No. 22-20289

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALIED SHATER,

Plaintiff – Appellant

v.

SHELL OIL COMPANY,

Defendant - Appellee

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division, No. 4:20-CV-1465

BRIEF OF APPELLANT WALIED SHATER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal in this case.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Circuit Rule 28.2.3 Shater requests oral argument because he believes that it would significantly aid the decisional process.

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TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Appellant Shater files his brief.

I. STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The District Court entered an order granting Shell's motion for summary judgment on May 31, 2022 (ROA.1667-1691; Record Excerpts ("RE") Tab 2). The order disposed of all parties' claims. Shater filed his notice of appeal on June 15, 2022 (ROA.1692-1693; RE Tab 3). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

Did the district court err in concluding as a matter of law that no reasonable jury could find that the real reason Shell did not promote Shater to the position of Regional Security Manager ("RSM") – Americas was race and national origin discrimination?

III. STATEMENT OF THE CASE

A. Between 1995 and 2013, Shater Was Employed With The U.S. Secret Service And ConocoPhillips

Shater is a non-white American citizen of Arab/Middle Eastern (Egyptian and Sudanese) race and national origin (ROA.1006). In 1995 Shater went to work as a Special Agent for the U.S. Secret Service (Shater Sworn Charge of Discrimination ("COD") at 1; ROA.519-20 and ROA.535-36). In 2000, Shater was assigned to the

Presidential Protective Division as a Special Agent (Shater Sworn COD at 1; ROA.520). For approximately five years in that role Shater was assigned to the White House (*Id*.). In 2007, Shater went to work for ConocoPhillips as a Regional Security Director for its Middle East and North Africa Business Unit (Shater Sworn COD at 1; ROA.520 and ROA.534).

B. In 2013, Shater Began Employment At Shell, And Earned Consistently Strong Performance Reviews Over The Years

In August 2013, Shater resigned from ConocoPhillips and began working for Shell in its Corporate Security Department as a Cluster Security Manager ("CSM") with responsibility for managing the security function for Shell in seven Middle Eastern and African countries (Shater Dep. at 32, 84; ROA.900, 913). Shell is a multinational oil, gas, and energy company (https://www.shell.com/about-us.html).

Shater worked from Dubai, UAE (Shater Dep. at 57; ROA.907). A CSM reports to a RSM (Shater Sworn COD at 1; ROA.520). Shater reported to Robert Buss ("Buss"), the RSM for Middle East & North Africa ("MENA") (Shater Sworn COD at 1, 3; ROA.520, 522; Shater Dep. at 57; ROA.907). Of the five RSMs around the globe, four of them had worked in a CSM role at Shell before becoming a RSM – it is a normal progression for a CSM to be promoted into a RSM role (Shater Sworn COD at 1; ROA.520; Maynor Dep. No. 2 at 68; ROA.958). In the CSM role, Shater was responsible for seven countries, which was more than any other CSM (Shater Sworn COD at 1; ROA.520).

Shater's performance was very strong in the CSM role, as reflected by his favorable performance reviews and ratings for 2014, 2015, and 2016, and his January 30, 2017 Individual Development Plan ("IDP") (Shater Sworn COD at 1-2 and Exs. A-2, A-3, A-4, and A-5 thereto; ROA.520-21, 539-60).

In January 2017, Buss wrote in Shater's IDP that, "[d]ue to experience, Walied [Shater] would be a strong contender for both RSM MENA or Americas." (Shater Sworn COD at 2 and Ex. A-5 thereto; ROA.521, 560; Shater Dep. at 159; ROA.932). The RSM – Americas job is the one at-issue in this case.

C. James Hall Prefers White, British Employees For The Corporate Security Department's Leadership

The Vice President and head of Shell's approximately seventy-person global Corporate Security Department at all times relevant to this case was James W.D. Hall ("Hall"), a white Brit working in The Hague, Netherlands (Shater Sworn COD at 2; ROA.521; Shell's Original Answer, Doc. No. 7 at ¶ 3; ROA.301; Hall Dep. at 6; ROA.740; Mulder Dep. at 7; ROA.987). Hall admits that Shell has never given him any training on U.S. employment laws (Hall Dep. at 268; ROA.805).

Hall is a former British government employee (Shater Sworn COD at 2; ROA.521; Hall Dep. at 27-29; ROA.745-46). Since taking over the Corporate Security Department in April 2011, Hall has hired many white British ex-government/military members to work in leadership positions in the department (Shater Sworn COD at 2; ROA.521; Gacheru Decl. at ¶¶ 3, 8; ROA.1003-04; RE

Tab 9; Mulder Dep. at 18; ROA.990; Hall Dep. at 29-30; ROA.746). Hall favors white Brits, like himself, for leadership roles (Shater Sworn COD at 2; ROA.521; Gacheru Decl. at ¶¶ 3, 8; ROA.1003-04; RE Tab 9). The RSMs around the globe report directly to Hall (Hall Decl. at ¶ 3; ROA.384).

The Corporate Security Leadership Team ("CSLT") is 100% white male (Shell's Original Answer, Doc. No. 7 at ¶ 60; ROA.311) ("Shell admits that the current CSLT is 100% white male."). Globally, between 2012 and the end of 2017, approximately 95% of all the promotions to Job Grades 1 or 2 (which are the senior level roles, such as a RSM role) in the Corporate Security Department were awarded to white persons, and approximately 75% of those promotions were awarded to white British nationals (Shater Sworn COD at 2, 10 and Ex. A-6 thereto; ROA.521, 529, 562). Minorities are regularly passed over for promotions, regardless of their qualifications (Gacheru Decl. at ¶¶ 3, 5-8; ROA.1003-04; RE Tab 9).

D. James Hall's Termination Of Crockett Oaks, The Then RSM – Americas, In December 2016, And Oaks' Subsequent Allegations Of Illegal Retaliation Against Hall, Which "Upset" Hall

On December 6, 2016, Hall fired Crockett Oaks, the then RSM – Americas (Oaks' Sworn Original Complaint at ¶ 4; ROA.571). Oaks is an African American former FBI Special Agent (Shater Sworn COD at 3; ROA.522). Oaks had been the only minority employee on the CSLT (Shater Sworn COD at 3; ROA.522; Mulder Dep. at 25; ROA.991; Shater Dep. at 182; ROA.938).

Later in December 2016, through counsel, Oaks asserted in a letter to Shell and Hall that Hall fired him in retaliation for refusing to follow Hall's instructions to make hiring decisions based on age (Hall Dep. at 188-89; ROA.785-86). Hall admitted that Oaks' allegations of retaliation "upset" him (Hall Dep. at 188-89; ROA.785-86).

In January 2017, Oaks filed a Charge of Discrimination with the EEOC, making the same allegations (Oaks' Sworn COD; ROA.564). Oaks had potent e-mails to prove his allegations, such as one where Hall wrote to Oaks: "[l]et's indeed look to backfill Bob's role with some **younger** external talent." (Email from Hall to Oaks of 07/07/2016; ROA.623) (bold added).

E. Hall's Preselection Of Wayne Hunt For The RSM – Americas Opening, And His Manipulation Of The Vetting And Hiring Process For The Job In Hunt's Favor

1. Hall Knew Wayne Hunt Spoke Spanish, And Shater Did Not, And So After He Fired Oaks He Secretly Altered The RSM – Americas Job Description To Insert An Unprecedented And Pretextual Spanish/Portuguese Language Preference

Hall needed to replace Oaks. On January 27, 2017, Hall posted an opening for Oaks' old job as RSM – Americas (Shater Sworn COD at 3, 16; ROA.522; RSM – Americas Job Description; ROA.566-68; RE Tab 5; Hall Decl. at ¶ 7; ROA.384). Oaks had worked out of Houston, Texas, as would his replacement (Shater Sworn COD at 3; ROA.522; Shell's Original Answer, Doc. No. 7 at ¶ 27; ROA.305). At

the time, Hall expected Oaks' replacement to begin working in the job on March 1, 2017 (ROA.406, 568; RE Tab 5).

While it is not a universal rule, is common for RSM openings to be filled by an individual, such as Shater, who has successfully performed the CSM role at Shell (Shater Sworn COD at 1; ROA.520; Maynor Dep. No. 2 at 68; ROA.958). This makes sense, as even Shell's own HR Manager, Andrew Maynor, admitted that the roles are essentially the same, except the RSM role has a larger geographic scope (Maynor Dep. No. 2 at 26, 68; ROA.948, 958; *see also* Shater Sworn COD at 3; ROA.522). The most recently promoted three RSMs had all been promoted while they were CSMs (Shater Sworn COD at 3; ROA.522). The RSM – Americas position would have been a promotion from Shater's Job Grade 3 position (*Id.*). Shater's manager, Buss, had just indicated Shater would be a "strong contender" for this very position (Shater Sworn COD at 2 and Ex. A-5 thereto; ROA.521, 560). So, Shater applied (Shater Sworn COD at 3; ROA.522).

The job posting included something highly irregular and suspicious: specifically, Hall knew Wayne Hunt, a white Brit Security Program Manager who worked in The Hague, spoke Spanish, and after firing Oaks, Hall secretly changed the existing job description to insert a statement that "[c]onversational Spanish and/or Portuguese speaking candidates preferred." (RSM – Americas Job Description; ROA.567; RE Tab 5; Maynor Dep. No. 2 at 30-32; ROA.949; Shell's

Responses to Shater's First RFAs at No. 15-17; ROA.876; Mulder Dep. at 55-56; ROA.999). Shell admits that none of the RSM – Americas job postings in the past had ever included any such preference (Shell's Responses to Shater's First RFAs at No. 14; ROA.875-76; Shell's Original Answer, Doc. No. 7 at ¶ 46; ROA.308-09; Prior RSM – Americas Job Description; ROA.688-89; RE Tab 4).[1] In fact, no other Shell RSM posting anywhere in the world had ever included a language preference, and many RSMs do not speak the language of the countries in their region, including Shater's manager at the time, Buss (Shater Sworn COD at 7-9; ROA.526-28; Shater Dep. at 167; ROA.934). There were no other criteria listed for the preferred candidate on the altered job description other than the newly secretly added "Spanish and/or Portuguese" language preference (RSM – Americas Job Description; ROA.567; RE Tab 5).

A reasonable inference is that Hall secretly inserted the unprecedented preference for Spanish and/or Portuguese speaking candidates because he had preselected Hunt to replace Oaks, and wanted to make Hunt appear more qualified since he lacked so many of the Core Security Competencies listed in the RSM –

[1] Oaks did not speak Spanish, and neither did his predecessor, Rob Ream (Shater Sworn COD at 7; ROA.526; Shell's Responses to Shater's First RFAs at No. 18; ROA.876). The official business language at Shell is English (Maynor Dep. No. 2 at 24-25; ROA.947; Mulder Dep. at 49; ROA.997). The most senior executive vice president for all Shell Americas did not speak Spanish, and he regularly met with South American government officials (Shater Sworn COD at 7; ROA.526; Shater Dep. at 166-67; ROA.934). Shell has approximately 18,000 employees in North America and only 1,000 in South America (Maynor Dep. No. 2 at 53; ROA.954; https://reports.shell.com/annual-report/2021/strategic-report/our-people.html).

Americas job posting (Shater Sworn COD at 7; ROA.526; Mulder Dep. at 55-56; ROA.999; *see also* Shell's Responses to Shater's First RFAs at No. 15-17. ROA.876).

Shell has asserted that Hunt's Spanish fluency made him a superior candidate (Shell's Position Statement to the EEOC at 4-5; ROA.824-25). But, for good reasons (*see supra* fn. 1) Andrew Maynor, the HR Manager who supported Hall's department at the time and was on the interview team, testified that he did not believe that Hunt's Spanish fluency made him a better candidate (Maynor Dep. No. 2 at 36; ROA.950).

Hall secretly played Maynor: Maynor was not even aware at the time of the interviews that Hall had just altered the job description to add the "Spanish and/or Portuguese" language preference (Maynor Dep. No. 2 at 33-34; ROA.949-50). Hall secretly conned Barbara Blakely (the other interviewer from Mexico who he personally selected for the interview team (Blakely Decl. at ¶ 3; ROA.445)) too: when Hall sent her the RSM – Americas job description just two to three days before the interviews of Shater and Hunt, he sent her the old job description without the preference for a Spanish and/or Portuguese speaking candidate, not his secretly altered version (Email from Hall to Blakely and Smits of 02/06/2017 with attached

prior RSM – Americas job description; ROA.691-694; RE Tab 10; Maynor Dep. No. 2 at 30-32; ROA.949).[2]

2. Shortly After The RSM – Americas Job Was Posted, Hall Sent Hunt To The United States To Meet The Corporate Security Team There That He Would Be Leading In The RSM – Americas Role

On November 17, 2016, the invitation for the Shell North Americas Corporate Security Workshop meeting to occur in February 2017 was sent out (Shater Sworn COD at 3; ROA.522). Hunt was not originally invited to this meeting (*Id.*). At this time, Oaks had not yet been fired, and thus the RSM – Americas job was not open. *See supra*.

But, on January 30, 2017, *i.e.*, after Oaks had been fired, Hunt's name was added to the invitation list (Shater Sworn COD at 3; ROA.522). Hunt accepted the invitation, and attended the meeting in Houston, Texas, in February 2017, along with the rest of the Americas Security team (Shater Sworn COD at 3; ROA.522; Shell's Original Answer, Doc. No. 7 at ¶ 28; ROA.306; Hunt Dep. at 30-32; ROA.975). A reasonable inference is that Hall had preselected Hunt for the RSM – Americas job and wanted him to meet the Americas Security team he would supervise as Oaks' replacement (Shater Sworn COD at 3-4; ROA.522-23). This would be an especially

[2] In an apparent effort to remove Hall's fingerprints from this damaging evidence, Shell asserted in an unverified interrogatory response that Maynor was also involved in setting the job requirements for the altered RSM – Americas position (Shell Rog. Answer No. 1; ROA.1031). That was false, as Maynor testified under oath (Maynor Dep. at 32; ROA.949). It was Hall alone who altered the job description to add the language preference (*Id.*).

reasonable inference given that, at the time, Hall expected Oaks' replacement to begin working in the job on March 1, 2017 (ROA.406, 568; RE Tab 5).

3. On January 1, 2017, Hall Was Involved In Giving Hunt Three New Direct Reports To Pump Up His Ostensible Qualifications For The RSM – Americas Job

On January 1, 2017, after Oaks had been fired, Hall was involved in giving Hunt three new direct reports (Hunt Dep. at 10-11; ROA.970; Shater Sworn COD at 4; ROA.523; Shell Rog Answer No. 6; ROA.1032). Before this time, during his tenure in his role since 2014, Hunt had never had any direct reports (Hunt Dep. at 6, 11; ROA.969-70). A reasonable inference is that Hall had preselected Hunt for the RSM – Americas job and was working to make Hunt appear more qualified for the role than he really was (Shater Sworn COD at 4; ROA.523).

4. Shortly After The RSM – Americas Position Opened Up, And Shater Applied For It, Hall: (a) Told Shater He Should Have A "Plan B"; And (b) Falsely Told Him He Was Needed Where He Was Because Shell Did Not Have Anyone To Backfill His Role If He Was Promoted

On January 31, 2017 – the day after Hunt's name was added to the invitation list for the Shell North Americas Corporate Security Workshop meeting to occur in February 2017 – Hall was in Dubai, and he told Shater that he knew that he had applied for the RSM – Americas position, and said that Shater should have a "Plan B." (Shater Sworn COD at 4; ROA.523). Hall said that Shater was so good in his current role that he did not want to lose him (*Id.*). Hall also said that there was no

replacement for Shater (*Id.*). This was untrue, as it is undisputed that Shater's supervisor, Buss, had already identified another CSM, Andrew Boult ("Boult"), to likely replace Shater if he was promoted (Shell's Responses to Shater's First RFAs at No. 32; ROA.879; Shater Sworn COD at 4; ROA.523). When Shater told Buss what Hall had told him about there not being a replacement, Buss said this was not true and that during succession planning sessions that Hall had participated in, Hall had been informed that Boult had been identified as Shater's likely replacement if Shater was promoted (Shater Sworn COD at 4; ROA.523).

Based on what Hall told him about needing a "Plan B," Shater got the hint that Hall had already decided not to select him for the RSM – Americas position and withdrew his application (Shater Sworn COD at 4; ROA.523). On February 2, 2017, Hunt formally applied for the RSM – Americas position (Hunt Application of 02/02/2017; ROA.399-400). Also on February 2, 2017, Hall asked Shater why he had withdrawn his application, and Shater told him that he had done so based on Hall's comments, as it appeared to Shater that Hall had already made a selection (Shater Sworn COD at 4; ROA.523; *see also* ROA.409). Hall – likely sensing he was caught out on shaky ground – told Shater that he had not (*Id.; see also* ROA.409). Despite not believing him, Shater retracted his withdrawal (ROA.409).

When Hall told Shater he had not made up his mind yet, he informed him that he was "one of the strongest contenders" for the role (ROA.409). That statement

cannot be reconciled with Hall's insistence that the ability to speak "Spanish and/or Portuguese" (which he knew Shater did not have) was so critical as to make it the only factor listed for the preferred candidate. A reasonable inference is that Hall was simply pacifying Shater knowing all along that he was going to give Hunt the job.

5. Maynor, Who Was Helping Shell Defend Against Crockett Oaks' Pending EEOC Charge, Was Also Involved In The Interviews For The RSM – Americas Position

On February 8, 2017, Shater was interviewed for the RSM – Americas position (Shater Sworn COD at 4; ROA.523). Shater was interviewed over Skype by Hall, Maynor, and Blakely, an External Relations Manager in Mexico (Shater Sworn COD at 4; ROA.523; Shell's Position Statement to the EEOC at 3; ROA.823). Hunt and Brian Butcher, an American employee, also received interviews that day or the next day (Shater Sworn COD at 4; ROA.523; Shell's Position Statement to the EEOC at 4; ROA.824). Shater performed extremely well in his interview (Shater Sworn COD at 4; ROA.523). In Hunt's interview it appears that he was not even asked about the functional competencies for the job that are listed on the job description (Maynor Dep. No. 2 at 67; ROA.958).

Maynor had a history of working to manage the fallout from Hall's discrimination and retaliation (Maynor Dep. at 27-32; ROA.708-09). For example, Maynor responded to Oaks' EEOC Charge – which was pending at the very time of

the interviews (Maynor Dep. at 32; ROA.709; Maynor Dep. No. 2 at 17, 47; ROA.945, 953). After Hall fired Oaks, Shell reinterviewed Michael Oliveri (the older candidate Hall had not wanted Oaks to hire), and Maynor was in Oliveri's interview (Maynor Dep. at 29; ROA.709). Maynor then admittedly worked with Hall and his boss, Sonja Gonzales, a HR Manager for Shell's Global Functions Group, to delay telling Oliveri that he did not get the job he re-interviewed for, so that Shell could first settle Oaks' lawsuit (Maynor Dep. at 38-39, 64-65; ROA.711, 717-18). After settling the Oaks case, Maynor then delivered the news for Hall to Oliveri that he did not get the job (Maynor Dep. at 67-68; ROA.718).

6. By Shell's Own Admission, Hall Decided To Select Hunt For The Job In Mid-February 2017, But Hall Lied About It In At Least Three Written Communications In March 2017

Maynor favored awarding Shater the RSM – Americas job (Maynor Dep. No. 2 at 11-12; ROA.944). But it was Hall's ultimate decision to make, and he decided to select Hunt (Maynor Dep. No. 2 at 11-12; ROA.944; Shell's Original Answer, Doc. No. 7 at ¶ 3; ROA.301; Mulder Dep. at 55-56; ROA.999; Hunt Dep. at 38; ROA.977). Maynor unequivocally testified from personal knowledge that Hall made the decision to award Hunt the job on or about February 13, 2017 (Maynor Dep. No. 2 at 15-16; ROA.945). Despite that, in March 2017 Hall repeatedly lied about not having yet decided:

- On March 3, 2017, Hall emailed Shater and told him: "I am afraid we are still not in a position to make a final decision." (Email from Hall to Shater of

03/03/2017; ROA.962; RE Tab 7). That was not true – the decision had been made more than two weeks earlier by that point (Maynor Dep. No. 2 at 15-16; ROA.945).

- On March 23, 2017, Hall sent an internal note to all Corporate Security staff that read in relevant part, "...and I look forward to announcing a new RSM for the Americas. We are a small community in security and I know there has been speculation that a final decision has already been made. I can assure you that it has not, but will advise you as soon as we are ready to move forward." (Shell's Original Answer, Doc. No. 7 at ¶ 35; ROA.307; Shell's Statement of Position at pp. 11, 16-17; ROA.831, 836-37; Email from Shater to Lattin of 05/04/2017; ROA.964-65; RE Tab 8). Again, that was not true – the decision had been made more than a month earlier by that point (Maynor Dep. No. 2 at 15-16; ROA.945).

- Also on March 23, 2017, Hall emailed Blakely and falsely told her he had still not made a decision (Email from Hall to Blakely of 03/23/2017; ROA.725; RE Tab 11).

Hall is adept at using people as pawns and perpetuating false scenarios to deflect attention from his wrongdoing. For example, to try to convince Oaks to sign a release and waiver agreement in Shell's favor after he fired him, Hall admittedly told Oaks that he wanted to work together to fabricate a false story to tell potential employers about why he was no longer employed by Shell (Oaks' Sworn Original Complaint at ¶ 51; ROA.588-89; Hall Dep. at 174-75; ROA.782). Hall knew that Oaks' father had a stroke shortly before he fired him (Hall Dep. at 174-75; ROA.782). Hall admittedly slyly suggested that he and Oaks both lie and tell potential employers that Oaks resigned to care for his sick father, and once he had done so, was seeking to get back into the job market (Hall Dep. at 174-75; ROA.782; Oaks' Sworn Original Complaint at ¶ 51; ROA.588-89). Oaks, a former FBI Special

Agent, refused to join in Hall's proposed deceptive scheme.[3]

Shell's Code of Conduct trumpets "honesty," as one of the Company's core values. *See* https://www.shell.com/about-us/our-values.html. But Shell permits Hall to lie with impunity and continues to enable, support, and vigorously defend him (Maynor Dep. at 19-20; ROA.706). Minorities like Oaks, Shater, and Jo Gacheru do not seem to receive the same support from Shell.

7. During March 2017 Hall And Shater's Boss Relentlessly Pestered Shater To Take A Different Job In The Company

In March 2017, while Shater was awaiting a decision on whether he would be awarded the RSM – Americas position – unaware Hall had already made the decision – his supervisor, Buss, contacted him about a possible position within the Business Integrity Division ("BID") (Shater Sworn COD at 8; ROA.527; Shell's Responses to Shater's First RFAs at No. 37; ROA.880). Shater told him he was not interested (Shater Sworn COD at 8; ROA.527). Despite this, Buss approached him four or five more times and told him that he and Hall had a conference call with the head of BID to discuss Shater's qualifications, and that she was interested in him (Shater Sworn COD at 8; ROA.527; Shater Dep. at 167-68; ROA.934). It was highly unusual for Buss to have hounded Shater so relentlessly for a job that Shater said from the start he was not interested in (Shater Dep. at 148-49, 167-68; ROA.929-30, 934).

[3] Hall testified under oath that he did not know if lying on an application to Shell is a terminable offense (Hall Dep. at 175-76; ROA.782).

One could easily reasonably conclude that Hall asked Buss to do this because he wanted Shater to accept another job so that Shater would not be in a position to complain when he announced Hunt's selection to replace Oaks. This conclusion is especially logical because, although Hall lied about it, it is now a known and undisputed fact that by March 2017 – the same time Shater was being hounded to take the BID job – Hall had already decided to select Hunt. *See supra* § III.E.6. Not surprisingly, no one encouraged Hunt to apply for another job during this same time (Hunt Dep. at 49; ROA.979). Why would they – despite Hall's lies to the contrary, he already had the RSM – Americas job in the bag by this time. *See supra* § III.E.6.

F. On March 30, 2017, Oaks Filed A Retaliation Lawsuit Against Shell, Which Was Dismissed By Agreement On April 11, 2017

On March 30, 2017, Oaks filed a retaliation lawsuit against Shell (Oaks' Sworn Original Complaint; ROA.570-648). On April 11, 2017, the case was resolved and dismissed by mutual agreement (Joint Motion and Order in Oaks' Case; ROA.650). The settlement to Oaks was paid out of Hall's department's budget (Hall Dep. at 229-30; ROA.796). With the Oaks case over, Hall was finally ready to announce what he had already decided long before but repeatedly lied about: that he had given Hunt the RSM – Americas job (Hall Decl. at ¶ 23; ROA.389).

G. On May 1, 2017, Hall Told Shater He Did Not Receive The RSM – Americas Position And Tellingly Explained That "Sometimes We Can't Go By Competencies"

On May 1, 2017, Hall called Shater and told him that he was second for the RSM – Americas role, and that another candidate was selected (Shater Sworn COD at 5; ROA.524; Shell's Responses to Shater's First RFAs at No. 9; ROA.875). Hall did not provide a name of the successful candidate (Shater Sworn COD at 5; ROA.524). Shater asked why he was not selected, and Hall initially said that the other candidate answered a question about leadership better than Shater did (Shater Sworn COD at 5; ROA.524; Shell's Responses to Shater's First RFAs at No. 41; ROA.881). That was untenable: Shater had significant leadership experience (Shater Sworn COD at 5; ROA.524).

Shater told Hall that if he went through all the listed competencies for the job from the job description, he was objectively qualified for them, and Hunt – who Shater suspected he had selected for the job – was not (Shater Sworn COD at 5; ROA.524). At that point Hall replied that "sometimes we can't go by competencies." (Shater Sworn COD at 5; ROA.524; Shater Dep. at 155; ROA.931). Hall did not mention the fact that Hunt spoke "Spanish and/or Portuguese," which would have been an obvious explanation for selecting Hunt had it been anything other than a pretextual red herring.

H. Hall Himself Had Stated In Writing That The RSM – Americas Job Should Preferably Be Filled By A "US National," But Instead He Selected A Non-U.S. National, Hunt; The Same Email Curiously Did Not Mention That The Person Would Preferably Speak Spanish Or Portuguese

It is especially bizarre that Hunt was selected for the RSM – Americas job because over 80% of Shell assets in the U.S. are regulated by the U.S. Government ("USG") (Shater Sworn COD at 6; ROA.525). The USG routinely shares threat information with Shell (Shater Sworn COD at 6; ROA.525; Shell's Original Answer, Doc. No. 7 at ¶ 44; ROA.308). The U.S. intelligence community also conducts briefings with the private sector regarding threats to energy infrastructure (Shater Sworn COD at 6; ROA.525; Shell's Original Answer, Doc. No. 7 at ¶ 44; ROA.308). To attend these briefings attendees must have an active USG security clearance (Shater Sworn COD at 6; ROA.525; Shell's Original Answer, Doc. No. 7 at ¶ 44; ROA.308). Non-Americans such as Hunt are not typically eligible for U.S. security clearances and cannot attend the briefings (Shater Sworn COD at 6; ROA.525; Hall Dep. at 265; ROA.805). This mandates the need for the RSM – Americas to be American and have access to classified threat reporting, as all previous RSM – Americas had (Shater Sworn COD at 6; ROA.525). This makes it especially inexplicable that Hunt – who did not hold a USG security clearance – would be hired for the role over Shater, who holds a USG security clearance (Shater Sworn COD at 6; ROA.525; Shell's Responses to Shater's First RFAs at Nos. 12-13; ROA.875).

As if to prove this very point, Hall stated in an email after the interviews were completed stating that the person he needed for the RSM – Americas job would "Preferably – for wider HR reasons, LT balance and the reason identified above" be

"a US national." (Email from Hall to Blakely, Smits, and Maynor of 02/13/2017; ROA.888; RE Tab 6). The "reason identified above" was because Hall also needed the RSM – Americas to be "[w]ell networked externally, especially with US security agencies." (*Id*.). Shater was a U.S. national and incredibly well networked with U.S. security agencies; Hunt was not a U.S. national or nearly as well networked with U.S. security agencies (Maynor Dep. No. 2 at 40-41, 59-60; ROA.951, 956; Shater Dep. at 174, 180-82; ROA.936, 937-38). As Hall himself admitted, Hunt had no security clearance and could not get one since he was not an American citizen (Hall Dep., Ex. F at 265; ROA.805). Shater was clearly better qualified than Hunt from any objective perspective – even based on Hall's own post-interviews email.

Hall's post-interviews email about the person he needed for the job said nothing about the ability for the person to speak Spanish or Portuguese (Email from Hall to Blakely, Smits, and Maynor of 02/13/2017; ROA.888; RE Tab 6). This would be an odd oversight if, as Hall had asserted, the ability to speak Spanish or Portuguese was truly so important as to make such a speaker a preferred candidate for the job.

I. Shater's Supervisor Said That Hunt "Should Be Embarrassed For Getting That [The RSM – Americas] Position" And Many Coworkers In The Corporate Security Department Said Essentially The Same Thing And Attributed Hunt's Selection To Discrimination

Later on May 1, 2017, another CSM, Boult, emailed Shater, and stated: "[c]an't wait to find out who it is. If it is Wayne [Hunt] then it sends the wrong

message to CS staff, especially those of us with operational experience." (Email from Boult to Shater of 05/01/2017; ROA.886).[4]

On May 18, 2017, Shater's manager, Buss, said to a coworker that Hunt "should be embarrassed for getting that position." (Shater Sworn COD at 7; ROA.526). That same day, during a meeting with Shater in the Dubai office, Buss told him he was the most qualified candidate for the RSM – Americas position (*Id.*). Buss had also previously personally told Shater that he was more qualified than Hunt for the job (ROA.964; RE Tab 8). Buss told a coworker, however, that if Shater was preparing an appeal, Hall had covered his tracks (*Id.*).

Others from Corporate Security also complained about Hall's selection of Hunt, including Dominic Taylor and Andrew Choong (*Id.*). They all cited favoritism towards British nationals and questioned Hunt's qualifications for the RSM position given that he was never a CSM and had never lived or worked in the U.S. (*Id.*).

In addition, following Hunt being appointed RSM – Americas, Maria Kuusisto, the Shell Corporate Security Global Threat Analyst, was vocal to other Shell staff that Shater never had a chance for the position, and it was destined for Hunt because of his British nationality (Shater Sworn COD at 8; ROA.527).

[4] A comparative analysis of Shater's CSM job versus the job Hunt held as Security Program Manager before he was given the RSM – Americas role reflects that the RSM role and Shater's CSM role are almost identical, and Hunt's job as Security Program Manager are not (Ex. A-11; ROA.652-57). Even Shell's own witness, Maynor, admits the CSM role is the same as the RSM role, just smaller in geographic scope (Maynor Dep. No. 2 at 26; ROA.948).

Kuusisto had also previously told Shater that and expressed her belief that Shater was better qualified than Hunt (Shater Sworn COD at 3; ROA.522).

In June 2017, another member of the Corporate Security team based in The Hague, Jo Gacheru, told Shater that it was known Hunt would be appointed RSM – Americas as he had a close relationship with Hall and James Lorge, Deputy VP of Corporate Security, and also a white Brit (Gacheru Decl. at ¶ 4; ROA.1003; RE Tab 9; Shater Sworn COD at 8; ROA.527). Others in the department had also told Shater long before the announcement that Hunt would get the position (ROA.964; RE Tab 8). Even Hall himself admits that his department was rife with what he called "rumors" that he had preselected Hunt (Hall Decl. at ¶ 24; ROA.389).

J. Hall's And Shell's Pattern of Racial And National Origin Discrimination, and Shater's Complaint To Shell HR, Which Shell Swept Under The Rug

1. Hall's And Shell's Pattern Of Discrimination In Favor Of White Brits

What Hall did to Shater in this case is part of a pattern of preference for white Brits, and against minorities since Hall took over the leadership of the department (Gacheru Decl. at ¶¶ 3, 8; ROA.1003-04). Between 2012 and the end of 2017, approximately 95% of all the promotions to job group 1 or 2 in the Corporate Security Department were awarded to white persons (the 5% was Oaks, who Hall later fired), and approximately 75% of those promotions were for British nationals (Shater Sworn COD at 2, 10 and Ex. A-6 thereto; ROA.521, 529, 562). The current

CSLT, which includes all the RSMs around the world and other leaders is made of up 100% white males – all Brits except one German (Shater Dep. at 183-84; ROA.938; Shell's Original Answer, Doc. No. 7 at ¶ 60; ROA.311) ("Shell admits that the current CSLT is 100% white male."). Shell and Hall have a pattern of discriminating against Shater, and in favor of white Brits:

a. In early 2013, before Shater joined Shell, Shell posted an external position for the RSM – Middle East & North Africa (Shater Sworn COD at 8; ROA.527). Shater applied for the position and met or exceeded all the position's qualifications (*Id*.). The position was given to Robert Buss, a white Brit who had been with Shell for only approximately 10 months, had no private sector experience, no previous oil and gas experience, and no college degree (Shater Sworn COD at 9; ROA.528). Hall was the hiring manager (*Id.*). As noted, Buss became Shater's supervisor after Shater joined Shell. *See supra*.

b. In May 2014, while working for Shell, Shater applied for the RSM – Europe and Russia/Caspian position (Shater Sworn COD at 9; ROA.529). He met all the qualifications (*Id*.). The position was given to James Lorge, a white Brit, and ex-British government member, who had been with Shell for only approximately eight months, had no private sector experience, no previous oil and gas experience, and only four to five years' experience working in the UK government (*Id*.; Shell's Position Statement to the EEOC at 20; ROA.840; Shater Dep. at 79-80; ROA.912). Hall was the hiring manager (Shater Sworn COD at 9; ROA.528).

c. In May 2015, Corporate Security announced a position for Iraq Country Security Manager (Shater Sworn COD at 9; ROA.528). The posting identified a "Preferred Candidate." (*Id*.). The position was subsequently given to a white Brit (*Id.*). A Deputy Country Security Manager position was also posted (*Id.*). The position was subsequently given to a white Brit. Both positions had previously been held by British white persons (*Id.*).

d. In September 2016, Shater applied for the RSM Strategy and Assurance Manager position based in The Hague (Shater Sworn COD at 9; ROA.528). He met all the qualifications (*Id.*). At the time, Shater had conducted more security assurance activities (conducting Security Risk Assessments, writing Country Security Plans, writing Facility Security Plans, and writing Country Security Threat Assessments) than all the RSMs combined (*Id.*). Despite this, the position was given to James Lorge, a white Brit with less experience than Shater in the private sector, government sector and oil and gas industry (*Id.;* Shell's Position Statement to the EEOC at 20; ROA.840).

e. In September 2016, a senior security position (Job Group 1), General Manager, Nigeria was opened (Shater Sworn COD at 9; ROA.528). The job was not posted for staff to apply (*Id*.). Shater had: (a) covered Nigeria previously for ConocoPhillips; (b) traveled to Nigeria, including the oil capital of Nigeria, Port Harcourt, and to the dangerous Niger Delta frequently for 3 continuous years; (c) worked with the Nigerian military battling local militants; and (d) understood the security dynamic of the country very well (*Id.*). Shell gave the position to Stephen Jones, a British white person (*Id.*; Mulder Dep. at 16, 51; ROA.998).

f. In September 2017, Shell announced it would exit the Majnoon project in Iraq (Shater Sworn COD at 9; ROA.528). Following that announcement, a meeting was held in Shater's office in Dubai to discuss how to handle any protests by staff in Iraq or Dubai, as all Iraq expatriate staff reside in Dubai and work in the Shell Dubai office (*Id.*). Hall participated in the meeting (Shater Sworn COD at 10; ROA.529). Two other members of the Corporate Security team, Dan Jones, based in London, and Simon Cutler, based in The Hague, were invited (*Id.*). Both are British white persons (*Id.*). Jones and Cutler had been with the company less time than Shater (*Id.*). Neither Jones nor Cutler had ever been to Shell Dubai, to Shell Iraq, or to any Shell location in the Middle East (*Id.*). Neither spoke Arabic or was familiar with Dubai or Iraq based Shell staff (*Id.*). Although Shater was based in the office which would be impacted by any protest activity (Shell Iraq expatriate staff are based in Dubai in his office), he spoke Arabic, and had been to Iraq more than twenty times in his career, he was not invited to the meeting (*Id.*). Further, Shater had managed a similar asset sale in Jordan where Shell staff were let go and managed this difficult situation

which included protests outside the Shell office, Jordan parliament members protesting, and media coverage including Al Jazeera (*Id.*). Despite this, Shater's two Europe-based white British counterparts who did not speak Arabic were selected to handle the Majnoon exit assignment instead of him (*Id.;* Shater Dep. at 161-64; ROA.933).

g. In September 2017, Corporate Security created the first Regional Security Advisor position (Shater Sworn COD at 10; ROA.529). The position was a job group 2, one higher than Shater's job group 3 (*Id.*). The position was based in London, the most stable region (Europe) with the least High Threat countries of any region (*Id.*). The position was given to a white British national who had approximately two years with the company, and who had no previous oil and gas experience (*Id.*).

Jo Gacheru, a Black Kenyan who worked in the Corporate Security Department from February 2013 through July 2021 experienced similar discrimination (Gacheru Decl. at ¶¶ 5-8; ROA.1004; RE Tab 9). Gacheru complained about racial discrimination in the department and was "brushed off and made to feel her concerns were not taken seriously." (Gacheru Decl. at ¶ 10; ROA.1004; RE Tab 9; Mulder Dep. at 19-22; ROA.990-91).

2. Shater's Complaint To Shell HR About Hall Was Swept Under The Rug By Sonja Gonzales, Who Had A History Of Making False Statements Under Oath To Protect Hall From The Consequences Of His Discriminatory Decisions

On May 1, 2017, Shater filed a complaint over his rejection with Shell's HR Department (Shater Sworn COD at 10; ROA.529; Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). Shater pointed out evidence supporting his assertion that Hall had preselected Shater (Email from Shater to Lattin of 05/04/2017; ROA.964-65; RE Tab 8).

Maynor's boss, Sonja Gonzales, reviewed Shater's complaint (Shater Sworn COD at 10; ROA.529). She told him an investigation would be conducted (*Id.*). On July 7, 2017, Shater was informed that no further action would be taken (Shater Sworn COD at 10; ROA.529; Shell's Original Answer, Doc. No. 7 at ¶ 62; ROA.312). Nothing was done.

It is not surprising that Gonzales did nothing. She has a proven history of working to cover up Hall's discrimination. For example, as previously noted, Hall had sent an email to Oaks about an opening in his organization, stating, "[l]et's indeed look to backfill Bob's role with some **younger** external talent." (Email from Hall to Oaks of 07/07/16; ROA.623) (bold added). Later, after Hall fired Oaks, the older candidate for the opening, Oliveri, was rejected for the at-issue job, and Oliveri sued Shell for age discrimination. *See Oliveri v. Shell Oil Company*, Civil Action No. 4:17-CV-01971 (S.D. Tex.).

In discovery in the *Oliveri* case, Gonzales swore under oath that Hall's intent in sending the facially discriminatory email to Oaks about wanting to backfill a role with "younger external talent" was "to reiterate to Oaks in his email Shell's commitment to seeking and retaining a diverse and inclusive workforce, subject to Shell's guiding principle to hire the most qualified applicant for every position." (Shell's Answers to Interrogatories in the Oliveri Case at No. 3; ROA.730-31). Gonzales' sworn explanation is dishonest, absurd, and bears all the hallmarks of a

post-hoc attempt to make a silk purse out of a sow's ear. The point is this: given Gonzales' willingness to bend the truth to cover for Hall – even in a federal court proceeding – there was no way Shater's complaint to her about Hall was going to go anywhere.

K. In August 2017, Hunt Began Working In The RSM – Americas Role In America, Where He Had Never Lived Or Been Employed In Before

In August 2017, Hunt began working in Houston, Texas, as the RSM – Americas (Shell's Responses to Shater's First RFAs at No. 61; ROA.884). Before this, Hunt had never lived or been employed in the U.S. (Hunt Dep. at 23; ROA.973; Shell's Responses to Shater's First RFAs at No. 8; ROA.874).

L. On April 24, 2020, Shater Filed This Suit And On May 31, 2022, The District Court Granted Shell's Motion For Summary Judgment

On April 24, 2020, Shater filed this Title VII suit, alleging race and national origin discrimination (Docket Entry No. 1; ROA.6). In his Original Complaint, Shater laid out his preselection argument in detail (*Id*. at ROA.13-23, 40-42). In April 2021, the district court referred dispositive motions to Magistrate Judge Frances H. Stacy (ROA.346). On December 13, 2021, Shell filed a motion for summary judgment that relied almost entirely on a declaration from Hall and did not meaningfully address Shater's preselection argument or evidence (ROA.359-475). On December 20, 2021, Shater filed a response (ROA.476-1012). As evidence supporting his response, Shater attached various exhibits, including his Sworn COD

that he had signed under oath, under penalty of perjury, in front of a notary (ROA.519-671).

Shell did not object to or move to strike Shater's Sworn COD. In fact, when the parties later exchanged trial exhibit lists, Shell listed Shater's Sworn COD as its own Exhibit No. 1 (ROA.1234).

On March 22, 2022, the district court entered a one-sentence order retracting its referral to Magistrate Judge Stacy (ROA.1036). On May 31, 2022, the district court, relying heavily on Hall's declaration, granted Shell's motion for summary judgment (ROA.1667; RE Tab 2). On June 15, 2022, Shater filed this appeal (ROA.1692; RE Tab 3).

IV. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo* and affirms only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir. 2020). A fact is material if it "might affect the outcome of the suit under the governing law," while a dispute about that fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). This Court construes all the evidence and makes all reasonable inferences in the light most favorable to Shater. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

V. SUMMARY OF THE ARGUMENT

The District Court's grant of summary judgment should be reversed because there is substantial evidence that Hall:

- Changed the pre-existing job description for the RSM – Americas position by secretly inserting an unprecedented bogus Spanish/Portuguese language preference – the only preference listed on the entire job description – to tip the scales in Hunt's favor, since he knew Hunt spoke Spanish, but Shater did not;

- Manipulated the vetting process in multiple other highly suspicious ways to achieve his predetermined goal of hiring his white, British choice for the job, Hunt;

- Selected Hunt for the job even though Hall himself had stated that the person he needed for the job would "Preferably – for wider HR reasons, LT [Leadership Team] balance and the reason identified above" be "a US national." (Email from Hall to Blakely, Smits, and Maynor of 02/13/2017; ROA.888). Shater was a US national; Hunt was not (Maynor Dep. No. 2 at 40-41; ROA.951); and

- Strategically lied in writing to Shater, Blakely, and the entire Corporate Security Department by telling them in March 2017 that he had not yet decided who to select for the RSM – Americas role, when in truth it is undisputed that he had already selected Hunt (Email from Hall to Shater of 03/03/2017; ROA.962; RE Tab 7; Shell's Original Answer, Doc. No. 7 at ¶ 35; ROA.307; Email from Shater to Lattin of 05/04/2017; ROA.964-65; RE Tab 8; Email from Hall to Blakely of 03/23/2017; ROA.725; RE Tab 11; Maynor Dep. No. 2 at 15-16; ROA.945).

This evidence was not meaningfully addressed by Shell in its myopically focused motion for summary judgment. This evidence is sufficient to show that Shell's articulated reason for rejecting Shater for the position – that it in good faith followed its standard policies and practices, which led Hall to ultimately conclude

that Hunt was better qualified – is false and unworthy of credence. For that reason alone, the District Court's grant of summary judgment was improper and should be reversed. *See, e.g.*, *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523, 528 (5th Cir. 2022) (reversing summary judgment in a discrimination case because the plaintiff presented evidence that the employer's given reason for the challenged action was false or unworthy of credence).

There is substantial additional evidence to further bolster the conclusion that reversal is proper. Specifically, there is significant evidence from which a reasonable jury could infer that Hall preselected Hunt and manipulated the process in his favor specifically because he wanted a white Brit to replace Oaks. Oaks was an African American former U.S. government federal agent who had "upset" and embarrassed Hall after he refused to follow his (illegal) orders to hire based on age (Hall Dep. at 188-89; ROA.785-86). After that disastrous experience with Oaks, a reasonable jury could infer that Hall wanted a malleable white Brit, like himself, and the overwhelming majority of the other senior leaders in his department, to replace Oaks – not another minority American like Shater, who was also a former U.S. government federal agent. A reasonable jury could conclude that Hall secretly changed the job description and manipulated the vetting process to achieve his discriminatory goal.

Finally, reversal is also proper because the District Court's ruling is inconsistent with the summary judgment standard. The District Court: (1) weighed the evidence and resolved inferences that are for the jury to decide; (2) relied on statements from Hall's declaration that had been disputed (and disproven) by other evidence; (3) ignored material evidence supporting Shater's claim; (4) speculated there was damaging evidence against Shater that did not exist; (5) applied an erroneously cramped and narrow view of the relevant evidence; and (6) incorrectly summarily dismissed Jo Gacheru's sworn declaration.

VI. ARGUMENT AND AUTHORITIES

A. Law

Under Title VII, race or national origin discrimination can be established through direct or circumstantial evidence. *Laxton v. Gap Inc*., 333 F.3d 572, 578 (5th Cir. 2003). Where the plaintiff has not presented direct evidence of discrimination, courts apply the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under the framework, to establish a *prima facie* case of race or national origin discrimination, a plaintiff must show that: "he is a member of a protected class; (2) he sought and was qualified for a position for which applicants were being sought; (3) he was rejected for the position; (4) the employer either (a) hired a person outside of the plaintiff's protected class, or (b) continued to seek applicants with the plaintiff's qualifications." *Johnson v. Pride*

Indus., Inc., 7 F.4th 392, 406 (5th Cir. 2021). After the plaintiff establishes a *prima facie* case, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse employment action. *Id*; *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). The employer's burden is one of production, not persuasion, and does not involve a credibility assessment. *Id*. at 559.

The burden then shifts back to the plaintiff to show either: "(1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative)." *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 259 (5th Cir. 2011) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (alteration in original). Under the pretext alternative, the plaintiff "bears the ultimate burden of proving that the employer's proffered reason is not true but instead is a pretext for the real discriminatory . . . purpose. To carry this burden, the plaintiff must rebut each nondiscriminatory . . . reason articulated by the employer." *Id.* (quoting *McCoy,* 492 F.3d at 557). To prove pretext, Shater could show either that "he is 'clearly better qualified' than" Hunt or that Shell's "proffered explanation is false or 'unworthy of credence.'" *Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc.*, 482 F.3d 408, 412 (5th Cir. 2007).

B. Analysis

1. Shater Makes Out A *Prima Facie* Case Of Race And National Origin Discrimination

Shater is a non-white person of Arab/Middle Eastern (Egyptian and Sudanese) race and national origin (ROA.1006). He applied and was qualified for the promotion to RSM – Americas, but was passed over in favor of Hunt, a white person of British national origin (Shell's Responses to Shater's First RFAs at No. 1; ROA.874; *see also* ROA.1006). Shater thus establishes a *prima facie* case of race and national origin discrimination.

2. Shater Has Substantial Evidence Of Pretext

The burden then shifted to Shell to articulate a legitimate, nondiscriminatory reason for selecting Hunt for the job opening, instead of him. Shell asserts that it selected Hunt because it in good faith followed its normal policies and practices and concluded that he was the best qualified for the job (Hall Decl. at ¶ 22; ROA.389). But there is substantial evidence from which a reasonable jury could conclude that Shell's given reason is false, lacks credence, and that Hall secretly preselected Hunt from the start. Thus, the district court's grant of summary judgment for Shell should be reversed. *See Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 576 (5th Cir. 2003) ("the establishment of a *prima facie* case and evidence casting doubt on the veracity of the employer's explanation is sufficient to find liability").

First, Hall secretly manipulated the job description to favor Hunt. Hall knew Hunt spoke Spanish and Shater did not, and after firing Oaks, Hall secretly changed the existing job description to insert a statement that "[c]onversational Spanish and/or Portuguese speaking candidates preferred." (Compare Former RSM – Americas Job Description; ROA.688-89; RE Tab 4 with Altered RSM – Americas Job Description; ROA.566-58; RE Tab 5; Maynor Dep. No. 2 at 30-32; ROA.949; Shell's Responses to Shater's First RFAs at No. 15-17; ROA.876). Hall played Maynor: Maynor did not even know Hall had done this (Maynor Dep. No. 2 at 33-34; ROA.949-50). Blakely was similarly conned by Hall: when Hall sent her the RSM – Americas job description two to three days before the interviews of Shater and Hunt, he sent her the prior job description without the Spanish and/or Portuguese speaking candidates, not his altered version (Email from Hall to Blakely and Smits of 02/06/2017 with attached prior RSM – Americas job description; ROA.691-694; RE Tab 10; Maynor Dep. No. 2 at 30-32; ROA.949).

Maynor testified he did not believe that Hunt's Spanish fluency made him a better candidate (Maynor Dep. No. 2 at 36). And Hall's post-interviews email about the person he needed for the job said nothing about the need for the person to speak Spanish or Portuguese (Email from Hall to Blakely, Smits, and Maynor of 02/13/2017; ROA.888; RE Tab 6). More importantly: (a) Shell admits that none of the RSM – American job postings in the past had ever included any such language

preference (Shell's Responses to Shater's First RFAs at No. 14; ROA.875-76; Shell's Original Answer, Doc. No. 7 at ¶ 46; ROA.308-09; (b) no other Shell RSM posting anywhere in the world has ever included a language preference, and many RSMs do not speak the language of the countries in their region, including Shater's manager at the time, Buss (Shater Sworn COD at 7-9; ROA.526-28; Shater Dep. at 167; ROA.934); (c) Oaks and the RSM – Americas before him did not speak Spanish, *see supra* fn. 1; (d) English is Shell's official business language, *see supra* fn. 1; and (e) Shell's workforce in North America is approximately twenty times as large as that of South America, where Shell's workforce is comparatively tiny – specifically, Shell has 18,000 employees in North America and only 1,000 in South America, *see supra* fn. 1. From this evidence, a reasonable jury could conclude that Shell's articulated basis for selecting Hunt over Shater is not worthy of credence and that instead Hall preselected Hunt based on race and national origin. *See Rollerson v. Brazos River Harbor Navigation Dist*., 6 F.4th 633, 640 (5th Cir. 2021) (discrimination may be found where the evidence "suggests the decision-makers were willing to deviate from established procedures in order to accomplish a discriminatory goal.").

Second, on January 30, 2017, and only after Oaks had been fired, Hunt's name was added to the invitation list to the Shell North Americas Corporate Security Workshop meeting to occur in February 2017 (Shater Sworn COD at 3; ROA.522;

Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). Hunt accepted the invitation, and attended the meeting in Houston in February 2017, along with the rest of the Americas Security Team (Shater Sworn COD at 3; ROA.522; Shell's Original Answer, Doc. No. 7 at ¶ 28; ROA.306; Hunt Dep. at 30-32; ROA.975). A reasonable jury could find that this evidence suggests that Hall had preselected Hunt to replace Oaks and wanted him to meet the Americas Security team that he would be supervising (Shater Sworn COD at 3-4; ROA.522-23; Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). A reasonable jury could also conclude that Hall had hoped the Oaks matter would be settled by the time of this meeting in Houston, and that Hunt could be announced as his replacement at the meeting (Email from Shater to Lattin of 05/04/17; ROA.964-65; RE Tab 8). This makes a lot of sense because, at the time, Hall expected Oaks' replacement to be in the role by March 1, 2017 (ROA.406, 568; RE Tab 5).

Third, in January 2017, after Oaks had been fired, Hall was involved in giving Hunt three new direct reports (Hunt Dep. at 10-11; ROA.970; Shater Sworn COD at 4; ROA.523; Shell Rog Answer No. 6; ROA.1032). Prior to this time, during his tenure in his role since 2014, Hunt had never had any direct reports (Hunt Dep. at 6, 11; ROA.969-70). A reasonable jury could view this as another suspicious piece of evidence that suggests Hall had preselected Hunt for the RSM – Americas job and was working to manipulate the facts to falsely make him appear more qualified for

the role than he really was. *See Watkins v. Tregre*, 997 F.3d 275, 285 (5th Cir. 2021) (relying in part on "suspicious sequence of events" in finding sufficient evidence of pretext to defeat summary judgment).

Fourth, on January 31, 2017 – one day after Hunt's name had been added to the invitation list to the Shell North Americas Corporate Security Workshop meeting to occur in February 2017 – Hall told Shater that he knew that he had applied for the RSM – Americas position, and said that Shater should have a "Plan B." (Shater Sworn COD at 4; ROA.523). Hall said that Shater was so good in his current role that Hall did not want to lose him (*Id.*). Hall also said that there was no replacement for Shater (*Id.*). This was untrue, as it is undisputed that Shater's supervisor, Buss, had already identified another CSM, Boult, to likely replace Shater if he was promoted (Shell's Responses to Shater's First RFAs at No. 32; ROA.879; Shater Sworn COD at 4; ROA.523). When Shater told Buss what Hall had told him about there not being a replacement for him, Buss said this was not true and that during succession planning sessions that Hall had participated in, Hall had been informed that Boult had previously been identified as Shater's likely replacement if Shater was promoted (Shater Sworn COD at 4; ROA.523). A reasonable jury could see these facts as evidence that Hall had preselected Hunt and was working to soften Shater up to the idea of not receiving the RSM – Americas job.

Fifth, Maynor unequivocally testified that Hall made the decision to award Hunt the job on or about February 13, 2017 (Maynor Dep. No. 2 at 15-16; ROA.945), but during March 2017 Hall repeatedly lied in writing about not having yet decided to Shater, Blakely, and his entire department. *See supra* at § III.E.6 and RE Tabs 7 and 11. A reasonable jury could logically conclude that since Hall lied in March 2017 about not yet having made a decision about who to hire for the position, he just as easily could have lied from the start about not having preselected Hunt for the job as soon as he fired Oaks (and thus Shell's articulated reason is false and lacks credence).[5]

Sixth, in March 2017, Buss relentlessly pestered Shater about potentially taking another job in the BID and indicated that Hall was involved in that effort (Shater Dep. at 148-49, 167-68; ROA.929-30, 934; Shater Sworn COD at 8; ROA.527; Shell's Responses to Shater's First RFAs at No. 37; ROA.880). A reasonable jury could conclude that Hall asked Buss to do this because he wanted Shater to accept another job so that he would not be able to complain when his predetermined selection for the RSM – Americas role, Hunt, was announced. This conclusion is especially sensible because, although Hall lied about it, it is now a

[5] After he interviewed for the RSM – Americas job, but before Hall announced he was selected for it in May 2017, in his IDP, Hunt himself identified his next job at Shell as the RSM – Americas job (Hunt Dep. at 19-20; ROA.972). Hunt claimed in his deposition that he was merely expressing that he aspired to the RSM – Americas job, but a reasonable jury could find that this statement is evidence that Hunt knew he already had the job in the bag.

known and undisputed fact that by March 2017 – the exact same time Shater was being hounded to take the BID job – Hall had already decided to select Hunt. *See supra* § III.E.6.

Seventh, on May 1, 2017, when Hall called Shater and told him that he was second for the RSM – Americas role, and that another candidate was selected, Shater told Hall that if he went through all the listed competencies for the job from the job description, he is objectively qualified for them, and Hunt – who Shater suspected he had selected for the job – is not (Shater Sworn COD at 5; ROA.524). At that point Hall replied that "sometimes we can't go by competencies." (Shater Sworn COD at 5; ROA.524; Shater Dep. at 155; ROA.931). A reasonable jury could find that Hall's reply is consistent with the fact that Hall had preselected Hunt and that he had done so not based on a good faith analysis of who had superior competencies for the role – as Shell now claims – but rather on the fact that Hall and Hunt shared the same race and national origin. This conclusion is bolstered by the facts that:

- Within Shell, of the five RSMs in the Company around the globe, four of them had been in a CSM role at Shell before becoming an RSM – *i.e.*, it is a natural progression for a CSM to be promoted into a RSM role (Shater Sworn COD at 1; ROA.520; Maynor Dep. No. 2 at 68; ROA.958). Shater had been a CSM at Shell for more than three years; Hunt had never been a CSM at Shell (Hunt Dep. at 13; ROA.970).
- Shater's boss, Buss, had stated in writing that Shater would be a "strong contender for both RSM MENA or Americas" (Shater Sworn COD at 2 and Ex. A-5 thereto; ROA.521, 560). There was no evidence that Hunt's boss, or anyone else, ever saw him as being a strong contender

for any RSM position, including the RSM – Americas position. No one did. *See supra* § III.I.

- Unlike Shater, Hunt had no security clearance and could not get one since he was not an American citizen (Hall Dep. at 265; ROA.805). This is why no expat had ever before been hired into the RSM – Americas role (Shater Dep. at 165; ROA.934; Shater Sworn COD at 6; ROA.525). Hunt's selection is indefensible on the merits, as Hall all but admitted to Shater during their phone conversation on May 1, 2017.

- Hall selected Hunt for the job even though Hall himself had stated that the person he needed for the job would "Preferably - for wider HR reasons, LT [Leadership Team] balance and the reason identified above" be "a US national." (Email from Hall to Blakely, Smits, and Maynor of 02/13/2017; ROA.888; RE Tab 6). Shater was a US national; Hunt was not (Maynor Dep. No. 2 at 40-41; ROA.951). Shater was clearly better qualified than Hunt from any objective perspective – even based on Hall's own post-interviews email.

- It is telling that Hall did not include the "US national" preference in his altered job description for the RSM – Americas position. If he had, that would have essentially ruled Hunt out. A reasonable jury could conclude that is exactly why Hall did not include it.

- Numerous members of the Corporate Security Department, including Shater's boss, Buss, opined that: (a) Shater was better qualified than Hunt; and (b) that Hunt had been preselected. *See supra* § III.I. The District Court dismissed this evidence on the grounds that these persons' statements are meaningless given that Shell employs tens of thousands of employees (ROA.1685). There is no legal authority to support the District Court on this point.

- Evidence of Hunt's preselection was so overwhelming and obvious that even Hall admitted that during the period between the interviews and announcement he "became aware of rumors that Mr. Hunt had been preselected for the RSM – Americas position." (Hall Decl. at ¶ 24; ROA.389). It turns out those "rumors" were well-founded. *See supra*.

While evidence of preselection alone is not proof of pretext, evidence of preselection is proof of pretext where there is indicia of unlawful discrimination

attached to the preselection. *See Hiner v. McHugh*, 546 Fed. Appx. 401, 407 (5th Cir. 2013). For example, "[a]n employer's preselection of a job candidate, in violation of its own procedures requiring fair consideration of qualified applicants, is "undeniably relevant to the question of discriminatory intent,'" *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), and "operates to discredit the employer's proffered explanation for its employment decision,'" *Goostree v. State of Tenn*., 796 F.2d 854, 861 (6th Cir. 1986). As explained herein, such is the case here: the evidence of Hall's preselection of Hunt is compelling proof of pretext because it reveals that Shell's fundamental assertion in this lawsuit – that it in good faith simply followed its standard, neutral policies and practices, which led Hall to conclude that Hunt was best qualified for the job – is false and unworthy of credence. *See, e.g*., *Stokes v. Detroit Pub. Sch.,* 807 Fed. Appx. 493, 503 (6th Cir. 2020) (reversing summary judgment in a discrimination case based solely on evidence of preselection)*; Edwards v. Oklahoma ex rel. Bureau of Narcotics and Dangerous Drugs Control*, 233 F. Supp.3d 1228, 1234 (W.D. Okla. 2017) (denying employer's motion for summary judgment in a Title VII failure to promote discrimination case in part because of evidence of preselection and suspicious procedural practices).

Fifth Circuit precedent is in line with these cases. Specifically, this Court has held that proof that the employer's given explanation is false or unworthy of credence is evidence of pretext and discrimination *vel non*. *See Haire v. Board of*

Sup'rs of La. State Univ. Agricultural & Mech. Coll., 719 F.3d 356, 365 n. 10 (5th Cir. 2013) ("[e]vidence demonstrating that the employer's explanation is false or unworthy of credence . . . is likely to support an inference of discrimination *even without further evidence of defendant's true motive*.") (italics in original). Here, a reasonable jury could find Shell's articulated reason is false and unworthy of credence. As such, summary judgment was not proper. *See, e.g., Gosby*, 30 F.4th at 528 (reversing summary judgment in a discrimination case where plaintiff presented evidence that the employer's given reason for the challenged action was false or unworthy of credence).

Eighth, when Shell responded to Shater's EEOC Charge, it obfuscated the fact that Hall controlled the entire process and was the sole decisionmaker and instead asserted that the "panel unanimously determined that Mr. Hunt would be a better fit for the role." (Shell's Position Statement to the EEOC at 5; ROA.825). That was false – Maynor did not agree that Hall was the better fit for the role (Maynor Dep. No. 2 at 11-12; ROA.944), and Blakely was totally out of the loop on Hall's vetting process and ultimate decision, as reflected by her email exchanges with Hall on: (a) February 6, 2017 when Hall sent her the prior job description without his secret alteration just days before the interviews (ROA.691; RE Tab 10); and (b) March 20 and 23, 2017 in which she asked Hall if he had made a decision yet and he falsely

replied that he had not (ROA.725; RE Tab 11).[6] Shell's misrepresentations to the EEOC – clearly designed to hide the fact that Hall alone controlled the process from start to finish – are more evidence of preselection and pretext (*see also supra* fn. 2). *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015) (reversing summary judgment that had been granted for the employer and holding that a jury may view "erroneous statements in [an] EEOC position statement" as "circumstantial evidence of discrimination.").

3. The District Court's Ruling Is Not Consistent With Summary Judgment Rules

Reversal is also proper because the District Court's ruling is inconsistent with the summary judgment standard in six ways. First, the District Court weighed the evidence and made and resolved inferences that are for the jury to decide. For example, the District Court tersely found as a matter of law that Hall's secret insertion into the job description that "[c]onversational Spanish and/or Portuguese speaking candidates preferred" was no evidence of pretext because "choosing someone who speaks Spanish to fill a post covering Mexico and Central America over someone who does not would make sense to any number of people." (ROA.1682). But that explanation ignores: (a) the highly suspicious timing of Hall's

[6] Blakely's email to Hall of February 6, 2017, shows that as of that date – just two to three days before the interviews – she had not even seen the job description or candidate profiles (ROA.691; RE Tab 10).

secret change to the job description; (b) that no such language preference was ever in any other RSM job description around the world; (c) that other RSM's (including Shater's boss, Buss) cover localities around the world for which they do not speak the local language; (d) that Shell's own HR Manager, Maynor, testified that Shater's Spanish fluency did not make him a better candidate for the job; (e) that Oaks and the person who held the RSM – Americas position before him did not speak Spanish; (f) that English is Shell's official business language; (g) that according to its annual reports, Shell has nearly twenty times more employees in North America than South America, where its workforce is comparatively tiny, *see supra* fn. 1; and (h) that Hall concealed his alteration from Maynor and Blakely. Given all this evidence, a reasonable jury could find that Hall's secret and suspiciously timed insertion into the job description that "[c]onversational Spanish and/or Portuguese speaking candidates preferred" was a red-herring pretext to justify his discriminatory preselection of Hunt. Even if a reasonable jury could also reject that conclusion (which frankly seems questionable) it was still error for the District Court to weigh the evidence and conclude otherwise as a matter of law. *See, e.g.*, *Insurance Co. of No. America v. Bosworth Construction Co.*, 469 F.2d 1266, 1268 (5th Cir. 1972) (summary judgment is inappropriate if competing reasonable inferences may be drawn regarding any material factual issue).

Second, the District Court relied on evidence from Hall's declaration that had been disputed (and disproven) by other evidence, which is inconsistent with the summary judgment standard. For example, even though Shell's assertion to the EEOC that the "panel unanimously determined that Mr. Hunt would be a better fit for the role" had been disputed (and disproven) by contrary evidence (*see supra*), Hall repeated this same false claim in his declaration in this case and the District Court credited it as being true. *See* Hall Decl. at ¶ 21 and ROA.389 and Court's Order at ROA.1678. This is particularly problematic in this case because Hall's declaration was the central evidence Shell relied on in its motion for summary judgment. *See Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016) (summary judgment improper in cases where the movant's evidence is primarily disputed declaration or deposition testimony).

Third, the District Court ignored damaging evidence against Shell. For example, the District Court completely ignored the undisputed evidence that Hall had lied to Shater, Blakely, and the entire Corporate Security Department in March 2017 about not yet having made a decision concerning who to select for the RSM – Americas job. *See supra*. This is not a small thing. In a case that turns on whether Hall was truthful about when he decided to select Hunt for that job, the fact that he lied about that very issue is highly relevant. As such, for the District Court not to address this evidence at all constitutes reversible error. *See, e.g.*, *Faruki v. Parsons*

S.I.P., Inc., 123 F.3d 315, 319 (5th Cir. 1997) (reversing summary judgment where district court failed to address the plaintiff's most compelling evidence).

Fourth, the District Court speculated there was damaging evidence against Shater that does not exist. For example, in footnote 15 of its Order, the District Court misconstrued statements in Shell's Position Statement to the EEOC to wrongly speculate that Shater was later promoted to the RSM – MENA position (in truth, as Shell's Position Statement actually said, a few months after he filed his EEOC Charge in this case, Shater was promoted to a newly created position called Regional Security *Advisor* – MENA (ROA.842), but Buss was still the RSM – MENA (ROA.992)) and then reasoned that somehow further demonstrated that Shater's discrimination claims over the RSM – Americas position were baseless (ROA.1690 n. 15). But Shater was never promoted to RSM – MENA. Even if he had been, that would not somehow retroactively demonstrate that his claim over the RSM – Americas position is meritless. What the District Court did does not align with the summary judgment standard. That standard requires the District Court to view "all facts and evidence in the light most favorable to [the nonmovant] and draw[s] all reasonable inferences in [the nonmovant's] favor." *Voss v. Goode*, 954 F.3d 234, 237 (5th Cir. 2020) (citation omitted). In this case, the District Court did the opposite (ROA.1690 n. 15).

Fifth, the District Court applied an erroneously cramped and narrow view of the relevant evidence to be considered in this case. As this Court has stated: "[j]ust as '[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, . . . similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.'" *Donaldson v. CDB Inc.*, 335 Fed. Appx. 494, 503 (5th Cir. 2009) (citations omitted). The District Court held that *Donaldson*'s admonition did not apply to failure to promote claims (ROA.1686). This is not a convincing distinction. At bottom, all the Court was saying in *Donaldson* is that in analyzing a discrimination claim, the entire relevant context matters. That makes sense in any discrimination claim.

The District Court alternatively concluded that, in any event, the Oaks matter was an "unrelated lawsuit[]," and was thus irrelevant (ROA.1687). But Hall and Shell strategically delayed telling Shater he did not get the job for months until it settled Oaks' lawsuit (*see* Hall Decl. at ¶ 23; ROA.389). As such, Shell's own actions show that Oaks' lawsuit was not "unrelated" to Shater's case.

Part of the contextually relevant evidence – *i.e.*, the "overall scenario" – in this case is that Hall had just been embarrassed by Oaks, an American minority who refused to faithfully execute his orders to hire based on age and whose allegations of retaliation against Hall in December 2016 admittedly "upset" him (Hall Dep. at 188-89; ROA.785-86). Based on the full record evidence in this case, a reasonable

jury could conclude that: (a) Hall favors white Brits and is more comfortable with them in leadership positions; and (b) after Oaks, an American minority, had embarrassed and "upset" him, he purposefully manipulated the process so he could replace Oaks with a fellow white Brit, Hunt, rather than another American minority like Shater. In other words, this evidence makes it even more reasonable for a jury to conclude that Hall's actions were driven by race and national origin. The District Court's refusal to consider or analyze the entire relevant overall scenario in this case was erroneous.

Sixth, the District Court summarily dismissed Jo Gacheru's entire declaration, concluding in a single sentence that it "relies entirely on conclusions and opinions." (ROA.1689). Gacheru is Black (Gacheru Decl. at ¶¶ 3, 5-8; ROA.1003; RE Tab 9). Gacheru (like Oaks and Shater) has no history of lying or encouraging others to lie. She worked in the Corporate Security Department from February 2013 through July 2021 (*Id.*). Gacheru testified that "[a]mong the openings in the Corporate Security Department for Job Grade 1 or 2 roles (which are the senior roles) white British nationals received the clear majority of the positions." (ROA.1003; RE Tab 9). This is factually true. Between 2012 and the end of 2017, approximately 95% of all the promotions to job group 1 or 2 in the Corporate Security department were awarded to white persons (the 5% was Oaks, who Hall later fired), approximately 75% white males of British national origin (Shater Sworn COD at 10; ROA.529). The current

CSLT is made of up 100% white males, all Brits except one German (Shell's Original Answer, Doc. No. 7 at ¶ 60; ROA.311; Shater Dep. at 183-84; ROA.938).

Gacheru also testified that she complained of racial discrimination in the Corporate Security Department, was brushed off, and that "[t]here is a culture at play that has favored white males predominantly of British origin for the senior Corporate Security Department roles, and if you don't fit that profile, well it's clear what happens – it is unlikely your career will advance into those sort of senior roles." (ROA.1004; RE Tab 9). Gacheru's statement in this regard (and other similar ones about the culture of discrimination in her declaration) are additional proof of pretext and discrimination *vel non,* even if they are opinions. For example, in *Hansard v. Pepsi–Cola Metropolitan Bottling Co.*, a coworker, Miller, testified that the plaintiff was not rehired because of his age. 865 F.2d 1461 (5th Cir. 1989). Miller had no first-hand knowledge regarding the disputed employment decision, but he was familiar with the defendant's "hiring policy and its general corporate youth movement...." *Id*. at 1465–66. The Fifth Circuit allowed the testimony, observing that "[c]ourts often have permitted lay witnesses to express opinions about the motivation or intent of a particular person if the witness has an adequate opportunity to observe the underlying circumstances." *Id*. at 1466. Similarly, in *Haun v. Ideal Industries Inc.*, the Court affirmed the district court's decision to allow lay testimony that the employer was "phasing out older workers." 81 F.3d 541, 548 (5th Cir. 1996).

The coworker's testimony stood because it was "based on his perception [drawn from personal observations] and helped the jury determine whether [the employer] discriminated." *Id*. The same is true here as concerns Gacheru's sworn declaration. As such, it was error for the District Court to summarily dismiss it (ROA.1689). Shater's appeal does not hinge on Gacheru's testimony, but her declaration additionally corroborates Shater's claims and further demonstrates that summary judgment was improper.

VII. CONCLUSION

The pretext inquiry ultimately asks whether there is sufficient evidence for a jury to find that unlawful discrimination was the real reason for the employer's challenged decision. *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 478 (5th Cir. 2015). Here, there is. Accordingly, Shater respectfully requests that this Court reverse the District Court's grant of summary judgment and remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been electronically filed with the United States Court of Appeals for the Fifth Circuit and served through the electronic filing system to the persons listed below on this the 29th day of July 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,963 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B) (iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word word-processing program in 14 font size, Times New Roman.

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