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 IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is utilization of the framework of *McDonnell Douglas Corp. v. Green* warranted when the defendant has articulated a legitimate, nondiscriminatory reason for a challenged action?

(2) Did the Ninth Circuit err in holding that the plaintiff had presented sufficient evidence to permit a reasonable jury to infer that the defendant had retaliated against her because of actions protected by Title IX?

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STATEMENT

This appeal presents a straightforward, although multi-faceted, dispute about the sufficiency of evidence to permit a jury to infer the existence of an unlawful retaliatory purpose. The particular circumstances are highly atypical, involving factual disputes unlike most discrimination or retaliation cases. The case does not present a vehicle for resolving any circuit conflict regarding such fact-bound issues.

(1) At the time of the events giving rise to this case, Monica Emeldi was a graduate student at the University of Oregon, studying for a Ph.D. in special education. Emeldi had largely completed her required coursework, and was increasingly focusing on the research and writing of her dissertation.[1]

As in virtually all Ph.D. programs, the successful completion of a dissertation was a core requirement for a Ph.D. at the university, and at the University of Oregon a student may only prepare and submit a dissertation under the supervision of a dissertation committee chair. The chair of Emeldi's dissertation committee was Dr. Robert Horner. The faculty member with whom Emeldi had originally planned to study had left the university subsequent to Emeldi's admission, and Horner had assumed the responsibility for serving as Emeldi's dissertation committee chair.

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[1] By the time she left the university, "[p]laintiff ha[d] completed all course work required and only need[ed] to complete her dissertation to complete her degree." (Pet.App. 56a).

In the spring of 2007, Emeldi was part of a Student Advisory Board that met with the Dean of the College of Education Department to express student concerns about various aspects of the graduate program.[2] Emeldi "collected comments from several graduate students and penned a memo, as the group's representative, listing the concerns." (Pet.App. 45a). Emeldi provided a copy of that memorandum to the Dean. The third item in the memorandum expressed concern about the paucity of women on the faculty.

> Students request that qualified Women be hired into tenured faculty positions [emphasis]. Students attempted and were unable to identify a current female appointment to a tenured faculty position. Students need to experience female role models successfully working within an academic context [emphasis]. Doctoral students request that the college model a balance of gender appointments that reflect the proportion of student gender population ratios.

(Pet.App. 4a). The complaint about the lack of women in tenured or tenure track positions referred to the Special Education Department[3], where Emeldi was studying. The College of Education Catalogue listed 9 professors or assistant professors on the Special Education Faculty; of this group only one was a woman. Among the other 26 faculty members who held lower ranking positions, 25 were women.[4]

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[2] Doc. 74, 19 (Emeldi Dec.).

[3] *Id.,* 14 ("What was challenged . . . is the percentage of women in the Special Education Area").

[4] Doc. 37-3, 156.

In other words, 8 of the 9 men held tenured or tenure track positions, compared to only 1 of the 26 women.

Emeldi contended that "all Department faculty received copies" of the memorandum she had written. (Pet.App. 6a).[5] The University, on the other hand, insisted that the Dean had deliberately not shown the memorandum to the faculty, even though the memorandum was concerned with practices of the faculty itself.[6]

At about this time Emeldi, for reasons that are in dispute, was encountering difficulties in her work with Horner. Horner had praised Emeldi's dissertation proposal as brilliant.[7] But, according to Emeldi, Horner exhibited systematic favoritism for male graduate students; in periodic research meetings with graduate students, Horner would generally ignore Emeldi or belittle her work. Horner increasingly pressed Emeldi to make changes in her research project which she believed were unworkable, and failed to provide her the detailed feedback she needed to move forward.

In October of 2007, in an effort to resolve these problems, Emeldi met with Marian Friestad, the Associate Dean of Graduate Studies in the

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[5] Doc. 37-2, 40 (I was told that . . . the work of the [student] group would be brought to faculty to build awareness and – and – for discussion.") (Emeldi Dep.).

[6] In the district court the university argued that "[t]he only person who knew about this memo was Dean Michael Bullis." Doc. 84, 6 (Oral Arg. Tr.). The district judge noted, however, that "Horner testified that while he was told there was a memo, he was not told about the content." (Pet.App. 60a).

[7] Doc. 74, 7 (Emeldi Dec.).

College of Education, and another university administrative official. According to Emeldi, she complained at that meeting about a systemic problem of gender-bias in the department, and pointed to Horner's action and attitude as examples of the less favorable treatment accorded to female graduate students.

> I described one possible cause of that problem as an institutional bias in favor of male doctoral candidates, and a *relative* lack of support and role models for female candidates. I mentioned the content issues in the [May 2007] Student Advisory Board memo and my concern about gender inequity of the faculty. I identified the chair of my dissertation committee, Dr. Rob Horner, as being distant and *relatively* inaccessible to me.

