No. 12-871

In the Supreme Court of the United States

UNIVERSITY OF OREGON,
Petitioner,

v.

MONICA EMELDI,
Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND SIX OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The petition presents the following questions:

1. Whether resort to the *McDonnell Douglas Corp. v. Green* framework is warranted when the defendant has articulated a legitimate, nondiscriminatory reason for the challenged action.

2. Whether the Ninth Circuit misapplied this Court's settled precedent governing retaliation claims when it concluded that the plaintiff's speculation about the reason for her academic difficulties constituted sufficient proof of retaliation to defeat summary judgment.

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INTEREST OF *AMICI CURIAE*[1]

Amici are a non-profit organization (American Council on Education) whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States, and six other organizations representing numerous additional higher education institutions and individuals engaged in higher education. A list of *amici* and summary of their members is included in the addendum hereto. The Ninth Circuit's ruling in this case is critically important to *amici* and their members because the Ninth Circuit's misapplication of summary judgment standards in allowing this case to proceed to trial could substantially interfere with academic judgments and subject universities to costly litigation in disputes arising out of a common form of academic discourse on campuses across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from an academic dispute of the sort that frequently arises in the university setting, far removed from the sort of invidious sexual harassment within the heartland of Title IX's protections.

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that they timely informed all parties of their intent to file this brief in support of the University's petition for certiorari. All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Respondent Monica Emeldi—a former Ph.D candidate at the University of Oregon—took issue with the critique of her dissertation advisor (Dr. David Horner) that her thesis was too unfocused and that her methodology was flawed. After Emeldi complained to an administrator and Dr. Horner about the substance of his critique and his lack of support, Dr. Horner resigned as her dissertation committee chair, having concluded that his continued involvement would be "a barrier to [Emeldi's] progress" on her dissertation. Pet. 9. When Emeldi was unable to find another faculty advisor, she dropped out of the Ph.D program and filed this lawsuit under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681(a), claiming that Dr. Horner discriminated against her in retaliation for vague complaints she allegedly had made to others about a lack of support and female role models for female Ph.D candidates. Pet. 7.

The University moved for summary judgment, explaining that the contemporaneous documentary evidence and witness testimony established that Dr. Horner resigned because of a substantive, academic disagreement with Emeldi, not because of anything else. Emeldi has never denied the nature of their disagreement, but—admittedly "speculating," Pet. App. 37a—she asserted that Dr. Horner acted in retaliation for her alleged complaints of gender discrimination. The Ninth Circuit held these assertions were sufficient to create a disputed issue of material fact on whether retaliation caused Dr. Horner's resignation. Emeldi has not pointed to any evidence to corroborate that Dr. Horner *even knew* about her alleged complaints of gender discrimination. Yet based on nothing more than Emeldi's own allegations and

speculation, the Ninth Circuit held that the University will be subjected to a full blown trial on her claim.

The Ninth Circuit's decision is contrary to settled law governing summary judgment standards. It appears to be the result of confusion regarding the burden-shifting framework initially devised by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In particular, as petitioner has explained (at 18-19), the panel improperly allowed Emeldi's *prima facie* showing that Dr. Horner's resignation was not "completely unrelated" to her alleged complaints to defeat summary judgment on the *ultimate* question of discrimination. Compounding that error, the court held that Emeldi's own ambiguous, self-serving statements in a declaration were sufficient to create a triable issue of fact precluding summary judgment on her Title IX claim. The upshot is—as the seven judges who dissented from the denial of rehearing *en banc* wrote—the decision in this case "erodes the well-established standards for summary judgment." Pet. App. 47a (Kozinski, C.J., joined by Judges O'Scannlain, Graber, Fisher, Tallman, Bea, and M. Smith, dissenting).

But as the dissenters recognized, it is much worse—the panel's decision "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors." *Id.* Candid back-and-forth exchanges between professor and student are essential to the dissertation process and innumerable other endeavors in the university setting. Under the panel's decision, a student may single-handedly transform a genuine academic disagreement into a triable issue of discrimination under federal law. Accordingly, the decision will inhibit education by impairing the dialogue between teachers and students.

