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

REPLY BRIEF FOR PETITIONER

RANDY GELLER
DOUGLAS PARK
UNIVERSITY OF OREGON
1226 University of Oregon
Eugene, OR 97403

NEAL KUMAR KATYAL
Counsel of Record
DAVID M. GINN
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 12-871

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

REPLY BRIEF FOR PETITIONER

Emeldi's brief in opposition opens with two important concessions that demonstrate precisely why this Court's review is needed. First, she concedes (as she must) that the circuits are divided over the proper role of the *McDonnell Douglas* burden-shifting framework. Second, she concedes that it is important for this Court to resolve that confusion. Those concessions bring this case within the heartland of this Court's certiorari jurisdiction.

Having let the horse out of the barn, Emeldi tries to close the door by arguing that this case is not an appropriate vehicle for reviewing the admittedly important question presented. She evidently would prefer for the Court to take a case in which the plaintiff lost below. But the confusion surrounding *McDonnell Douglas* harms defendants as well as plaintiffs. In this case, the confusion happens to

have worked to the plaintiff's benefit. But the identity of the petitioner is not a principled reason to deny review in an otherwise certworthy case.

Nor is there any merit to Emeldi's lengthy discussion and argument regarding the facts of this case, which amounts to little more than a transparent attempt to suggest that the Ninth Circuit's errors were factbound and harmless. As a wide-ranging group of seven judges explained in dissent, the Ninth Circuit reversed the entry of summary judgment based on a fundamental misunderstanding about the quantum of evidence needed to prove retaliation under Title IX. Pet. App. 47a-50a (Kozinski, C.J., dissenting from the denial of reh'g en banc). And that misunderstanding is directly traceable to the confusing *McDonnell Douglas* framework. This case is an excellent vehicle for this Court to resolve that confusion. Alternatively, the Court may wish to summarily reverse the Ninth Circuit's decision.

ARGUMENT

I. AS EMELDI CONCEDES, THE LOWER COURTS ARE DIVIDED OVER THE IMPORTANT QUESTION PRESENTED IN THE PETITION.

1. Emeldi makes a critical concession in her brief in opposition: 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." Opp. 12. That disagreement is precisely what the University's petition asks the Court to resolve. Pet. i. And Emeldi concedes that the question presented is "important" and "should [be] address[ed] in

an appropriate case." Opp. 12. She concedes, in other words, that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). The Court should grant certiorari to resolve that conflict.

If anything, Emeldi understates the depth of the confusion and the importance of resolving it. The circuits are not simply split on the proper application of *McDonnell Douglas*; they are in hopeless disarray. *See* Pet. 15-16. There is little agreement within each circuit, let alone across the circuits. *See, e.g.*, *Rodgers* v. *U.S. Bank, NA*, 417 F.3d 845, 851-52 (8th Cir. 2005) (describing "conflicting lines of cases in our Circuit" applying *McDonnell Douglas*). Even defenders of *McDonnell Douglas* admit that its burden-shifting framework has led to "widespread confusion." Ruth I. Major, *McDonnell Douglas: The Oft-Misunderstood Method of Proof*, Federal Lawyer, May 2012, at 16.

This confusion has led to frequent errors in judicial reasoning. Pet. 16-19. It has also diverted time and resources away from more salient issues. Faced with inconsistent precedents, some judges have started covering their bases by first applying *McDonnell Douglas* and then, in the alternative, reviewing the evidence under a "single, unified approach." *Harper* v. *C.R. England, Inc.*, 687 F.3d 297, 313-14 (7th Cir. 2012). In *Harper*, for example, the Seventh Circuit first went through the entire burden-shifting analysis and concluded that the plaintiff had neither made out a prima facie case nor shown pretext. *Id.* at 309-13. Having done all that, it then conducted a second "streamlined evaluation" of the same evidence and reached "the same conclusion, without the 'snarls

and knots.' " *Id.* (quoting *Coleman* v. *Donahoe*, 667 F.3d 835, 862 (7th Cir. 2012) (Wood, J., concurring)). The Seventh Circuit's urge to replow the same ground is understandable in light of the confused state of the law, but it wastes the resources of courts and litigants. *Cf. Adeyemi* v. *District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008) (D.C. Circuit's "streamlined approach" spares courts and litigants from having to address "the often difficult and usually irrelevant prima-facie-case question").