(Pet.App. 19a n. 7)(emphasis added). As the court of appeals noted, the use of the term "relatively" indicated Emeldi was asserting that Horner was less accessible to her than he was to male graduate students. (Pet.App. 18a-19a).[8] Freistad then spoke with Horner, and "debriefed" him about Emeldi's complaints. Friestad subsequently asserted, however, that she did not tell Horner that Emeldi had complained about gender bias.

A month after Emeldi's complaint to Friestad, Horner abruptly resigned as Emeldi's dissertation adviser. Without indicating in advance that he had any concerns about serving in that role, and without

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[8] The petition at times omits the adjective "relatively" when quoting this portion of Emeldi's declaration. Pet. 3, 27.

meeting with Emeldi to discuss the matter, Horner simply sent Emeldi an e-mail announcing his decision to resign. In that e-mail Horner explained that he was quitting because he wanted to help Emeldi, and believed that by doing so he would enable her to work with a different faculty member dissertation chair, someone whose views were more aligned with Emeldi's proposal.[9] Emeldi claims that Horner actually resigned to retaliate against her for having complained about gender-bias.[10]

Horner's resignation set in motion a chain of events which was fatal to Emeldi's graduate work. According to Emeldi, shortly after resigning as the chair of her dissertation committee, "Horner . . . told other Department faculty members that Emeldi should not be granted a Ph.D., and should instead be directed into the Ed.D. program." (Pet.App. 6a). An Ed.D. degree is in several respects a less desirable degree than a Ph.D.[11]

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[9] "I believe the most logical move is for you to work with an advisor who is more in tune with your research vision." (Force Aff., Ex. 3, 3). "[Horner] resigned as chair of Emeldi's dissertation committee in order to allow her to work with a professor who shared her research vision." (Pet. 2).

[10] Even the dissenting judge in the court of appeals acknowledged that that "Horner does not dispute that he resigned because of Emeldi's complaints . . . as relayed in general terms by Friestad." (Pet.App. 39a). There is a dispute is about whether Horner was told by Friestad that Emeldi's complaints included a charge of gender bias.

[11] Doc. 37-2, 48 ("the D.Ed. . . . does not allow me to conduct research in the field of education and essentially use my own assessment measure that I was working to develop for the dissertation, thus preventing me from publishing that research.

In the wake of Horner's resignation, Emeldi could not continue her graduate work and obtain a Ph.D. without finding another faculty member who was willing to replace Horner and serve as her dissertation chair. Emeldi asked fifteen other faculty members, virtually the entire special education faculty, to serve as her dissertation chair. Every one refused. (Pet.App. 6a). The faculty member with whom Emeldi had originally intended to study had by then returned to the university, but he was now working in a different unit and was not eligible to serve as Emeldi's dissertation chair.[12]

This extraordinary refusal of virtually the entire special education faculty to serve as Emeldi's dissertation committee chair doomed her efforts to obtain a Ph.D. Under the university's rules Emeldi was "[u]nable to complete her Ph.D. without a dissertation chair." (6a). Thus, "although the University did not formally dismiss Emeldi from the Ph.D. program, as a practical matter it rendered her unable to complete the degree." (Pet. App. 13a). The university's action "effectively terminated [Emeldi] from the program." (Pet. App. 59a).

(2) Emeldi filed suit against the university, alleging inter alia that she had been retaliated against because of her opposition to gender bias, in violation of Title IX of the Education Amendments Act of 1972.[13]

. . . The Ph.D. would allow me to conduct research with my own instrument to publish that research.")

[12] Doc. 74, 14 (Emeldi Dec.).

[13] Emeldi commenced her action in Oregon state court. The university removed the case to federal court.

After a period of discovery, the university moved for summary judgment. The district court granted summary judgment on the ground that Emeldi had not proffered sufficient evidence that the university's actions were taken because of a retaliatory motive. (Pet.App. 60a-61a). The district judge did not resolve the university's contention that Emeldi's May 7 memorandum, her work with the Student Advisory Board, and her complaint to Friestad did not constitute protected activity under Title IX. (Pet. App. 57a-60a).

(3) On appeal, as the university notes, "[t]he principal issue . . . was whether Emeldi had sufficient evidence to show that" the actions complained of were the result of retaliation for her objections to gender bias at the school. (Pet. 10). Surprisingly, however, the section of the university's appellate brief entitled "Emeldi failed to demonstrate a causal connection between her alleged protected activity and the adverse action about which she complains" was only three paragraphs long.[14]

The court of appeals reversed the dismissal of Emeldi's Title IX claim. The court of appeals concluded that Emeldi's action in complaining to Friestad about Horner's gender-based discrimination was protected activity under Title IX.

> Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally. . . . Emeldi's

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[14] Appellee's Brief, 14-16, *available at* 2011 WL 2617722 at *14-*16. The first and longest of those paragraphs was devoted to summarizing the relevant legal standards.

> complaint to Friestad that there was institutional bias against women in the Ph.D. program and that her dissertation chair, Horner, was treating his male graduate students more favorably than his female graduate students, is thus unmistakably a protected activity under Title IX.