Indeed, going forward in the Ninth Circuit, "professors will have to think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court." *Id.* at 51a. At the same time, the decision below threatens to interfere with a university's right to determine and enforce its educational standards for academic progression.

This is—as the dissenters aptly observed—"a very, very bad result, which bespeaks a major misapplication of long-standing legal principles to the sensitive area of academia." *Id.* at 51a-52a. Certiorari is warranted to review the questions presented or, at a minimum, summarily reverse the Ninth Circuit's decision, which governs over 125 universities that issue tens of thousands of doctoral degrees each year.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION FUNDAMENTALLY MISAPPLIES SETTLED SUMMARY JUDGMENT STANDARDS

1. Summary judgment is "an integral part of the Federal Rules," which are "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). A "principal purpose" of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 323-24. It is intended to "prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials." 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2712 (1998) (citing cases). It must be applied to take into account both the rights of the party asserting the claims and "the rights of

persons opposing such claims . . . to demonstrate in the manner provided by the Rule, prior to trial, that the claims . . . have no factual basis." 477 U.S. at 327.

The summary judgment standards apply with the same force in discrimination cases, even though such cases often involve questions of motivation and intent. This Court has "reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (citation omitted); *id.* (refusing to "insulate an entire category of employment discrimination cases from review under Rule 50"); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993)); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). In discrimination cases, as in other cases, "summary judgment has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992).[2]

2. As explained in the petition and the dissenting opinions below, the Ninth Circuit's decision in this case misapplies settled summary judgment standards. The

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[2] *See also Chapman v. AI Transp.*, 229 F.3d 1012, 1026 (11th Cir. 2000) (*en banc*) ("The long and short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale."); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (*en banc*) ("There is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial.").

court held that Emeldi's self-serving and speculative statements were sufficient to establish that her advisor resigned *because* she had complained about gender discrimination, despite substantial contemporaneous documentary evidence and affidavits showing that the advisor had already advised that he disagreed with the plaintiff's research agenda and methodology. In so doing, the court allowed a student to single-handedly transform an academic dispute into a full-blown trial regarding gender discrimination. The Ninth Circuit committed multiple errors in reaching that result.

At the outset, the Ninth Circuit misapplied the familiar *McDonnell Douglas* framework—lending credence to the growing chorus of concerns that have been raised about its utility. *See* Pet. 12-22. The purpose of the framework is to ease the plaintiff's initial burden of showing discrimination—by applying a lenient standard—so that the defendant will come forward with contrary evidence. *See Hicks*, 509 U.S. at 510-11. When the defendant does so, the presumption of discrimination created by the *prima facie* case "drops out of the picture," and the factfinder is left to weigh the defendant's non-discriminatory explanation against the plaintiff's evidence (including evidence of pretext) to "decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her].'" *Id.* at 511 (citation omitted); *see also Reeves*, 530 U.S. at 146-47. Critically, "'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Hicks*, 509 U.S. at 507 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

In this case, the Ninth Circuit erred by applying the lenient standard of step one of the *McDonnell Douglas* framework (which looks to whether there is a *prima facie* case) to the ultimate question of discrimination. The panel emphasized at step one that the plaintiff's required showing is "minimal," Pet. App. 9a, and that to establish a *prima facie* case of causation, the plaintiff need only show that the protected activity and the adverse action are "not completely unrelated," *id.* at 14a. But then again, at step three—without acknowledging the difference in the standard—the court stated: "For substantially the same reasons we concluded that Emeldi proffered sufficient evidence of causation, we likewise conclude that Emeldi's evidence is sufficient to show pretext." *Id.* at 20a. As a result, the court failed to ensure that there was adequate evidence of pretext to bring the case to the jury. And, in the process, the court lost sight of the "ultimate question of discrimination *vel non*." *Aikens*, 460 U.S. at 714-15. As discussed in the petition (at 15-19), the Ninth Circuit's misapplication of *McDonnell Douglas* in this case is emblematic of the widespread confusion caused by the *McDonnell Douglas* framework.

