No 07 233

In The

Supreme Court of the United States

DANIEL CRAWFORD

Petitioner,

v

CITY OF FAIRBURN, GEORGIA

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Did the District Court properly enter summary judgment for the defendant-employer in an employment discrimination case in which the defendant-employer articulated more than one legitimate, nondiscriminatory reason for the decision to terminate the plaintiff-employee's employment, and the plaintiff-employee failed to show pretext as to each of those reasons

PARTIES

The parties to this action are set forth in the caption

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent City of Fairburn, Georgia ("City"), respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by Petitioner Daniel Crawford

COUNTER STATEMENT OF THE CASE

Crawford's Statement of the Case omits several undisputed facts that properly led the United States Court of Appeals for the Eleventh Circuit to affirm the grant of summary judgment against him In the Fall of 2002, the City retained the Georgia Association of Chiefs of Police to perform an assessment of its Police Department (*See* Pet App 23a) That assessment subsequently identified "pervasive problems of management and morale " (*See* Pet App 4a *See also* Pet App 23a-24a) During that same time, the City was required to pay a large sum of back wages to its officers for failing to pay overtime for attendance at mandatory staff meetings (*See* Pet App 38a n 12) It was against this backdrop that the City hired Frederick Brown as its new Chief of Police in February 2003 and, upon Brown's recommendation, created the position of Major and hired Crawford to fill the same in March 2003 (*See* Pet App 4a, 19a, 24a)

Prior to Brown or Crawford's employment, in September 2002, Officer Louise Tallman had filed an internal complaint contending that a verbal altercation

with Sergeant James Smith, during which he allegedly told her that she was useless, did nothing and was hired to fend off a lawsuit, constituted sexual harassment (*See* Pet App 23a, 49a) Tallman filed a charge of discrimination with the U S Equal Employment Opportunity Commission ("EEOC") regarding the alleged incident in December 2002 (*See* Pet App 23a) The City submitted its position statement and supporting evidence to the EEOC on February 18, 2003, several weeks *before* Crawford began his employment with the City (*See* Pet App 14a n 3)

Approximately nine months later, Tallman filed another internal complaint against Smith alleging that he had sexually harassed her by standing too close to her during the Department's firearms qualifications test in November 2003 (*See* Pet App 14a n 3, 25a) Crawford, in keeping with his position within the Department and his duties related to personnel matters and internal affairs investigations, was assigned by Brown to investigate this second internal complaint (*See* Pet App 4a-5a, 24a) Contrary to Crawford's allegations, however, there is no evidence that "City officials" generally were "very displeased" by the nature of his investigation " (*See* Pet , p 2) Instead, Crawford alleged that the City Administrator, James Williams, made certain remarks during a meeting with him as generally set forth in the Petition's Statement of the Case (*See* Pet , p 2) Williams denied these allegations, but admitted that he had issues with both the scope and conduct of Crawford's investigation (*See* Pet App

12a-13a, 14a-15a, 34a n 9) Nevertheless, it is undisputed that Williams made no effort to restrict Crawford's investigation or to influence its outcome, to the contrary, Williams cooperated with Crawford's expansion of the investigation (*See* Pet App 13a)

In January 2004, Crawford provided Brown with an investigative report consisting of a one-page summary and over 400 pages of attachments, which Brown, in turn, provided to Williams (*See* Pet App 27a-29a) Crawford did not discuss his report with anyone other than Brown (*See* Pet App 44a) On its face, the report indicated that the investigation had failed to sustain Tallman's allegation of a hostile work environment while sustaining her allegation of verbal harassment on "[o]ther" grounds, meaning "misconduct other than that charged occurred " (*See* Pet App 27a-29a *See also* Pet App 5a) Although Crawford suggests that his report was detrimental to the City's interests, Williams, the City Clerk/Personnel Director Nancy Faulkner, the City Council, and Mayor Betty Hannah all believed that Crawford's investigation had concluded that Tallman had not been subject to any unlawful harassment (*See* Pet App 5a *See also* Pet App 14a, 34a-35a)

At a City Council meeting on February 27, 2004, the Mayor and Council voted to place Brown on probation and to eliminate the position of Major from the Department, thereby effectively terminating Crawford's employment with the City (*See* Pet App 38a) Brown testified that, following the Council meeting, Williams indicated to him that the reasons

for Crawford's discharge included (1) complaints from a dispatcher, Nicole Wood-Norman, (2) the Department's continued patrol of Interstate 85, and (3) new complaints by officers regarding the failure to receive overtime pay (*See* Pet App 12a, 13a n 2, 38a *See also gen'lly* Pet App 35a-38a) Williams testified that general complaints of low morale and favoritism in the Department had formed the basis of the Mayor and Council's decision as well (*See* Pet App 12a, 35a-38a, 73a-74a *See also* Pet App 13a n 2) Brown, who was not at the meeting itself, also testified that Williams mentioned the "accuracy" of the internal affairs investigation (*See* Pet App 38a, 74a)

The Magistrate Judge's report and recommendation, the district court's order, and the court of appeals' opinion speak for themselves, and their contents are discussed more fully below in Part IV in connection with the particular issues raised by the Petition

REASONS FOR DENYING THE WRIT

No compelling reason warrants the granting of a writ of *certiorari* in this case Crawford's assertions notwithstanding, the Eleventh Circuit's case law is not in substantive conflict with the case law of the other federal circuits At most, Crawford's Petition rests upon the Mississippi Supreme Court's misreading of a single Fifth Circuit panel opinion