(Pet.App. 11a). The University no longer disputes that under Title IX it could not retaliate against Emeldi for making those complaints.[15]

The court of appeals then analyzed the sufficiency of the evidence adduced by Emeldi that she had been retaliated against because of her complaints about gender discrimination. First, the Ninth Circuit concluded that the evidence was adequate to establish a prima facie case of retaliation. (Pet.App. 10a-19a). Second, the court of appeals assessed separately whether, in light of the University's proffered justification for its actions, Emeldi had offered sufficient evidence to permit a reasonable jury to conclude that the disputed actions—Horner's resignation as her dissertation committee chair and the subsequent refusal of 15 faculty members to serve in that position—were the result of an unlawful discriminatory motive. (Pet.App. 20a-23a). The court held that Emeldi had provided "ample circumstantial evidence" (Pet.App.16a) of such an unlawful motive, and that a reasonable jury could thus infer that the actions

[15] The court of appeals did not address the separate question of whether Emeldi's actions in May 2007, in connection with the Student Advisory Board, objecting to the paucity of women on the faculty, were protected activity under Title IX.

complained of had been taken because of her protected activity. (Pet.App. 20a-23a).

One member of the panel dissented, arguing that the evidence of retaliation offered by Emeldi was insufficient to withstand the university's motion for summary judgment. The analysis in that dissenting opinion of the evidence offered by Emeldi and by the university was considerably more detailed than the short argument the university itself had made in its appellate brief. (Pet.App. 25-42).

(4) The university filed a petition seeking panel rehearing and rehearing en banc. The university did not in that petition challenge the panel's conclusion that Emeldi had adduced sufficient evidence that she was a victim of retaliation.

The university's petition, rather, contended only that Emeldi's statements and actions regarding gender bias did not constitute protected activity. The university insisted that its officials had a constitutional right to retaliate against Emeldi because of her complaints. The university argued that the First Amendment protected its right to select its students, and thus immunized from judicial scrutiny decisions by university officials to effectively expel a student.[16] The university insisted that it also had a constitutional right to retaliate against Emeldi

[16] "One of the four essential [First Amendment] freedoms of a university is the right to determine for itself 'who may be admitted to study,' which reasonably includes the right to determine . . . whether a dissertation chair will or will not continue to serve as an adviser." Petition for Panel Rehearing and Suggestion for Rehearing En Banc, 8.

insofar as she was complaining about the composition of the faculty, because the selection of faculty members is protected by the First Amendment.[17] "A student's pronouncement about a university's decisions regarding its essential freedoms is not protected activity."[18]

The Ninth Circuit denied the petition. Six members of the court of appeals dissented from the denial of the petition for rehearing en banc. The dissenting opinion argued that Emeldi had not adduced sufficient evidence that university's actions were the result of a retaliatory motive. (Pet.App. 46a-51a). The dissenting opinion did not, however, endorse the university's contention that it had a First Amendment right to retaliate against Emeldi.

REASONS FOR DENYING THE PETITION

The question which divided the court of appeals is a disagreement about the sufficiency of the evidence in this particular case. The panel majority concluded Emeldi had adduced "ample circumstantial evidence." (Pet.App. 16a). The dissenters insisted Emeldi's evidence was insufficient. But however impassioned those dissents may have been, at bottom this is simply a

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[17] "Emeldi's allegedly protected activity relating to the University's hiring of faculty bears on something lawfully within the discretion of the University and about which the University has a First Amendment right to make its own decisions." *Id.* 11.

[18] *Id.*

fact-bound dispute that does not warrant review by this Court.

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER ONCE A DEFENDANT HAS ADDUCED EVIDENCE OF A LEGITIMATE REASON FOR A DISPUTED ACTION, A PLAINTIFF MUST STILL ESTABLISH A PRIMA FACIE CASE

For four decades the lower courts have relied on this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in analyzing claims of discrimination, retaliation, or other unlawful motive. The specific issue raised by the university regarding the meaning and applicability of *McDonnell Douglas* would not affect the outcome of this case, which thus does not provide an appropriate vehicle for addressing that question.

McDonnell Douglas establishes a straightforward three step framework which a plaintiff may use. First, a plaintiff must establish a prima facie case of discrimination or retaliation. The elements of that case vary with the circumstances. "The burden of establishing a prima facie case . . . is not onerous." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). A prima facie case raises a rebuttable presumption that the defendant did in fact discriminate (or retaliate) on an unlawful ground. *Id.* at 254 and n. 7. The burden then shifts to the defendant to "produce evidence that the [action complained of was taken] for a legitimate, nondiscriminatory reason." *Id.* at 254. The defendant must do so through admissible evidence, not mere argument of counsel. Id. at 255

and n. 9. If the defendant meets this burden of production, the presumption drops out of the picture, and the parties proceed to the ultimate question of whether the defendant took the action complained of for an unlawful purpose. Proof that the defendant's explanation is false will usually be sufficient to support an inference that the defendant "is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 146-47 (2000).