3. As the dissenting judges explained, when viewed through the proper lens of the ultimate question of discrimination and settled summary judgment standards, the evidence at summary judgment was insufficient to create a material issue of disputed fact on causation. *See* Pet. App. 28a-44a (Fisher, J., dissenting); *id.* at 47a-49a (Kozinski, C.J., dissenting). In particular, Emeldi did not present sufficient evidence that Dr. Horner resigned as her dissertation chair and prevented her from finding a replacement *because* she had complained about gender

discrimination—the *sine qua non* of a retaliation claim. The evidence showed that, at the time of his resignation, Dr. Horner did not know about Emeldi's complaints of gender disparity. Oregon CA9 Br. 15.

The crux of Emeldi's claim is that she complained to an administrator about Dr. Horner's gender bias and the administrator relayed the discussion to Dr. Horner who then resigned (almost a month later). The supposed factual basis for the claim is her statement to the administrator that Dr. Horner was "being distant and relatively inaccessible to me" and her statement that the administrator "debriefed" Dr. Horner about their conversation. *See* Pet. App. 5a-6a. This cannot defeat summary judgment for at least two reasons.

First, Emeldi's only evidence is her own declarations—while the contemporaneous documentary evidence and testimony from other witnesses contradict her recollection. The Ninth Circuit made clear it was relying only on her own declarations when it held that a jury "crediting Emeldi's recollection" could find causation. *Id.* at 15a. But it is settled that a non-moving party cannot defeat summary judgment with conclusory allegations in its own affidavits. This Court has repeatedly admonished that a plaintiff may "not rest on his allegations . . . to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). And self-serving declarations of a plaintiff are no better than allegations in a complaint. As this Court has stressed, the purpose of Rule 56 "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. National Wildlife*

Fed'n, 497 U.S. 871, 888 (1990). But that is precisely what the Ninth Circuit allowed here. As the dissent from the denial of rehearing put it, the panel effectively "permitt[ed] Emeldi to plead her way out of summary judgment." Pet. App. 48a.[3]

Even if a plaintiff's own statements could defeat summary judgment, Emeldi's statements are too ambiguous to create a triable issue on her retaliation claim. This Court has held that "ambiguous conduct" does not create a triable issue of conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 597 n.21 (1986). Likewise, lower courts have recognized that ambiguous statements cannot support a jury finding of discrimination. *See, e.g.*, *Griffin v. Finkbeiner*, 689 F.3d 584, 596 (6th Cir. 2012) ("Even if made by a relevant speaker, '[i]solated and ambiguous' comments will not support a finding of discrimination." (citation omitted)); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1151 (10th Cir. 2008) ("[A]n isolated and ambiguous comment is generally considered too abstract to support an inference of discrimination"). And more generally, this

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[3] In stark contrast with the Ninth Circuit's decision below, other courts of appeals have consistently recognized that conclusory allegations in an affidavit are not sufficient to defeat summary judgment. *See, e.g.*, *Thomas v. Corwin*, 483 F.3d 516, 526-27 (8th Cir. 2007) ("Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment."); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("[U]nsubstantiated assertions are not competent summary judgment evidence. The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." (citation omitted)).

Court has held that "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

Emeldi's ambiguous statement that Dr. Horner was "distant and relatively inaccessible" hardly qualifies as a complaint about gender discrimination. If it did, then professors across the country would be open to Title IX charges simply for being aloof or difficult to reach after class. And Emeldi's claim that the administrator "debriefed" Dr. Horner about the conversation she had with Emeldi in which she reportedly said that Dr. Horner was "distant and relatively accessible" (and allegedly raised other, more generalized complaints with the Ph.D program) does not amount to evidence that Dr. Horner actually knew about Emeldi's alleged complaints or understood them to be *gender* based, especially given that the administrator denies discussing gender discrimination with either Emeldi or Dr. Horner. Allowing this ambiguous evidence to move the case past summary judgment directly contravenes this Court's settled precedent.

Emeldi herself candidly admitted when asked why she believed Dr. Horner's resignation was gender-based retaliation, "I would be speculating." Pet. App. 37a. Speculation, and no more, is hardly sufficient to defeat a motion for summary judgment.

3. As the dissent from the denial of rehearing explained, the panel's misapplication of summary judgment standards in this case also is at odds with this Court's seminal teachings in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Pet. App. 50a. Even at the pleading stage, "'naked assertion[s]' devoid of 'further

factual enhancement'" are not sufficient to avoid a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The plaintiff must cross "the line from conceivable to plausible." *Id.* at 680 (quoting *Twombly*, 550 U.S. at 570). Emeldi has not satisfied even that burden—even assuming she has moved the meter to *conceivability*. The plaintiff's obligation to do so is only more pressing at the summary judgment stage, once discovery is complete.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF SUMMARY JUDGMENT STANDARDS WILL IMPAIR ACADEMIC FREEDOM

Failing to enforce summary judgment standards imposes serious costs on defendants and society. But, as the dissent from the denial of rehearing observed, "[t]he costs are even greater in the Title IX context, where the vagaries of litigation will chill academic freedom and intimidate institutions into granting degrees to undeserving candidates." Pet. App. 51a.

This Court has long recognized the need for deference to academic judgments. In rejecting a student's claim that his dismissal from medical school violated the Fourteenth Amendment, the Court explained: "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Indeed, "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Id.* at 225 n.11 (quoting *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)); *see also*

Horowitz, 435 U.S. at 90 ("Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

Likewise, in cases where professors have sued universities claiming employment discrimination in tenure decisions and academic honors, lower courts have "recognized that scholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service." *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005); *see also, e.g.*, *Weinstock v. Columbia Univ.*, 224 F.3d 33, 47 (2d Cir. 2000), *cert. denied*, 540 U.S. 811 (2003); *Adams v. Trustees of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 557-58 (4th Cir. 2011). These cases recognize that courts and juries lack the expertise and standards to evaluate such judgments. In addition, courts are not accountable—like universities are—for the issuance of academic credentials to unqualified individuals.

The high level of deference and respect that courts traditionally have afforded universities and educators on the exercise of academic judgments is not simply a matter of sound policy—it is a matter of constitutional concern. As this Court has repeatedly recognized, academic freedom is a "special concern" of the First Amendment. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The First Amendment protects "educational autonomy"—"'[t]he freedom of a university to make its own judgments as to education.'" *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citation

omitted); *see also Ewing*, 474 U.S. at 226 & n.12 (the First Amendment protects "autonomous decisionmaking by the academy itself"). A university has "'four essential freedoms'" that are protected: "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)); *see also Grutter*, 539 U.S. at 329; *Ewing*, 474 U.S. at 226 n.12.

The First Amendment shields the free exchange of ideas between teachers and students. This Court has repeatedly invalidated government action that seeks to limit open discussion in educational institutions. In *Sweezy*, Chief Justice Warren explained that "[t]he essentiality of freedom in the community of American universities is almost self-evident." 354 U.S. at 250. A prohibition on lecturing on certain topics invaded the teacher's right to academic freedom. As the Court explained, "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

Ten years later, in *Keyishian*, the Court struck down a New York law that prohibited seditious utterances in public schools, echoing the Court's reasoning in *Sweezy*. *See Keyishian*, 385 U.S. at 603. The Court explained: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a

special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* (citation omitted). More recently, the Court reiterated in *Ewing* that academic freedom "thrives" on the "independent and uninhibited exchange of ideas among teachers and students." 474 U.S. at 226 n.12.

The decision below disregards these vital interests. The dissertation process is central to a university's academic freedom and second-guessing academic judgments made during that process jeopardizes that freedom. *See* Pet. App. 51a. The dispute in this case epitomizes that concern. Dr. Horner's action was based on his "judgment Ms. Emeldi's dissertation proposal was insufficiently developed to allow presentation to a dissertation committee. The conceptual foundation was not established, and her methodology would not have met the standards for a doctoral dissertation." *Id.* at 36a-37a. According to the University's current written policies, the dissertation committee "supervises a student's dissertation work, determines the acceptability of the dissertation, and serves as the final examining committee."[4] That is exactly what Dr. Horner was doing, and that process is of First Amendment concern. The result in this case will "dilut[e] the authority of our schools and universities to maintain standards of academic excellence among students and faculty." Pet. App. 52a.

