NO. 23-_____

In the Supreme Court of the United States

DEANA POLLARD SACKS,

Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY; AHUNANYA ANGA; JAMES DOUGLAS; FERNANDO COLON–NAVARRO; ANA OTERO; AND APRIL WALKER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Deana Pollard Sacks was a tenured professor at the Thurgood Marshall School of Law (TMSL) at Texas Southern University (TSU) until 2020. She filed two lawsuits against TSU, *Sacks-I* in 2018 and *Sacks-II* in 2022. Sacks alleged violations of Title VII for sex discrimination, a hostile environment, and retaliation, *inter alia*.

The Title VII gender-discrimination claims were dismissed in both cases for failure to state a claim and the United States Court of Appeals for the Fifth Circuit affirmed. This petition concerns *Sacks-I*. The petition for certiorari for *Sacks-II* was filed February 14, 2024.

The District Court rejected continuing violations and granted summary judgment for all defendants as to all claims other than the non-retaliation EPA claim against TSU. The court did not allow Petitioner to discover female wage data or to amend her complaint to add EPA comparators once she discovered which male professors were paid higher wages, among many other issues that Petitioner appealed.

The following issues are presented:

1. Whether a federal court may reject the doctrine of continuing violations in a Title VII hostile-work-environment case and eliminate from consideration all Complaint allegations that occurred more than 300 days prior to the date plaintiff filed an EEOC charge.

2. Whether a federal court may deprive an EPA plaintiff of female wage data and require her to identify male comparators before she knows which males were paid higher wages.

3. Whether this Court overruled *Swierkiewicz* and changed the pleading standard for Title VII cases by its decisions in *Twombly* and *Iqbal*, and if so, whether *Iqbal* empowers trial courts to disregard factual allegations, make factual findings to determine "plausibility," and/or adopt pleading burdens in direct conflict with this Court's pre-*Iqbal* precedent.

4. Whether a federal court may reject this Court's summary judgment standards and make findings of disputed fact in a summary judgment proceeding post-*Iqbal*.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Deana Pollard Sacks

Respondents and Defendants-Appellees below

- Texas Southern University
- Ahunanya Anga
- James Douglas
- Fernando Colon–Navarro
- Ana Otero
- April Walker

LIST OF PROCEEDINGS

CURRENT CASE (SACKS I)

U.S. Court of Appeals for the Fifth Court
Docket 22-20474
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker
Date of Judgment December 15, 2023

U.S. District Court for the Southern District of Texas
Docket Civil Action H-18-3563
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker ("Sacks-I")
Date of Judgment April 8, 2022

RELATED CASE (SACKS II)

U.S. Court of Appeals for the Fifth Court
Docket 22-20541
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker; Darnell Weeden
Date of Judgment October 3, 2023

U.S. District Court for the Southern District of Texas
Docket Civil Action H-22-299
Deana Pollard Sacks v. Texas Southern University; Ahunanya Anga; James Douglas; Fernando Colon–Navarro; Ana Otero; April Walker; Darnell Weeden ("Sacks-II")
Date of Judgment September 13, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

REGULATIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Deana Pollard Sacks petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at App.1a.

The United States District Court for the Southern District of Texas issued:

a. Memorandum and Order Granting Defendants' Amended Motion to Dismiss, in part, U.S. District Court for the Southern District of Texas (August 29, 2019); App.43a.

b. Memorandum and Order Granting Defendants' Amended Motion for Summary Judgment, in part, U.S. District Court for the Southern District of Texas (January 25, 2021); App.6a.

c. Order Denying Plaintiff's Motion to Compel the Production of Women's W-2s, U.S. District Court for the Southern District of Texas (April 29, 2020); App.35a.

d. Order Denying Plaintiff's Motion to Reconsider her Motion to Compel Women's W-2s, U.S. District Court for the Southern District of Texas (June 10, 2020); App.32a.

e. Final Judgment, U.S. District Court, Southern District of Texas (April 8, 2022); App.4a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment on December 15, 2023. App.1a.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) as she filed her petition for writ of certiorari within 90 days from the date the Fifth Circuit rendered its judgment. Sup. R. Civ. P. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 206(d)(1)&(3):

> **(d) Prohibition of sex discrimination**
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> [. . .]
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

42 U.S.C. § 1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Factual Background

Because the District Court dismissed the Title VII sex-discrimination claims for failure to state a claim, the sex-discrimination facts must be presumed

true and construed in the light most favorable to the Petitioner.

The District Court dismissed all claims and all parties pretrial other than the Equal Pay Act claim against TSU. As to the EPA claim the court: 1) dismissed the retaliation portion; 2) denied Petitioner discovery of female professors' wages; 3) required Petitioner to name comparators before she obtained accurate male wage data and could identify proper comparators; 4) refused to instruct the jury on EPA liability arising from withholding wages, 29 U.S.C. § 206(d)(3);[1] and 5) refused to conduct a jury investigation or order a new trial despite a juror's admission that another juror conducted outside research on Petitioner's wealth and shared it with all jurors.[2]

B. Complaint Allegations

Petitioner became a law professor at Texas Southern University (TSU) in 2000. Petitioner and other female and white professors were subjected to a sex- and race-based hostile environment for years, disparate treatment, and harsh retaliation for complaining including withholding of wages and physical assault/battery. The factual allegations include:

1. Hostile Environment

"Certain non-white administrators and professors … target white and female employees for harassment and abuse, to attempt to force them out of their jobs,"

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[1] ROA.22-20474.3119-3140, ROA.22-20474.3159-3167, ROA.22-20474.3464-3489.

[2] ROA.22-20474.3570-3639, ROA.22-20474.3645-3654.

including: "Physical threats, assault, battery, and property damage…; Failing to pay monies earned…; Verbal abuse, yelling…and other bullying tactics;… Interfering with the [Petitioner's] ability to do her job, such as refusing to give keys to access necessary equipment." ROA.22-20474.241-243[¶2].

"Caucasian and female law professors…refer to the hostile work environment at the law school as 'constant,' 'persistent,' and 'pervasive.'" ROA.22-20474.243-245[¶¶3,7]. Petitioner "has been screamed at, falsely accused of misconduct, physically hit or shoved, assaulted, and slandered… The harassment has interfered with [Petitioner's] work, distracted her from her job performance, impeded her professional advancement… and caused her to feel intimidated and threatened by [Respondents'] very loud, aggressive, and physically threatening behavior… motivated by racial and gender animus." ROA.22-20474.268-269 [¶46].