I CRAWFORD MISCHARACTERIZES THE FIFTH AND ELEVENTH CIRCUITS' CASE LAW

Crawford petitions this Court to grant a writ of *certiorari* in this case in order to resolve a purported split between the circuits as to the following issue

> In an employment discrimination case in which an employer proffers *multiple* reasons for an allegedly unlawfully motivated dismissal, can the plaintiff establish a violation of the law by proving that one such reason was a pretext for discriminatory animus, or must the plaintiff go further and also separately and "directly rebut" each and every other reason

(*See* Pet , p 1) (Emphasis in original) Crawford contends that the purported "absolute requirement" of the latter showing in the Fifth and Eleventh Circuits is in conflict with the case law of the Third, Sixth, Seventh and Tenth Circuits, as well as with that of the State of Mississippi (*See* Pet , p 20 *See also* Pet , pp 12-18) As discussed below, Crawford's contention is based upon a misreading of the majority opinion in *Chapman v AI Transp* , 229 F 3d 1012 (11th Cir 2000) (*en banc*), and the existing case law of the other circuits

In *Chapman*, the primary issue before the court was whether an employer could carry its burden of production under *Texas Dep't of Community Affairs v Burdine*, 450 U S 248, 254-56, 101 S Ct 1089, 1094-95, 67 L Ed 2d 207, 216-17 (1981), by articulating a

subjective reason for the employment action at issue *See Chapman*, 229 F 3d at 1016, 1040 The employer had articulated two reasons for rejecting the plaintiff's application for a new position a "subjective" one, *i e* , a "poor interview", and an "objective" one, *i e* , a "lack of 'stability in light of the number of jobs he had held in a short period of time'" (or "job-skipping") *See id* at 1028, 1054 The majority held that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion " *See id* at 1034 Having held that "[s]ubjective reasons can be just as valid as objective reasons," *see id* , the majority then concluded that, because the plaintiff had failed to produce "sufficient evidence to create a genuine issue of pretext as to either" of the employer's reasons for not hiring him, summary judgment for the employer was appropriate, *see id* at 1037 In so holding, the majority relied upon a panel opinion "requiring a plaintiff to rebut 'all of the defendant's proffered nondiscriminatory reasons for its action'" *See id* (*quoting Combs v Plantation Patterns, Meadowcraft, Inc* , 106 F 3d 1519, 1543 (11th Cir 1997))

The dissent in *Chapman* agreed with the "general rule" as stated in *Combs* *See* 229 F 3d at 1049 [1]

[1] Judge Birch, who was a member of the *Combs* panel, styled his opinion in *Chapman* as a concurrence in part and a dissent in part *See* 229 F 3d at 1040 However, because Judge

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The dissent, however, asserted that the majority's focus should have been "upon the dispositive weight to be accorded an employer's purely subjective rationale for a putative non-discriminatory adverse employment action" *See id* at 1040 The dissent opined that "[s]ome subjective reasons, those which cannot be objectively evaluated and/or are vague, should be accorded no weight," while still "[o]ther subjective reasons, such as those that are premised on stereotypes, should be scrutinized strictly" *Id* at 1048 *See also gen'lly id* at 1044-48 The dissent further opined that subjective reasons should be accorded less weight if they are not "consistent with clear criteria that preexisted the adverse employment action" *Id* at 1048

The majority in *Chapman* did not address this particular argument, but this Court has In *St Mary's Honor Ctr v Hicks*, 509 U S 502, 509, 113 S Ct 2742, 2748, 125 L Ed 2d 407, 417 (1993), this Court held that "the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination)

Birch did not join in either the majority's analysis or decision with regard to the issues presented here, as well as for reasons of convenience, the City will refer to his opinion as the "dissent" *See* B Garner, *A Dictionary of Modern Legal Usage*, p 194 (2nd ed 1995) ("To American judges [concurrence] has two senses (1) 'to join in a judicial decision, adopting the reasoning and result as one's own, (2) to join in a judicial decision while not agreeing with the ground expressed in the majority opinion supporting the decision)

can involve no credibility assessment" *See also Reeves v Sanderson Plumbing Prods, Inc*, 530 U S 133, 142, 120 S Ct 2097, 2106, 147 L Ed 2d 105, 117 (2000) (same) So long as the employer has offered into evidence a "clear and reasonably specific" reason for its decision, it has carried its burden under *Burdine* *See* 450 U S at 258, 101 S Ct at 1096, 67 L Ed 2d at 218 *See also id* at 254 & n 9, 101 S Ct at 1095 & n 9, 67 L Ed 2d at 216 & n 9 (discussing the employer's burden) Thus, the dissent in *Chapman* was mistaken in urging greater limitations upon an employer's ability to carry its burden of production under *Burdine* when the articulated reason is a "subjective" one

Nevertheless, from this shaky platform, the dissent then proceeded to the question of whether, when a defendant articulates "multiple" – in that case, two – reasons for its decision, a plaintiff is required to proffer evidence that each reason is pretextual *See id* at 1049-51 The dissent opined that, while the general rule requiring a plaintiff to show pretext as to each reason "accords well with common sense" and "is reasonable in the majority of cases, [it] fails when applied to a small percentage of cases" *See id* at 1049-50 *See also id* at 1050 n 32 ("the percentage of cases affected by the exception is quite small") Thus, the dissent urged the adoption of four so-called "exceptions" to the general rule "where two legitimate reasons proffered by an employer are intertwined", "where the showing of pretext as to one reason is sufficiently strong as to permit a jury to find

that the employer (or its decisionmaker) lacks all credibility", where a "large number of arguably pretextual reasons" are proffered, and "where an employer offers an objective reason for its employment action and a subjective reason , [and] the plaintiff has offered evidence establishing pretext as to the objective reason " *See id* at 1050-51