As the university correctly observes, there is disagreement among the lower courts as to whether a plaintiff must establish a prima facie case in a case in which (as almost invariably occurs) the defendant has indeed articulated a legitimate reason for the disputed action. (Pet. 16-17). That difference matters because in a number of circuits, notwithstanding this Court's admonition that the standard for establishing a prima facie case should not be a demanding one, the courts of appeals require a plaintiff to show, as a necessary element of a prima facie case, that he or she was treated differently than a "similarly situated" or "nearly identical" comparator. Because such comparators often do not exist, a claim may be dismissed for want of a prima facie case even though there is ample evidence—such as proof of the falsity of the defendant's explanation, biased remarks, or a pattern of discrimination—of an unlawful motive. (See Pet. 16-17).

This is an important problem, and one which this Court should address in an appropriate case. But this appeal is not a viable vehicle for doing so. The court below held that Emeldi had indeed established a prima facie case, so whether Emeldi was even required to do so—in light of the fact that

the university had articulated a reason for Horner's action—is simply irrelevant.

The issue might matter if the university both argued that Emeldi had not established a prima facie case and insisted that Emeldi was required to do so even though the university had offered evidence of a legitimate motive on the part of Horner. But the university has not advanced either such contention. The university does not in this Court argue that Emeldi failed to establish a prima facie case, and did not advance any such argument in the court of appeal. In addition, the university agrees with the courts that hold that once an employer has provided such a neutral explanation, it does not matter whether the plaintiff established a prima facie case, and that the only issue at summary judgment is whether the plaintiff has adduced sufficient evidence to permit the trier of fact to infer the existence of an unlawful motive. (Pet. 19).

The resolution of this issue would not affect the outcome of this case, and in fact the parties agree that Emeldi was not required to establish a prima facie case.

II. THIS COURT SHOULD NOT GRANT CERTIORARI MERELY TO REAFFIRM THAT THE QUANTUM OF EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE IS DIFFERENT FROM THE AMOUNT OF EVIDENCE NEEDED TO PROVE DISCRIMINATON OR RETALIATION

The university correctly notes that the amount of evidence needed to prove that discrimination or retaliation occurred is different than the evidence sufficient to create a prima facie

case. To establish discrimination or retaliation a plaintiff must offer evidence sufficient to permit a reasonable jury to conclude that a defendant acted with an unlawful motive.[19] The standard for establishing a mere prima facie case, on the other hand, is meant to be significantly less demanding. That basic distinction was established by *McDonnell Douglas*, and has been reiterated by this Court on several occasions.

The university asserts that "[m]ost commonly, courts conflate the plaintiff's light burden of establishing a prima facie case with her much heavier burden of establishing a genuine issue for trial." (Pet. 17). The university, however, does not point to *any* cases demonstrating the existence of that supposedly "common[]" problem, and certainly not the large number of decisions that would show that this problem is the "most common[]" difficulty that the lower courts have in assessing discrimination or retaliation cases.

The petition also contends that "this problem is particularly acute in retaliation cases, where courts have held that 'causation' is an element of both the prima face case and the claim itself." (*Id.*). Again, however, the university does not identify any body of decisions documenting the existence of this supposedly "acute" problem, and certainly not the sort of widespread pattern of decisions that would warrant this sweeping assertion.

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[19] Whether the plaintiff must show that that motive was a but-for cause of the adverse action in question, or merely a motivating factor, depends on the underlying statute or constitutional provision.

The instant case, the university argues, is its best example of this supposed problem. "The decision below vividly illustrates this danger of confusion." (Pet. 17). But the assertedly "common" error hypothesized by the university did not occur even in the instant case. The petition states that

> [a]lthough the discussion is cursory, it is *plain* that the majority applied the same standard at both the prima facie stage and the 'pretext' stage. In other words, Emeldi was allowed to escape summary judgment simply by showing that her complaint and Dr. Horner's resignation were '"not completely unrelated."' Pet. App. 14a.

(Pet. 18)(emphasis added). But it is not at all "plain" that the majority used the quoted phrase in assessing the overall sufficiency of the evidence. To the contrary, the phrase "not completely unrelated" appears only in the court of appeals' discussion of the prima facie case (at Pet.App. 14a), and never in the subsequent separate discussion of the sufficiency of Emeldi's evidence to prove retaliation (which is at Pet.App. 20a-23a).

The university correctly observes that in determining whether summary judgment should have been granted, the controlling standard is whether a jury could have found that the university retaliated against Emeldi because of her protected activity. '[T]he 'only relevant question' is whether a jury could conclude that the challenged action was based on plaintiff's protected status." (Pet. 19; see *id.* 28 ("[plaintiff] must demonstrate that the evidence is sufficient to support a jury finding that her version of events is more likely than the alternative")(emphasis omitted).