Respondents acted with "sheer hatred for whites," calling them "white bitch," "fucking whites" and "fucking white people" on a "regular basis." ROA.22-20474.246[¶9], ROA.22-20474.271[¶48(d)]. Respondents' abusive conduct includes violence: "slamming a door into [Petitioner's] body, punching a handbag off of [Petitioner's] shoulder, and grabbing [Petitioner's] arm," *inter alia*. ROA.22-20474.269-270[¶48(a)], ROA. 22-20474.282-284[¶63], ROA.22-20474.285-286[¶65(c)]. Petitioner hid behind the dean's body (a very tall man) to block Otero's attempts to get in close range of Petitioner's body after Otero "stormed into the dean's office yelling and gesturing" toward Petitioner. The dean physically blocked Otero from reaching Petitioner. ROA.22-20474.269-270[¶48(a)].

Respondents are an insular group of mostly TSU law graduates with longstanding personal relationships, operated in concert, and "defamed Plaintiff to students and interfered with her relationships with her teaching assistants and research assistants… Plaintiff is routinely discredited, screamed at, and bullied on a constant basis," and "hostile" Black strangers stood near Petitioner's car and glared at Petitioner. ROA.22-20474.244[¶6], ROA.22-20474.251 [¶21], ROA.22-20474.255[¶¶30-31], ROA.22-20474.269-272[¶48(a)&(d)], ROA.22-20474.285-287[¶¶65(c)-(d)], ROA.22-20474.290[¶67], ROA.22-20474.298[¶¶94-95].

Petitioner spent "hundreds of hours… defending herself against false charges, documenting other employees' harassment, obtaining witness statements… Human Resources has refused to conduct a reasonable investigation." ROA.22-20474.273[¶50]. Petitioner's and many women's sex-discrimination complaints were mishandled or ignored by Respondents. ROA.22-20474.245-246[¶8], ROA.22-20474.252-253[¶¶23-24], ROA.22-20474.269-273[¶48], ROA.22-20474.273-274[¶¶50-51], ROA.22-20474.276-277[¶56], ROA.22-20474.282[¶62]. The American Bar Association (ABA) found that TSU has a "persistent" pattern of ignoring many sexual-harassment and sex-discrimination complaints. ROA.22-20474.273[¶1], ROA.22-20474.244-245[¶7], ROA.22-20474.257[¶34], ROA.22-20474.269[¶47].

2. Disparate Treatment

"The law school pays higher compensation and provides much better conditions of employment for male and non-white employees." ROA.22-20474.254-255[¶29]. "Employment benefits that non-white and

male professors routinely enjoy are denied to [Petitioner], such as dean positions and director positions, large sums of additional income." ROA.22-20474.243-244[¶5], ROA.22-20474.274-275[¶52]. "Between 2015 and 2018, [Petitioner] repeatedly asked [for dean/ director positions and was] denied every time" while Blacks and males were given the lucrative positions. ROA.22-20474.281[¶61].

"Female professors are given more difficult or undesirable course schedules and are paid less than male professors. Male professors are given deanships, directorships, or professorships with substantial increased compensation of $20,000.00 to $40,000.00 or more per year, while females are generally passed over." ROA.22-20474.256, ¶33.

3. TSU's Failure to Investigate Sex-Discrimination Complaints and Retaliation

"The egregious racist and sexist hostile work environment has been the subject of dozens or hundreds of EEOC charges of discrimination lodged against TSU and TMSL, and dozens or hundreds of discrimination and civil rights lawsuits." ROA.22-20474.241[¶1].

"In 2016-2017, the ABA issued censures against TMSL for violations of gender anti-discrimination accreditation standards…while James Douglas was the interim dean [including] a fine of $15,000…The ABA directed the law school to remedy the unequal pay based on gender…The law school has taken no reasonable steps to equalize the salaries of the professors, despite the ABA's specific directive." ROA. 22-20474.257[¶34]. TSU "has never undertaken a serious investigation into such systemic discrimination

and harassment… despite receiving many complaints." ROA.22-20474.274[¶51].

Soon after Petitioner's 2017 EEOC charge, "the harassment intensified…The retaliatory harassment includes… reprimanding [Petitioner] or yelling at her at every opportunity, to punish her for filing an EEOC Charge" and repeated physical assault including Anga physically charging at Petitioner and getting "within 10 inches of [Petitioner's] face and shout[ing] in an angry manner, 'What are you going to do about it!?'" TSU ignored Petitioner's complaints. ROA.22-20474.284-286[¶65(a)-(c)]. In the fall of 2017 students warned Petitioner that TSU planned to orchestrate a false, derogatory student evaluation in retaliation for her EEOC filing. ROA.22-20474.244[¶6], ROA.22-20474.287-288[¶65(f)]. Paragraphs 65-66 list harassing acts 2017-2018 following the EEOC charge. ROA.22-20474.284-290[¶¶65-66].

4. Discriminatory/Retaliatory Abuses of State Power

The Respondents "have acted with malicious intent, racial hate, and misogyny. They have formed voting blocks to manipulate the [law school] committee processes and the distribution of taxpayer dollars, acting under color of state law, to divert funds away from deserving Caucasians," acted "in concert," and "subverted TSU processes for their own racist and misogynist purposes." ROA.22-20474.246[¶9], ROA.22-20474.298[¶¶94-96]. Respondents used "state processes… [to] fail[] to pay monies earned." ROA.22-20474.241-242[¶2(b)-(c)]. "The right to be free from race and sex harassment and discrimination is a clearly established right." ROA.22-20474.252[¶23]. "The law

school… allows and ratifies racial and gender discrimination, harassment, and retaliation." ROA.22-20474.254[¶29].

In 2016, "soon after [Petitioner] made a race-based complaint…[Respondents] voted to recommend a finding of discrimination against [Petitioner]." ROA.22-20474.271-272[¶48(c)], ROA.22-20474.280[¶59]. Respondents were "openly hostile" at the committee hearing, "shouted at" Petitioner, and Anga "rudely informed [Petitioner] that they were in control of her fate." ROA.22-20474.282-284[¶63]. Ultimately the dean "did not support the committee's bogus recommendation because there was 'no evidence'…Still, the [committee] proceeding was very distressing and cost [Petitioner] many hours defending herself." ROA.22-20474.271-272[¶48(c)].

After Petitioner complained of Otero's and Walker's assaults, TSU withheld $20,000 from Petitioner: "[TSU] has a pattern of not paying whites monies earned." ROA.22-20474.276-281[¶¶56-60].