The majority in *Chapman* specifically considered the dissent's argument in this regard, but rejected it as follows

> The dissenting opinion would carve out a number of exceptions to the well-established rule that a plaintiff must show pretext as to each proffered reason *To the extent this case presents a factual basis for any such exception, we reject that exception To the extent this case does not present a factual basis for such an exception, we express no view on whether that exception might exist in some cases with different facts*

See id at 1037 n 33 (Emphasis supplied) Therefore, the majority did not foreclose altogether a plaintiff's ability to show pretext using circumstantial evidence even when he is unable to rebut all of a defendant's articulated reasons The majority simply held that the facts in that case did not bring it within that "small percentage of cases" contemplated by the dissent and, thus, did not require the majority to express a view as whether any of the exceptions urged by the dissent might be appropriate in another case presenting different facts Accordingly, the

Chapman majority did not "emphatically reject[ ]" the dissent's argument that any such exception to the general rule might exist, as Crawford asserts (*see* Pet , p 9), but merely exercised proper judicial restraint in choosing not to hold forth generally on issues that were not presented by the facts of the case before it [2]

The plaintiff in *Chapman* did not offer (at least in the majority's opinion) any evidence tending to show that his age motivated the employer in rejecting his application The plaintiff did not allege prior discriminatory treatment or ageist comments, although he did seek to rely upon the final decisionmakers' deposition testimony that he was, *inter alia*, not "aggressive" in answering questions during his interview *See* 229 F 3d at 1020 *See also* 229 F 3d at 1028 n 14 The dissent believed that term should have been viewed as "age bias" or, at least, as "highly suspicious " *See* 229 F 3d at 1046-47 The majority, however, declined to accord such an interpretation to that term either as a general matter or in light of the facts of that particular case *See* 229 F 3d at 1036 Thus, the majority in *Chapman* concluded that the

[2] Indeed, the vacated panel opinion in *Chapman*, also written by Judge Birch, had not found it necessary to rely upon any exception to *Combs* in finding summary judgment inappro priate That opinion had held simply that the employer had failed to carry the "increased burden on summary judgment that the panel believed to be "appropriate where the defendant's proffered justification is highly subjective " *See Chapman v AI Transp* 180 F 3d 1244 1250 (11th Cir 1999)

plaintiff had failed to show either of the employer's articulated reasons to be false or otherwise pretextual *See id* at 1037 [3]

As even the dissent in *Chapman* conceded, any exceptions to the general rule articulated in *Combs* would apply in, at most, a "quite small" number of cases *See Chapman*, 229 F 3d at 1049-50 n 32 Nevertheless, contrary to Crawford's suggestion, the Eleventh Circuit has, subsequent to *Combs*, found summary judgment to be inappropriate even when the employer's reason is undisputed *See, e g , Sledge v Goodyear Dunlop Tires N Am* , 275 F 3d 1014, 1019-20 (11th Cir 2001) (holding that a plaintiff who indisputably failed a maintenance mechanic exam showed that reason could be a mere pretext for race discrimination when, *inter alia*, only one of 107 mechanics was black and the white applicant hired also failed the exam) And other decisions since the *en banc* court's decision in *Chapman* further belie

[3] The plaintiff in *Combs* had likewise failed to present any evidence from which a fact finder might reasonably infer discrimination In that case, the plaintiff testified at trial that he had been asked to "hide' from visiting officials from the company's headquarters on one occasion, and implied that he had been asked to do so because of his race *See* 106 F 3d at 1525 The plaintiff, however, conceded on cross examination that he was never told that his race was the reason for his supervisor's request and the supervisor testified that the plaintiff had been asked to hide because headquarters had not approved the plaintiff's position *See id* at 1525 Thus, the plaintiff's evi dence in *Combs* ultimately was nothing more than a mere disagreement with the employer's reasons *See id* at 1538 43

Crawford's contention that a plaintiff's inability to prove *all* of an employer's reasons to be false is an "absolute" bar to a finding of pretext in the Eleventh Circuit *See, e g , Vessels v Atlanta Indep Sch Sys* , 408 F 3d 763, 772 (11th Cir 2005) (reversing grant of summary judgment based on evidence of racially-tinged statements by the decisionmakers, the relative superiority of the plaintiff's qualifications, the employer's disregard for its own regulations, and the plaintiff's rebuttal of "many" of the employer's proffered justifications)

Crawford's characterization of the holding in *Chapman*, however, is disproved most convincingly by those cases in which the employer's articulated reason is the violation of a work rule, and wherein the Eleventh Circuit has long held that "[w]hen an individual proves that he was fired but one outside his class was retained, although both violated the work rule, this raises an inference that the rule was discriminatorily applied against that individual " *See Nix v WLCY Radio/Rahall Communications*, 738 F 2d 1181, 1186 (11th Cir 1984) There is no indication whatsoever that *Chapman* prevents employees from challenging an employer's legitimate, nondiscriminatory reason(s) based upon such facts