But that is precisely the standard that the majority opinion applied. "When deciding whether an asserted evidentiary dispute is genuine, we inquire whether a jury could reasonably find in the nonmovant's favor from the evidence presented." (Pet.App. 22a). "[A] reasonable jury could conclude from the evidence presented . . . that Horner's resignation was gender-based retaliation." (Pet.App. 22a).[20] "A reasonable jury could infer that she was blackballed as a troublemaker because of her claims of institutional gender bias in the Ph.D. program." (Pet.App. 22a n.8). "We cannot say that a reasonable jury would be compelled to reject liability." (Pet.App. 22a).[21]

In determining whether there is sufficient evidence to support a jury verdict in favor of the nonmoving party, a court may of course look at the same evidence relied on to demonstrate the existence of a prima facie case. *Reeves,* 530 U.S. at 143. At the prima facie case stage, a court is not required to

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[20] See Pet.App. 15a ("a reasonable jury, crediting Emeldi's recollection that she complained specifically to Friestad about Horner's favoring of male Ph.D. candidates, could find a causal link between Friestad's conversation with Horner and his resignation from the dissertation chair post"; "a jury reasonably could infer that Friestad passed Emeldi's [gender-bias] complaint on to Horner, and that Horner's resignation not long thereafter as Emeldi's dissertation chair was a response to Emeldi's complaint"), 20a (evidence adduced by Emeldi "could lead a reasonable jury to conclude that Emeldi's complaints of unequal treatment, and not Horner's dissatisfaction with her research, motivated Horner's resignation").

[21] See Pet.App. 20a ("Emeldi has presented evidence from which a reasonable jury could conclude that the University's account is pretextual").

limit its consideration to only part of a plaintiff's evidence; if the evidence considered at that stage is considerably more than needed to establish a bare-bones prima facie case, it may well suffice as well to defeat summary judgment. In the instant case, for example, much of the evidence discussed by the court of appeal in its assessment of the prima facie case was evidence that the reason given by Horner for resigning as Emeldi's committee chair was pretextual; the court necessarily considered the same evidence in deciding that a reasonable jury could find Horner's explanation was pretextual.

In sum, the court of appeals properly distinguished between the standard governing the creation of a prima facie case and the standard governing when evidence is sufficient to withstand a motion for summary judgment.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE

The university describes the second question presented as concerning whether the court below "misapplied this Court's settled precedent governing retaliation claims." (Pet. i). If that indeed were the issue, review would not be warranted. Once this Court has established "settled precedent" governing a question, it does not grant review to correct errors in the application of that standard.

But the actual issue is even less deserving of review. The substance of this portion of the petition (Pet. 22-30) does not concern any issue of substantive law—such as a dispute about the elements of a retaliation claim—but instead presents

only a series of objections to the court of appeals' evaluation of the evidence in this particular case.[22]

(1) The panel reasonably found probative the fact that Horner, who had been Emeldi's dissertation chair for several years, quit within a month after she complained of gender bias on his part. "[T]he proximity in time between Emeldi's complaint to Friestad about Horner and Horner's resignation as her dissertation chair is strong circumstantial evidence of causation." (Pet.App.14a; see *id.* at 14a-15a n.4, 20a,).[23] The university does not deny that proximity in time between protected activity and an adverse action is widely accepted as proof of retaliation.[24] The university points out that the two developments "were separated by a full month" (Pet 26), but does not suggest that a month is as a matter of law so long as to vitiate the probative value of the

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[22]Pet. 3 (plaintiff's claims have a "vanishing thin evidentiary foundation", 22 ("The Ninth Circuit got the merits completely wrong."), 23 ("Proof of such an unlawful motive is the sine qua non of a retaliation claim. Yet there is none."), 25 (evidence cited by the court of appeals was "minimally probative at best."), 27 ("Emeldi's theory of retaliation . . . had no evidentiary basis at all.").

[23] There was also evidence that Emeldi's May 2007 call for an increase in the number of female tenured and tenure track faculty was followed by retaliation. "[B]eginning after my advocacy for greater gender diversity on the faculty, I was publicly and chronically ignored in research team meetings by Rob Horner which resulted in . . . lack of access to academic support . . . ." Doc. 74, 7 (Emeldi Dec.).

[24] "[T]he idea that a causal connection can be shown by proximity in time between protected activity and adverse actions is the well-established rule followed in many cases." (Pet.App. 14a n.4).

evidence. The defendant notes that several other events occurred in between, and suggests that the proper inference would be that one of those intervening developments (or perhaps something before Emeldi's complaint) actually precipitated Horner's resignation. (Pet. 26). But those intervening events were merely recurrences of prior disagreements between Emeldi and Horner; a reasonable jury could conclude that Horner, who had not quit over such differences in the past, simply seized on the later events as an excuse.

The court of appeals also concluded that Emeldi's claims were supported by evidence that Horner had been discriminating against female graduate students and in favor of male students.

