him.[31]

- Although NetJets claims it was not able to conduct Petitioner's CRB for multiple years because of changes in management and ongoing union negotiations, Petitioner demonstrated that NetJets did conduct multiple other CRBs and fully resolve other disciplinary matters during this same time, and significantly faster than Petitioner's matter.[32]

- As demonstrated by the short duration of Petitioner's eventual CRB, NetJets' assertion that it could not set aside a single afternoon over the course of over two years to resolve Petitioner's allegedly serious matter lacks credibility.[33]

- NetJets' CEO admitted in his deposition that, despite having "no idea" and "no way to know" what level of risk Petitioner may have posed, he acted, at least in part, based on "the amount of smoke" created by the optics of the allegations.[34]

Despite the foregoing evidence, the Court of Appeals utilized an improperly strict standard for the summary judgment stage, finding that Petitioner failed to identify facts sufficient to create a triable issue on the question of

31. Doc. 42-1 at 3-4.

32. Doc. 42-2 at 179-203.

33. Doc. 42-1 at 5-6.

34. Doc. 42-2 at 167.

NetJets' intent.[35] The Court's opinion correctly concedes that "NetJets's arguably 'ham-handed investigation' and unreasonable delay in resolving the situation could perhaps lead a jury to conclude that NetJets's asserted reasons for those problems…were pretexts for *something*,"[36] but stopped short of seeing a fact issue, instead asserting Petitioner failed to put forth any evidence "apart from his proffered comparators" to support an inference of discrimination. The Court of Appeals failed to properly consider the "convincing mosaic of circumstantial evidence" as put forth by Petitioner. *See Holland v. Gee*, 677 F.3d 1047, 1056 (11th Cir. 2012) (internal citations

35. At multiple points in its Opinion, the Court of Appeals found Petitioner's arguments fell short because he failed to identify who specifically made certain decisions. For example, regarding the delay in Petitioner's CRB, the Court dismissed that evidence because "Siddiqui has not created a genuine issue of fact…given the lack of evidence concerning who, if anyone, affirmatively decided to delay" his proceeding. Pet. App. A. Although the question of decision makers is one relevant factor in comparator and retaliation analyses, the Court of Appeals cited no authority which justifies imposing a burden on Petitioner at this stage to specifically identify any one individual who delayed proceedings.

36. Pet. App. A at 6a; *see also* Appellant's Brief in Chief at 10 (NetJets admittedly selected the most "management friendly" witnesses to interview, and did not interview the pilot who flew with Petitioner the most), 12 (NetJets' CEO admitted that Petitioner's personal trips to Pakistan to visit family would not present any business-related issues, but NetJets included those trips in its investigation anyway), and 14 (the Union for pilots like Petitioner received no information about the allegations against Petitioner like it usually does); Doc. 42-2 at 37-38 (NetJets shifted its reasoning for its actions from the belated "security concern" to vague and unidentified comments purportedly about Jewish and Palestinian individuals).

omitted); *Smith v. Lockheed-Martin Corp.,* 644 F.3d 1321, 1328 (11th Cir. 2011) ("the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent").

IV. The Courts Below Failed to Consider Each Identified Act of Retaliation, Wrongly Defaulting to the General Discrimination Analysis.

The District Court and the Appellate Court both found Petitioner's retaliation claims under Title VII and Section 1981 to fail, ruling that he did not adequately demonstrate causation. *See* Pet. App. A at 11a; Pet. App. B at 49a – 51a. However, they failed to address each act he raised in this regard, and instead deferred to their own previous discrimination analyses. The District Court, as the entirety of its analysis of pretext for Petitioner's retaliation claims, stated only that "for the reasons discussed above, even if Plaintiff could establish a *prima facie* case of retaliation, he cannot show that NetJets' reasons for its action were pretextual. Consequently, NetJets' motion for final summary judgment is granted." Pet. App. B at 51a. The Appellate Court allocated slightly more space to its analysis, with its applied reasoning as to each aspect it did choose to address of Petitioner's identified acts supporting retaliation totaling just over one page. *See* Pet. App. A at 11a. Courts, however, need analyze retaliation claims as exactly what they are: separate and independent causes of action, thereby meriting separate and independent analysis. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) ("[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'").

In order to show causation, Petitioner need only show "that the protected activity and the adverse actions were not wholly unrelated"; each aspect of Petitioner's retaliation argument is therefore addressed briefly below. *Shannon v. Bellsouth Telecoms, Inc., 292 F.3d. 712* 292 (11th Cir 2002) (internal citations omitted). Petitioner identifies four acts as the basis of his retaliation claims: (1) his attorney sent a letter to NetJets while he was on administrative leave, alleging discrimination, and shortly thereafter NetJets finally commenced the CRB, albeit with conclusory questions regarding allegations that went back several years, and without providing Petitioner any context for the previously uncommunicated allegations;[37] (2) Petitioner complained during the CRB that he felt he was being discriminated against, and specifically retaliated against, for having hired an attorney;[38] (3) he filed a Charge of Discrimination shortly after the CRB;[39] and (4) after three years on administrative leave, Petitioner was terminated on the ninetieth day after the EEOC issued him a Notice of Right to Sue, leading to a reasonable inference that NetJets believed it was in the clear as to legal action by Petitioner (in reality, it simply had not been served with the lawsuit yet).[40]

The failure of the courts below to analyze Petitioner's retaliation claims on their own merits, as well as the failure to consider each act identified by Petitioner as supporting his retaliation claims, contradicts the prior rulings of this Court. *See CBOCS*, 533 U.S. at 453-54;

37. Doc. 42-2 at 115-120.

38. *Id.*

39. *Id.* at 75-76.

40. *Id.* at 143.

Patterson, 491 U.S. at 201-12. Accordingly, Petitioner respectfully requests that this Court grant this Petition and consider the matter on the merits.

CONCLUSION

A pilot with an exceptional performance record was sidelined for three years, then terminated, with little to no explanation or opportunity to respond. The reason given that prompted these actions: he's Muslim, and he occasionally traveled to Pakistan on his personal time to see family. His fellow pilots (even though the employer hand-picked the most "management friendly" ones to interview) agreed that while Petitioner likes to hear himself talk, he's "harmless"; the FBI closed its inquiry, which it only opened at the request of Petitioner's employer, after just a few months. But the CEO insisted the optics were bad and that he couldn't "get over the amount of smoke that was created to be able to just willfully release [Petitioner] back into the environment" to do his job again.[41] So this American turned to the courts, trusting that the legal system would treat him fairly. Instead, his claims received abbreviated or absent analyses, with conjecture and conclusions drawn by judges instead of a jury. And the lower courts minimized the multiple comparators he identified who received better treatment, because they weren't the same in "all" respects.[42]

Petitioner asks that this Court grant this Petition, so that his case may be examined on its merits and the law instead of by the "amount of smoke."

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41. Doc. 42-2 at 167.

42. Pet. App. A at 5a; *Lewis*, 918 F.3d at 1218.

Respectfully submitted,

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