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[4] *See* Univ. of Or., Dissertation Committee Policy (Effective Fall 2012), *available at* http://gradschool.uoregon.edu/committee-policy (last visited Feb. 13, 2013) ("Dissertation Committee Policy").

Tens of thousands of students and professors across the country—if not more—are engaged in the dissertation process. As the dissent from the denial of rehearing explained, "[t]he relationship between professor and Ph.D. student requires both parties to engage in candid, searing analysis of each other and each other's ideas. Methodology, philosophy and personality often lead to intractable disputes and, when they do, the professor must be free to walk away without fear of a frivolous discrimination suit." *Id.* at 50a-51a. Moreover, "by its very nature," the dissertation process "requires the professor to be highly critical of the student's work and capabilities." *Id.* at 26a-27a (Fisher, J, dissenting). Supervising a dissertation is an intensive personal and intellectual endeavor, and a significant time commitment. It is also voluntary: the committee chair "must be able and willing to assume principal responsibility for advising the student."[5] The Ninth Circuit's decision increases the cost of supervising a dissertation by adding the risk of an unfounded, federal discrimination lawsuit.

Allowing cases to proceed past summary judgment on the kind of scant record here "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors." Pet. App. 47a. The student-teacher relationship cannot be successful if the teacher cannot fairly criticize a student's work. Indeed, as the dissent from the denial of rehearing explained, "[i]f this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for

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[5] *See* Dissertation Committee Policy, *available at* http://gradschool.uoregon.edu/committee-policy.

fear that disgruntled students may haul them into court. This is a loss for professors and students and for society, which depends on their creative format." *Id.* at 51a. Of course, sex discrimination—and attempts to retaliate against those who report such discrimination—should not be tolerated. But permitting students to make a triable federal case out of the sort of evidence presented by respondent would directly impact and threaten academic judgments.

This result not only runs afoul of this Court's summary judgment cases, but it cannot be what Congress intended when it passed Title IX. After first inferring a cause of action for discrimination (*see Cannon v. University of Chicago*, 441 U.S. 677 (1979)), this Court inferred a private cause of action for retaliation under Title IX in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Inferred causes of action—no less than causes of action actually expressed by Congress—must be interpreted against the backdrop of the First Amendment. If the text of a statute is susceptible of an interpretation that can avoid a potential conflict with the First Amendment, it must be interpreted that way. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Title IX—which does not express a cause of action to begin with—is unquestionably subject to narrower interpretations that avoid First Amendment problems.

The U.S. Department of Education Office for Civil Rights (OCR) has recognized that Title IX must be interpreted to give a wide berth for the First Amendment. In the context of sexual harassment, the OCR explained that "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech," and that a school "must formulate,

interpret, and apply its rules so as to protect academic freedom and free speech rights."[6] Sexual harassment is not alleged in this case. But the same goes for retaliation claims—which, generally speaking, are one of the fastest growing categories of discrimination claims. Title IX and its anti-retaliation rule must be interpreted to respect the First Amendment interest in academic freedom. Congress could not possibly have intended the "very, very bad result" that the Ninth Circuit has dealt to academic freedom in this case.[7]

III. CERTIORARI IS WARRANTED

This Court's intervention is needed. As the petition explained, there is a conflict of authority regarding the

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[6] U.S. Dep't of Educ. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX* at 22 (2001), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[7] The Ninth Circuit decided this case on the premise that Title VII standards should be imported into Title IX for purposes of resolving retaliation claims, even when, as here, the claim arises outside of the employment context. Pet. App. 26a. As petitioner has explained, the decision below is wrong even accepting that premise. But it bears noting that—as the dissenters recognized—there are "critical differences between academia and the outside world." *Id.* at 51a (Kozinski, J., dissenting); *id.* at 26a ("[E]xtending the [Title VII] employment model wholesale into the *teacher-student* context—particularly to a graduate school Ph.D program—is problematic because these contexts differ in significant ways.") (Fisher, J., dissenting); *see also Cohen v. Brown Univ.*, 101 F.3d 155, 176-77 (1st Cir. 1996) (explaining that, although the First Circuit has "approved the importation of Title VII standards into Title IX analysis, [it has] explicitly limited the crossover to the employment context"), *cert. denied*, 520 U.S. 1186 (1997). The Ninth Circuit's decision in this case is even more shocking once these "critical differences" are taken into account.