C. Petitioner's Summary Judgment Evidence

1. Hostile Environment

A former white female dean (PG) testified/swore:

1) "There were two sets of rules at the law school, one for African American employees, and one for Caucasians…The atmosphere at TMSL is very hostile toward Caucasians, and Caucasians are harassed as I was on a regular basis, including being screamed at, not being given the same access to the school as African Americans, and getting resistance to necessary equipment and

other things needed to do the job." ROA.22-20474.2115-2116[¶¶10-19].

2) As with Petitioner, TSU falsely accused PG of discrimination after she complained of race discrimination. ROA.22-20474.2117[¶3].

3) As with Petitioner, TSU retaliated after PG made a discrimination complaint by creating a false and derogatory performance evaluation. ROA.22-20474.2139-2141.

4) PG and other Caucasians had unexplained deductions in their paychecks (but not Blacks) and TSU failed to pay PG $5000 for a class taught then paid a Black $26,000 for teaching the same class. ROA.22-20474.2161-2166.

5) PG suffered from "technology interference" which is a "form of harassment" directed at whites and "common" at TSU (her emails and important documents went missing, etc.). ROA.22-20474.2146, ROA.22-20474.2176-2178.

6) The atmosphere at TSU was "extremely intolerable" and "dangerous" for whites, and "slowly but surely all Caucasians leave TSU." ROA.22-20474.2159-2160.

A tenured white female professor and Harvard law graduate (RS) who resigned in 2020 because she was harassed, overworked, constantly sick, and TSU ignored her multiple sexual-harassment and unequal-pay complaints testified:

1) When RS was a tenure candidate, her Black male tenure reporter summoned her to his office, told her "he was a healer and that

God had given him healing powers, came across the desk, put his hands on me somewhere on my upper body" and physically manipulated her onto his office floor "in a skirt, legs splayed… And then after pushing me there on the floor, would not let me up until I admitted that I could feel the healing powers." TSU ignored her multiple complaints. ROA.22-20474.2279-2280, ROA.22-20474.2306-2314.

2) The law school had an underlying current of sexism, was "institutionally abusive," and was "like an abusive relationship" until she resigned. ROA.22-20474.2293-2298, ROA. 22-20474.2305.

3) TSU subjected RS to exhaustion harassment "death by a thousand cuts" until it was "intolerable" and she "felt sick and unable to continue at the workload that they were giving me." ROA.22-20474.2283-2285, ROA. 22-20474.2305.

Petitioner's sworn statement:

1) A TSU security guard told Plaintiff that law professors "want to kill you." Strange Black men followed Petitioner to her car on TSU campus after she complained of discrimination. ROA.22-20474.1572[¶73(a)&(g)]. Petitioner did not feel "safe" at TSU and was very "uncomfortable and stress[ed]," and had to "spend thousands of dollars on personal security to escort me to and from TSU." ROA.22-20474.1572-1575[¶73(a)-(g)].

2) Respondents acted in concert 2012-2019 and repeatedly approached Petitioner aggressively, screamed into Petitioner's face at very close range, and made unwanted harmful/offensive physical contact with Petitioner's body. Walker repeatedly assaulted Petitioner and screamed that Petitioner is a "lie," stating, "Why does she get away with this, because she's white!?" Petitioner repeatedly complained to TSU Human Resources and the law school deans but TSU did not contact witnesses or conduct a reasonable investigation, and usually ignored Petitioner's complaints entirely. ROA.22-20474.1548[¶30], Exh.4(ROA.22-20474.1627-1636), ROA.22-20474.1545-1548[¶¶23-28], ROA.22-20474.1562-1563[¶¶59-60], ROA.22-20474.1755-1775, ROA.22-20474.1782-1789, ROA.22-20474.1799.

3) After Petitioner filed an EEOC charge, she was subjected to "extreme hostility" by Respondents, including physical assault, slander, being yelled at and "shout[ed] down" at faculty meetings, and did not receive emails sent to the entire faculty from interim-dean Douglas. ROA.22-20474.1566-1579[¶¶70-73].

4) After not receiving a single student complaint in 16 years of teaching at five ABA-accredited law schools, soon after Petitioner's original 2016 complaint, Respondents orchestrated an official committee proceeding, yelled at Petitioner during the meeting that she was "not in control," then made a bogus finding of discrimination against Petitioner

(grounds for termination) although the dean (Dannye Holley) ultimately concluded that "no evidence" supported the committee's finding. ROA.22-20474.1559-1561[¶¶51-55].

5) Petitioner's hostile assistant (assigned by Douglas) slandered Petitioner to her students during the fall 2017 student evaluation to create a false, negative evaluation to "put [Petitioner] in [her] place" soon after Petitioner's 2017 EEOC charge. ROA.22-20474. 1576-1577[¶73(i)].

6) After Petitioner filed her EEOC charge, Respondents' harassment continued and exacerbated until Petitioner resigned, including: wage withholding, technology interference including blocked access to Petitioner's TSU emails and payroll data, property damage, repeated assaults and verbal abuse, and her workload was "increased significantly." ROA.22-20474.1571-1579[¶¶72-73].

2. Evidence of Douglas's Pattern of Discrimination/Harassment/Retaliation, Intent, and Dishonesty

1) A former dean (DH) testified that interim-dean Douglas apparently provided "misleading information" to the ABA investigators concerning the many gender-discrimination complaints; Douglas has been "dishonest or misleading." When asked whether Douglas threw him under the bus, the former dean testified, "Sure he did. What else would he

do?... That's the kind of guy he is." ROA.22-20474.2209-2213.

2) Douglas has a decades-long history of racial/gender discrimination and was found liable for punitive damages for intentional discrimination against white males. *Harrington v. Harris*, 118 F.3d 359 (5th Cir.1997), *cert. denied*, 522 U.S. 1016 (1997). Soon after the verdict Douglas was promoted to TSU President with a "substantial" raise, which Douglas testified was a "good example for the students and the employees at TSU." ROA.22-20474.2229-2233.

3) Douglas denied a female (IS) $5000 for teaching legal research but men were paid. When she complained to Douglas about gender discrimination, "James Douglas threatened to fire me if I did not continue to teach without being compensated... He has stated that he was not concerned about firing people at the law school because even if he were to be sued, that the lawyers and insurance would handle that for him." ROA.22-20474.2326. Douglas testified that all discrimination complainants were at "fault" for complaining. ROA.22-20474.2238-2246.