> Emeldi offered evidence that Horner exhibited gender-based animus in other contexts. . . . Specifically, Emeldi said that Horner gave more attention and support to male students and that he ignored her and did not make eye contact with her. She contended that, when she attended Horner's graduate student group meetings, she was 'not on the agenda, or when [she was] on the agenda, that no substantial/meaningful work [of hers was] discussed.' She gave specific examples of Horner's male students being given opportunities that were not available to his female students.

(Pet.App. 16a; see *id.* 20a).[25] The university argues that proof that Horner was biased against female

[25] Emeldi asserted that "Horner's male students had opportunities that were not available to his female students,

students would not support a conclusion that he would be likely to retaliate against a female student who objected to that discrimination. (Pet. 27). A reasonable jury, however, surely could believe that a misogynistic official (if that is what Horner was) might well retaliate against a woman who complained about being treated unequally. The university also objects that this type of evidence would "likely be inadmissible" under the Federal Rules of Evidence. (Pet. 27). But the defendant made no such objection in the courts below, and cannot do so for the first time in this Court.[26]

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such as access to more and better resources." (Pet.App. 4a). There were "disparities between the quality and quantity of academic support and related opportunities by gender that advantage male doctoral students need to be addressed" Doc. 74, 15-16 (Emeldi Dec.) A male student stated to Emeldi "that he was given permission by Rob Horner to choose a university desk of his preference, take it home, and keep and use it as personal property. This opportunity was not given to female doctoral students." *Id.* 17. Emeldi stated that her allegation of discrimination was based on "my observations between the disparity of support given male and female students, and the expectations, the kind of cultural norms around how females should conduct themselves." Doc 37-2, 141.

[26] The university argues that the retaliation claim is not supported by "Emeldi's perception that Dr. Horner . . . seemed 'distant and unapproachable toward her.'" (Pet. 27). But the actual statement in Emeldi's declaration differs significantly from this description and quotation. (Pet.App. 19a n. 7). The specific language used by Emeldi in describing Horner was that he was "distant and relatively inaccessible to me." The term "inaccessible" reiterates Emeldi's repeated complaint that she did not receive adequate feedback and guidance from Horner. The word "relatively," at the court of appeals stressed (Pet.App.

The court of appeals found potentially significant the fact that, following Horner's resignation, fifteen faculty members—virtually the entire special education unit--refused to serve as Emeldi's dissertation committee chair. "A reasonable jury could infer that she was blackballed as a troublemaker because of her claims of institutional gender bias in the Ph.D. program." (Pet.App. 22a n. 8). There was evidence that Horner, shortly after resigning, had spoken out against Emeldi continuing as a Ph.D. student. Although the university denied that Horner had resigned as Emeldi's dissertation adviser because of her bias complaints, it effectively conceded that Horner's displeasure with Emeldi (whatever its cause) prevented her from finding a replacement. "She drops out of the program because she fails to retain a relationship with Dr. Horner, her dissertation advisor. And as a result, cannot find herself a new dissertation advisor." (Doc. 84, 5 (Oral Arg. Tr.).

Although in any given case one or two faculty members might decline to serve as a dissertation committee chair, a reasonable jury could certainly conclude that fifteen having done so was too great a number to be a coincidence. The university argues that the excuses given to Emeldi by these faculty members were "satisfactory reasons for declining" (Pet. 24), but the university in support of its summary judgment motion did not—as *Burdine* requires--provide sworn declarations from those

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18a), was in context an assertion that male students had greater access. And Emeldi described Horner "as being" distant and relatively inaccessible, not merely as "seem[ing]" to act in that way.

fifteen officials explaining their actions or denying that someone else in the university had asked them to reject Emeldi's request. Where, as here, a graduate student has already devoted almost three years to her courses and research, a graduate unit and its faculty would normally find a way to provide a dissertation committee chair so that the student's effort to obtain a Ph.D. would not fail solely for want of such a chair.

In the district court the university insisted that Emeldi had never raised a gender complaint about Horner in her meeting with Friestad, relying on Friestad's declaration to that effect. But Emeldi in her own declaration insisted that she had voiced just such a complaint, and in this Court the university does not suggest that a jury would have been obligated to believe Friestad rather than Emeldi.

Because Friestad had admittedly conveyed Emeldi's concerns to Horner, the court of appeals held that a jury could infer that the briefing would have included word of Emeldi's bias complaint. "If we assume Emeldi's statements are true, a reasonable inference arises that Friestad 'debriefed' Horner about Emeldi's complaints of gender discrimination." (Pet.App.19a). A jury that concluded that Friestad was lying (or had forgotten) about Emeldi's bias complaint could reasonably conclude as well that she was also not telling the truth (or had also forgotten) about what she told Horner. In this regard the university argues only that "[i]t is hardly clear" that Friestad told Horner about Emeldi's discrimination complaint. (Pet. 25). But the evidence supporting a nonmoving party's contentions need not be "clear."

We do not suggest that the decision to grant or deny certiorari should turn on whether or not this Court agrees with the Ninth Circuit's assessment of this and other evidence. Rather, we set out these issues only to illustrate that the university's objection to the decision below really rests on fact-specific and fairly idiosyncratic evidentiary disputes.