McDonnell Douglas framework and how it applies once a defendant has come forward with a non-discriminatory reason for the challenged action. *See* Pet. 12-22. The proper application of the *McDonnell Douglas* framework is an unquestionably important issue—extending beyond Title IX to other claims of discrimination under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Section 1983, and other laws. Moreover, the Ninth Circuit's watering down of summary judgment standards will impact *all* civil cases, not just those arising in the university setting. As the dissent from the denial of rehearing observed, plaintiffs in the Ninth Circuit "will now cite *Emeldi* in droves to fight off summary judgment," claiming that that virtually any evidence is "enough under *Emeldi*"—and "[d]efendants will go straight to a trial or their checkbooks." Pet. App. 47a.

The decision in this case also will have enormous practical consequences for universities and their boards. The impact in the Ninth Circuit alone is substantial: there are 128 universities with doctoral programs that awarded over 26,000 degrees in 2010.[8] The decision allows students to turn a genuine

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[8] *See* NWCCU, *Northwest Comm'n on Colleges & Universities*, http://www.nwccu.org/Directory%20of%20Inst/Member%20Institutions/All%20Institutions.htm (last visited Feb. 13, 2013) (Alaska, Idaho, Montana, Nevada, Oregon, and Washington); HLC, *Higher Learning Commission*, http://www.ncahlc.org/Directory-of-HLC-Institutions.html (last visited Feb. 13, 2013) (Arizona); WSC, *Western Association of Schools and Colleges*, http://directory.wascsenior.org (last visited Feb. 13, 2013) (California, Hawaii); Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics*, http://nces.ed.gov/programs/digest/d12/tables/dt12_339.asp (last visited Feb. 13, 2013) (degrees awarded).

academic dispute with a professor into a credible threat of costly federal litigation. That threat is magnified by the fact that Title IX with its inferred cause of action is not subject to the express cap on compensatory damages under Title VII. *See* 42 U.S.C. § 1981a; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 656-57 &n.4 (5th Cir. 1997); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 681 (1999) (Kennedy, J., dissenting). In the wake of this Court's decision in *Jackson*, juries have awarded record-setting verdicts, including a $19.1 million and a $5.85 million award in two cases against California State University at Fresno.[9] Such awards increase the incentives for plaintiffs to bring such suits, and their ability to extract costly settlements. Universities, especially in today's economic climate, lack the institutional resources and funding to engage in protracted litigation and trials in such matters, particularly when risking such high damages awards. While the vast majority of students act in good faith, universities are still susceptible to baseless litigation.

Plenary review of the important questions presented is warranted. Alternatively, and at a minimum, the Ninth Circuit's flagrant contravention of this Court's summary judgment standards warrants summary reversal. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*).

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[9] *See* Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 Duke J. Gender L. & Pol'y 1, 2 (2010). The court later reduced the $19.1 million verdict and the parties settled for $9 million. *Id.* at 2 n.13.

CONCLUSION

For the foregoing reasons, and those in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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ADDENDUM

ADDENDUM: *AMICI* ON THIS BRIEF

The American Council on Education (ACE) is a non-profit organization that was founded in 1918, whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. ACE represents all sectors of American higher education—public and private, large and small, and denominational and nondenominational. ACE strives to enhance the vitality and well-being of the nation's higher education institutions through advocacy, research, leadership, and program initiatives. ACE regularly submits amicus briefs in cases that raise legal issues important to higher education.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities (AASCU) is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research

universities, AAU today focuses on issues that are important to research intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests of academic governing boards, boards of institutionally related foundations, and campus chief executive officers and other senior-level governance and leadership. AGB includes 1,900 institutions of higher learning and serves nearly 1,300 boards, both publicly supported and independent. The Association also serves more than 36,000 individuals, including trustees and regents, campus and public college and university foundation chief executive officers, board professionals and staff members and senior level administrators. AGB's mission is to strengthen, protect and advocate on behalf of citizen trusteeship in ways that support and advance higher education.

The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, landgrant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.

The National Association of Independent Colleges and Universities (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational

institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.