On this point, Crawford also misreads *Wallace v Methodist Hosp Sys* , 271 F 3d 212 (5th Cir 2001), and the Fifth Circuit's existing case law In *Wallace*, the employer articulated two reasons for the plaintiff's discharge she had performed a procedure without authorization, and she had falsified medical

records regarding the same *See id* at 221 It was undisputed that the plaintiff had engaged in both acts *See id* at 221, 226 The plaintiff nevertheless alleged that she was subject to sex discrimination because other employees who had engaged in the same or similar conduct, but who were not pregnant, were treated more favorably *See id* at 221

The panel found that the plaintiff had created a genuine issue of material fact as to the first reason because a non-pregnant nurse had received only a verbal reprimand for similar conduct *See id* at 221-22 The panel, however, noted that the employer had articulated "two *independent* reasons for terminating [the plaintiff], each of which alone could have served as a basis for terminating her" *See id* at 221-22 (Emphasis in original) *See also id* at 222 n 14 ("We note that [the employer] did not assert that these two acts together constituted a single nondiscriminatory reason for [the plaintiff's] termination") As to the second reason, the panel found that not only had the plaintiff failed to proffer evidence that any non-pregnant employee had received more favorable treatment, but the record reflected that another non-pregnant nurse had been terminated for the same conduct *See id* at 222 [4]

[4] A Fifth Circuit panel subsequently reached a different conclusion in another pregnancy discrimination case In *Laxton v Gap Inc* 333 F3d 572, 579 (5th Cir 2003), the employer asserted that the plaintiff had engaged in five violations of store policy, "the cumulative effect of which justified" her discharge

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Contrary to Crawford's suggestion, the *Wallace* panel did not terminate its legal analysis based upon the plaintiff's mere inability to dispute each of the employer's articulated reasons Instead, part "C" of the panel's opinion addressed whether certain alleged comments "constituted sufficient evidence of discrimination" *See id* at 222 The panel, nevertheless, held that the comments were mere "stray remarks" and not otherwise probative of discriminatory intent *See id* at 222-24

Finally, in part "D" of its opinion, the *Wallace* panel considered, but rejected, the plaintiff's arguments that discriminatory intent could be inferred from alleged inadequacies in the employer's investigation of her internal complaint, the employer's failure to investigate additional allegations made during an informal grievance hearing, and anecdotal notes kept by her supervisor *See id* at 224-26 Thus, the panel affirmed the district court's order granting judgment as a matter of law for the employer *See id* at 226 [5]

Although the plaintiff admitted certain policy violations, she denied the others, and the panel, finding sufficient evidence of pretext as to those alleged violations, affirmed a jury verdict for the plaintiff *See id* at 579 86

[5] In *Cash Distrib Co v Neely*, 947 So 2d 286, 294 (Miss 2007), the Mississippi Supreme Court specifically rejected *Wallace* and the general rule that the plaintiff prove pretext as to each reason articulated by the employer Interestingly for purposes of Crawford's position in this matter, the Mississippi Supreme Court opined that the Fifth Circuit's "minority position'

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In summary, Crawford has mischaracterized the state of the law in the Fifth and Eleventh Circuits As a general rule, a plaintiff bringing suit in those circuits under the federal anti-discrimination laws must show pretext as to each of the employer's articulated legitimate, nondiscriminatory reasons for its decision *See Chapman*, 229 F 3d at 1037, *Wallace*, 271 F 3d at 221-22 However, as discussed above, this general rule is not the "absolute" standard that Crawford asserts Moreover, as discussed below in Parts II and III, the Fifth and Eleventh Circuit's case law is not in conflict with this Court's applicable jurisprudence or the case law of the other federal circuits

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had been adopted by the Third and Seventh Circuits, as well as by the Eleventh Circuit *See id* at 294 n 9

The Mississippi Supreme Court believed the case before it to be distinguishable from *Wallace* because the plaintiff "Neely was free to admit that some or all of the wrongful acts attributed to him by Cash were true but were not the real reason for his dismissal " *See* 947 So 2d at 296 *Wallace*, however, did not hold to the contrary and in order to conclude that it did, one would have to ignore altogether parts 'C" and "D' of that Fifth Circuit opinion, *see* 271 F 3d at 222 26, as well as its subsequent holding in *Laxton*, 333 F 3d 572 Thus, the Mississippi Supreme Court, like Crawford, has simply misread *Wallace* and the Fifth Circuit's case law Moreover, as discussed below in Part II, the Mississippi Supreme Court's characterization of the general rule as stated in *Wallace* as the "minority position" among the federal courts of appeals is incorrect

II CRAWFORD MISCHARACTERIZES THE THIRD, SIXTH, SEVENTH AND TENTH CIRCUITS' CASE LAW

Contrary to Crawford's assertion, the Third, Sixth, Seventh and Tenth Circuits agree with the Fifth and Eleventh Circuits that, as a general rule, a plaintiff proceeding under the circumstantial evidence framework established in *McDonnell Douglas Corp v Green*, 411 U S 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973), must show pretext as to each of an employer's reasons, at least to the extent those reasons are articulated as independent reasons for the employment action at issue *See Fuentes v Perskie*, 32 F 3d 759, 764 (3rd Cir 1994), *Smith v Chrysler Corp* , 155 F 3d 799, 809 (6th Cir 1998), *Russell v Acme Evans Co* , 51 F 3d 64, 69-71 (7th Cir 1995), *Tyler v RE/MAX Mt States, Inc* , 232 F 3d 808, 814 (10th Cir 2000) *Accord Sher v United States VA*, 488 F 3d 489, 507 (1st Cir 2007) The courts in *Fuentes*, *Russell*, and *Smith* suggested that the general rule might not apply under certain circumstances, but found those circumstances to be absent from the cases before them *See Fuentes*, 32 F 3d at 766, *Russell*, 51 F 3d at 70, *Smith*, 155 F 3d at 809 As such, any exceptions to the general rule discussed in those cases were mere *obiter dictum*, at least at that time Only in *Tyler* did the court express its agreement with the general rule but nevertheless find that judgment for the employer was inappropriate *See* 232 F 3d at 814-16

The Seventh Circuit in *Russell* explained, at some length, the reason for the general rule as follows

> Now it might seem that as soon as one reason for an allegedly discriminatory action is found to be a pretext (or rather must be *assumed* for purposes of summary judgment to be a pretext, because the plaintiff has succeeded in putting the matter in doubt), the company's honesty is so far drawn in question, and the plausibility of supposing that the action was not based on an invidious motive is so weakened, that the defendant cannot possibly stave off trial But this is true only if the company has offered no other reason that, *if that reason stood alone* (more precisely if it did not have support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining

51 F 3d at 69 (Emphasis in original) The court then noted, in *dictum*, that "[t]here may be cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment " *See id* at 70 Nevertheless, the court did not suggest that the plaintiff ultimately bears the burden of demonstrating, either directly or indirectly, anything less than "real" discrimination

> there is nothing within our power to do that would lighten the burden of the employee without depriving the employer of procedural rights conferred upon him by settled law And these procedural rights are not to be thought merely irksome obstacles to truth and justice They are necessary to distinguish the real from the spurious cases of discrimination

See id at 71

Moreover, the Third Circuit has correctly recognized that there is a substantive basis for the general rule as well "While this standard places a difficult burden on the plaintiff, it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs" *See Fuentes*, 32 F3d at 765 (Internal quotation marks and citation omitted) Therefore, *Title VII of the Civil Rights Act of 1964*, 42 U S C § 2000e *et seq* ("Title VII"), "eliminates certain bases for distinguishing among employees," but "does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions" *See Price Waterhouse v Hopkins*, 490 U S 228, 239, 109 S Ct 1775, 1784-85, 104 L Ed 2d 268, 280-81 (1989) (Emphasis in original) *See also Hazen Paper Co v Biggins*, 507 U S 604, 612, 113 S Ct 1701, 1707, 123 L Ed 2d 338, 348 (1993) (*The Age Discrimination in Employment Act*, 29 U S C § 621 *et seq* ("ADEA") requires the employer to ignore an

employee's age" but "does not specify *further* characteristics that an employer must also ignore") (Emphasis in original) As such, neither Title VII nor the other federal anti-discrimination laws require an employer to have "cause" for its decisions *See Price Waterhouse*, 490 U S at 239, 109 S Ct at 1784, 104 L Ed 2d at 281 *See also Nix*, 738 F 2d at 1187 (holding that Title VII does not "require the employer to have good cause for its decisions") Rather, an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason " *See id See also Chapman*, 229 F 3d at 1030 (collecting cases holding the same), *Hazen Paper Co* , 507 U S at 612, 113 S Ct at 1707, 123 L Ed 2d at 348 ("Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper *in any respect*, *see* [*McDonnell Douglas*, 411 U S at 802, 93 S Ct at 1824, 36 L Ed 2d at 677-78] this reading is obviously incorrect") (emphasis in original) [6] Accordingly, unless specifically proscribed by the statute(s) at issue, an

[6] *Accord Bishop v Wood*, 426 U S 341 349 50, 96 S Ct 2074, 2080, 48 L Ed 2d 684, 693 (1976) (declining to find a constitutionally protected property interest in a public em ployee's at will employment, and holding that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies We must accept the fact that numerous individual mistakes are inevitable in the day to-day administration of our affairs ") (Footnote omitted)

employer is entitled to act on *any* reason(s) in making its various employment decisions *See Hazen Paper Co* , 507 U S at 612, 113 S Ct at 1707-1708, 123 L Ed 2d at 348 (holding that the discharge of an employee to prevent his pension benefits from vesting may be actionable under the *Employee Retirement Income Security Act*, 29 U S C § 1140, "[b]ut it would not, without more, violate the ADEA")

Respect for and adherence to the above principles is especially important in states such as Georgia, where the employment-at-will doctrine is not a matter of mere judicial deference under the common law, but rather, a statutorily-protected right *See* O C G A § 34-7-1 ("An indefinite hiring may be terminated at will by either party") [7] The Georgia courts, of course,

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[7] *See also Reilly v Alcan Aluminum Corp* , 272 Ga 279, 280, 528 S E 2d 238, 239-40 (2000) (declining to find a state law claim for age discrimination, the court held that, "[a]lthough there can be public policy exceptions to the doctrine judicially created exceptions are not favored, and Georgia courts thus generally defer to the legislature to create them') *Borden v Johnson*, 196 Ga App 288, 289, 395 S E 2d 628, 629 (1990) (declining to find a state law claim for pregnancy discrimination, the court held that whether "the courts of other jurisdictions may have done so is of no consequence because in Georgia this rule is statutory') (internal quotation marks omitted), *Green v Sun Trust Banks Inc* , 197 Ga App 804, 806, 399 S E 2d 712, 715 (1990) (declining to find public policy claim for racially motivated discharge under state law) *Accord Reilly v Alcan Aluminum Corp* , 221 F 3d 1170, 1171 (11th Cir 2000) ("An employee-at will in Georgia may be terminated without judicial recourse for wrongful termination ')

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recognize that "[t]here are rights created under federal statutes which may be enforced by certain aggrieved at-will employees without regard to the principles of state law" *See Borden*, 196 Ga App at 290, 395 S E 2d at 629 Nevertheless, the general rule requiring a plaintiff to show pretext as to each of an employer's articulated reasons serves to properly focus the court's inquiry on the specific form(s) of prohibited discrimination at issue, thereby protecting the respective statutory rights of the parties to the employment relationship under both federal and state law Adopting broad exceptions to the general rule based upon the mere number of articulated reasons is unnecessary, unwarranted and unwise

III THERE IS NO SPLIT IN THE CIRCUITS AS TO THOSE CIRCUMSTANCES UNDER WHICH THE GENERAL RULE MAY NOT APPLY

Therefore, contrary to Crawford's assertion, each of the federal circuits discussed in his Petition require, as

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In contrast to Georgia, employment at will in most states is a common law doctrine *See e g Hinrichs v Tranquilaire Hospital*, 352 So 2d 1130 (Ala 1977), *Smith v Piezo Technology & Professional Adm rs*, 427 So 2d 182 (Fla 1983) Some state courts have created specific exceptions to their respective doctrines, *see e g Palmateer v International Harvester Co* , 85 Ill 2d 124, 421 N E 2d 876 (1981), but Montana is alone among the states in requiring that an employer have "good cause" for the termination of a non probationary employee generally, *see* Mont Code Ann § 39 2 901

a general rule, that a plaintiff show each of the defendant-employer's articulated reasons to be pretextual The City submits that many of the so-called "exceptions" urged here by Crawford simply do not rise to the level of a judicially-manageable legal standard *See, e g , Bryant v Farmers Ins Exch* , 432 F 3d 1114, 1126-27 n 6 (10th Cir 2005) (employing the term "circumstance" in lieu of "exception") For example, redundancy aside, does "so fishy and suspicious," *see Jaramillo v Colorado Judicial Dep't*, 427 F 3d 1303, 1311 (10th Cir 2005) (*quoting Chapman*, 229 F 3d at 1050 (Birch, J , dissenting)), constitute a discernible legal standard [8] Likewise, how does a plaintiff show a person to be "a liar in an outrageous manner" (or even an outrageous liar)? *See Chapman*, 229 F 3d at 1050 (Birch, J , dissenting) How many reasons, in fact, constitute a "plethora"? *See Tyler*, 232 F 3d at 814 And how does a plaintiff who has been unable to prove pretext as to each of an em ployer's reasons nevertheless demonstrate that the employer "lacks *all* credibility"? *See Jaramillo*, 427 F 3d at 1311 (*quoting Chapman*, 229 F 3d at 1050 (Birch, J , dissenting)) (Emphasis supplied) Simply put, mere wordplay fails to provide the parameters necessary for guiding the courts in the uniform and predictable application of the law so as to be elevated to the status of a legal standard

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[8] Of course, this wording as originally contained in *Russell*, was at most mere *dictum* in that case and possibly something less than that *See* 51 F 3d at 70

At most, only three (or four) of the seven exceptions urged upon this Court by Crawford's Petition even begin to rise to such a level (1) where multiple legitimate, nondiscriminatory reasons articulated by the defendant are "intertwined," *see Tyler*, 232 F 3d at 814, or where one of those reasons "predominates" over the others, *see Bryant*, 432 F 3d at 1127, (2) where "[t]he employer has changed its explanation under circumstances that suggest dishonesty or bad faith," *see Jaramillo*, 427 F 3d at 1311, and (3) where "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision," *see id* Contrary to Crawford's assertion, the federal circuits are not split, at least not in any substantive manner, on any of these so-called exceptions

Although no circuit court has offered any specific guidance on when an employer's articulated reasons may be said to be intertwined – or when one of them may be said to predominate – this exception(s) appears to refer to the general requirement that a plaintiff debunk each reason that, *standing alone*, caused the employer to take the action at issue *See, e g , Russell*, 51 F 3d at 69 ("this is true only if the company has offered no other reason that, *if that reason stood alone* (more precisely if it did not have support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining") (emphasis in original), *Jaramillo*, 427 F 3d at 1310 (quoting *Russell*), *Smith*, 155 F 3d at 809 ("The two justifications and the sources from

which they were derived were separate in nature"), *but see Wolff v Buss Am Inc*, 77 F3d 914, 925 (7th Cir 1996) (affirming summary judgment while recognizing that the employer did not contend that the two remaining reasons would be sufficient, standing alone, to justify the plaintiff's dismissal) The Fifth Circuit's case law does not differ from those other circuits in this regard *Compare Wallace*, 271 F3d 221-22 (observing that the employer had offered "two *independent* reasons" for the decision at issue and, ultimately, affirming summary judgment for the employer) (emphasis in original), *and Laxton*, 333 F3d at 579 (noting that the employer had relied upon the "cumulative effect" of its five reasons to justify the plaintiff's discharge and, ultimately, affirming verdict for the employee) Moreover, there is no evidence that the Eleventh Circuit is not similarly willing to undertake such an analysis when required by the facts of a particular case *See, e g, Boyd v Golder Assocs*, 212 Fed Appx 860, 863 (11th Cir 2006) ("The incidents were cited as specific examples of continuing problems and not independent reasons for Boyd's termination") [9]

[9] While *Boyd* is not binding precedent in the Eleventh Circuit, *see* 11th Cir R 36 2 and, perhaps not directly on point here, there is no published circuit authority rejecting such an analysis as improper in that circuit Moreover, the absence of any binding authority as to this particular exception is not particularly noteworthy inasmuch as Judge Birch's dissent in *Chapman* conceded that the percentage of cases possibly

(Continued on following page)

As to the second reason – a change in an employer's articulated reasons – both the Fifth and the Eleventh Circuits have held that such a change may be evidence of pretext *See Hurlbert v St Mary's Health Care Sys , Inc* , 439 F 3d 1286, 1298 (11th Cir 2006) ("an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext"), *Strong v Univer sity Healthcare Sys , L L C* , 482 F 3d 802, 806 n 2 (5th Cir 2007) (acknowledging the plaintiff's argument that the employer had " 'constantly changed' its reasons for firing her," but holding that the record revealed "no material change") Like the Fifth Circuit in *Strong*, the Tenth Circuit in *Jaramillo* has recognized that "the mere fact that the [employer] has offered different explanations for its decision does not create a genuine question of pretext " *See* 427 F 3d at 1311 (discussing circumstances under which such a change supports a finding of pretext and holding that the defendant's inconsistent explanations for the decision in that case were insufficient to do so) *See also Zaccagnini v Chas Levy Circulating Co* , 338 F 3d 672, 676-77 (7th Cir 2003) (finding pretext as to the employer's second articulated reason when, *inter alia*, it was raised for the first time in the employer's summary judgment reply brief) Thus, once again, Crawford's assertion that there is a split between the circuits is incorrect

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affected by the proposed exceptions would have been "quite small *See* 229 F 3d at 1050 n 32

Finally, there is no split between the circuits with regard to the last proposed exception, namely, where "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *See Jaramillo*, 427 F.3d at 1310. *See also Chapman*, 229 F.3d at 1050-51 (Birch, J., dissenting). Although that exception is listed with four others in *Jaramillo*, the court there did not find that exception – or any of the others – applicable to the case before it. *See* 427 F.3d at 1310-12. Nor have any of the other cases cited in the Petition applied that particular exception.

As authority for this exception, *Jaramillo* cited *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298-99 (D.C. Cir. 1998) (*en banc*). In *Aka*, the court held that a reasonable jury could have concluded that the plaintiff was "significantly better qualified" than the successful candidate. *See id.* at 1297. Furthermore, the court expressed reluctance "to give too much weight at summary judgment" to the decisionmaker's subjective opinion regarding the plaintiff's lack of enthusiasm during his interview, and held that a jury could find that reason to be pretextual based on the decisionmaker's failure to indicate the same on her interview summary sheet. *See id.* at 1298. In so holding, the court opined that, "[p]articularly in cases where a jury could reasonably find that the plaintiff was otherwise significantly better qualified than the successful applicant, an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination." *See id.* Finally, the court held that there existed other evidence of

discrimination, including a dispute as to whether the plaintiff, in fact, had told the decisionmaker during his interview that he "did not really want" the position, a statement which the decisionmaker had likewise failed to indicate on the interview summary sheet and which was articulated for the first time in a "later affidavit" *See id* at 1299 Accordingly, the court held that summary judgment for the employer was improper *See id* at 1299-1300

Therefore, its reference in *Jaramillo* notwithstanding, *Aka* is not a case in which the plaintiff was unable to establish pretext with regard to the so-called subjective reason Instead, and in addition to other evidence of discrimination, the plaintiff in *Aka* specifically disputed the employer's characterization of his interview demeanor and further supported his argument by pointing to the absence of that reason in any of the employer's contemporaneous documentation *See* 156 F 3d at 1299-1300 *Compare Chapman*, 229 F 3d at 1036 ("Chapman never refuted these objective bases"), *see also id* at 1051 n 34 (Birch, J , dissenting) ("It is true that Aka, unlike Chapman, specifically disputed the subjective assessment of his interview") Moreover, as demonstrated in Part II, a properly-articulated subjective reason is not to be accorded any lesser status than an objective reason under this Court's jurisprudence Thus, there is no split between the circuits even as to this last proposed exception to the general rule requiring that a plaintiff establish pretext as to each of an employer's legitimate, nondiscriminatory reasons, whether objective or subjective

IV THE ELEVENTH CIRCUIT CORRECTLY HELD THAT CRAWFORD'S CLAIM WAS SUBJECT TO DISMISSAL PURSUANT TO THE GENERAL RULE

Finally, Crawford's unfounded assertion of a split between the circuits notwithstanding, he cannot bring his discharge within any of the so-called exceptions to the general rule Before the Eleventh Circuit, Crawford neither acknowledged the general rule in *Combs* nor argued that his case fell within any exception(s) not foreclosed by *Chapman* Indeed, even in his Petition here, Crawford does not state which of the City's reasons are undisputed – and which, if any, are not – and does not address which exception to the general rule is purportedly applicable to the facts of his case To hold forth on the propriety of any exception(s) not presented by the facts of this case, as Crawford effectively urges the Court to do, would amount to nothing more than a mere advisory opinion, a practice long disfavored by the Court *See Massachusetts v EPA*, ___ U S ___, 167 L Ed 2d 248, 267, 127 S Ct 1438, 1452 (2007)

The City articulated four legitimate, nondiscriminatory reasons for its decision to discharge Crawford the Department's continued patrolling of Interstate 85, new complaints regarding overtime pay, problems in the Department's dispatch office, and general complaints of low morale and favoritism within the Department (*See* Pet App 12a) Mayor Hannah testified that the City Council would have voted to discharge Crawford based on the Interstate 85 issue alone (R2-27-#83, p 6, ¶ 15), and Crawford

proffered no evidence, by way of cross-examination or otherwise, tending to show that the Mayor and Council members were not genuinely upset about these issues or that they did not honestly believe Crawford to be responsible, at least in part, for each of them (*see* Pet App 13a n 2, 17a) [10]

As both the district court and the court of appeals found, Crawford failed to show any of the City's articulated reasons to be without credence (*See* Pet App 7a, 16a-17a) The magistrate judge had concluded in his report and recommendation that although Crawford had failed to show that the City could not have held an honest belief as to the overtime issue, its failure to criticize him with regard to that issue prior to his discharge, "*suggested* that the [City's] wage issue *might* be evidence of pretext " (*See* Pet App 66a-69a) (Emphasis supplied) The district court's Order, however, concluded simply that there was no evidence that the Mayor or Council did not

[10] The Mayor and Council voted to place Crawford's supervisor, Brown, on probation at the same meeting during which they voted to discharge Crawford and continued Brown in the City's employ for less than four more months until June 16, 2004 (*See* Pet App 24a, 38a) Brown testified that he believed the Mayor, the City Council and the City Administrator were genuinely upset with Crawford based on their perception that Crawford was responsible for the Department's continued activity on Interstate 85 and its problems relating to morale and favoritism (*See* Pet App 13a n 2) While Brown believed the source of these charges to be "certain unnamed subordinate employees' who were unhappy because Crawford sought to hold them accountable for their job performance (*see id*), this belief is not probative of any reason proscribed by Title VII

reasonably rely upon their genuinely-held beliefs in connection with this issue, their failure to apprise Crawford of any displeasure prior to that time notwithstanding (*See* Pet App 17a, 19a) Although Crawford also argued before the district court that he was not personally responsible for these problems and that it was unfair to hold him responsible for the acts of his subordinates, such is the nature of a supervisor's duties and responsibilities (*See* Pet App 16a-17a n 4)

On appeal, of course, Crawford simply made no attempt to rebut any of the four articulated reasons (*See* Pet App 7a) Instead, Crawford argued – and only in reply – that the City had failed to properly articulate its legitimate, nondiscriminatory reasons (*See* Reply Brief of Plaintiff-Appellant, 09/19/06, pp 7-8) Crawford also argued that Williams' alleged comments and their purported temporal relationship to Crawford's discharge, as well as Brown's testimony regarding the internal affairs investigation as yet another reason allegedly given for that action, was sufficient evidence of pretext to withstand summary judgment (*See* Brief of Appellant, 07/20/06, pp 10-19) However, the court of appeals, like the district court before it, found that these statements, while presumed true for purposes of summary judgment, and even when viewed as suggesting any retaliatory animus, failed to create a genuine issue of material fact as to whether any or all of the City's articulated reasons were a pretext for retaliation (*See* Pet App 8a)

While a plaintiff who fails to (or otherwise cannot) contest an employer's legitimate, nondiscriminatory reasons may not be entirely foreclosed from pursuing a claim under Title VII, the combined effect of the employment-at-will doctrine and the limited scope of the federal statute logically presents him with a formidable challenge in showing that the employer nevertheless acted for discriminatory – or, in this case, retaliatory – reasons *See Russell*, 51 F 3d at 71, *Fuentes*, 32 F 3d at 765 The district court here concluded, and the court of appeals subsequently agreed, that Williams' alleged comments, taken as true but considered in the context of the summary judgment record as a whole, including the uncontested reasons articulated by the City, failed to raise a genuine issue as to whether it terminated Crawford's employment in retaliation for his investigation of Tallman's internal complaint(s) In this regard, Crawford's evidence is far less compelling than the plaintiff's showing in several of the cases relied upon by the Petition as proof of the purported split between the circuit *See, e g , Jaramillo*, 427 F 3d at 1310-15 (holding that evidence that the employer had given a false reason for not hiring the plaintiff (*i e* , that the plaintiff had scored lower than the successful applicant on the promotional exam), used subjective hiring criteria, and offered differing explanations as to the reasons for the decision was nevertheless insufficient to establish pretext), *Wolf*, 77 F 3d at 923 (affirming summary judgment although the plaintiff showed pretext as to four of the six reasons offered by the employer, and the employer had not contended that the two remaining reasons standing alone would have

justified the plaintiff's dismissal) In summary, Crawford's assertion of the purported split between the federal circuits as to the general rule is a mere pretext to have this Court review the grant of summary judgment against him under the general liability principles previously settled by this Court in *St Mary Honor Ctr* and *Reeves* As such, the City respectfully submits that Crawford's Petition does not present a compelling reason for granting a writ of *certiorari* and, thus, should be denied

CONCLUSION

Since the Eleventh Circuit's opinion is in accordance with this Court's precedent and does not conflict with the decisions reached by the other federal courts of appeals, as well as for the other reasons set forth above, Crawford's Petition should be denied

Respectfully submitted,

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