(2) In this Court the university suggests that its graduate school mandates that professors and doctoral candidates engage in harsh personal criticism of one another. "That relationship [between professors and graduate students] 'requires both parties to engage in candid, searing analysis *of each other* and each other's ideas.'" (Pet. 29, *quoting* Pet.App. 50a)(emphasis added). Divisive personal disputes are routine, the university suggests, repeatedly prompting dissertation committee chairs to resign from that position. "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." (Pet. 29, *quoting* Pet.App. 50a-51a)(emphasis added). This sounds less like an conventional graduate program[27] than a recrimination-filled television reality show, "Jerseylicious" with advanced degrees.

Nothing in the record so far, however, supports this suggestion that the University of Oregon graduate programs have such an acrimonious environment. Perhaps at trial the university will persuade jury that Emeldi was not

[27] The American Council on Education describes the normal student-teacher relationship as one in which a teacher can "fairly criticize a student's work." Brief of *Amici Curiae* American Council on Education, et al., 15.

the victim of retaliation, but merely had the ill fortune to have enrolled in a graduate program pervaded by "searing" personal criticisms, frequent "personality"-based disputes, dissertation committee chairs who abandon their responsibilities, and faculty members indifferent to the fate of the university's graduate students. But the record in this case assuredly would not compel a jury to accept that characterization of the University of Oregon.

(3) The university insists that "plaintiffs 'will now cite *Emeldi* in droves to fight off summary judgment: We may not have any evidence, but it's enough under *Emeldi*.'" (Pet.29, *quoting* Pet. App. 47a)(Kozinski, C.J. dissenting). But a full year has passed since the March 12, 2012 panel decision, and that has not occurred. Among the thousands of federal briefs available on Westlaw, the panel decision in the instant case has been referred to in only nine briefs.[28] The decision is not cited (as the university predicts) for the implausible proposition that a nonmoving party can defeat summary judgment without any evidence at all. Rather, the

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[28] In addition to the briefs cited below, see Plaintiff-Appellant's Opening Brief, *Kilby v. CVS Pharmacy, Inc.,* No. 12-56130 (9th Cir. 2012), *available at* 2012 WL 6100493 at *17; Appellant's Reply Brief, *Schiff v. Barrett*, (9th Cir.), *available at* 2012 WL 6018870 at *5-*8; Opening Brief, *Cardenas v. United Parcel Service, Inc.,* No. 12-3986403 (9th Cir.) *available at* 2012 WL 3986403 at *23; Plaintiff/Appellant's Brief, *Ames v. Nationwide Mutual Ins. Co.,* No. 12-3780 (9th Cir.), *available at* 2013 WL 431683 at *39-*40; Appellant's Opening Brief, *Joki v. Rogue Community College,* No. 12-35413 (9th Cir.), *available at* 2012 WL 4364799 at *38; Petition for Writ of Certiorari, *Patraw v. Groth*, 133 S.Ct. 545 (2012), *available at* 2012 WL 3875290 at 10 n. 12.

panel opinion has been relied on for uncontroversial matters, such as its holding that summary judgment can be granted if there is no genuine issue of material fact[29], and has been invoked by defendants, Walmart[30] and BP.[31]

The en banc dissent warned, somewhat apocalyptically, that the panel decision had effectively abolished summary judgment. "Defendants will go straight to trial or their checkbooks—because summary judgment will be out of reach in the Ninth Circuit." (Pet.App. 47a). No such thing, of course, has happened in the year since the original panel decision. To the contrary, summary judgment continues to be routinely granted by district courts in that circuit using pre-*Emeldi* standards. District court and appellate judges in the Ninth Circuit most often cite the panel decision in the instant case for the propositions that summary judgment can be granted if there is no genuine issue of material fact[32] and that summary

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[29] Appellants' Brief, *Balestrieri v. Menlo Park Fire Protection Dist.,* No. 12-15975 (9th Cir.), *available at* 2012 WL 4364746 at *12.

[30] Defendants-Cross Appellants' Reply Brief, *Speedtrack, Inc. v. Walmart.com USA, LLC,* No. 12-1319 (Fed. Cir.), *available at* 2012 WL 5507127 at *5-*6.

[31] Appellee BP America Inc.'s Response Brief, *Vargas v. DP America Inc.*, No. 12-15340 (9th Cir.), *available at* 2012 WL 5387228 at *34.