2. This confusion would be bad enough if *McDonnell Douglas* came up in just a handful of cases every year. But it does not. Over the years, the burden-shifting framework has become the primary doctrinal lens for assessing discrimination and retaliation claims under a wide range of federal statutes. *See* Pet. 21. More than 2,500 cases have cited *McDonnell Douglas* in the past year alone. And the decision's true impact is far greater than the reported cases reveal, for the burden-shifting framework casts a long shadow over out-of-court negotiations and day-to-day employment practices.

Without intervention from this Court, the mess will grow as decisions applying *McDonnell Douglas* continue to accumulate. The Ninth Circuit's recent decision in *Brockbank* v. *U.S. Bancorp*, No. 11-35618, 2013 WL 311326 (9th Cir. Jan. 28, 2013), demonstrates the need for a definitive ruling from this Court. In *Brockbank*, the majority and the dissent split over whether the employer's stated reason for firing the plaintiff—that she had charged a number of personal expenses to her corporate credit card—was a pretext for age discrimination. The dissent observed that the disagreement illustrated "the 'snarls and knots' that the so-called indirect method

[of proof] under *McDonnell Douglas* causes the courts today." *Id.* at *6 (Ripple, J., dissenting) (citation omitted). The majority's attention to the entire burden-shifting analysis distracted from the only relevant question: whether the plaintiff had been fired *because of* her age. *Id.* at *6 (Ripple, J., dissenting) (citation omitted). As the dissent explained, "[w]ithout the 'ins and outs' of the now-prevalent paradigm, our focus on the ultimate question of discrimination would be sharper and, perhaps, we all would have seen the wisdom of the district court's decision in this case." *Id.* Yet the dissent also recognized that the majority's hands were tied: The "doctrines of stare decisis and precedent," it conceded, "prevent us" from taking a more straightforward and sensible approach to the evidence. *Id.*

3. This Court is uniquely positioned to untie the lower courts' hands and remove the "barnacles of multi-factor tests and inquiries" that have become encrusted on federal civil rights law. *Gordon* v. *United Airlines, Inc.*, 246 F.3d 878, 893 (7th Cir. 2001) (Easterbrook, J., dissenting). The question presented is ripe for review. Lower courts have struggled with *McDonnell Douglas* for forty years, and this Court has let the issues percolate without intervention for ten years, *see Raytheon Co.* v. *Hernandez*, 540 U.S. 44 (2003); *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003); *Reeves* v. *Sanderson Plumbing Products*, 530 U.S. 133 (2000).

The Court will soon hear argument in a case involving the standard of causation under Title VII's retaliation provision. *See University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 978 (2013) (No. 12-484). Reviewing the present case would be a sensible next step. After the Court elaborates the

ultimate standard of causation, it can then explain how the *McDonnell Douglas* framework relates to that standard. This case presents a perfect opportunity to clarify the meaning of this Court's precedents and bring a measure of harmony to a vitally important area of the law. *Cf. Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002) (certiorari granted to "resolve the conflict among the lower courts and in the process resolve any ambiguity in our own opinions").

II. THIS CASE IS AN EXCELLENT VEHICLE.

1. Despite conceding that the question presented generally warrants this Court's attention, Emeldi maintains that this particular case is unworthy of review. That is so, she says, because this Court's resolution of the question presented "would not affect the outcome of this case." Opp. 11. She acknowledges that confusion over the role of the prima facie case often leads courts to erroneously reject civil rights claims. Opp. 12. But she apparently believes the confusion harms only plaintiffs and never defendants. Emeldi suggests that when a defendant does not challenge the existence of a prima facie case (as here), the erroneous application of *McDonnell Douglas* is harmless. As she puts it in reference to her own lawsuit, the question of whether she actually had to make out a prima facie case "is simply irrelevant." Opp. 13.

It would have been more accurate for Emeldi to say that the prima facie case "*should have been* irrelevant." For even though the parties now agree that the Ninth Circuit should not have considered the prima facie case, there is no denying that the court of appeals went through the entire burden-shifting analysis. Pet. App. 10a-22a. That lengthy detour skewed the court's assessment of the ultimate

question of retaliation. Pet. 17-19. And while it is always difficult to evaluate outcome-determinativeness in a case such as this (where the standards are confused), skipping directly to that ultimate question would have made the focus "sharper," and would have revealed the "wisdom of the district court's decision" to enter summary judgment. *Brockbank*, 2013 WL 311326, at *6 (Ripple, J., dissenting). The question presented goes to the propriety of the court of appeals' detour. *See* Pet. i; Opp. i; *see also* Br. of American Council on Education et al. as *Amici Curiae* (ACE Br.) at 7-10. Emeldi's contention that a proper application of *McDonnell Douglas* would not have changed the outcome could be said of most cases, since courts rarely announce that they would have reached a different conclusion if they had applied a different standard. That cannot be sufficient to defeat this Court's review.

2. The Ninth Circuit's erroneous application of *McDonnell Douglas* led it to blur the distinction between the prima facie case and the ultimate issue of retaliation. Pet. 17-19. Emeldi agrees that the distinction is important and acknowledges that the standard for making out a prima facie case is "significantly less demanding" than the standard for proving the ultimate issue of retaliation. Opp. 13-14. She doubts, however, that courts confuse the two standards. Opp. 14.

She is wrong. Courts have expressly noted that "the similarity between the language used to describe the 'causal link' element of a plaintiff's prima facie case and the language used to describe the ultimate issue of what caused the employer to take an adverse employment action can understandably lead to confusion." *Adams* v. *City of Gretna*, 2009

WL 1668374, No. 07-9720, at *8 (E.D. La. June 12, 2009). And while judges do not often announce that they are applying the wrong standard, they have occasionally remarked when their colleagues do. *See, e.g.*, *Davison* v. *City of Minneapolis*, 490 F.3d 648, 663 (8th Cir. 2007) (Colloton, J., dissenting in part) ("Although the prima facie case requirement under *McDonnell Douglas* is 'not onerous' and should not be 'conflated with the ultimate issue of discrimination,' the majority treats it for purposes of summary judgment as sufficient to prove conclusively that the employer acted with retaliatory motive—regardless of the employer's proffered legitimate non-retaliatory reasons for the promotion decisions.").

As it happens, a district court in the Ninth Circuit confused the prima facie case with the ultimate issue just before Emeldi filed her brief in opposition. In *Chen* v. *Maricopa County*, No. 12-814, 2013 WL 1045484, at *5 (D. Ariz. Mar. 14, 2013), the defendant in a retaliation suit challenged the sufficiency of the allegations linking the plaintiff's protected conduct to her termination. Ignoring this Court's holding that the prima facie case is not relevant at the pleading stage, *see Swierkiewicz* v. *Sorema NA*, 534 U.S. 506 (2002), the district court concluded—quoting the Ninth Circuit's opinion in this case—that the plaintiff simply had to allege that her " 'protected activity and the negative employment action are not completely unrelated.' " *Chen*, 2013 WL 1045484, at *5 (quoting *Emeldi* v. *Univ. of Oregon*, 698 F.3d 715, 726 (9th Cir. 2012)). The plaintiff's sketchy allegations met that low prima facie standard, *id.*, and "unlock[ed] the doors of discovery," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Conflation of the prima

facie case and the ultimate issue can thus adversely affect defendants as well as plaintiffs.

3. Emeldi next contends that the Ninth Circuit applied the *correct* standard, suggesting that the majority's attention to the burden-shifting framework was a harmless frolic. Opp. 15-17. She points out that the court of appeals recited the summary judgment standard several times. *See* Opp. 16. And she finds it unsurprising that the court "considered the same evidence" at both the first stage of the burden-shifting analysis and the last stage. In her view, the Ninth Circuit "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." Opp. 17.

That formulation is misleading. The evidence at summary judgment must be viewed "through the prism of the substantive evidentiary burden." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Here, that means Emeldi had to submit enough evidence to support a jury finding that her retaliation theory is more likely to be true than Dr. Horner's neutral explanation for his resignation. And the record speaks for itself on that score. As the petition, the panel dissent, and the dissent from the denial of rehearing en banc have all explained in detail, there is no way to reconcile the panel majority's result with the proper analysis under Title IX.

The Ninth Circuit's opinion discloses the reason for this erroneous result: The court of appeals blended the light burden of establishing a prima facie case with the much heavier burden of establishing a genuine issue for trial. Although the Ninth Circuit naturally did not admit to being confused, its confu-

sion is palpable. When discussing the prima facie case, the majority said that Emeldi could establish a "causal link" between her protected activity and Dr. Horner's resignation simply by showing that the two " 'are not completely unrelated.' " Pet. App. 13a-14a. It then concluded—two sentences later—that Emeldi had made that showing. Pet. App. 14a. Critically, the majority framed its prima facie "causal link" conclusion in summary judgment terms: "From the record, we conclude that Emeldi has produced evidence from which a rational fact-finder could find a causal link between Emeldi's complaints of gender discrimination in the Department and the adverse actions identified above." Pet. App. 14a; *see also* Pet. App. 17a. Although that phrasing superficially resembles "but for" causation, it is clear from context that the majority meant that a reasonable jury could conclude that Emeldi's complaints and Dr. Horner's resignation were *not completely unrelated*.

The majority then transported that diluted standard to the third stage of the burden-shifting analysis. Rather than going over all the evidence with a critical eye, the majority summarily announced its conclusion: "For substantially the same reasons we concluded that Emeldi proffered sufficient evidence of causation" at the prima facie stage, "we likewise conclude that Emeldi's evidence is sufficient to show pretext." Pet. App. 20a. After having spent several pages painstakingly addressing the prima facie case, the majority devoted only one sentence to the question that actually mattered. *Id.* It was able to do that because it conflated the light burden of establishing causation at the prima facie stage with the more onerous burden of establishing the ultimate

issue of causation. *See id.* (citing case for the proposition that "the causation and pretext inquiries are often overlapping"). That was error, and the error is directly traceable the majority's reliance on the confusing *McDonnell Douglas* framework.

III. IN THE ALTERNATIVE, SUMMARY REVERSAL MAY BE APPROPRIATE.

The petition, the dissents below, and the amici have chronicled the many reasons why the Ninth Circuit's judgment is egregiously wrong on the merits. *See* Pet. 22-29; Pet. App. 28a-44a (Fisher, J., dissenting); Pet. App. 47a-50a (Kozinski, C.J., dissenting from the denial of reh'g en banc); ACE Br. 4-11; Br. of Eagle Forum Educ. & Legal Defense Fund as *Amicus Curiae* at 9-12. Emeldi's latest attempt to shore up her case highlights just how weak it is. To take just one example, she argues that her inability to convince a number of faculty members to serve as her dissertation committee chair supports an inference that she " 'was blackballed as a troublemaker because of her claims of institutional gender bias in the Ph.D program.' " Opp. 21 (quoting Pet. App. 22a n.8). But as Judge Fisher explained, the faculty members declined her request for legitimate reasons, and many offered to meet with Emeldi or serve on her dissertation committee. Pet. App. 42a-43a. "These are not responses one would expect from colleagues who had been 'poisoned.' " Pet. App. 43a.

Emeldi also characterizes the events surrounding her departure from the Ph.D program as "quite extraordinary," suggesting that the circumstances are so unusual that they give rise to an inference of malfeasance. Opp. 28. For better or for worse, however, many doctoral students have difficulty

completing their degrees. One report estimates that "the attrition rate in doctoral education is in the range of 40% to 50%." Comm'n on the Future of Graduate Education in the U.S., *The Path Forward* 27 (Apr. 2010). This phenomenon is problematic, and universities across the nation are striving to address it. But the solution is not to have the federal courts order universities to grant degrees, as Emeldi proposes. Increased federalization of academic disputes would impair the student-teacher relationship and chill academic freedom. *See* ACE Br. 11-19.

The Ninth Circuit's decision is legally unsupportable and practically problematic. As an alternative to plenary review, the Court may wish to summarily reverse the Ninth Circuit's judgment.

CONCLUSION

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

April 2013

Respectfully submitted,

RANDY GELLER
DOUGLAS PARK
UNIVERSITY OF OREGON
1226 University of Oregon
Eugene, OR 97403

NEAL KUMAR KATYAL
Counsel of Record
DAVID M. GINN
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
(202) 637-5491
neal.katyal@hoganlovells.com

Counsel for Petitioner