4) Douglas "ignored all of [Petitioner's] emails to him while he was the dean," refused to allow Petitioner to speak in faculty meetings, made false charges of misconduct in response to Petitioner's complaints, and failed to respond to Petitioner's 2016 173–page discrimination complaint. ROA.22-20474.1583-1585.

D. Trial Court And Fifth Circuit Opinions

1. Improper FRCP 12(b)(6) Dismissal

Despite the lengthy, detailed complaint, the District Court granted a 12(b)(6) motion concerning all Title VII sex-discrimination claims: hostile environment, disparate treatment, and retaliation. The District Court dismissed all individual Respondents except Douglas. App.43a.

2. Pretrial Abuses of Discretion That Deprived Petitioner of Critical Evidence Necessary to Prove Her EPA Claim

The District Court refused to compel production of female law professors' W-2s (App.35a) and denied Petitioner's motion for reconsideration. App.32a.

After Petitioner obtained the men's W2s and learned that TSU's official wage data underreported men's wages by tens of thousands per year[3] and that virtually the entire male faculty[4] was paid made more than her regardless of longevity, deanships, or directorships, she moved to amend the Complaint to add multiple comparators. This was denied. ROA.22-20474.1072-1270 (Doc. 76).

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[3] *See* Petitioner's Response to Defendants' Amended Motion for Summary Judgment, *Table 1–Bogus TSU reports versus W-2s*, ROA.22-20474.1512-1513.

[4] *See* Petitioner's Response to Defendants' Amended Motion for Summary Judgment, *Table 2–Plaintiff v. Male Wages, 2017-2019*, ROA.22-20474.1514.

3. Improper Summary Judgment Dismissals

On January 25, 2021, the District Court granted summary judgment in favor of TSU on the race-based claims. The court dismissed all claims against Douglas. App.6a. Only the EPA claim went to trial; the court excluded the EPA retaliation claim.

4. Other Trial Court Abuses of Discretion And Petitioner's Appeal

The trial court continuously abused its discretion–all in favor of TSU–during trial and even post-trial. Petitioner lacked critical male-female wage evidence and TSU obtained a dean/director factor-other-than-sex defense verdict. Petitioner was denied female dean/director wage information and was unable to show that female deans/directors were paid less than male deans/directors.

Petitioner raised multiple pre-trial, trial, and post-trial issues on appeal. The Fifth Circuit did not analyze any appellate issues but instead affirmed in a less-than-two-page opinion "for substantially the reasons given by the district court." App.1a, p.2.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT CONFLICT CONCERNING WHETHER A CIRCUIT MAY REJECT THE DOCTRINE OF CONTINUING VIOLATIONS IN A HOSTILE-ENVIRONMENT CASE

The District Court eliminated all evidence of continuing violations before April 7, 2016 as "time-barred" because the prior acts occurred more than 300 days before Petitioner's EEOC charge. App.58a-59a. The court ignored nearly all sex-based allegations post-2016 and found that Petitioner did "not adequately allege" the exact dates of the sex-based epithets or whether they were directed at her. App.55a-56a. The court found, "None of [Petitioner's] allegations state facts sufficiently severe to create a hostile work environment for [Petitioner] because of her sex." App.56a.

The District Court confused disparate-treatment liability requiring an element of "adverse employment action" with hostile-environment liability which requires no such element but rather depends on a pattern of hostile/harassing acts. The court then applied the Fifth Circuit's subsequently-reversed interpretation of "adverse employment action" (reversed because it conflicted with this Court and all Circuits)[5]

[5] In 2023 the Fifth Circuit interpreted "adverse employment action" to include "terms, conditions, or privileges of employment," reversing its previous interpretation, "ultimate employment decision[s]." *Hamilton v. Dallas County*, 79 F.4th 494, 501-506 (5th Cir. 2023).

and found that TSU's refusal to promote Petitioner or provide opportunities for additional wages was the only "adverse employment action" alleged.

The District Court construed Petitioner's allegations "2015-2018" against Petitioner: "This date range makes it possible that [Petitioner] was denied… pay *before* her 2016 complaint… In sum, [Petitioner] has not satisfied the 'causal connection' prong of her prima facie case… [Petitioner] pleads no contextual facts to show retaliation against her or its causal connection to her protected activity," despite Petitioner's detailed harassment allegations "soon after" Petitioner's 2017 EEOC charge. App.60a-62a (italics in original, emphasis added); ROA.22-20474.284-290 [¶¶65-66].

The court dismissed § 1983 claims against all Respondents besides Douglas, finding that Petitioner "does not adequately allege that [Respondents'] alleged harassing acts were taken in the [Respondents'] performance of official duties," ignoring detailed facts concerning how the Respondents abused state power as deans/committee members. App.66a. The court found that Petitioner failed to meet her pleading burden on the affirmative defense of qualified immunity. App.67a.

The hostile-environment theory of liability is critical because it is the exclusive Title VII theory that addresses years-long, progressive workplace harassment that causes involuntary resignation and other serious harms for women in particular. "A hostile environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 117 (2002)

(citing Title VII), *abrogated on unrelated grounds*.[6] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

Issues of exceptional importance are involved. Millions of women work in Louisiana, Mississippi, and Texas. Social facts show that harassment of females is rising and causes devastating health and employment effects. The type of discrimination involved in this case–accumulated harassment, career "sabotage," and bullying–disproportionately harms females, the "usual targets."[7] This Court should grant review to

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6 The Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 expanded admissible evidence to prove discrimination: "With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside of the time for filing a charge of discrimination.").

7 *See, e.g., Chai Feldblum & Victoria Lipnic, Select Task Force on the Study of Harassment in the Workplace*, EEOC (June 2016); Purdue University, *Workplace Bullying takes an emotional, physical toll; support is in place to help*, PURDUE TODAY (January 12, 2022). The EEOC and experts explain that ongoing workplace harassment is "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is threatening, humiliating, or intimidating, work interference–sabotage–which prevents work from getting done, verbal abuse" and females are the usual targets. PURDUE TODAY, supra. The EEOC determined that workplace harassment "Starts at the Top…Workplace culture has the greatest impact on allowing harassment to flourish…" The EEOC reports retaliation as the most common complaint.

settle whether a Circuit may reject the doctrine of continuing violations in a hostile-environment case.

A. Supreme Court Precedent

The Fifth Circuit's affirmation and rejection of the doctrine of continuing violations conflicts with this Court's and all Circuits' precedent that require consideration of years of continuing violations, including prior acts outside of limitations, in hostile-environment cases. The trial court relied on this Court's decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) but missed *Morgan*'s critical holding that pre-limitations evidence must be considered. The Court held: "The statute [Title VII] does not separate individual acts that are part of the hostile environment claim from the whole…the employer may be liable for all acts that are part of this single claim… the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment… the statute in no way bars a Petitioner from recovering damages for that portion of the hostile environment that falls outside the period for filing a timely charge." *Morgan*, 536 U.S. at 118.

Where discriminatory conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," Title VII has been violated. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65 (1986), *quoting* 29 C.F.R. § 1604.11(a)(3) (EEOC Guidelines). Hostile-environment claims are "environmental" claims that create negligence-based employer liability. *Faragher v. City of Boca Raton,* 524 U.S. 775, 786 (1998); *Pennsylvania*

State Police v. Suders, 542 U.S. 129, 154 (2004) (Thomas, J., dissenting) (noting the Circuit split on the employer-intent element and explaining why intent is not an element of the negligence-based claim, a Circuit split that remains today).[8]

This Court explained: "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct… The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps even years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own… Such claims are based on the cumulative effects of individual acts." *Morgan*, 536 U.S. at 115 (emphasis added, internal citations and quotations omitted). *Morgan* made clear that hostile-environment and retaliation claims require consideration of years of continuing violations regardless of significant time gaps between harassing acts. 536 U.S. at 118 ("it does not matter whether nothing occurred within the intervening 301 days so long as each act is part of the whole… all incidents are still part of the same claim").

"We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating,

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[8] *See, e.g., Rester v. Stephens Media, LLC,* 739 F.3d 1127, 1132 (8th Cir. 2014) (requiring that employer "intended to force her to quit"); *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1355 (4th Cir. 1995) ("intent" means the "reasonably foreseeable consequences" of ongoing harassment").

or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher* at 787-788 (1998), *quoting Harris* at 23 (coworker harassment constitutes "circumstances").

Disparate-treatment claims require discrete/ adverse acts and the statute of limitations begins to run on the date of the discrete act, unlike the "thousand cuts" of hostile acts that collectively comprise a hostile environment. Although liability for "discrete acts" may be time-barred the discrete acts are relevant "as background evidence to support a timely claim." *Morgan* at 113. And although no discrete or "adverse" employment actions are necessary for hostile-environment liability, they are relevant to whether a hostile environment exists, as Circuits have held. *See infra* Section I.B.

Retaliation claims may arise from continuing violations and are given even broader evidentiary latitude because the conduct prohibited protects a different interest: encouraging the reporting of discrimination. "The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67 (2006) (emphasis added). "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing a harm *outside* the workplace… effective retaliation can take [many forms]." *Id.* at 63-64 (italics in original, citations omitted).

B. The Circuits Are Split Concerning the Proper Test/Analysis in Hostile-Environment Cases

The District Court eliminated a wealth of continuing violations prior to April 7, 2016 (300 days before the EEOC charge) in direct conflict with *Morgan*. Other Circuits consistently follow *Morgan* and hold that it is reversible error to exclude evidence of continuing violations because the evidence establishes: 1) defendant's motive/intent/knowledge; 2) overall workplace environment or "corporate state-of-mind;"[9] and 3) cumulative effects of continuing harassment. All other Circuits admit hostile-environment evidence whether the prior acts were directed at plaintiff or coworkers, whether they were within or outside of the statute of limitations, and whether they were work-related or not, because the acts of harassment collectively constitute one claim.

"In a hostile work environment claim, evidence concerning all circumstances of the complainant's employment must be considered… Incidents which occurred outside the filing period also may be admissible as relevant background to later discriminatory acts… to illustrate a pattern of sex discrimination and… whether a hostile work environment existed." *Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 572-573 (8th Cir. 1997) (emphasis added); *Glass v. Philadelphia Electric Co.,* 34 F.3d 188, 192-194 (3rd Cir. 1994) (reversible error to exclude years of harassment evidence outside the limitations period including employer's failure to investigate/correct discrimination).

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9 *Conway v. Electro Switch Corp*., 825 F.2d 593, 596 (1st Cir. 1987).

As the Ninth Circuit observed: "[I]t is not possible to determine whether the environment was 'hostile or abusive' without considering *the cumulative effects of the conduct at issue* to determine whether it was sufficiently 'severe or pervasive' to alter the conditions of the workplace." *Zetwick v. County of Yolo*, 850 F.3d 436, 444 (9th Cir. 2017) (italics in original, citation omitted). A hostile environment is "ambient and persistent,…it continues to exist between overt manifestations." *Id.* at 444 (citation omitted). "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081, 1083 (3rd Cir. 1996) (six years of "suspicious" remarks cannot be excluded from hostile-environment "totality of the circumstances" analysis).

Excluding coworker harassment is reversible error because, "evidence tending to show [defendant's] harassment of other women working alongside [plaintiff] is directly relevant to the question whether [defendant] created an environment violative of Title VII" and "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd, Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986). Coworker harassment is "critical to a plaintiff's case, for a claim of harassment cannot be established without a showing of more than isolated indicia of a discriminatory environment." *Vinson*, at 146 & n. 9 (citation omitted). "[I]f… hostility pervades a work-

place, a plaintiff may establish a violation of Title VII, even if such hostility [over a five-year period] was not directly targeted at the plaintiff." *Dominguez-Curry v. Nevada Transportation Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005) (internal quotations and citation omitted).

In 1986 Judge Posner explained why it is "essential" to admit prior acts to show employer negligence in allowing a hostile environment. In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986), *overruled on other grounds, Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a supervisor's racial epithet was "direct evidence" of his "racial attitudes." "The evidence disclosed a strong and persistent pattern of racial hostility that management could hardly have been unaware." *Id.* at 1423-1424.

It is reversible error to exclude evidence of prior acts directed at the plaintiff, coworkers, or students: "an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases. Hawkins is entitled to present evidence of such an atmosphere." *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 156 (8th Cir. 1990), *cert. denied*, 498 U.S. 854 (1990) (citations omitted); *Becker v. ARCO Chemical Company*, 207 F.3d 176, 194, n. 8 (3rd Cir. 2000), *citing United States Postal Serv. Bd of Governors v. Aikens*, 460 U.S. 711, 713, n. 2 (1983) ("evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible… to establish whether a defendant…was motivated by invidious discrimination") (listing circuit cases); *Demers v. Adams Homes of Northwest Florida, Inc.,* 321 Fed. Appx. 847, 853-854 (11th Cir. 2009) ("Me too evidence"

must be considered as evidence of "employer's mental processes"), *citing Aikens* 460 U.S. at 714-716; *Ansell v. Green Acres Contracting Co., Inc.,* 347 F.3d 515, 523 (3rd Cir. 2003)("evidence regarding an employer's treatment of other members of a protected class is especially relevant to the issue of an employer's discriminatory intent").

Because hostile-environment liability may arise from employers' negligent failure reasonably to investigate and correct discrimination, "Evidence of other acts of harassment is extremely probative as to whether…the [employer] knew or should have known that sexual harassment was occurring." *Hurley v. Atlantic City Police Dept.,* 174 F.3d 95, 111 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000) (emphasis added). "The plaintiff can prove that the employer knew of the harassment by showing either that she complained to higher management or that the harassment was pervasive enough to charge the employer with constructive knowledge." *Vance v. Southern Bell and Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989), *cert. denied*, 513 U.S. 1155 (1995), *reversed on other grounds*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993).

> "[S]exual harassment may be symptomatic of gender-based hostility, the employer or supervisor using sexual harassment primarily to subordinate women, to remind them of their lower status in the workplace, and to demean them… the 'sexual' element of the harassment is only secondary… evidence of sexual harassment often will be relevant to claims of gender-based employment discrim-

> ination… the factfinder must first have access to the evidence."

EEOC v. Farmer Brothers Co., 31 F.3d 891, 898 (9th Cir. 1994). Remarks by a university president that a department had become a "damn matriarchy" despite a small percentage of female professors and referring to female professors' husbands as "parachutes" showed discriminatory animus toward females as a class. *Brown v. Trustees of Boston University*, 891 F.2d 337, 349-350 (1st Cir. 1990), *cert. denied*, 496 U.S. 937 (1990). *See also Conway v. Electro Switch Corp.,* 825 F.2d 593, 596-597 (1st Cir. 1987) ("For a woman supervisor, you do very well" reflects a gender-biased "corporate state-of-mind").

It does not matter whether remarks revealing a gender-biased mindset were made subsequent to the alleged discrimination because inferentially "any discriminatory animus toward women manifested in 1982 and 1983 would have existed in 1980 and 1981." *Brown,* 891 F.2d at 350; *Wilson v. City of Aliceville*, 779 F.2d 631, 633, 634, 635 (11th Cir. 1986) (reversible error to exclude mayor's racial slur months after the alleged discrimination).

The District Court erred by requiring an "adverse employment action" for a hostile-environment claim and ignoring the many harassing acts showing that TSU is a very abusive environment for women and whites—to the point that they resign. Petitioner need allege only "bits and pieces" of harassment that collectively establish liability, and Petitioner surely met this pleading burden. *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 86 (2nd Cir. 2015).[10]

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[10] Superseded on unrelated state-statute-amendment grounds.

This Court should grant review to decide whether a Circuit may exclude evidence of discrimination before the statute of limitations when such evidence is probative of a hostile environment.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT CONCERNING WHETHER AN EQUAL PAY ACT PLAINTIFF MAY BE DENIED FEMALE WAGE DATA AND FORCED TO NAME COMPARATORS BEFORE SHE DISCOVERS WHICH MALES WERE PAID HIGHER WAGES

A. Deprivation of Female Wage Evidence

Plaintiff requested all law professors' W-2s to prove *Gunther*[11] and EPA wage-disparity claims. ROA.22-20474.667-669 (No. 4). TSU objected to the production of the professors' W-2s as "confidential."[12] The court ordered TSU to produce male W-2s only. App.36a-39a; ROA.22-20474.770; ROA.22-20474.667-669. Moreover, the trial court limited Petitioner's male-female wage comparisons by requiring her to name comparators before Petitioner obtained the men's W-2s. The District Court then denied Petitioner's motion to amend the Complaint to name additional comparators upon Petitioner's discovery that nearly all male professors were paid more than her regardless of longevity, deanships, or directorships, contrary to TSU's false official wage reports which showed that

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See Syeed v. Bloomberg, L.P., 568 F.Supp.3d 314 (S.D.N.Y. 2021).

11 *County of Washington v. Gunther*, 452 U.S. 161 (1981)

12 *See* Tex. Att'y Gen. ORD-441 (1986) (Tex. Gov't Code § 552.002(a)(2) renders public salaries "not confidential").

Petitioner was paid higher wages than these proper comparators. App.6a-7a, n. 1 (order denying motion to amend); ROA.22-20474.1072-1271 (motion for leave to amend with attached Third Amendment complaint).

This Court made clear in *McDonnel Douglas v. Green*, 411 U.S. 792, 804 (1973)[13] that after a plaintiff establishes a prima facie case of discrimination and the employer meets its burden of presenting a non-discriminatory reason for the alleged discrimination, "the inquiry must not end here." The plaintiff "must… be afforded a fair opportunity to show that the petitioner's stated reason for [alleged discrimination] was in fact pretext." *Id*. at 804. Concerning pretext, "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination… respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup" for discrimination. *Id*. at 805. Plaintiffs "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision… She may succeed in this either 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." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981), *citing McDonnell Douglas* (emphasis added).

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13 Superseded in part by the Civil Rights Act of 1991.

The same rules apply to Equal Pay Act cases. Once the employer establishes that the pay disparity can be explained by one of the four affirmative defenses, "then the plaintiff must come forward with affirmative evidence that indicates that the proffered reason for the disparity is actually a pretext for sex discrimination." *Swartz v. Florida Board of Regents*, 954 F.2d 620, 623 (11th Cir. 1991). "Where a plaintiff lacks evidence of employer conduct that directly expresses discrimination, the plaintiff may rely on statistical or other circumstantial evidence." *Pollis v. The New School For Social Research*, 132 F.3d 115, 123 (2nd Cir. 1997).

The Second, Fourth, and Sixth Circuits follow this Court's policies and have held that Equal Pay Act plaintiffs are entitled to show gender-based wage disparity by group or statistical analyses. In *Lavin-McEleney v. Marist College*, 239 F.3d 476 (2nd Cir. 2001), the Second Circuit held that an Equal Pay Act professor-plaintiff can show male-female unequal pay by a gender-based statistical analysis of professors across the entire university. *Id.* at 481. The Second Circuit explained that "such evidence may be *required* because isolated incidents of discrimination may not be sufficient to make out a prima facie case." *Id.* (italics in original, citations omitted).

In *Houck v. Va. Polytechnic Inst. & State Univ.*, 10 F.3d 204, 206-207 (4th Cir. 1993), the plaintiff failed to identify a single male comparator, but the Fourth Circuit held that if she had, she would have been entitled to compare male-female professor wage data statistically because "isolated incidents or random comparisons demonstrating disparities in treatment may be insufficient to draw a prima facie inference of

discrimination without additional evidence that the alleged phenomenon of inequality also exists with respect to the entire relevant group of employees." *Houck* at 206-207.

In *Beck-Wilson v. Principi*, 441 F.3d 353, 364 (6th Cir. 2006) the Sixth Circuit found that "statistical evidence of a gender-based disparity in pay" supports an Equal Pay Act claim and that male-female statistics may be used "in conjunction with individual comparator evidence" to allow a plaintiff to meet her burden of proof. "[T]he most important [male-female wage comparison] data would be the data regarding the individual department" within which plaintiff taught and accordingly she was allowed to introduce male-female wage comparisons in her university department. *Kovacevish v. Kent State Univ.*, 224 F.3d 806, 832 (6th Cir. 2000).

TSU's factor-other-than-sex defense focused on the higher-paid men's deanships/directorships. Petitioner was denied evidence showing pretext: 1) female deans/directors were paid far less than male deans/directors; 2) males who were never deans/directors were paid more than Petitioner; and 3) female law professors as a group made far less than males. TSU capitalized on Petitioner's lack of evidence to disprove its dean/director affirmative defense and repeated the dean/director basis for pay disparity over 60 times at trial, knowing that Petitioner lacked female dean/director W-2s and proper comparators to undermine TSU's defense. ROA.22-20474.3796-4624. Brief of Appellant Deana Pollard Sacks, 22-20474, Doc. 31, p. 52 (listing citations to trial transcript).

The Second Circuit held that where a female professor complained of unequal pay over the years

and the employer "did not rectify the situation," these facts are sufficient to support a "reckless or willful violation" of the Equal Pay Act. *Pollis* 132 F.3d at 120. "This [EPA] continuing violation theory is equally applicable to Title VII." *Brinkley-Obu v. Hughes Training, Incorporated*, 36 F.3d 336, 347 (4th Cir. 1994). But since the District Court dismissed all other claims, Petitioner was not allowed to present to the jury evidence of continuing unequal pay/abuse of female professors, which is relevant evidence. ROA. 22-20474.1597[¶97].

The Fifth Circuit rule that Equal Pay Act plaintiffs cannot discover female wages or use statistical/group data to prove gender-based pay disparity conflicts with the Second, Fourth, and Sixth Circuits. The Fifth Circuit rule also conflicts with this Court's precedent that discrimination plaintiffs must have a fair opportunity to prove pretext after the employer proffers a nondiscriminatory reason. This Court's guidance is needed to resolve whether EPA plaintiffs are entitled to female wage data.

B. Refusal to Allow Petitioner to Add Comparators Upon Discovering Men's Wages

Plaintiff first discovered that virtually the entire male faculty made more money than she did when she finally obtained the men's W-2s in mid-2020. TSU's official wage reports underreported men's wages significantly and therefore Petitioner was unable to name proper comparators until after the W-2 production, whereupon she moved to amend the Complaint to add comparators who were never deans/directors. *See* ROA.22-20474.1513-1514 (W-2 wage comparisons/

discrepancies between TSU's official wage reports and W-2s). ROA.22-20474.1072-1271 (motion for leave to amend). The court denied leave to amend, depriving Petitioner of the necessary comparator evidence to undermine TSU's dean/director factor-other-than-sex affirmative defense. App.6a-7a, n. 1.

Other Circuits recognize the importance of giving broad latitude to plaintiffs' choice of comparators because of the remedial purposes of the Equal Pay Act. "In the context of the Equal Pay Act, the statute of limitations does not dictate which co-workers the plaintiff may submit as comparators. It is immaterial that a member of the higher paid sex ceased to be employed prior to the period covered by the applicable statute of limitations period for filing a timely suit under the EPA." *Brinkley-Obu* at 346, *interpreting* 29 C.F.R. § 1620.13(b)(5).

In the Fourth Circuit, Petitioner could have obtained wage information for comparator-professors who departed. In the Fifth Circuit, Petitioner was required to name comparators before she had truthful wage data to determine which men were currently paid higher wages. This is a critical conflict and this Court's guidance is needed.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CIRCUIT SPLITS CONCERNING WHETHER *TWOMBLY-IQBAL* OVERRULED *SWIERKIEWICZ,* WHETHER *IQBAL* CREATED A NEW PLEADING STANDARD ALLOWING "FACT-FINDING," AND WHETHER A COURT MAY PLACE QUALIFIED IMMUNITY BURDENS OF PLEADING/ PERSUASION ON PLAINTIFFS

In addition to eliminating years of continuing violations, the District Court ignored many fact-specific post-EEOC-charge harassment/retaliation allegations and construed a date range of "2015-2018" against the Petitioner. The court found that Petitioner alleged no facts that Respondents abused official state processes despite detailed descriptions of abuse of state processes to harass Petitioner and deny her wages. The court found that Petitioner failed to allege that Respondents violated "clearly established law" despite discrimination liability being "clearly established" as a matter of controlling precedent and Petitioner's specific allegations in this regard. The court improperly placed the burden of pleading the affirmative defense of good-faith/qualified immunity on the Petitioner and found that Petitioner failed to meet her pleading burden. All of this conflicts in multiple ways with this Court's and other Circuits' precedent.

Racial and gender discrimination are "clearly established" as unlawful and the standard is "objective legal reasonableness" relative to "legal rules that were 'clearly established' at the time…" *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) *citing Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982)(other citations omitted); *West v. Atkins*, 487 U.S. 42, 49-50 (1988) ("It is firmly established that a defendant in a §1983

suit acts under color of state law when he abuses the position given to him by the State.").

"Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow* at 815, *citing Gomez v. Toledo*, 446 U.S. 635 (1980) (since qualified immunity is a defense, the burden of pleading it rests with the defendant). The *Gomez* Court found: "two–and only two–allegations are required" to state a §1983 claim: 1) plaintiff was deprived of a federal right; 2) the defendant acted under color of state law. *Id*. at 640. Justice Rehnquist clarified that *Gomez* addressed only the pleading burden, not the burden of persuasion. *Id*. at 642 (Rehnquist, J., concurring).