[32] *McCauley v. ASML US, Inc.,* 2012 WL 124116 at *6 (9th Cir., Jan. 9, 2013); *So v. Kondas,* 485 Fed.Appx. 201, 201 (9th Cir. 2012); *Lalack v. Oregon*, 2013 WL 819789 at *9 (D.Or. March 5, 2013) *Pefley v. Gower,* 2013 WL 140036 (D.Or. Jan. 10, 2013); *Clarendon America Ins. Co. v. State Farm Fire and Casualty*

judgment cannot be defeated by mere conclusory allegations.[33] In a large majority of the lower court decisions in which the panel decision has been cited, summary judgment was been granted.[34]

The petition contains a number of pointed references to the fact that this retaliation claim arises in the context of higher education. But the university never explains how that context could affect the standard for granting summary judgment. Rule 56 of the Federal Rules of Civil Procedure does not establish a separate standard for lawsuits against (or by) institutions of higher education. This Court has repeatedly rejected suggestions that the courts should devise special standards under the Federal Rules out of solicitude for particular types of

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Co., 2013 WL 54032 at *3 (D.Or. Jan. 3, 2013); *Woods v. Gutierrez,* 2012 WL 6203170 at *4 (D.Or. Dec. 12, 2012);.

[33] *Grissom v. Riverside County Jail*, 2012 WL 5060029 at *3 (C.D.Cal. Aug. 22, 2012); *Hamilton v. White*, 2012 WL 3867358 at *3 (C.D.Cal. Aug. 10, 2012); *Barlin v. Sodhi*, 2012 WL 5411710 at *3 (C.D.Cal. Aug. 8, 2012).

[34] In addition to the cases cited above, see *Davis v. Folsom Cordova Unified School Dist.,* 2013 WL 268925 at *10-*11 (E.D.Cal. Jan. 23, 2013)(summary judgment for defendant); *Mizraim v. NCL America, Inc.,* 2012 WL 6569300 at *16 (D.Hawai'i, Dec. 14, 2012)(summary judgment for defendant granted on one of two claims); *Fearance v. Frances,* 2012 WL 6552232 at *3 (C.D.Cal. Sept. 27, 2012)(summary judgment for defendant granted on one of two claims); *Phan v. CSK Auto, Inc.,* 2012 WL 3727305 at *9 (N.D.Cal., Aug. 27, 2012)(summary judgment for defendant granted on claim regarding which *Emeldi* cited).

defendants.[35] Certainly Title IX itself does not authorize the courts to fashion special barriers to discrimination or retaliation claims of female students.

In *University of Pennsylvania v. E.E.O.C.,* 493 U.S. 182 (1990), this Court unanimously rejected the contention that institutions of higher education are entitled to more favorable treatment in the application of the nation's anti-discrimination statutes. The Court pointed out that if such defendant-friendly standards were applied to universities, those standards could with equal justification be demanded by other institutions that play "significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers?" 493 U.S. at 585. The generalized predictions of harm to higher education made in the instant case by the university and the American Council on Education are essentially the same as the dire—and unfounded--warnings made by the university defendant and the Council in *University of Pennsylvania v. EEOC.*[36] See 493 U.S. at 197 (noting defendant's argument), 201 (rejecting argument as "remote," "attenuated," and "speculative").

When Congress enacted Title IX, which is expressly directed at gender-based discrimination in

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[35] *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 514-15 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 166-68 (1993).

[36]Brief of Petitioner, No. 88-493, 34-36, *available at* 1988 WL 1025709; Reply Brief for Petitioner, No. 88-493, *available at* 1989 WL 1126946; Brief of the American Council on Education as Amicus Curiae in Support of Petitioner, No. 88-493, 11-18, *available at* 1989 WL 1126939.

an "*education* program," 20 U.S.C. § 1681(a) (emphasis added), it necessarily concluded that any resulting burdens on schools or universities would be outweighed by the uniquely destructive harms caused by the long history of invidious discrimination against female students. At the same time that Congress was enacting Title IX, it extended Title VII of the 1964 Civil Rights Act to forbid discrimination by educational institutions, concluding that "the costs associated with racial and sexual discrimination in institutions of higher learning" outweighed objections that the government should not "interfere[] with decisions to hire and promote faculty members." *University of Pennsylvania v. E.E.O.C.,* 493 U.S. at 190, 197.

The university insists that Ms. Emeldi's difficulties at the University of Oregon were mere "run-of-the-mill academic disputes" that should not be "federaliz[ed]." (Pet. 30). That turn of phrase ignores the quite extraordinary events that gave rise to this case. It is almost unheard of for a dissertation committee chair or adviser to abruptly quit mid-stream (and by e-mail, at that), or for virtually an entire department to then join in refusing to work with a graduate student, thus vitiating the years of coursework she had already devoted to obtaining a Ph.D. Of course, a jury may yet accept the university's contention that this was just a series of regrettable but unrelated events. But a jury might reasonably conclude instead that in this case a female graduate student who twice complained about gender-bias in her department, once on behalf of a group of her fellow students, was in retaliation repudiated by her dissertation committee chair and blackballed by the rest of the faculty. If that is indeed what occurred, it was not some "run-of-the-mill academic dispute[]," but a

pattern of abuse that epitomizes the very evils which Title IX was enacted to correct.[37]

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[37] *Jackson v. Birmingham Bd. of Ed.,* 544 U.S. 167, 180-81 (2005)("if retaliation were not prohibited, Title IX's enforcement scheme would unravel. . . . Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied").