No. 12-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit in this case applied the *McDonnell Douglas Corp.* v. *Green* burden-shifting framework, despite the fact that the defendant articulated a legitimate, nondiscriminatory reason for the challenged action. The D.C. Circuit has held that *McDonnell Douglas* is inapplicable in such situations. But the Ninth Circuit, along with the Fifth, Tenth, and most other circuits, disagrees. The questions presented are:

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.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. The University of Oregon, petitioner on review, was defendant-appellee below.

2. Monica Emeldi, respondent on review, was plaintiff-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner University of Oregon is a public institution of higher education. Petitioner has no parent company, and no publicly-held company has a ten percent or greater interest in Petitioner.

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The University of Oregon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The District Court's opinion is not reported. Pet. App. 53a. The Ninth Circuit's initial panel decision is reported at 673 F.3d 1218. The Ninth Circuit's amended panel opinion, order denying rehearing, and an opinion dissenting from the denial of rehearing en banc are reported at 698 F.3d 715. Pet. App. 1a, 65a, 46a.

JURISDICTION

The Ninth Circuit entered judgment on March 21, 2012, and denied rehearing on October 17, 2012. Pet. App. 1a, 65a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

INTRODUCTION

The landmark Title IX statute has had a tremendous beneficial impact on gender equality in our nation's universities. The decades of precedent that have accreted, however, have meant that sometimes its fundamental purposes get lost within complex legal formulas. This case illustrates that unfortunate result.

Monica Emeldi had an academic conflict with her dissertation adviser. When the adviser told her that her proposed dissertation was too broad in scope, she accused him of interfering with her academic progress and complained to the administration. The adviser subsequently resigned as chair of Emeldi's dissertation committee in order to allow her to work with a professor who shared her research vision. Emeldi was unable to find a new adviser, however, and was unable to complete her doctoral program without one.

Emeldi filed a federal lawsuit seeking substantial money damages and an injunction requiring the University of Oregon to grant her a Ph.D within two years. She contended that her academic troubles were the result of a campaign to retaliate against her for complaining about sex discrimination. Her claim

was founded on a comment she said she made to an administrator during a meeting about her dissertation. She contended that she told the administrator that her adviser was "distant and inaccessible"—a comment she characterized as a charge of gender bias. Emeldi believed the administrator then relayed her comment to the adviser. When the adviser resigned a month later, citing irreconcilable academic differences, Emeldi became convinced that he was punishing her for the comment to the administrator. She believed the adviser also secretly conspired with the rest of the faculty to prevent her from completing her doctoral program.

As this brief overview suggests, Emeldi's theory of retaliation is based on little more than her own fanciful speculation. The record is full of evidence documenting the severe academic conflicts between Emeldi and her adviser and is completely devoid of any evidence of retaliation. Indeed, the administrator and the adviser have both denied talking about sex discrimination at all. The record discloses no reason to question that testimony aside from Emeldi's unsupported conviction that something nefarious must have happened. Emeldi's evidence is not just weak, it is virtually nonexistent, as the District Court concluded.

Yet despite the Title IX claim's vanishingly thin evidentiary foundation, a divided panel of the Ninth Circuit reversed the District Court and held that Emeldi is entitled to present this case to a jury. The full court of appeals then denied rehearing over a vigorous seven-judge dissent. *See* Pet. App. 46a (Kozinski, C.J., dissenting from the denial of reh'g en banc).

This Court's intervention is required. The Ninth Circuit's decision departs so far from the accepted and usual course of judicial proceedings that it warrants an exercise of this Court's supervisory power. S. Ct. R. 10(a). If left to stand, it will have pernicious effects in the halls of academia: The panel's lax standard of proof "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors." Pet. App. 47a (Kozinski, C.J., dissenting from the denial of reh'g en banc).

Granting certiorari would permit this Court to address the intractable confusion generated by the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). As the Ninth Circuit's decision in this case illustrates, that framework leads to inadvertent judicial error in a large number of cases. A growing chorus of judges and commentators has questioned the framework's continued utility. The D.C. Circuit is at the forefront of that movement, having relied on this Court's decision in *U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), to limit *McDonnell Douglas* to a narrow class of cases. Several other circuits have taken steps in that direction. But the Ninth Circuit in this case, as well as other courts of appeals, continue to apply *McDonnell Douglas* in all cases. It is time for this Court to dispel the confusion and provide much-needed guidance about the proper role of the *McDonnell Douglas* burden-shifting framework.

The Court should grant the petition and reverse the decision below.

STATEMENT

A. Emeldi's Academic Difficulties

Emeldi was a doctoral candidate in the University of Oregon's Department of Special Education. Like all Ph.D students, Emeldi was expected to find a member of the University's faculty to serve as the chair of her dissertation committee. She initially worked with Dr. Edward Kame'enui. Less than a year after Emeldi began her studies, however, Dr. Kame'enui took a leave of absence to serve in the U.S. Department of Education. Emeldi then asked another faculty member, Dr. Robert Horner, to take over as her dissertation committee chair. Dr. Horner agreed, and the two began working together in 2005.

Over the next two years, Emeldi became increasingly dissatisfied with Dr. Horner. Although Dr. Horner commented favorably on Emeldi's initial progress in the Ph.D program, he expressed concerns as she attempted to develop her proposed dissertation topic into a concrete research proposal. Dr. Horner believed Emeldi's proposed inquiry was too broad in scope and that her proposed methodology was insufficiently rigorous to meet the academic standards for a dissertation. DCt ECF 39, at 2.[1]

Emeldi now concedes that her proposal may have had flaws. DCt ECF 74, at 6 (Emeldi Decl.). She claims, however, that Dr. Horner frustrated her efforts to reformulate the proposal. In her view, Dr. Horner provided insufficiently detailed feedback and inadequate support. *Id.* She rejected Dr. Horner's entreaty to narrow the focus of her dissertation, complaining to a University administrator that

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[1] Record citations refer to the docket in Civil No. 08-6346 (D. Or.).

abandoning her "comprehensive" project would be tantamount to accepting a "lesser standard" for her work. DCt ECF 37-3, at 24. And she viewed some of Dr. Horner's other suggestions as pointless "busy-work." *Id.* Emeldi thus began to view Dr. Horner as an obstacle to her academic progress. DCt ECF 74, at 7-8 (Emeldi Decl.).

The differences between Emeldi and Dr. Horner came to a head in the fall of 2007. Dr. Horner gave Emeldi formal feedback on her dissertation proposal in September. He praised her project as "tremendously interesting" and said that she had "done brilliantly" in attempting to design a research questionnaire. DCt ECF 37-3, at 10. At the same time, however, he also identified a number of shortcomings in the proposal and asked Emeldi to clarify various issues. *Id.* at 9-10. Emeldi and Dr. Horner then exchanged a series of e-mails in which Emeldi agreed to submit a revised dissertation proposal and to postpone her anticipated graduation date by a year. *Id.* at 11-13.

Concerned by this proposed delay, Emeldi arranged a meeting with two University administrators—Marian Friestad and Annie Bentz—regarding what she perceived as a lack of support in her doctoral program. DCt ECF 74, at 19 (Emeldi Decl.). Emeldi detailed her concerns in several lengthy memoranda submitted to the administrators before the meeting. Those memoranda accused Dr. Horner and the other members of her dissertation committee of not responding to her e-mails. Emeldi hypothesized that the committee members had agreed to "function as a bloc[ ] to ignore" her communications. DCt ECF 37-3 at 19. She ultimately said she wanted to retain her current dissertation committee "if a mutually agreed

upon structure for collaboration can be defined," but requested that the administration restructure her program if no such solution was possible. *Id.* at 20.

Emeldi elaborated on her academic grievances during the meeting with the administrators on October 18. Importantly, she also claims she orally raised the issue of sex discrimination during that meeting. She supposedly told the administrators that one possible cause of her academic difficulties was "an institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates." DCt ECF 74, at 19 (Emeldi Decl.). Emeldi and several other graduate students had shared a similar concern with the Dean of the College of Education in May 2007 after he solicited feedback regarding potential improvements to the graduate program. As one of fifteen suggestions, the students identified a supposed shortage of female tenured faculty members as a problem and requested that the College of Education "model a balance of gender appointments that reflect[s] the proportion of student gender population ratios." DCt ECF 37-3, at 3. Emeldi says she repeated that concern to the administrators at the October 18 meeting. DCt ECF 74, at 19 (Emeldi Decl.). The administrators have denied that the topic of sex discrimination came up at all. DCt ECF 60, at 2 (Friestad Aff.).

Whatever the case, Emeldi now says that Dr. Horner was part of the problem. She claims Dr. Horner treated one of his male advisees more favorably than his female advisees, and lists this as an example of the "gender-based disparities" that she perceived within the College of Education. DCt ECF 74, at 16-17 (Emeldi Decl.). Although she did not air

that concern during the October 18 meeting, she says she "identified" Dr. Horner "as being distant and relatively inaccessible" to her. *Id.* at 19.

With Emeldi's permission, one of the administrators, Dr. Friestad, then contacted Dr. Horner to discuss Emeldi's concerns. DCt ECF 60, at 2 (Friestad Aff.). According to Dr. Friestad, the discussion focused on Emeldi's academic difficulties and did not raise sex discrimination. *Id.* Emeldi stated only that Dr. Friestad "debriefed" Dr. Horner regarding the meeting. DCt ECF 74, at 12 (Emeldi Decl.). When Emeldi and Dr. Friestad met again a week later, Dr. Friestad "declined to intervene to remove identified academic barriers" and told Emeldi that she could file a formal grievance. *Id.* Emeldi believes Dr. Friestad was "dismissive" of her concerns. *Id.* at 19.

The academic disagreements between Dr. Horner and Emeldi escalated in the following weeks. On November 4, Dr. Horner gave Emeldi additional written feedback on her dissertation proposal. He again praised her effort but said that she had proposed "more than is fair to expect from a dissertation" and needed to "narrow down [her] plan to something that is 'doable' as a dissertation." DCt ECF 37-3, at 53-54. He offered suggestions regarding potentially fruitful areas of focus. *Id.* at 53.

The following week, on November 12, Emeldi sent Dr. Horner a lengthy memorandum in response to his comments. DCt ECF 52-3, at 11-16. The memorandum argued that it was unnecessary to narrow the scope of the dissertation and offered responses to what Emeldi saw as the more important concerns. Emeldi also criticized Dr. Horner for being insufficiently attentive and suggested that he had imple-

mented an "extinction plan" to prevent her from accessing the necessary academic supports. *Id.* at 15. Although Emeldi told Dr. Horner that she had decided to retain him as her adviser, she demanded that he devote more time to in-person meetings with her. *Id.* at 15, 16.

Emeldi and Dr. Horner arranged to meet on November 19 to discuss Emeldi's dissertation. DCt ECF 74, at 22-23. Emeldi did not attend the meeting, however. She later said that she believed she would have been publicly humiliated at the meeting and so decided to skip it. *Id.* at 23.

Later that same day, Dr. Horner sent Emeldi an e-mail expressing regret that she had missed the meeting. *Id.* at 9. The e-mail continued:

> I wish you well, and I want you to progress successfully in your program. Your message is clear that you see my feedback as a barrier to your progress, and not helpful in moving your dissertation forward. I have great respect for your personal and professional judgment and I do not wish to be a barrier to your advancement. At the same time, I think we have differences in our view of your research plan. After some serious thought, I believe the most logical move is for you to work with an advisor who is more in tune with your research vision. As such I resign today as chair of your dissertation committee. *Id.* at 10.

Dr. Horner offered to continue serving as Emeldi's program adviser, but gave her the option of seeking a new adviser. *Id.* Dr. Horner continued to collaborate with Emeldi on other projects after resigning. DCt ECF 39, at 3 (Horner Aff.).

Without a committee chair, Emeldi could not make further progress on her dissertation. She therefore set out to find a new chair. She sent e-mails to fifteen faculty members, but for a variety of reasons none of them was able to step in. *See* DCt ECF 37-2, at 95-105. Emeldi did not reach out to other faculty members who might have been available, including her original adviser (who had returned to the University by that time). She eventually abandoned her efforts to find a new dissertation committee chair—a decision that effectively ended her participation in the Ph.D program.

B. The Decision Below

Emeldi then filed a lawsuit in Oregon state court, asserting that the University had retaliated against her for complaining about sex discrimination, in violation of Title IX. She requested both money damages and an injunction requiring the University to put her on track to earn her Ph.D within two years. The University removed the action to federal district court, and, after substantial discovery, the district court granted summary judgment for the University.

The principal issue on appeal was whether Emeldi had submitted sufficient evidence to show that Dr. Horner resigned because of her complaint to the University administrators about gender bias.[2] *See Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167,

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[2] Emeldi also claimed that a typographical error in the original notice of removal—stating that the state court action had been filed in "Linn County" rather than "Lane County"—deprived the district court of jurisdiction. The Ninth Circuit properly rejected that argument. *See* Pet. App. 23a-24a.

184 (2005) (plaintiff alleging retaliation under Title IX must show that institution took adverse action "*because* [she] complained of sex discrimination"). In a 2-1 panel decision, the Ninth Circuit held that she had. The majority first held, following several other courts of appeals, that Title IX retaliation claims should be evaluated under the burden-shifting framework first articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 8a-10a. Applying that framework, it concluded that Emeldi had established a prima facie case by making a "minimal threshold showing of retaliation." Pet. App. 9a. It rested that decision on six circumstantial considerations that suggested (in its view) that Emeldi's complaint and Dr. Horner's resignation were " 'not completely unrelated.' " Pet. App. 14a (quoting *Poland* v. *Chertoff*, 494 F. 3d 1174, 1180 n.2 (9th Cir. 2007)).

The majority then turned to the University's explanation for Dr. Horner's resignation—irreconcilable academic differences—which it found sufficient to satisfy the burden of production. Pet. App. 20a. But the majority also concluded that Emeldi had submitted "evidence from which a reasonable jury could conclude that the University's account is pretextual." Pet. App. 20a. According to the majority, the same six circumstantial factors that sufficed to establish the prima facie case created a genuine issue for trial. Pet. App. 20a. The majority conceded that the University's evidence was "strong"; but it ultimately concluded that a reasonable jury would not be compelled to reject liability. Pet. App. 23a.

Judge Fisher dissented. After surveying the evidence in detail, he concluded that Emeldi's retaliation theory was based "almost entirely on her own

speculation and conclusory allegations, without any supporting factual data." Pet. App. 26a. Chief Judge Kozinski and six other judges echoed those concerns in a vigorous dissent from the denial of rehearing en banc. Pet. App. 46a. The dissenters decried the panel's "very, very bad result," emphasizing that the decision will have chilling effects across higher education. Pet. App. 51a. As they explained, the panel's lax standard of proof "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors." Pet. App. 47a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD CLARIFY THE ROLE OF THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK, WHICH HAS CAUSED INTRACTABLE CONFUSION IN THE LOWER COURTS.

Title IX prohibits covered educational institutions from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). This Court held in *Jackson* v. *Birmingham Board of Education* that retaliation against a person who complains of sex discrimination is itself a form of sex discrimination within the meaning of Title IX. 544 U.S. at 174. A plaintiff who alleges such retaliation may therefore sue the responsible institution for damages and injunctive relief under Title IX's implied cause of action. *Id.* at 171. Her ultimate burden is to establish that the institution intentionally retaliated against her "*because* [she] complained of sex discrimination." *Id.* at 184.

As discussed below, the Ninth Circuit in this case grossly misunderstood the quantum of proof needed to defeat summary judgment on that issue. *See infra*

pp. 22-29. That error is traceable to a fundamental problem that has plagued federal civil rights law for nearly 40 years. Ever since this Court decided *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the lower courts have struggled to apply the famous burden-shifting framework articulated in that case. This Court has granted certiorari numerous times to clarify the details of that framework, but to no avail. As Judge Wood recently pointed out, *McDonnell Douglas* continues to ensnare courts and litigants in "snarls and knots." *Coleman* v. *Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (concurring opinion). This Court should grant certiorari to resolve that confusion.[3]

1. The *McDonnell Douglas* framework is deceptively simple. First, the plaintiff must make out a prima facie case of discrimination (or retaliation). *Reeves* v. *Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000). The elements of that case vary with the circumstances, but in all cases the plaintiff must point to suspicious circumstances that are suggestive of unlawful activity. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 n.6 (1981). Success in that endeavor raises a rebuttable presumption that the defendant did in fact discriminate (or retaliate) on an unlawful ground. *Id.* at 254 & n.7. The burden then shifts to the defendant to articulate a

[3] The Court may assume without deciding that *McDonnell Douglas* applies to Title IX retaliation claims. *Cf. O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (assuming that *McDonnell Douglas* applies to claims under the Age Discrimination in Employment Act); *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming that *McDonnell Douglas* applies to certain claims under 42 U.S.C. § 1983).

legitimate, non-discriminatory reason for its action. *Id.* If it does, the presumption "drops out of the picture," and the parties proceed to the ultimate question of whether the defendant intentionally discriminated against the plaintiff *because of* the plaintiff's protected status (or conduct). *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993).

The workhorse of the *McDonnell Douglas* framework is the rebuttable presumption of discrimination. That presumption, like most evidentiary presumptions, is intended to ease the plaintiff's burden of proof. Direct evidence of discrimination is hard to come by, for it is typically hidden within the minds of the defendant's employees. The *McDonnell Douglas* presumption aims to flush out that evidence. If the circumstances are *suggestive* of unlawful behavior, and if the defendant fails to articulate any lawful reason for its actions, courts presume that the defendant *did* act unlawfully. That presumption is justified because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Thus, if no legitimate explanation for the defendant's action is apparent, we may conclude that "it is more likely than not the [defendant], who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Id.*

The *McDonnell Douglas* presumption—backed by the threat of an adverse judgment—serves a valuable purpose of forcing a defendant to come forward with its version of events. *See Hicks*, 509 U.S. at 510 n.3. Without the presumption, defendants would have an incentive to stay silent, and many civil

rights cases would founder for lack of proof. Once the defendant has given its explanation, a plaintiff without other proof of discrimination can at the very least attempt to *dis*prove the defendant's explanation. Under appropriate circumstances, credible proof that the defendant's explanation is false can support an inference that the defendant "is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147. Even then, however, the ultimate question is not whether the defendant's explanation is pretextual, but whether the defendant unlawfully discriminated. *Id.* at 146-147.

2. Although the *McDonnell Douglas* framework has its place, it has also caused enormous confusion over the years. Countless judges and scholars have complained that *McDonnell Douglas* needlessly complicates civil rights cases. Writing for the D.C. Circuit, Judge Kavanaugh observed that the framework "has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." *Brady* v. *Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Judge Hartz wrote separately in another case to denounce his own majority opinion, arguing that the *McDonnell Douglas* framework—which he felt constrained to apply—"only creates confusion." *Wells* v. *Colorado Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (separate opinion). And Judge Wood recently added her voice to the chorus, criticizing *McDonnell Douglas* as "an allemande worthy of the 16th century" that has lost its utility in the modern era. *Coleman*, 667 F.3d

at 863 (concurring opinion).[4] Commentators have similarly characterized the framework "as a 'yo-yo rule,' 'befudd[ing],' 'replete with confusion,' and 'incomprehensible.' " *Lapsley* v. *Columbia Univ.-College of Physicians & Surgeons*, 999 F. Supp. 506, 513 (S.D.N.Y. 1998) (citations omitted); *see also* D. Brock Hornby, *Summary Judgment without Illusions*, 13 Green Bag 2d 273, 282 (2009) (*McDonnell Douglas* is largely unnecessary and "mostly complicates analysis and verbiage"); Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503, 505, 528 (2008) (*McDonnell Douglas* "has left the entire area of law confused" and should be abandoned); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 Notre Dame L. Rev. 109, 113 n.15 (2007) (collecting critical sources).

Civil rights plaintiffs are often the victims of this confusion. Courts frequently dismiss lawsuits because the plaintiff has failed to satisfy one or more of the elements of the prima facie case. That mode of analysis leads to error, however, because it directs attention away from the "ultimate question of discrimination *vel non*." *Aikens,* 460 U.S. at 714-715. Plaintiffs are commonly instructed that they "must show" as an element of the prima facie case that they were treated differently than a "similarly situated" person of a different race (sex, etc.). *E.g.*, *Chuang* v. *Univ. of Cal. Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000). But comparisons of that sort do not exhaust the categories of circumstantial evidence that may tend to prove an unlawful motive. For example, the general counsel of a corporation may not have any

[4] Remarkably, all three members of the panel joined Judge Wood's concurring opinion.

"similarly situated" colleagues but may nevertheless attempt to prove discrimination by showing that the CEO made racist comments, or that the corporation has a general pattern of not hiring people of her race, or that the circumstances suggest a cover-up, or any number of other things. Requiring plaintiffs to meet the elements of the prima facie case artificially and erroneously circumscribes the types of evidence that a court can consider. Both district courts and appellate courts are prone to this error. *See, e.g.*, *Green* v. *Fidelity Invs.*, 374 F. App'x 573, 577 (6th Cir. 2010) ("this court routinely affirms the grant of summary judgment for failure to establish a prima facie case"); *Hinds* v. *Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008) (same); *Smith* v. *Lockheed-Martin Corp.*, 644 F.3d 1321, 1327-28 (11th Cir. 2011) (reversing district court for focusing solely on prima facie case).

Plaintiffs are not the only victims of *McDonnell Douglas*; defendants often suffer too. Most 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. *Cf. Burdine*, 450 U.S. at 253 (burden of establishing prima facie case is "not onerous"). This problem is particularly acute in retaliation cases, where courts have held that "causation" is an element of both the prima facie case and the claim itself. *See Bourbon* v. *Kmart Corp.*, 223 F.3d 469, 475-476 (7th Cir. 2000) (Posner, J., concurring).

The decision below vividly illustrates this danger of confusion. In explaining the prima facie case, the majority said that Emeldi needed to make only a "minimal threshold showing of retaliation." Pet. App. 9a. It found six circumstantial factors sufficient

to meet that standard. Although the factors did not demonstrate that Dr. Horner retaliated against Emeldi *because of* her complaint, they did show that " 'the protected activity and the negative action * * * [were] not completely unrelated.' " Pet. App. 13a-14a. That was enough, in the Ninth Circuit's view, to make out a prima facie case.

After considering the University's explanation, the majority then turned to what it thought was the ultimate question: whether the University's explanation was pretextual. (That single-minded focus on pretext is another common error. The real question, of course, is whether the University intentionally discriminated against Emeldi *because of* her protected conduct. *See Reeves*, 530 U.S. at 146-147.) Citing the very same six factors, the majority held: "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.

Although 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. That was error; a plaintiff must show that adverse action was taken "*because* [she] complained of sex discrimination." *Jackson*, 544 U.S. at 184. And the error is directly traceable to the majority's reliance on the *McDonnell Douglas* framework, which has become "so encrusted with the barnacles of multi-factor tests and inquiries that it misdirects attention." *Gordon* v. *United*

Airlines, Inc., 246 F.3d 878, 893 (7th Cir. 2001) (Easterbrook, J., dissenting). "Only a lawyer trapped in a warren of 'tests' and 'factors' " could conclude that Emeldi's paper-thin evidence was sufficient to support a jury verdict. *Id.* at 894. Thus, although Emeldi's case rests on little more than speculation, the University must now "go straight to trial or [its] checkbook[ ]." Pet. App. 47a (Kozinski, C.J., dissenting from the denial of reh'g en banc).

3. This Court's decision in *U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), suggests a way out of this mess. The *Aikens* Court admonished the parties and the court of appeals for focusing on the prima facie case after the defendant had proffered a legitimate reason for its employment decision. 460 U.S. at 713-714. The ultimate issue in the case, the Court observed, was whether the defendant had intentionally discriminated. *Id.* at 715. The *McDonnell Douglas* framework can be an orderly way of evaluating the evidence bearing on that issue. But the framework was never intended to be "rigid, mechanized, or ritualistic." *Id.* Thus, once the defendant has "done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *Id.* At that stage, the court "has before it all the evidence it needs" to decide the ultimate question of discrimination. *Id.*; *see also Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 53 (2003) (once the defendant offers a neutral explanation, the "only relevant question" is whether a jury could conclude that the challenged action was based on plaintiff's protected status).

Some courts of appeals have taken *Aikens* to heart. In *Brady*, for example, the D.C. Circuit held that as

it read "the Supreme Court precedents beginning with *Aikens*, the prima facie case is a largely unnecessary sideshow. It has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." 520 F.3d at 494. The court explained that once the defendant has offered its legitimate, nondiscriminatory reason, the district court "need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*." *Id.* The only time the prima facie case will be relevant is the "rare" situation in which the defendant has not offered *any* legitimate explanation for its decision. *Id.* at 494 n.2. In that instance, the plaintiff will be entitled to judgment *if* he is able to make out a prima facie case. *See Hicks*, 509 U.S. at 509. The D.C. Circuit is alone in its strong embrace of *Aikens*, but other courts of appeals sporadically recognize the *Aikens* principle. *Compare, e.g.*, *EEOC* v. *Kohler Co.*, 335 F.3d 766, 773 n.7 (8th Cir. 2003) (district court's focus on prima facie case was "improper"), *with Bennett* v. *Nucor Corp.*, 656 F.3d 802, 819-820 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1807 (2012) (focusing on prima facie case); *see also Kendrick* v. *Penske Transp. Servs.*, 220 F.3d 1220, 1226 (10th Cir. 2000) (*Aikens* applies after full trial but not at summary judgment).

By and large, though, courts unfortunately still require litigants to jump through the *McDonnell Douglas* hoops in every case. The Fifth Circuit and the Tenth Circuit have expressly refused to follow the reasoning of the D.C. Circuit's *Brady* decision. *Hinds*, 523 F.3d at 1202 n.12; *Stallworth* v. *Singing*

River Health Sys., 469 F. App'x 369, 372 (5th Cir. 2012). Other circuits—like the Ninth Circuit here—address the prima facie case and expect litigants to do the same. *See* Pet. App. 8a-23a; *Vasquez* v. *Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (plaintiffs "must establish a prima facie case of discrimination" in order to prevail); *EEOC* v. *Inland Marine Indus.*, 729 F.2d 1229, 1234-35 (9th Cir. 1984) (notwithstanding *Aikens*, district courts are "require[d]" to address the prima facie case). Litigants therefore continue to argue over the prima facie case. The end result is a colossal waste of resources and endless opportunities for error. *Wells*, 325 F.3d at 1221 (Hartz, J., writing separately).

4. The proper role of *McDonnell Douglas* is a question of enormous importance. Lower courts apply the burden-shifting framework in cases involving a staggering variety of statutes: Titles VI and VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Housing Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act; the Civil Rights Acts of 1866 and 1871 (42 U.S.C. §§ 1981 and 1983); and many more. Most of these are civil rights cases, which constitute a substantial portion of the federal courts' workload. *See* Administrative Office of the U.S. Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 129 (2012) (37,000 new civil rights filings in 2010-2011, which was 12.8% of total new filings). In addition, many states have imported *McDonnell Douglas* into their own jurisprudence. *E.g.*, *Reid* v. *Google, Inc.*, 235 P.3d 988, 993 n.2 (Cal. 2010); *Forrest* v. *Jewish Guild for the Blind*, 819

N.E.2d 998, 1019-20 (N.Y. 2004). The confusion generated by *McDonnell Douglas* is thus omnipresent in American legal life. And it leads to particularly troubling consequences in the academic context, where every mistake can burden universities' exercise of academic freedom, a right protected under the First Amendment. *See* Pet. App. 51a (Kozinski, C.J., dissenting from the denial of reh'g en banc).

Only this Court is positioned to correct the situation. As lower courts have noted, *McDonnell Douglas* remains good law, and this Court continues to invoke the burden-shifting framework. *E.g.*, *Reeves*, 530 U.S. at 142-143; *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-312 (1996). Indeed, this Court has said (in dictum) that a plaintiff "*must* establish a prima facie case," which could be taken to mean that resort to the framework is mandatory. *Reeves*, 530 U.S. at 142 (emphasis added). More explicit guidance from this Court is needed before lower courts will be willing to confine *McDonnell Douglas* to its appropriate sphere. Now is the time to provide that guidance. The Court should grant the petition for certiorari to address the proper role of the *McDonnell Douglas* burden-shifting framework.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS GOVERNING RETALIATION CLAIMS.

There is another pressing reason to grant review: The Ninth Circuit got the merits completely wrong. There is no dispute that a graduate student such as Emeldi can invoke Title IX's implied cause of action under appropriate circumstances. But not every setback in such a student's educational program

constitutes illegal retaliation. Title IX prohibits disparate treatment "on the basis of" sex. The phrase "on the basis of" indicates a "but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007) (construing the phrase "based on"). A student claiming retaliation accordingly must prove that her school intentionally retaliated against her "*because* [she] complained of sex discrimination." *Jackson*, 544 U.S. at 184. In other words, she must show that her protected conduct "actually motivated" the school's decision and "had a determinative influence on the outcome." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993).

Proof of such an unlawful motive is the sine qua non of a retaliation claim. Yet there is none here. The Ninth Circuit's decision—if permitted to stand—will cause untold damage to universities and academic freedom in the nine States that comprise that circuit. For that reason, this Court's review is justified.

1. The court below pinpointed the series of events that it believed to be retaliatory: Emeldi complained to Dr. Friestad that Dr. Horner was "distant and relatively inaccessible"; Dr. Friestad "debriefed" Dr. Horner regarding her meeting with Emeldi; Dr. Horner resigned as Emeldi's dissertation committee chair one month later; and Emeldi was subsequently unable to find a new committee chair. Pet. App. 13a, 15a-17a. In assessing whether that series of events contravened Title IX, the critical question is whether Dr. Horner resigned *because* Emeldi complained to Dr. Friestad. Emeldi has no direct evidence that he did. On the contrary, Dr. Horner testified—and the contemporaneous written record

confirms—that he resigned because of significant disagreements over Emeldi's dissertation. Nor does Emeldi have any direct evidence that her complaint to Dr. Friestad led the rest of the faculty within her department to shun her. Zilch.

The Ninth Circuit nevertheless held that six circumstantial factors supported an *inference* that Emeldi's complaint motivated Dr. Horner's resignation, Pet. App. 16a, and that Dr. Horner then "poisoned" his colleagues against Emeldi, *id.* at 17a, 22a n.8.[5] Those factors are: Emeldi's perception that Dr. Horner favored one of his male graduate students; Dr. Horner's praise for aspects of Emeldi's work; Dr. Friestad's admission that she "debriefed" Dr. Horner after meeting with Emeldi; the "proximity in time" between Emeldi's complaint and Dr. Horner's resignation; Emeldi's inability to find a replacement chair; and Dr. Horner's apparent failure to assist Emeldi in that effort. Pet. App. 14a-17a.

None of these six factors can justify sending this case, or others like it, to a jury. The last two factors do not support Emeldi's theory of retaliation at all. Any number of things may have impeded Emeldi's search for a new chair. The faculty members she approached gave satisfactory reasons for declining: some were too busy, some did not have the necessary qualifications, some were no longer active in the department. Nothing in the record casts doubt on

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[5] Of course, the University cannot be held vicariously liable for the actions of an employee like Dr. Horner. *See Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). Emeldi must ultimately prove that a University official with authority to institute corrective measures knew of the problem and made an official decision not to remedy it. *Id.* at 290.

those explanations or suggests that Dr. Horner was secretly interfering behind the scenes. Moreover, without knowing more about Dr. Horner's supposed failure to offer assistance—did Emeldi ask him for help? did he refuse? had he helped other students under similar circumstances?—it is impossible to view it as evidence of retaliation. The student is responsible for choosing a dissertation committee chair; Dr. Horner may have reasonably assumed that Emeldi would do so on her own. Without some indication that Dr. Horner's actions were unusual, there is no reason to suppose that he conspired against Emeldi, much less that he convinced fifteen of his colleagues to join his conspiracy.

Nor is there any basis for inferring retaliation from Dr. Friestad's comment that she "debriefed" Dr. Horner following her meeting with Emeldi. It is hardly clear from that comment that Dr. Friestad mentioned sex discrimination in the conversation at all; Dr. Friestad herself denies having done so. DCt ECF 60, at 2 (Friestad Aff.). If Dr. Horner never even knew of Emeldi's supposed complaint, he could not have retaliated against her for making it. *Clark Cnty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) (per curiam). And even if Dr. Friestad did tell Dr. Horner that Emeldi complained of sex discrimination, that would only clear away a threshold obstacle. Emeldi would still have to establish that Dr. Horner retaliated against her *because of* that complaint. Proof that Dr. Horner was aware of the complaint would not move that ball forward.

The remainder of the Ninth Circuit's factors are minimally probative at best. The majority believed that the "proximity in time" between Emeldi's complaint and Dr. Horner's resignation constituted

"strong" evidence of causation. Pet. App. 14a. But the two events were separated by a full month, and a number of key interactions took place in the interim. Dr. Horner reiterated his serious concerns about the scope of Emeldi's project two weeks before resigning. DCt ECF 37-3, at 54-55. And the following week Emeldi rejected Dr. Horner's suggestions, accused him of being a barrier to her advancement, and purposefully skipped a research meeting where her concerns could have been addressed. DCt ECF 53-2, at 11-16; DCt ECF 74, at 23. To the extent the timeline of events gives rise to any inference at all, it is that Dr. Horner resigned because of those later events, not Emeldi's much earlier complaint. *See Twigg* v. *Hawker Beechcraft Corp.*, 659 F.3d 987, 1001-02 (10th Cir. 2011) ("evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action"); *Wasek* v. *Arrow Energy Servs.*, 682 F.3d 463, 472 (6th Cir. 2012) (same).

The Ninth Circuit's reliance on Dr. Horner's praise for Emeldi likewise misses the mark. The court of appeals saw Dr. Horner's encouraging words as evidence that Dr. Horner's stated reason for resigning—disagreement over the direction of Emeldi's academic work—was a mere pretext. But the majority misunderstood the pretext inquiry, which focuses on whether the "asserted justification is *false*." *Reeves*, 530 U.S. at 148 (emphasis added). Emeldi has never disputed that she and Dr. Horner had substantial disagreements about the scope and methodology of her proposed dissertation. The

contemporaneous written record documents those disagreements in great detail.

That leaves only Emeldi's perception that Dr. Horner favored one of his male graduate students and seemed "distant and unapproachable" toward her. The court of appeals considered that to be evidence of "gender-based animus" and took it as evidence that Dr. Horner retaliated against Emeldi. Pet. App. 16a. The discrimination charge falls flat, however. Even by Emeldi's own account, the graduate student in question was treated more favorably than *all* of his peers, not just the female graduate students. DCt ECF 74, at 16-17. Whether that favoritism was deserved or not, it is hardly evidence of "gender-based animus."

Moreover, even if Dr. Horner had in fact treated his male students more favorably than his female students, it is by no means clear why that should be relevant to the entirely different question of whether he *retaliated* against Emeldi. A retaliator targets his victim because of her conduct, not her sex. Evidence of past incidents of gender bias therefore does not establish the subject's propensity to punish whistleblowers; and even if it did, it would likely be inadmissible for that purpose. *See* Fed. R. Evid. 404.

Emeldi's theory of retaliation—that Dr. Horner retaliated against her for claiming sex discrimination, conspired with his colleagues to drive her from the doctoral program, and then lied about his motives—had no evidentiary basis at all. Viewing the factors in the aggregate cannot make up for that deficiency. "The adding of zeros to zeros, no matter how many, cannot amount to more than zero." *United States* v. *Martinez*, 54 F. 3d 1040, 1045 (2d Cir. 1995) (Calabresi, J., concurring).

2. Even on the most generous reading of the evidence, the most that can be said of Emeldi's theory is that it cannot be ruled out with certainty. For although the record overwhelmingly supports the University's account, it does not conclusively disprove Emeldi's. But even so, the mere *possibility* of unlawful behavior is not a sufficient basis for a federal jury trial. A plaintiff armed with nothing more than a conceivable story cannot even get past the pleading stage. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 683 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). To survive summary judgment, she must do far more: she must demonstrate that the evidence is sufficient to support a jury finding that her version of events is *more likely* than the alternative. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Evidence that is "merely colorable" or "not significantly probative" will not suffice to cross that threshold. *Id.* at 249.

This is not a case in which a jury must be called upon to resolve fundamentally conflicting accounts of the relevant events. Emeldi does not dispute the basic thrust of the University's account: that she and Dr. Horner had serious disagreements over the direction of her dissertation. Nor could she; her own e-mails to Dr. Horner confirm that she viewed him as a barrier to her advancement in the program. That undisputed fact strongly supports Dr. Horner's explanation, which he conveyed both to Emeldi and to the Dean of the College of Education when he resigned. Emeldi has done nothing to cast doubt on that explanation or otherwise show that her theory is the most likely explanation of events.

At the end of the day, the evidentiary engine driving Emeldi's claim is her own *subjective* belief—

expressed in her declaration—that Dr. Horner acted for improper reasons. But speculation of that sort cannot defeat summary judgment. A party's declaration must be based on her own "personal knowledge," Fed. R. Civ. P. 56(c)(4); statements of belief are not permissible, 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2738 (3d ed. & supp. 2012); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950), *overruled in part on other grounds*, *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 671 (1969). And once Emeldi's speculation is disregarded, it becomes clear that the evidence in the record is "so one-sided" that summary judgment is warranted. *Anderson*, 477 U.S. at 252. The Ninth Circuit was wrong to rule otherwise.

3. The Ninth Circuit's decision is not a temporary lapse that will soon be forgotten. As Chief Judge Kozinski explained, 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. App. 47a. That result would be bad enough if it were limited to the employment relationship. But it is not. As this case well illustrates, Title IX also reaches the sensitive relationship between university professors and the doctoral candidates under their supervision. That relationship "requires both parties to engage in candid, searing analysis of each other and each other's ideas." Pet. App. 50a. "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. App. 50a-51a.

The Ninth Circuit's decision upsets that relationship, giving students a guide to dressing up their

academic frustrations as retaliation lawsuits. Universities faced with the prospect of defending every speculative claim at trial will predictably attempt to mitigate their risk by tightening control over the adviser-advisee relationship. Professors will have to "think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court." Pet. App. 51a. The net effect will be to "chill academic freedom and intimidate institutions into granting degrees to undeserving candidates." Pet. App. 51a.

Title IX is an important civil rights statute. It roots out pernicious discrimination and advances the struggle for sex equality. Letting plaintiffs use the statute as a tool for federalizing run-of-the-mill academic disputes disserves the interests of both educational institutions and victims of sex discrimination. And the public too. As Chief Judge Kozinski remarked, "Would any of us choose to go under the scalpel of a surgeon who 'earned' his M.D. by bullying his medical school with unsubstantiated claims of unlawful discrimination?" Pet. App. 51a.

To avert these harms, the Court should grant the petition and order plenary review. Alternatively, the Court may wish to summarily reverse the Ninth Circuit's decision. *Cf. Clark Cnty. School Dist.*, 532 U.S. 268 (summarily reversing the Ninth Circuit for misapplying legal principles governing retaliation claims).

CONCLUSION

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

January 2013

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-35551
D.C. No. 6:08-cv-06346-HO

MONICA EMELDI,
Plaintiff-Appellant,
v.
UNIVERSITY OF OREGON
Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted
June 9, 2011—Portland, Oregon

Filed March 21, 2012
Amended October 17, 2012

Before: FISHER, GOULD, and PAEZ,
Circuit Judges.

Order;
Dissent to order by Chief Judge Kozinski;
Opinion by Judge Gould;
Dissent by Judge Fisher

COUNSEL

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Denise Gale Fjordbeck, Assistant Attorney General, Office of the Oregon Attorney General, Salem, Oregon, for the University of Oregon.

OPINION

GOULD, Circuit Judge:

In *Jackson v. Birmingham Board of Education*, the Supreme Court held that retaliation by a federally funded educational institution against someone who complains of gender discrimination is actionable under Title IX. 544 U.S. 167, 171 (2005). We must decide what a plaintiff must prove to prevail on a Title IX retaliation claim, and whether plaintiff Monica Emeldi adduced sufficient evidence of her claim to overcome summary judgment.

I

Monica Emeldi sued the University of Oregon, alleging that it prevented her from completing a Ph.D. program in retaliation for having complained of gender-based institutional bias in the University's Ph.D. program, and gender discrimination by her faculty dissertation committee chair.

Emeldi was a Ph.D. student in the University of Oregon's College of Education, in its Department of Special Education. Her advisor and dissertation committee chair, Edward Kame'enui, took a sabbatical starting in the fall of 2005. Emeldi asked Robert Horner, another professor, to replace Kame'enui as her dissertation chair. Horner agreed. During the time of Emeldi's work with Horner, Emeldi and other Ph.D. candidates complained to Mike Bullis, Dean of the College of Education, about lack of adequate support for female Ph.D. candidates. In May 2007, Emeldi produced a memo summarizing a meeting between Bullis and several graduate students. That memo lists, as one of fifteen topics discussed, the students' concern about the

Department's lack of female role models. The memo says:

> 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 empowered 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.

While the University maintains that no one other than Bullis knew of the memo, Emeldi's position was that she was told that all Department faculty received copies; that it was "common knowledge in the College of Education" that she was dis-satisfied with the Department's level of support for women; that Horner, her dissertation chair, was treating her less favorably than his male graduate students and did not give her the same support and attention that he gave male candidates; that Horner often ignored her and did not make eye contact with her; that, when Emeldi attended Horner's group meetings with his graduate students, either she was not on the agenda, or no substantial or meaningful work of hers was discussed; and that Horner's male students had opportunities that were not available to his female students, such as access to more and better resources, including more office space and better technology for collecting data.

Whatever their teacher-student relationship at first, Emeldi's relationship with Horner as Ph.D.

advisor soured. The reasons for this development are unclear. The University vigorously disputes that Horner treated his male students more favorably than his female students, and its position is that Emeldi's relationship with Horner deteriorated because Emeldi "refused to listen to Dr. Horner regarding the necessary changes to produce a dissertation that would be a focused piece of scholarship."[1] Emeldi attributes the worsening relationship to Horner's gender animus.

In October 2007, Emeldi met with University administrators Annie Bentz and Marian Friestad to discuss her worsening relationship with Horner. Emeldi says that she complained to Friestad about the Department's "institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates." To illustrate her experience of this "institutional bias," she said that she "identified the chair of [her] dissertation committee, Dr. Rob Horner, as being distant and relatively inaccessible to me." According to Emeldi, Friestad then alerted Horner that Emeldi had accused him of discriminating against her. While Friestad does not dispute that she spoke with Horner, her version of the conversation Emeldi

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[1] The summary judgment record contains evidence of email communication between Horner and Emeldi in mid-2007. In July 2007, Emeldi submitted to Horner a "Dissertation Prospectus" that laid out her research plans. In September 2007, Horner provided feedback on Emeldi's proposal. Horner's feedback stated that Emeldi had proposed a "tremendously interesting project," and had "done brilliantly in [her] efforts," but also expressed concern that "the reader struggles to find the details that can be examined within a dissertation."

described is markedly different. Friestad, who is an administrator and professor, says that Emeldi never alleged discrimination in their discussion about Horner and that Friestad and Horner discussed only Emeldi's dissertation, not an allegation of discrimination. However, Emeldi in her amended declaration explicitly said that Friestad told Emeldi that Friestad had "debriefed" Horner on the conversation Friestad had with Emeldi. Within a few weeks, Horner, by email, resigned as Emeldi's dissertation chair. According to Emeldi, Horner then told other Department faculty members that Emeldi should not be granted a Ph.D., and should instead be directed into the Ed.D. program, which Emeldi says is a less prestigious degree. The University denies that this occurred.

Emeldi sought a new dissertation chair, but did not find one. According to Emeldi, she asked fifteen faculty members in her Department, some of whom said that they were too busy and some of whom said that they were not qualified to supervise her research. The University doesn't dispute that she inquired of fifteen faculty members, but criticizes Emeldi's efforts to obtain a new dissertation chair as inadequate, arguing that she did not try to recruit two faculty members who were qualified and available, including her former advisor Kame'enui. While seeking a new dissertation chair, Emeldi also pursued the University's internal grievance procedure, which, she says, contributed to her inability to find a willing faculty member. Unable to complete her Ph.D. without a dissertation chair, Emeldi abandoned her pursuit of the Ph.D. degree, thus effectively withdrawing from the University.

Emeldi then filed this lawsuit in Oregon state court. The University timely removed the action to federal court, but mistakenly said in its notice of removal that Emeldi's suit was filed in Linn and Multnomah Counties, when in fact the suit was filed in Lane County. The University then filed an amended notice of removal correcting these errors, but the amendment was filed after the 30-day removal deadline had expired. Emeldi sought remand on the basis that the defective notice of removal was fatal to federal jurisdiction, but the district court rejected this argument.

After a period of discovery, the University moved for summary judgment, which Emeldi opposed. The district court granted summary judgment for the University on the alternative grounds that Emeldi did not engage in protected activity and that she adduced no evidence showing that the University's adverse actions were causally related to her protected activity. *Emeldi v. Univ. of Or.*, No. 08-6346, 2010 WL 2330190, at *2-5 (D. Or. June 4, 2010). Emeldi timely appealed.

II

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). "Summary judgment is warranted when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

III

[1] We start with the statutory premise that Title IX of the Education Amendments of 1972 bars

gender-based discrimination by federally funded educational institutions. It provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). In *Jackson*, the Supreme Court held that "[r]etaliation against a person because that person has complained of sex discrimination" is a form of gender-based discrimination actionable under Title IX. 544 U.S. at 173.[2]

[2] Until now, we have not had occasion to say what a plaintiff must prove to prevail on a retaliation claim under Title IX. We join our sister circuits in applying the familiar framework used to decide retaliation claims under Title VII.[3] In this framework, a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two. *Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003). We have emphasized

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[2] Like the Supreme Court in *Jackson*, "[w]e do not rely on regulations extending Title IX's protection beyond its statutory limits." 544 U.S. at 178. Our decision rests on "the statute itself," not on regulations implementing Title IX. *Id.*; *see also* 34 C.F.R. §§ 100.7(e), 106.71.

[3] *See, e.g., Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 91-92 (2d Cir. 2011) (applying the Title VII framework to a Title IX retaliation claim); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) (same); *Clinger v. N.M. Highlands Univ., Bd. of Regents*, 215 F.3d 1162, 1168 (10th Cir. 2000) (same).

that to make out a prima facie case, a plaintiff need only make a minimal threshold showing of retaliation. As we have explained, " 'The requisite degree of proof necessary to establish a prima facie case for Title VII claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence.' " *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (ellipses omitted)); *see also Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007) (noting that "[e]stablishing a prima facie case" is "not . . . an onerous requirement").

[3] Once a plaintiff has made the threshold prima facie showing, the defendant must articulate a legitimate, non-retaliatory reason for the challenged action. *Davis*, 520 F.3d at 1089. If the defendant does so, the plaintiff must then "show that the reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (internal quotation marks and citation omitted).

We stress three reasons for adopting the Title VII framework for Title IX retaliation claims. First, the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988). The House Report provides:

> One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 . . . . Title VII,

> however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.

H.R. Rep. No. 92-554, at 46 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512.

Second, we have found the Title VII framework useful in assessing claims of discrimination and retaliation outside the Title VII context, even where its application is not mandatory. *See, e.g., Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (applying the Title VII framework to a claim under the Age Discrimination in Employment Act); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 754 (9th Cir. 2001) (applying the Title VII framework to an equal protection claim); *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 538 (9th Cir. 1982) (applying the Title VII framework to a claim brought under 42 U.S.C. § 1981).

Third, the Supreme Court has often "looked to its Title VII interpretations of discrimination in illuminating Title IX." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999). Following this approach, we hold that the Title VII framework generally governs Title IX retaliation claims.

IV

A

The first requirement of a prima facie case of retaliation is that the plaintiff engaged in protected activity. Viewing the evidence presented at summary judgment in Emeldi's favor, we hold that Emeldi's complaints to Bullis and Friestad about

gender-based institutional bias, and to Friestad about Horner's unequal treatment of female students, were protected activity under Title IX.

[4] As an initial matter, we have no doubt that Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally. *Jackson*, 544 U.S. at 174; *see also generally* Lucy M. Stark, Exposing *Hostile Environments for Female Graduate Students in Academic Science Laboratories*, 31 Harv. J.L. & Gender 101 (2008). Emeldi's 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. The protected status of her alleged statements holds whether or not she ultimately would be able to prove her contentions about discrimination. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

Emeldi says that she complained to Friestad about the Department's "institutional bias in favor of male doctoral candidates, and a relative lack of support and role models for female candidates." Illustrating her experience of this "institutional bias" in speaking with Friestad, she says that she "identified the chair of [her] dissertation committee, Dr. Rob Horner, as being distant and relatively inaccessible to me."

[5] It is a protected activity to "protest[ ] or other wise oppose[ ] unlawful . . . discrimination." *Moyo*, 40 F.3d at 984; *see also Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990). In the Title IX context, "speak[ing] out against sex discrimination"—precisely what Emeldi says that

she did—is protected activity. *Jackson*, 544 U.S. at 178. Accordingly, we hold that Emeldi has alleged facts that, if true, demonstrate that she engaged in an activity protected by Title IX.

B

The second requirement of a prima facie case of retaliation is that the plaintiff suffered an adverse action. Viewing the evidence presented at the summary judgment stage in Emeldi's favor, we hold that Horner's resignation constitutes an adverse action.

[6] In the Title VII context, the Supreme Court has said that the adverse action element is present when "a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks and citations omitted). We have held the adverse action requirement was satisfied, for example, when an employee was forced to use a grievance procedure to get overtime work assignments that were routinely awarded to others, *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 848 (9th Cir. 2004), when an employee was assigned more hazardous work than her co-workers, *Davis*, 520 F.3d at 1089-90, and when an employee was laterally transferred or received undeserved poor performance ratings, *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

[7] We will not establish a different rule on adverse action for Title IX than for Title VII. Women students should not be deterred from advancing

pleas that they be treated as favorably as male students. A student cannot complete the University's Ph.D. program without a faculty dissertation chair, and the loss of a chair is an adverse action.

[8] This sort of adverse action bears analogy to the concept of constructive discharge, in which a retaliating employer creates working conditions so " 'extraordinary and egregious [as] to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job.' " *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000)). Here, 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. A reasonable person in Emeldi's position—someone who had been abandoned by her dissertation chair and who was unable, despite diligent efforts, to secure a replacement chair—could justifiably feel unable to complete the Ph.D. program. A reasonable person would find these events "materially adverse" insofar as they "might have dissuaded" such person from complaining of discrimination in the Department. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68. We therefore conclude that Horner's resignation was an adverse action.

C

[9] The third requirement of a prima facie case of retaliation is a causal link between the protected activity and adverse action. "At the prima facie stage of a retaliation case, 'the causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative . . .

action are not completely unrelated.' " *Poland*, 494 F.3d at 1180 n.2 (quoting *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001)) (alteration omitted). Emeldi has met this standard. 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.

[10] First, the 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. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1035 (9th Cir. 2006) ("[C]ausation sufficient to establish the third element of the prima facie case may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision." (quoting *Yartzoff*, 809 F.2d at 1376)).[4]

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[4] The dissent suggests that *Cornwell* is irrelevant because, it urges, we there rejected a causal connection. But the idea that a causal connection can be shown by proximity in time between protected activity and adverse action is the well-established rule followed in many cases. *E.g., Dawson v. Entek Int'l*, 630 F.3d 928, 937 (9th Cir. 2011); *Bell v. Clackamas Cnty.*, 341 F.3d 858, 865 (9th Cir. 2003); *Yartzoff*, 809 F.2d at 1376; *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986). The application of that rule in *Cornwell* does not negate its application here. In *Cornwell*, we concluded that Cornwell presented "no evidence raising an inference" that his demotion was caused by his complaint because there was no evidence that the person who demoted him knew about Cornwell's complaint before his demotion. 439 F.3d at 1035. We also concluded that the "gap" of nearly eight months between Cornwell's complaint and his

[11] Second, Emeldi has articulated a theory of how Horner found out about her complaints: Friestad relayed them to him. Emeldi alleges that she complained of Horner's gender bias—among other things—at her October 2007 meeting with Friestad. Friestad admits that she relayed Emeldi's complaints to Horner, but denies that Emeldi raised concerns about discrimination at the meeting. Friestad also insists that she did not inform Horner of any allegations of discrimination. Nonetheless, 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. Stated another way, a jury reasonably could infer that Friestad passed Emeldi's complaint on to Horner, and that Horner's resignation not long thereafter[5] as Emeldi's dissertation chair was a response to Emeldi's complaint.

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termination was "too great to support an inference" that his termination was caused by his complaint. *Id.* Here, by contrast, Friestad "debriefed" Horner about the content of her discussion with Emeldi, thus "raising an inference" that Horner knew about Emeldi's complaint and resigned as a result. *See id.* Also in contrast to *Cornwell*, there was only a short time of a few weeks between Emeldi's discussion with Friestad and Horner's resignation without replacement.

[5] Emeldi's conversation with Friestad took place on or about October 19, 2007. Horner resigned on November 19, 2007. In Horner's November 20, 2007 email to administrator Mike Bullis, Horner stated that Friestad had contacted him a few weeks beforehand.

[12] Third, Emeldi offered evidence that Horner exhibited gender-based animus in other contexts. *See Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 n.6 (9th Cir. 2005) (stating that "evidence establish[ing] the employer's animus toward the class to which the plaintiff belongs" is relevant to proving causation). 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. For example, Horner allegedly gave one male student access to more office space and better technology for collecting data than similar female students.

[13] As the above discussion reveals, there is ample circumstantial evidence to establish causation. Emeldi also points to other evidence in the record that would support a jury inference of causation: (1) that Horner resigned as Emeldi's dissertation chair without designating or providing assistance in securing a replacement chair is circumstantial evidence of retaliatory intent; (2) that Horner praised Emeldi on the progress of her dissertation, could, together with other evidence, support the inference that his stated reasons for resigning as her dissertation chair were pretextual;[6] and (3) that

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[6] *See Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003) (stating that evidence of pretext is also probative of causation). We note that the email in which

Emeldi could not secure a replacement dissertation chair, despite asking fifteen faculty members, is circumstantial evidence that Horner poisoned his colleagues against her.

[14] These items together provide a sufficient basis for a jury to find that Emeldi's protected activity brought about Horner's resignation.

The dissent argues that Emeldi's position is based on impermissible speculation, citing *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011). But this case is nothing like *Cafasso*. There, we rejected Cafasso's claim that her employer eliminated her department and terminated her employment in retaliation for her inquiries about suspected fraud. *Cafasso*, 638 F.3d at 1060-61. The employer's position was that the action was part of a corporate reorganization unrelated to Cafasso's inquiries; Christopher Marzilli, the official who terminated Cafasso, testified that he did not know about her inquiries when he made the reorganization decision; and "Cafasso admitted in deposition that she had no reason to disbelieve Marzilli's account." *Id.* at 1060. Cafasso nevertheless argued for a "cat's paw" theory of liability, *see generally Poland v. Chertoff*, 494 F.3d 1174, 1182-83 (9th Cir. 2007), which we rejected as speculative. *Cafasso*, 637 F.3d at 1061. Cafasso would have had to establish "that one of Marzilli's subordinates, in response to Cafasso's protected activity, set in motion Marzilli's decision to eliminate Cafasso's department and job, and that the subordinate influenced or was involved in the decision or decisionmaking process." *Id.*

Horner praised Emeldi's dissertation work also contains criticism of her scholarship.

(internal quotation marks, citation, and alteration omitted). Because Cafasso did not "set forth non-speculative evidence of specific facts" that this chain of events in fact occurred, we concluded that to find liability would require "undue speculation." *Id.*

We do not disagree with the principle that mere speculation cannot raise an issue of fact. But here, by contrast, Emeldi proffered non-speculative evidence supporting reasonable inferences of causation. Her declaration states that she complained to Friestad about gender discrimination in the Department and, at this stage, her assertions must be accepted as true. The dissent reaches a contrary conclusion only by disregarding tried and true principles governing summary judgment. The dissent first asserts that Emeldi's complaint to Friestad that Horner was "distant and relatively inaccessible" is not a claim of gender bias. However, the correct approach is to consider Emeldi's complaint in its context. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987) ("[T]he court's ultimate inquiry is to determine whether the 'specific facts' set forth by the non-moving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986))). Here, where the complaint that Horner was "distant and relatively inaccessible" immediately followed Emeldi's complaint of institutional bias, a jury could reasonably infer that she was giving an example of the institutional bias that led to inadequate support for women Ph.D. candidates, and indeed the normal reading of her "distant and relatively inaccessible"

criticism of Horner in context is that he was relatively inaccessible by contrast to his accessibility for male Ph.D. candidates.[7]

The dissent further argues that, even if "gender discrimination was discussed" between Friestad and Emeldi, it is only speculative to infer that Friestad relayed Emeldi's complaints of discrimination to Horner. Again, the dissent reaches this conclusion only by ignoring the general rules governing summary judgment. As noted above, as the nonmoving party Emeldi was to be believed and reasonable inferences given her. In her amended declaration, she explicitly states that Friestad told her that Horner was "debriefed" on their discussion. If we assume Emeldi's statements are true, a reasonable inference arises that Friestad "debriefed" Horner about Emeldi's complaints of gender discrimination. These facts are sufficient to state a prima facie case.

D

Because Emeldi established a prima facie case of retaliation, we inquire whether the University has stated a legitimate, non-retaliatory reason for the challenged action, and if so, whether Emeldi has shown that the reason is pretextual. *See Davis*, 520 F.3d at 1089.

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[7] Emeldi's declaration asserted, "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."

[15] The University says that Horner resigned for a proper reason, that is, because Emeldi did not follow his research advice. Further, University administrators did not provide a dissertation chair because, the University says, the faculty members who Emeldi solicited were unwilling to take Emeldi as a student for legitimate reasons, such as being unavailable or unqualified to advise her research. If credited by the jury, the University states legitimate, non-retaliatory reasons for Horner's resignation.

[16] But Emeldi has presented evidence from which a reasonable jury could conclude that the University's account is pretexutal. 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. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 286 (3d Cir. 2000) (explaining that the causation and pretext inquiries are often overlapping). The proximity in time between Emeldi's complaints of unequal treatment and Horner's resignation as Emeldi's dissertation chair; Friestad's admission that she relayed Emeldi's complaints to Horner; Horner's resignation without providing assistance in securing a replacement chair; other evidence of Horner's gender-based animus; Horner's praise for Emeldi; and Emeldi's inability to secure a replacement dissertation chair, all considered together, 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.[8]

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[8] The dissent parts company with the majority by concluding that there is no genuine dispute of material fact

as to whether the adverse actions suffered by Emeldi were causally related to her complaints of institutional gender bias or as to whether there was pretext. As we have noted, the dissent's conclusions ignore traditional rules for applying Rule 56.

Specifically, the dissent complains that Emeldi did not provide other evidence supporting her assertions. An example concerns Emeldi's complaint that at Horner's graduate student group meetings Emeldi was not on the agenda or if on it her meaningful work was not discussed. These statements are not speculative but based on Emeldi's personal knowledge and would be admissible at trial. Emeldi had direct percipient knowledge of what happened at the graduate student group meetings she attended. The dissent argues there are no minutes in the record so one cannot verify their substance, and that "there is no proffered testimony of other students or faculty members to give credence to Emeldi's perceptions that Horner was slighting her (and presumably other women students)." But her declaration that she "was publicly and chronically ignored in research team meetings by Rob Horner" generates a genuine dispute of material fact. The dissent's insistence on corroborating testimony of others inserts into the law governing summary judgments a precondition that has never been recognized. *See SEC v. Phan*, 500 F.3d 895, 910 (9th Cir. 2007) (holding that district court erred in disregarding declarations as "uncorroborated and self-serving"); *see also* 10A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2727 (3d ed. 2011) ("[F]acts asserted by the party opposing the motion [for summary judgment], if supported by affidavits or other evidentiary material, are regarded as true."). Like much of the dissent, this point goes to the weight of Emeldi's evidence, not to its admissibility and sufficiency to withstand summary judgment.

The dissent characterizes as "speculative" Emeldi's difficulties gaining a replacement chair of her dissertation committee. But it is not speculative for Emeldi to say that she asked fifteen faculty members who declined for various

[17] Because a reasonable jury could conclude from the evidence presented at summary judgment that Horner's resignation was gender-based retaliation, the district court erred in granting summary judgment.

E

We pause to elaborate on the sufficiency of evidence that Emeldi presented in response to the University's motion for summary judgment. 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. *See Anderson*, 477 U.S. at 251-52 (stating that summary judgment requires determination of "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

We cannot say that a reasonable jury would be compelled to reject liability. We are mindful that the University has offered evidence that would support a verdict in its favor. For starters, the testimony of Horner and Friestad contradicts Emeldi's account, and emails corroborate the University's version of events. Making matters worse for Emeldi, her own account at times may appear to be inconsistent. In deposition, she testified that she "would be speculating" if she said why she believed Horner's resignation as her dissertation chair was gender-

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reasons. 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.

based retaliation.[9] Further, the record does not disclose why, despite unsuccessfully soliciting fifteen faculty members, Emeldi overlooked two professors who, the University says, were qualified and available to replace Horner as Emeldi's dissertation chair. All of this is to say that the University may have a convincing case at trial. However, that the University has presented strong evidence in its defense does not undermine our conclusion that there is a genuine dispute of factual issues that requires resolution by a jury.

V

Emeldi also challenges federal subject-matter jurisdiction over her case. The basis of her jurisdictional challenge is that the University's original notice of removal mistakenly said that the action was filed in Linn and Multnomah Counties, when in fact it was filed in Lane County. This error was corrected by an amended notice of removal, but Emeldi protests that the amendment was untimely.

"[T]he propriety of removal is determined solely on the basis of the pleadings filed in state court." *Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006) (per curiam). Where, as here, the state court pleadings establish federal jurisdiction,

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[9] While the University characterizes Emeldi's answer as an admission that she does not know whether Horner's resignation was motivated by retaliatory animus, we note that Emeldi clearly says, elsewhere in her deposition, that she believes Horner's conduct was gender-based retaliation. Emeldi might explain to a jury's satisfaction her anomalous deposition comment in a way that would be consistent with the University's liability. Further, in light of the other evidence that we have noted, it would be incorrect to view Emeldi's word choice as conclusive against her.

an obvious factual error in the notice of removal is not fatal to jurisdiction. But even if the notice's mistaken listing of the county from which the case was removed were fatal to jurisdiction, the University's amendment would cure the defect. *See Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1248 (9th Cir. 1987) (holding that insufficient verification of a notice of removal was not fatal to jurisdiction because the technical error was later corrected by amended notice).

VI

We reverse the district court's grant of summary judgment on Emeldi's state law claim for the same reasons as Emeldi's Title IX claim.[10] Also, we reverse the district court's award of costs because the University is no longer the prevailing party under Federal Rule of Civil Procedure 54(d). *See Cascade Health Sol. v. PeaceHealth*, 515 F.3d 883, 917 (9th Cir. 2008).

REVERSED and **REMANDED**.

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[10] We need not decide whether, in the context of gender-based retaliation, the state law cause of action is coextensive with Title IX. Because the district court granted summary judgment on Emeldi's state law claim for the same erroneous reasons as her Title IX claim, we need not decide the state statute's coverage.

FISHER, Circuit Judge, dissenting:

I generally agree with much of what my colleagues have to say about extending the principles and jurisprudence developed under Title VII to the context of discrimination against women in colleges and universities under the rubric of Title IX. Ms. Emeldi, however, has not shown that the problems she experienced in her Ph.D. program, and particularly with her supervising faculty advisor, Dr. Horner, were the result of gender discrimination rather than an unfortunate — but not unlawful — breakdown in the academic relationship between a master professor and a graduate student. The record plainly reveals Emeldi's frustration with her lack of progress on completing her Ph.D. studies and her dissertation, including problems she attributed to Horner as her dissertation chair. She became so frustrated that she finally complained to University administrators. She may have believed these problems and Dr. Horner's actions were caused by his bias against her as a woman. But this is a retaliation case, where it is critical that she present evidence from which a reasonable jury could find that Horner (a) knew she believed him to be gender biased, and (b) resigned in retaliation *because* she made such an allegation. She simply has not done so, no matter how sympathetic one might be to her academic disappointments.

We need to be cautious when transporting the doctrines that govern the workplace into the university setting, where the roles of student and teacher, especially in a Ph.D. program, are so bound up in personal interactions and subjective judgments. To turn a falling out between a male professor and a female doctoral candidate into a jury

trial over the professor's alleged bias against women should not happen unless there is good evidence to support the charge of discrimination based on gender. Because Emeldi's evidence has not met that threshold, I respectfully dissent.

In sum, Emeldi relies almost entirely on her own speculation and conclusory allegations, without any supporting factual data. I do not believe she has provided sufficient evidence of causation to make out a prima facie case of gender-based retaliation. Even assuming she has made a prima facie case, she has utterly failed to show that Horner's stated reason for resigning as her dissertation chair — that she had come to view his role as her dissertation chair as "a barrier to her advancement" — had anything to do with her being a woman and was merely a pretext.

I. Framework

The majority joins the First, Second and Tenth Circuits in applying the Title VII framework to a Title IX retaliation claim. Maj. Op. 12457-58 & n.2. I agree that this framework should apply to Title IX retaliation cases arising in the *employment* context. But extending the 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. The academic process involves highly personal, idiosyncratic relationships that depend on various professional qualities. This is especially the case for dissertation chairs and their Ph.D. students, which are not run-of-the-mill relationships between managers and employees. A dissertation chair must have expertise in the student's area of research as well as be someone with whom the student can work closely, in a process that by its very nature requires

the professor to be highly critical of the student's work and capabilities. The professor's role as a dissertation chair is voluntary, unlike a business manager whose very job is to supervise a group of subordinate employees. In agreeing to supervise a student, a dissertation chair enters a relationship where the responsibilities run both ways — the student owes the professor time, intellectual commitment and work product, and the dissertation chair implicitly agrees to provide the same in the form of guidance and critical evaluation. Unlike the relationship between a manager and an employee, each relationship in a Ph.D. program is inherently unique and highly subjective. Of course, this does not mean professors can be permitted to discriminate against students because of their gender or other protected status, but we must be careful not to open them up to claims of discrimination based only on unsubstantiated allegations any time there is an intellectual disagreement about a research project.

Despite these cautions, however, I will accept that we should apply the Title VII framework to Emeldi's Title IX retaliation claims.

II. Burden-Shifting

To establish a prima facie case of retaliation under Title VII, and hence under Title IX, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse action; and (3) there was a causal connection between the two. *See Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to set forth a legitimate, nonretaliatory reason for its actions. *See id.* If the defendant sets forth such a reason, the plaintiff bears the ultimate burden of submitting

evidence showing that the defendant's proffered reason is merely a pretext for a retaliatory motive. *See Nilsson v. City of Mesa*, 503 F.3d 947, 954 (9th Cir. 2007).

Without accepting the majority's reasoning, I will assume that Emeldi has met the first two elements of a prima facie case — that she engaged in a protected activity and suffered an adverse action. She has not, however, shown enough to require a jury to decide whether Professor Horner's resignation as her dissertation chair was in retaliation for complaints she made against him (and the University) of gender discrimination. I have trouble seeing how her largely subjective and pervasive speculative interpretations of events are sufficient to make a prima facie case of causation. But even assuming she clears that hurdle, I think the University and Horner have established a legitimate, nondiscriminatory explanation for Horner's resignation and Emeldi's inability to find a replacement chair, and she has failed to present evidence from which a reasonable jury could find it to be mere pretext. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008).

Emeldi complains that Horner resigned as her dissertation chair and also prevented her from finding a replacement so she could complete her Ph.D.[1] He did this, she contends, because she sent a memo to University officials that included a criticism of the underrepresentation of women on the faculty, then later complained to other officials that Horner's

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[1] The majority's characterization of Horner as having "poisoned his colleagues against her," Maj. Op. 12464, is especially hollow on this record. *See* pp. 12484, *infra.*

treatment of her in class meetings and his supervision of her thesis reflected his own bias against her as a woman. Horner and the University vigorously deny these serious allegations — that Horner was biased against women generally or specifically against Emeldi, and that at the time he resigned he even knew that Emeldi thought he was. The majority concedes this is a close case; but it concludes nonetheless that Emeldi has shown enough to warrant a jury trial. Maj. Op. 12469. I think not. The majority is too generous to Emeldi's "evidence." Notably, almost all of her proof of Horner's gender bias and retaliatory actions is based on her own suspicions and speculation. She may in her own mind have believed her problems were the result of gender bias. The issue, however, is whether Horner was biased, knew she thought that and retaliated against her for saying so. Tellingly, Emeldi has not provided statements from other witnesses who might have corroborated her speculation, particularly on factual issues where one would expect her to have at least tried to find someone who would support her theory of the case. She offers no explanation or excuse — such as faculty or student witnesses who refused to cooperate by providing sworn statements, or the existence of some "code-of-silence."

I acknowledge that this is a summary judgment appeal, and we give substantial leeway to the plaintiff as the losing party below. Nonetheless, it is well-settled that, "[w]hen the non-moving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." *Hansen v. United States*, 7 F.3d 137,

138 (9th Cir. 1993) (per curiam); *see also United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (Gould, J.) ("The evidence adduced by Cafasso establishes only that this set of events could conceivably have occurred; it does not give rise to a reasonable inference that it did in fact occur. To find liability on this evidence would require undue speculation. To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations."); *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1059 (9th Cir. 2005) (discussing the "longstanding precedent that conclusory declarations are insufficient to raise a question of material fact").

Emeldi's claims come up short for these very reasons. She seeks to blame her failed Ph.D. dissertation effort on her master professor's gender bias and retaliatory motive, transforming academic judgment calls into a civil rights violation. In this context, I submit there is good reason to insist that the student provide specific and substantial evidence — not just speculation and circumstantial inferences that are not attested to by others and, importantly, are inconsistent with the contemporaneous documentary record.

A brief review of the evidence the majority relies on, and the University's rebuttal, shows why.

1. *May 2007 memo to Bullis.* In May 2007, Emeldi wrote a memo summarizing a meeting between several graduate students and Mike Bullis, the Dean of the College of Education. ER 34-35. That memo, under the heading "Recommendations," listed as one of many topics that had been discussed the following bullet point:

> 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 empowered 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.

SER 56 (brackets and bracketed text in original). This paragraph is the keystone of Emeldi's claim that Horner resigned in retaliation for Emeldi having complained to the University about gender inequality. Horner, however, in uncontradicted testimony states that he was never made aware of the contents of Emeldi's May 2007 memo before he resigned as her chair, learning its contents only during this litigation. *See* SER 5-6, 24. Emeldi has provided no evidence of Horner's actual knowledge of the memo's contents, particularly the gender issue, before then. At most, she offers only uncorroborated hearsay from an unidentified source that all faculty got copies of the memo and, she says, its contents were "common knowledge." Maj. Op. 12454.

2. *Meeting with Friestad and Bentz.* The next critical piece of evidence in Emeldi's attempt to link Horner's resignation to gender discrimination is a meeting she had with University administrators Marian Friestad and (possibly) Annie Bentz in October 2007. ER 37.[2] Emeldi says that after there

[2] Neither party has submitted a declaration from Bentz.

had been no response or follow-up to her earlier May memo, she arranged the meeting:

> regarding what I perceived to be relative lack of academic support and related diminishment of financial support . . . to complete my doctoral degree problem. 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 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.*

ER 28 (emphasis added). This is the whole of Emeldi's proof that sex discrimination was discussed and, more importantly, of her supposed allegation of gender bias against Horner. She then theorizes that Friestad told Horner about Emeldi's allegation, triggering his resignation. Even assuming Emeldi's ambiguous characterization of Horner as being "distant and relatively inaccessible" was meant as an accusation of gender bias, Friestad certainly did not understand that to be the issue. She denies that sex discrimination was discussed at all, much less any accusations of such against Horner. SER 9 at ¶ 4.

Friestad's account is supported by a contemporaneous document that further undermines Emeldi's recollection of the discussion. In connection with the meeting, Emeldi sent Friestad a memo entitled "Reference Information for Requested Conflict Resolution Services," which chronicled what Emeldi obviously found to be a frustrating history

with the Special Education Doctoral program from 2004 to October 2007. *See* Memorandum dated Oct. 18, 2007, dkt. #37-3. The memo detailed perceived slights, lack of cooperation or response and some disagreements or "conflicts" with various faculty members, including Horner in his capacity as chair of her dissertation committee and supervisor of her academic work. As the memo's "Introductory Comments" section states, however, it was "not intended as a criticism of the faculty members discussed. It is intended to describe the series of conflicts that have resulted in communication failures and the events that have contributed to a lack of progress made in my program." Dkt. #37-3 at 14. Friestad says that was her understanding of what the meeting was about, and reflects the nature of what she and Emeldi actually discussed — "what might best be termed as a series of perceived personality conflicts." SER 9 at ¶ 4, SER 10. Critically, Friestad states that "Ms. Emeldi did not discuss any issues related to sexual harassment or discrimination. Nor was there any inference [sic] or indication that she was concerned about sexual harassment or discrimination in the Memorandum." SER 9 at ¶ 4. Reading Emeldi's memo confirms Friestad's account and understanding.

Although the evidence of a nonmoving party is to be believed, and all justifiable inferences are to be drawn in her favor, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), "evidence in opposition to the motion that clearly is without any force is insufficient to raise a genuine issue," 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727 (3d ed. 2011). Emeldi's "evidence" regarding what took place at the

October 19 meeting appears to fall into this category. Even if Emeldi's claim that gender discrimination was discussed is credited, however, Emeldi offers only speculation that Friestad informed Horner of any charges of discrimination following the meeting.

3. *Friestad phone call to Horner*. The next critical link in Emeldi's chain of causation is Friestad's phone call to Horner sometime after the October 19 meeting. With Emeldi's permission, Friestad called Horner to discuss Emeldi's concerns about her lack of progress in the doctoral program, including Horner's role in the delay. SER 10.[3] Horner acknowledges the phone call "with Marian Friestad in which she informed me that Ms. Emeldi had filed a concern related to her moving forward." SER 20. Friestad did not share with him the contents of any documents; she "simply told me that there was a concern." *Id.* Significantly, Emeldi's counsel did not ask Horner at his deposition whether Friestad mentioned gender bias. And Friestad, as quoted above, denies that she and Emeldi ever discussed gender discrimination at any of their meetings. SER 8-11. On this record, there is no evidence that Horner understood from the phone call that Emeldi's "concerns" about her progress and Horner's role involved gender bias. Equally important, although Horner readily acknowledges that Emeldi's concerns about him ultimately led to his resignation, he said his decision came only after receiving an email memo from Emeldi on

[3] Friestad asked Emeldi "at multiple points, including at the end of the meeting, if she wanted [her] to contact Dr. Horner and discuss her concerns about her progress in the doctoral program. Ms. Emeldi gave [her] permission to do so." SER 9-10 at ¶ 5.

November 12, well after Friestad's phone call. SER 20-23.

4. *Emeldi's November 2007 memo/email exchanges with Horner*. Horner attributes his decision to resign as Emeldi's dissertation chair, and his timing, to a November 12 email memo he received from Emeldi, *see* SER 63-68, "identifying me as a barrier to her advancement and indicating that she was concerned about my unwillingness to move her doctoral committee forward"; "she was significantly concerned that I was a barrier to her advancement. That is not a role I am interested in playing, therefore it seemed that the logical step was for her to work with someone who would be able to promote her objectives. I chose to stop being the chair of her dissertation committee." SER 21-23.[4] Horner's description of the lengthy and detailed memo is accurate; and — consistent with Friestad's account of her initial and subsequent meetings with Emeldi — it contains no suggestion of gender discrimination. Emeldi wrote to Horner, "Though support has been requested, and you have acknowledged my patience in waiting for your involvement, we have, to date, not collaborated to progress my dissertation research forward." SER 67. She continued, "The extinction plan that's been implemented over the last year particularly has prevented me from accessing support in weekly research meetings to progress dissertation prerequisite and project work and from directly communicating, accessing support, and collaborating

[4] He noted that though he "chose to stop being the chair of her dissertation committee," SER 23, he "stayed as her program advisor." SER 21.

with you, committee, and other faculty members causing my program to be unnecessarily extended." *Id.* On November 19, Horner sent Emeldi the following email in response:

> I am sorry you were unable to come to the research meeting today, because I think it is important for us to resolve the issues you frame in your message without delay. . . . [¶] Your message is clear that you see my feedback as a barrier to your progress, and not helpful in moving your dissertation forward. [¶] I have great respect for your personal and professional judgement and I do not wish to be a barrier to your advancement. [¶] At the same time, I think we have differences in our view of your research plan. [¶] After some serious thought, I believe the most logical move is for you to work with an advisor who is more in tune with your research vision. As such I resign as of today as chair of your dissertation committee.

SER 61-62. Significantly absent from this contemporaneous documentary exchange between Emeldi and Horner (like Emeldi's memo to Friestad) is any hint of gender discrimination being at issue or having been surfaced. *See* SER 20-23; *see also* dkt. #54. Rather, Horner describes the intellectual and interpersonal conflicts that led to his resignation:

> Ms. Emeldi developed a dissertation proposal but was dissatisfied with my critiques about the scope and substance of her proposal. In my 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.

SER 5 at ¶ 2. Horner explains that Emeldi "did not respond well to [my criticisms]. . . . [S]he resisted my suggestions, and went to University administration complaining that I was an obstacle to her progress." SER 5 at ¶ 3.

I submit that, even making allowances for Emeldi's need in some instances to rely on circumstantial evidence, and giving her the benefit of permissible inferences on summary judgment, there is nothing but speculation to supply the vital missing element in Emeldi's gender discrimination claim: that the cause of and true reason for Horner's resignation (and his alleged undermining of finding a replacement chair) was gender-based retaliation. Not only do Horner and Friestad deny it, the documents created at the time corroborate them. *See* Maj. Op. 12466-67. Nonetheless, leveraging off her disputed complaint about Horner's gender bias to Friestad, Emeldi now theorizes that Horner's resignation as her chair had to be because Friestad reported that accusation in her call to Horner. However, when asked why she believed Horner's resignation was "gender based retaliation," she candidly — and correctly — replied, "I would be speculating. I think that's a question for Rob Horner." SER 53. *See* Maj. Op. 12469 & n.8.

The majority, however, believes a jury should decide this question. To justify allowing Emeldi to get that far, it cites three items of "ample circumstantial evidence" to establish causation and pretext. Maj. Op. 12464. The first and "strong" circumstance is the proximity in time between

Emeldi's protected conduct — her assumed complaint of gender discrimination — and Horner's resignation. Maj. Op. 12462 (citing *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1035 (9th Cir. 2006)). Of course, in *Cornwell* we held "the record did not contain evidence that Sharp knew about Cornwell's complaint before Sharp demoted him, and thus Cornwell's complaint could not have caused Cornwell's demotion." *Cornwell*, 439 F.3d at 1035. Likewise, that is the record here. Emeldi has no evidence that Horner had any idea she was accusing him of gender discrimination.

To close this evidentiary gap, the majority credits Emeldi's "theory" on appeal of how Horner learned of her supposed gender-bias complaints about him. In her brief to this court, Emeldi speculates that "[a]s soon as [she] left the discussion with Friestad, [Friestad] called Horner and told him that [Emeldi] had accused him of discriminating against her." Bl. Br. 6. She contends that because of that contact, Horner resigned as her dissertation chair "that very day." Bl. Br. 23. In fact, events did not move anywhere near that fast.[5] As documented by the record, Horner resigned on November 19, after receiving Emeldi's long email memo on November 12. *See* SER 21. As noted above, the Emeldi-Friestad meeting was on October 19, with the Friestad-Horner phone call occurring shortly after. The evidence shows that almost a month intervened between the call and Horner's resignation, during which time Horner and Emeldi had rather extensive

[5] Emeldi's counsel's willingness to exaggerate the documented facts undermines the credibility of counsel and his client.

email contacts, providing a contemporaneous documentary record that confirms Horner's nonpretextual explanation for his resignation.

Regardless of the timeline, Horner does not dispute that he resigned because of Emeldi's complaints about delays in her dissertation's progress — as relayed in general terms by Friestad and supplemented by Emeldi's email memo. But he does dispute — and there is no credible objective evidence to the contrary — that his resignation had anything to do with her being a woman rather than a grad student who had come to view him as a "barrier to her advancement." SER 21.

The majority tries to bolster Emeldi's case by citing to Horner's supposed acts of gender bias "in other contexts," all of which are anecdotal, based largely on hearsay and unsupported other than by Emeldi's own accounts. Maj. Op. 12453-54, 12464. For example, the majority credits Emeldi's assertion "that Horner gave more attention and support to male students and that he ignored her and did not make eye contact with her." Maj. Op. 12464.[6]

The majority also credits Emeldi's complaint that when she attended Horner's graduate student group meetings, she was "not on the agenda," or when she was on the agenda, none of her "substantial/meaningful work" was discussed. Maj. Op. 12464. Once again, there is no proffered

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[6] The majority cites only Emeldi's own speculative statement of facts in opposition to the University's motion for summary judgment, ER 36, and her statements in the Notice of Grievance, dkt. #53 at 27-28, which she filed against Horner on January 16, 2008, two months after his resignation.

testimony of other students or faculty members to give credence to Emeldi's perceptions that Horner was slighting her (and presumably other women students). The majority excuses this shortcoming because Emeldi "had direct percipient knowledge of what happened at the graduate student group meetings she attended." Op. at 12466 n.7. But this misses the point. She and the majority rely on these "facts" to prove Horner's actual gender-biased behavior — discrimination that took place not in one-on-one dealings between Horner and Emeldi where it would have to be a "he said, she said" dispute, but in front of many potential witnesses. Summary judgment standards do not require us to turn a blind eye to Emeldi's failure to make her affirmative case or to rebut the defendants' nonpretextual explanations with anything other than her own characterizations and perceptions.

This failure is particularly troubling with respect to what the majority invokes as Emeldi's "specific examples of Horner's male students being given opportunities that were not available to his female students," such as access to office space and technology. Maj. Op. 12464. The majority refers only to Emeldi's declaration; Emeldi cites nothing at all. She describes favorable treatment given to four specified male students, and names a female professor and a female student, both of whom she says complained of "subordinating" and "derogatory" treatment resulting from this disparity. Dkt. #74 at 16-18. She also says these disparities were "observed by doctoral students interviewed for the Student Advisory Board Memo." *Id.* at 16. But she does not offer declarations from any of these sources, or any direct evidence of Jason Naranjo's premature

"assist[ance] to get a tenure-track position," Scott Ross' "three office spaces" and "number of palm pilots" or Scott Yamamoto's "several opportunities to work on research projects." *Id.* at 16-17. This evidence, which Emeldi has not bothered to corroborate, is too anecdotal and lacking in specific evidentiary support to raise any reasonable inference that Horner was gender biased and actively discriminated between his male and female students.

Perhaps the most glaring example of Emeldi's speculative accusations, credited by the majority as supportive "other evidence" of Horner's retaliatory intent, Maj. Op. 12464, relates to her inability to secure a replacement chair despite asking 15 faculty members — which she attributes to Horner's gender-based animus against her. The majority cites Emeldi's contention that after his resignation, 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, which Emeldi says is a less prestigious degree." Maj. Op. 12456.

Other than Emeldi's own speculation and hearsay, neither of which can establish a disputed issue of material fact, the evidence that this statement was made is nonexistent. The "evidence" is actually the excerpt of record Emeldi submitted in this appeal (ER 37-38), which in turn is the statement of facts Emeldi submitted in opposition to the University's summary judgment motion in the district court. There Emeldi stated: "Horner announced to other faculty . . . that plaintiff should not be granted a Ph.D. degree but should be directed into a program for the lesser Ed.D. degree. Horner has never discussed that change with plaintiff." ER 37-38. As

support, she cites to her own declaration, in which she alleges, "[there was a] November 27, 2007 faculty meeting in which [Horner] advocated that I obtain a[ ] D.Ed. rather than a Ph.D. . . . Professor Cindy Herr described this statement by Horner to me immediately after it occurred, but I had never heard such a suggestion previously from Horner or anyone else." Dkt. #54 at 8. Where is the corroboration from Cindy Herr? All we have is a two-page excerpt of Herr's deposition. *See* dkt. #56-2. Nowhere does Herr testify that Horner made these statements, nor does she testify that she told Emeldi that Horner made these statements. Indeed, nothing in Herr's excerpted testimony refers to the Ed.D. program, a faculty meeting or even Horner at all. Emeldi's failure to ask Herr to confirm her alleged statement to Emeldi discredits the accusation against Horner as completely unfounded and certainly not "material to Emeldi's retaliation claim."

I am sympathetic to the majority's belief that the University could have done more for Emeldi in helping her find a replacement. *See* Maj. Op. 12456. That does not establish gender discrimination as the motivation for Horner's actions or the University's shortcomings, however. To posit, as the majority does, that she was unable to secure a replacement chair because Horner "poisoned" his colleagues against her is simply not credible on this record. Maj. Op. 12464. Not only has Emeldi failed to support Herr's alleged statement, she has presented no evidence from (or about) any of the 15 faculty members she asked, or from anyone else, suggesting that Horner did anything to dissuade them from acting as her chair. Rather, emails she placed in the record show that those she asked declined for a

number of legitimate reasons: they did not believe they had the appropriate specialization to oversee her research; they were already overextended with other projects; they were ineligible to serve as chairs due to University policies. One was hesitant to make a commitment due to health issues. One had moved to Kansas. Another was retired. *See* dkt. #48 at 16-26. Further, these emails show that many of the faculty members offered to meet with her to discuss her project, and then wished her well when they determined they were unable to serve as her chair. Some referred her to other faculty members, and several volunteered to serve on her dissertation committee. These are not responses one would expect from colleagues who had been "poisoned." And equally notable, as the majority concedes, "the record does not disclose why, despite unsuccessfully soliciting fifteen faculty members, Emeldi overlooked two professors who, the University says, were qualified and available to replace Horner as Emeldi's dissertation chair." Maj. Op. 12469.

Finally, the majority uses Horner's earlier praise for Emeldi's work as evidence that his explanation for resignation is pretextual. *See* Maj. Op. 12464. To do so seems a pure Catch 22. Had Horner never praised Emeldi, undoubtedly she (and the majority) would cite that as evidence of his long-standing, persistent gender bias. Horner praised Emeldi's work at various points in their relationship, but he also critiqued her work, as the majority itself notes. *See* Maj. Op. 12455 n.1, 12463 n.5. One would expect nothing less from a dissertation committee chair. Part of the chair's role is to offer the student advice and criticism on her dissertation's weaknesses as well as strengths, as well as on her own academic

performance. That Horner did just that does not show that his stated reason for resigning as her advisor after she told him he was "a barrier to her advancement" was pretextual. SER 21.[7]

In sum, Emeldi's case should fail because she has not shown enough to warrant a jury's finding causation. But even if we give her the benefit of doubt on that requirement, she *certainly has not shown enough to rebut as mere pretext Horner's reason for resigning as her dissertation chair*. The evidence, including Friestad and Horner's testimony and Emeldi's own documented complaints, makes it clear that Horner's nondiscriminatory explanation was genuine: he resigned as dissertation chair because of intellectual and interpersonal incompatibilities with his Ph.D. candidate. Emeldi's unsupported statements and speculation do not overcome this evidence, and she has not offered corroborative evidence that was available to her that would create triable issues of causation and pretext. We should not allow this case to go forward.

Title IX's worthy antidiscrimination objectives notwithstanding, to let Ms. Emeldi's claims go to a jury will serve only as a precedent-setting example of

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[7] In his declaration, Horner describes criticism he gave Emeldi leading up to his resignation: "In my 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. I pointed these and other issues out to her in a memo I wrote to her on September 7, 2009 . . . . I informed her that she was not yet ready to call her dissertation committee together because her proposal was not yet functional." SER 5 at ¶ 2.

how little it takes to turn a failed supervisory relationship between a professor and his Ph.D. candidate into a federal case of gender discrimination. The district court properly granted summary judgment. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-35551
D.C. No. 6:08-cv-06346-HO

MONICA EMELDI,
Plaintiff-Appellant,
v.
UNIVERSITY OF OREGON
Defendant-Appellee.

October 17, 2012

Dissent to order by Chief Judge Kozinski

OPINION

Chief Judge KOZINSKI, with whom Judges O'SCANNLAIN, GRABER, FISHER, TALLMAN, BEA and M. SMITH join, dissenting from the order denying the petition for rehearing en banc:

Bad facts make bad law. No facts make worse law. That's what happened here when the panel majority allowed plaintiff Monica Emeldi to escape summary judgment even though she produced no evidence of causation, an element of her retaliation claim. In the place of evidence, the majority permits Emeldi to create a material issue of fact by speculation. This opinion undermines the pleading framework for Title

IX and Title VII and erodes the well-established standards for summary judgment. Worse still, it jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors. Plaintiffs will now cite *Emeldi* in droves to fight off summary judgment: We may not have any evidence, but it's enough under *Emeldi*. Defendants will go straight to trial or their checkbooks—because summary judgment will be out of reach in the Ninth Circuit.

I

Monica Emeldi, a former Ph.D. candidate at the University of Oregon, had a falling out with her dissertation advisor. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1221-22 (9th Cir. 2012). Emeldi says that she complained to a university administrator about sex discrimination, the administrator relayed this complaint to Emeldi's advisor and the advisor resigned as her dissertation chair in retaliation. *Id.* at 1222, 1225. Emeldi also asserts, again without evidence, that the advisor prevented Emeldi from finding a replacement, thus forcing her to withdraw. *Id.* at 1222.

Under the established Title VII pleading framework, which the majority applies to this Title IX case, Emeldi must show a causal connection between her complaint and her advisor's resignation. *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008). Emeldi says the administrator told the advisor about the discrimination complaint in a phone call between the two. *Emeldi*, 673 F.3d at 1222, 1226-27. But Emeldi has no evidence that the administrator and the advisor discussed discrimination. To the contrary, the administrator stated under oath that she didn't talk to the advisor

about discrimination and that she couldn't have because she never heard Emeldi make the complaint in the first place. *Id.* at 1222, 1226.

This case is not at the pleading stage. The parties have gone through discovery and Emeldi has come up with nothing to support her speculation that the discrimination complaint was discussed. All we're left with is Emeldi's claim, sourced to her own amended declaration, that the administrator said she "debriefed" the advisor about the conversation with Emeldi. *Id.* at 1222, 1226 n.3, 1228. Debriefing the advisor is hardly an admission that they discussed discrimination. This is especially true in light of the fact that the administrator asked for and received Emeldi's permission to call the advisor about Emeldi's dissertation difficulties, *id.* at 1235 & n.3 (Fisher, J., dissenting), and in light of the fact that the administrator testified she'd never heard the discrimination complaint, id. at 1222, 1226 (majority opinion).

The majority finds the debriefing "evidence" sufficient to reverse the grant of summary judgment. It holds that "a jury reasonably could infer that [the administrator] passed Emeldi's complaint on to [the advisor]." *Id.* at 1226. This is a serious error that contravenes our own precedent, as the dissent notes: "[W]hen the non-moving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." *Id.* at 1233 (Fisher, J., dissenting) (quoting *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (per curiam)). It's also contrary to the teachings of the Supreme Court, by permitting Emeldi to plead her way out of summary judgment.

The Supreme Court has held that "mere pleadings themselves" can't defeat summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). And even where some evidence is presented beyond the pleadings, that's still not enough "[i]f the evidence is merely colorable, or is not significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted). The supposed admission about debriefing says nothing about whether discrimination was discussed, so it's not even relevant evidence. But even if it were, it's of vanishing probative value, far short of the threshold needed to stave off summary judgment.

The most Emeldi can say about the phone call is that the administrator and the advisor discussed something about Emeldi's conversation with the administrator. The Supreme Court warned against defeating summary judgment based on inferences drawn from such "ambiguous conduct": "[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). The administrator's phone call to the dissertation advisor is just such an example: It's as consistent with a discussion about Emeldi's dissertation as with any mention of discrimination. The majority is wrong to rely on it as evidence of causation.

The danger of the majority's opinion should be obvious. If a plaintiff can escape summary judgment based on his own vague description of what someone else said during a conversation with a third party, defendants can never get summary judgment

because the plaintiff will always have his own word to fall back on. This would thwart the Supreme Court's directive that summary judgment be "regarded not as a disfavored procedural shortcut," but as "an integral part of the Federal Rules" designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (internal quotation marks omitted). It would also cut against the grain of the Supreme Court's recent opinions in *Twombly* and *Iqbal*, which required plaintiffs to provide more than "bare assertions" or a " 'formulaic recitation of the elements' " in pleading a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (quoting *Twombly*, 550 U.S. at 555). Even at the motion to dismiss stage, plaintiffs must do something to "nudge[ ] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Emeldi has made it all the way past summary judgment without doing even that.

II

The majority's opinion would be bad enough if confined to the Title VII context. But this decision will impair the open exchange of ideas in our schools and universities if applied, as the panel majority does, in the Title IX context. Even accepting that the Title VII pleading standard applies to Title IX cases, no one claims the pleading standard should be *lower* for students suing professors in the Ivory Tower than for employees suing supervisors on the factory floor. The 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.

It's not just the practicalities of academia that require this freedom. The First Amendment does, too. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). In equating Title IX with Title VII, the panel overlooks the critical differences between academia and the outside world. It applies the law so loosely that one of the laxest interpretations of the pleading standard is now planted squarely in academia, just where the pleading standard should be highest. If this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for 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 ferment.

* * *

A great deal is at stake in the decision whether to allow a case like this to go to trial. In the Title VII context, subjecting employers to the expenses and risks of trial when the employee has presented nothing but unsubstantiated suspicions of discrimination imposes huge costs on businesses and makes them targets for hold-up settlements. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The 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. Would any of us choose to go under the scalpel of a surgeon who "earned" his M.D. by bullying his medical school with unsubstantiated claims of unlawful discrimination? *Emeldi* is a very, very bad result, which bespeaks a major misapplication of long-

standing legal principles to the sensitive area of academia. It invites all manner of frivolous suits while further diluting the authority of our schools and universities to maintain standards of academic excellence among students and faculty. I can only hope it will not be followed by other courts considering the issue.

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 08-6346-HO

MONICA EMELDI,
Plaintiff,
v.
UNIVERSITY OF OREGON
AN AGENCY AND INSTRUMENTALITY OF
THE STATE OF OREGON,
Defendant.

June 4, 2010

ORDER

Plaintiff filed this action in the Circuit Court for the State of Oregon, County of Lane. Plaintiff alleges three claims for relief: (1) Title IX retaliation; (2) violation of ORS § 659.850; and (3) breach of contract. Defendant removed the action to this court and now seeks summary judgment as to all claims.

In 2004, defendant, the University of Oregon, admitted plaintiff Monica Emeldi to the doctoral program at the University's College of Education (COE). Dr. Edward Kame'enui advised plaintiff and chaired her dissertation committee.

Upon admission, plaintiff received financial aid from the Project Vanguard grant which was co-directed by Dr. Kame'enui and Dr. Robert Horner.

Plaintiff agreed to perform service upon graduation in exchange for funding from Vanguard.

Beginning with the 2005-06 academic year, Dr. Kame'enui took a sabbatical from the COE with a return date in 2007. Dr. Horner agreed to take over as plaintiff's dissertation chair.

In May of 2007, plaintiff collected comments from several graduate students and penned a memo, as the group's representative, listing the concerns. The memo is two pages long and documents 15 recommendations by the graduate students to COE Dean Michael Bullis. The comments were collected to make recommendations regarding program improvement and "reflect the collective discussion and thought of eight doctoral students (female and male) across three cohorts." Doctoral Program Improvement Recommendations dated April 29, 2007 and May 3, 2007 (attached to Emeldi Deposition as Exhibit 18 which is attached to the Affidavit of Mark Abrams (#37)). The third comment recommended:

> 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 empowered 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.

Id.[1]

In October of 2007, plaintiff met with Marian Friestad, vice president for graduate studies, about concerns she had with her doctoral program. Friestad states that no discussion related to sexual discrimination occurred. Plaintiff's counsel, without any citation to the record, states that plaintiff described one possible cause of the problems as an institutional bias in favor of male candidates and a relative lack of support and role models for female candidates.[2] During this meeting a discussion regarding plaintiff instituting a grievance against the University apparently took place.

On November 27, 2007, Dr. Horner, citing plaintiff's refusal to listen to him about necessary changes to her dissertation proposal, stopped serving as plaintiff's dissertation chair. Plaintiff contacted 15 other faulty members via e-mail, but was unable to recruit another professor to serve as chair. Several of the faculty contacted cited being too busy and several others lacked the necessary

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[1] It should be noted that at the time, there were six tenured female faculty members within the college of education including Marilyn Nippold in plaintiff's department.

[2] Although the court has no duty to search the record, plaintiff's counsel did submit an unsigned declaration in which she purportedly makes this statement. Defendant has moved to strike the declaration which motion will be discussed below. The declaration conflicts with plaintiff's written information to Friestad for the October meeting which does not include complaints regarding discrimination. *See* Note to Marian Friestad (attached to Emeldi Deposition as Exhibit 29 which is attached to the Affidavit of Mark Abrams (#37)).

qualifications to serve. There were other qualified faculty members that plaintiff did not approach. In addition, plaintiff did not contact Dr. Kame'enui who had returned to the University by this time.

Plaintiff has completed all course work required and only needs to complete her dissertation to complete her degree. Plaintiff claims she is unable to find a qualified member to chair her dissertation committee. Her dissertation proposal remains unapproved and uncompleted.

Plaintiff filed a grievance within the University system contending that Dr. Horner's resignation was the commencement of a sexist retaliation against her for the May 2007 memo. Prior to completion of the appeals process for the grievance, plaintiff instituted this action.

A. Title IX Claim

A cause of action for retaliation for complaints of sex discrimination may be brought under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183-84 (2005). Title IX should be analyzed under the same burden shifting scheme recognized for Title VII cases. *See Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (applying Title VII methodology to Title IX discrimination claim); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (applying the burden-shifting scheme from *McDonnell Douglas* to Title VII). Thus, at this stage of the proceedings, plaintiff must prove a prima facie case and, if she does so, defendant must present legitimate non-discriminatory reasons for any adverse actions plaintiff suffered. If defendant presents such reasons, plaintiff must then demonstrate that the reasons are a pretext for

discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Plaintiff can establish a prima facie case of retaliation by showing she engaged in a protected activity, that she suffered an adverse action and a causal link between the two. *See Burch v. Regents of University of California*, 433 F.Supp.2d 1110, 1126 (E.D. Cal. 2006).

The memo penned by plaintiff does not appear to qualify as protected activity. Protected activity in this context involves complaints of discrimination. The *Burch* court's discussion on this issue is probative where *Burch* advocated for a women's varsity wrestling team:

> This advocacy is not equivalent to a complaint of discrimination. *Cf. Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (holding that plaintiff failed to establish that he engaged in protected activity when he complained about the impact that an English-only rule would have on his reputation as a radio personality and only alleged that this same conduct was discriminatory after he was fired). Moreover, because establishing a women's wrestling team, as opposed to more varsity opportunities for women in general, was not required to comply with Title IX, the court cannot say that defendants should have interpreted plaintiff's inexact complaints as complaints of discrimination. *Cf. Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995) ("A general complaint of unfair treatment does not translate into a charge of illegal . . . discrimination."). (See also Pl.'s SUF No. 39 (recognizing that "Title IX

> compares actual participation opportunities for males and females, not the number of sports")). Plaintiff may not be required to use "magic words" to engage in protected activity, but he did have an obligation to "at least say something to indicate [that gender was] an issue." [Footnote omitted] *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000); *Mayfield v. Sara Lee Corp.*, No. C 04-1588, 2005 WL 88965, at *8 (N.D. Cal. Jan. 13, 2005) (recognizing plaintiff's duty to "alert[ ] his employer to his belief that discrimination, not merely unfair … treatment, had occurred"). Significantly, plaintiff has failed to point the court to any declarations or testimony where he described under oath how he objected to gender discrimination prior to May, 2001. Meanwhile, Warzecka has declared that prior to May, 2001, he did not construe any of plaintiff's opinions on the plight of the female wrestlers as allegations of gender discrimination.

Id. at 1127.[3]

The memo does not raise charges or allegations of gender discrimination. Plaintiff apparently also relies on the unsigned declaration submitted by counsel to show she raised complaints of gender discrimination. Defendant moves to strike the declaration. (#61). Instead of filing an affidavit, plaintiff's counsel submitted the declaration without

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[3] Moreover, plaintiff testified at her deposition that the memo did not reflect any illegal activity on the part of the University.

a signature stating that plaintiff gave him permission to "file the declaration using her electronic signature, while she was out of state..." Since oral argument, plaintiff resubmitted the declaration with a signature and the court will consider it.

Defendant also moves to strike the attachment to the original declaration which is a 178 page summary of events which is apparently a diary covering the period from July 2007 to end of 2009, because it was not produced in discovery. There is some dispute as to whether a compact disc containing all entries listed in the summary of events diary was provided. The motion to strike is denied, but the court will only consider admissible evidence. The declaration provides weak evidence of complaints of discrimination at best, plaintiff now contends that the University perceived her to have opposed illegal acts and is not relying solely on complaints of discrimination.

Defendant also contends that the University did not commit an adverse act. This argument really goes to causation because if plaintiff's failure to obtain a chair for her dissertation committee is related to any perceived complaints of gender inequality, then the University has effectively terminated her from the program which is certainly adverse.

Causation may be established from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision. *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731-32

(9th Cir. 1986). There is no direct evidence of retaliation in this case.

As noted above, the alleged protected activity is borderline at best and thus, it is difficult if not impossible to infer causation even assuming knowledge. However, plaintiff produces insufficient evidence of knowledge of the alleged activity on the part of Horner or other faculty members who declined to chair plaintiff's dissertation committee. Plaintiff's counsel's argument with regard to Dr. Horner cites some deposition testimony that does not appear to have been produced in the record before the court,[4] but essentially states that Friestad met with Horner after the October 2007 meeting and told him plaintiff was contemplating filing a grievance, that Horner was told that plaintiff authored the May 2007 memo and that immediately thereafter, Horner withdrew as chair.

However, Horner testified that while he was told there was a memo, he was not told about the content and there is no indication from Friestad or Horner that Horner was informed of any complaints of harassment or discrimination. The only record support that plaintiff even made "complaints" of discrimination is her declaration. Plaintiff provides insufficient evidence to link knowledge of any such complaint to Horner. A trier of fact would not only have to accept that such complaints were made to

[4] For instance, plaintiff cites the Dr. Horner's deposition at pp. 16-17 as evidence that Horner knew plaintiff had accused him of discriminating against her. The court cannot find any submission from plaintiff including Horner's deposition, and can only find page 16 in an attachment from defense counsel submitted in reply to plaintiff's opposition to the summary judgment motion. *See* Document #59 at Ex. C.

Friestad, but speculate that Friestad relayed such complaints to Horner. The only admissible evidence in this regard is Horner's testimony and Friestad's testimony that there was no discussion related to discrimination. Even plaintiff herself stated when asked why she thought Dr. Horner's resignation was gender based responded, "I would be speculating. I think that that's a question for Rob Horner." Emeldi Deposition at p. 260.[5]

The same is true for the other would-be dissertation chairs plaintiff contacted. Plaintiff can offer nothing more than speculation that she has been unable to find a chair based on any perception that she engaged in activity protesting gender discrimination at the University. Accordingly, the motion for summary judgment on plaintiff's Title IX claim is granted.

B. ORS § 659.850 Claim

ORS § 659.850 prohibits unreasonable differentiation in treatment (in form or operation) based on sex. Plaintiff apparently intends to amend her complaint to make clear that this claim is also based on retaliation. Because plaintiff fails to present sufficient evidence of causation, this claim also necessarily fails.

C. Breach of Contract

It is difficult to decipher plaintiff's breach of contract claim, but it appears she alleges that she was required to obtain a Ph.D. and satisfy service obligations in return for the Vanguard funding and

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[5] It should be noted that Dr. Horner, after resignation as plaintiff's dissertation chair, continued to work with plaintiff on a co-authored article.

that the University breached the contract by not permitting her to complete that performance.

The alleged contract apparently is based on promises made by Dr. Kame'enui and that Kame'enui is an apparent agent of the University and thus the University is bound by the alleged contract.[6]

There are several problems with plaintiff's theory. There is no writing and thus the contract would violate the statute of frauds, ORS § 41.580. Plaintiff contends that equity should be applied to enforce the contract because it was partially performed. A party can be estopped from raising the statute of frauds when the person relying on the promise has acted to her detriment solely in reliance on an oral agreement. *Engelcke v. Stoehsler*, 273 Or. 937, 944 (1975). Plaintiff provides no evidence that she acted solely in reliance on the alleged oral agreement.[7]

Moreover, Dr. Kame'enui did not have apparent authority to bind the University. Plaintiff could not reasonably believe Kame'enui had authority to bind

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[6] It is difficult to see how there is a breach even of plaintiff's construct of the alleged contract. She received funding for every year she attended the University. It appears that plaintiff is asserting perhaps some sort of interference with economic relations assuming she is asserting that she will have to pay the money back because she cannot provide the service she is allegedly required to provide.

[7] Plaintiff seeks to supplement the record with the Attorney General's review of the Bellotti matter to show that the University honors verbal agreements. The court grants the motion to supplement, but the University does not make the law concerning the statute of frauds and thus the materials do not favor plaintiff on the issue.

the University as she knew he was not an administrator and the University catalog, which plaintiff was familiar with, states that there is no contract between the student and the University. Moreover, plaintiff's admission letter stated that there was no guarantee of funding or support. Dr. Kame'enui's apparent authority to do any particular act can be created only by some conduct of the University which, when reasonably interpreted, caused plaintiff to believe that the University consents to have Dr. Kame'enui act for it on that matter. *Wiggins v. Barrett & Associates, Inc.*, 295 Or. 679, 687-88 (1983).[8] Plaintiff must also rely on that belief. *Id.* at 688. Plaintiff claims Dr. Kame'enui engaged in some conduct to make her believe he had authority, but she points to no conduct on the part of the University which could have caused plaintiff to believe Kame'enui had

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[8] Moreover, a government actor can only be bound by the promise of its agent acting beyond the scope of actual authority if

> (a) the municipality clothes the agent with apparent authority, (b) the promise is one which the municipality could lawfully make and perform, (c) there is no statute, charter, ordinance, administrative rule, or public record that puts the agent's act beyond his authority, (d) the person asserting the authority has no reason to know of the want of actual authority, and (e) the municipality has accepted and retained the benefit received by the municipality in return for the promise.

Wiggens, 295 Or. at 683. Plaintiff does not address these elements. The Oregon administrative rules demonstrate the Dr. Kame-enui's authority is limited in this regard. *See* OAR § 580-004-005.

authority, especially in light of the catalog to the contrary.[9]

The motion for summary judgment is granted as to all claims and the clerk shall issue a judgment in favor of defendant dismissing this action.

CONCLUSION

For the reasons stated above, plaintiff's motion to supplement the record (#69) is granted, defendant's motion to strike (#61) is denied, and defendant's motion for summary judgment (#34) is granted. This action is dismissed.

DATED this 4th day of June, 2010

s/ Michael R. Hogan
United States District Judge

[9] Plaintiff cites the Bellotti situation again, but that occurred after the alleged contract in this case, and thus plaintiff could not have relied on such conduct.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-35551
D.C. No. 6:08-cv-06346-HO

MONICA EMELDI,
Plaintiff-Appellant,
v.
UNIVERSITY OF OREGON
Defendant-Appellee.

October 17, 2012

ORDER

The opinion in the above-captioned matter filed on March 21, 2012, and published at 673 F.3d 1218, is amended as follows and is simultaneously filed with this order:

At slip opinion page 3268, line 2, add a footnote after <544 U.S. at 173.>, stating: <Like the Supreme Court in *Jackson*, "[w]e do not rely on regulations extending Title IX's protection beyond its statutory limits." 544 U.S. at 178. Our decision rests on "the statute itself," not on regulations implementing Title IX. *Id.*; *see also* 34 C.F.R. §§ 100.7(e), 106.71.>.

Judges Gould and Paez have voted to deny the petition for panel rehearing and rehearing en banc. Judge Fisher has voted to grant the petition for panel rehearing and rehearing en banc. The full

court has been advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is denied.

No future petitions for rehearing or rehearing en banc will be entertained.

IT IS SO ORDERED.