The Eighth Circuit decided that where university officials allegedly violated constitutional rights and sought qualified immunity, the "defendant bears the burden of proof for this affirmative defense" but "the plaintiff must demonstrate that the law was clearly established." *Monroe v. Arkansas State University*, 495 F.3d 591 (8th Cir. 2007), *citing Sparr v. Ward,* 306 F.3d 589, 593 (8th Cir. 2002). To the contrary, the Fifth Circuit placed the qualified-immunity pleading burden on Petitioner—in direct conflict with *Harlow, Gomez*, and other Circuits—and presumably would place the burden of persuasion on Petitioner—in direct conflict with *Monroe, Sparr,* and other Circuits.

The Circuits are split concerning who bears the burden of showing that the official's conduct violated plaintiff's clearly established rights. The Fifth Circuit placed it on Petitioner and the Sixth, Seventh, Eighth,

Tenth, Eleventh, and D.C. Circuits agree.[14] But the Second and Third Circuits place the burden on defendants[15] and the First and Ninth Circuits go both ways.[16] The good-faith defense of qualified immunity is very important because it sets the boundaries concerning abuse of government power.

The Fifth Circuit further departs from *Harlow* concerning

> "the circumstances in which qualified immunity would not be available… [r]eferring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* that he took the action *with the malicious intention* to cause a depri-

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[14] *Daugherty v. Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018), *cert. denied*, 139 S.Ct. 1294 (2019); *Henry v. Purnell*, 652 F.3d 524, 548 (4th Cir. 2011) *cert. denied*, 565 U.S. 1062 (2011); *Pierce v. Smith*, 117 F.3d 866, 872 (5th Cir. 1997); *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013); *Corbitt v. Vickers*, 929 F.3d 1304, 1311 (11th Cir. 2019), *cert. denied*, 141 S.Ct. 110 (2020).

[15] *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2nd Cir. 2018); *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014).

[16] *DiMarco-Zappa v. Cabanillas,* 238 F.3d 25, 35 (1st Cir. 2001); *Rivera-Corraliza v. Morales*, 794 F.3d 208, 215 (1st Cir. 2015); *Felarca v. Birgeneau*, 891 F.3d 809, 822 (9th Cir. 2018); *Slater v. Deasey,* 789 Fed.Appx. 17, 21 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 550 (2020).

> vation of constitutional rights or other injury…'"

Harlow at 815 (italics in original, citations omitted). Liability may be based on negligence or intentional theory, as with hostile-environment employer liability, but if intentional discrimination is proven, the good-faith defense of qualified immunity is unavailable. *See, e.g., Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541, 546 (8th Cir. 1984), *cert. denied*, 469 U.S. 828 (1984), *cert. denied*, 469 U.S. 1216 (1985) ("If the jury finds… intentional discrimination… 'good faith' on the part of the defendant is logically excluded… The right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable'…") (citation omitted).

Petitioner specifically pled how Respondents abused state power to withhold wages from Petitioner and threaten her. Respondents have decades-long personal relationships and operated in concert to harass Petitioner maliciously and deprive her of wages. These facts alone satisfy *Harlow*'s second basis of liability and defeat good-faith immunity.

The Circuits are split concerning the pleading standards for Title VII discrimination claims in two ways: 1) whether *Swierkiewicz*'s[17] notice-pleading rule was overruled by *Twombly*[18] and *Iqbal*;[19] and 2) whether *Iqbal* empowers trial courts to ignore facts

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17 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

18 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

19 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

pled, construe pleadings against plaintiffs, and engage in "fact-finding" to decide "plausibility."

The Second Circuit recognized the Circuit conflict and determined, "*Swierkiewicz*'s rejection of a heightened pleading standard in discrimination cases remains valid." *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 84 (2nd Cir. 2015).[20] The Fourth Circuit disagrees: *Twombly* "announced a new pleading standard" that "superseded" the notice-pleading standard of *Swierkiewicz. Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017), *cert. denied*, 583 U.S. 1044 (2017). The Fifth Circuit opinion in this case indicates its agreement with the Fourth Circuit that *Swierkiewicz*'s Title VII notice-pleading standard was overruled.

The District Court ignored most allegations and made findings concerning Respondents' conduct and motive contrary to the facts pled. The Fifth Circuit affirmed. The trial court in *Woods*, the District Court, and the Fifth Circuit, apparently interpret *Iqbal* "plausibility" to empower courts to engage in "fact-finding," in conflict with the Fourth Circuit. *Woods,* 855 F.3d at 650 (the trial court improperly engaged in "fact-finding"). This Court should grant review to settle: 1) whether *Swierkiewicz* was overruled by *Iqbal*; 2) whether *Iqbal's* "plausibility" standard allows trial courts to ignore pled facts, construe facts against plaintiffs, and engage in "fact-finding;" and 3) whether the Fifth Circuit may place the qualified immunity pleading burden on plaintiffs.

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20 Superseded on unrelated state-statute-amendment grounds. *See Syeed v. Bloomberg, L.P.*, 568 F.Supp.3d 314 (S.D.N.Y. 2021).

IV. THE FIFTH CIRCUIT'S SUMMARY JUDGMENT ANALYSIS CONFLICTS WITH THIS COURT'S PRECEDENT

Summary judgment is proper only where no issues of disputed fact are presented by the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Whether TSU created/allowed a hostile environment is a fact issue. *Burlington*, 548 U.S. at 69 (whether a hostile environment exists is an objective determination depending on the entire "context"). Fact issues concern Douglas's: 1) history and pattern of discrimination against whites/women; 2) handling of discrimination complaints including whether he was dishonest with ABA investigators; and 3) racial/gender animus and intent. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-148 (2000) (whether discrimination is intentional is a fact issue dependent on all of the evidence).

The District Court made findings of disputed fact to grant summary judgment and the Fifth Circuit affirmed. This Court's guidance on post-*Iqbal* dismissal standards is needed.

For the hostile environment claim, the District Court focused on just "three altercations" then found them "insufficient to raise a genuine issue of material fact that these encounters were racially motivated." App.19a-24a. The court found that no "racial slurs" were in evidence despite Walker's racially-charged rant and TSU's culture allowing hateful anti-white remarks. App.22a; ROA.22-20474.1548[¶30], ROA.22-20474.1759. The court disregarded substantial evidence that TSU ignored race-discrimination complaints.

The District Court found that one white female resigned due to an "underlying current of sexism," suggesting that this sex-based discrimination undermined race-based discrimination. But the court had dismissed the sex-discrimination claims and ignored the Petitioner's "intersectionality" theory that white women were targeted for the worst abuse at TSU, rendering sex- and race-based harassment intertwined and relevant.[21] App.25a-27a. The court found that coworker "second-hand harassment carries less evidentiary weight in a hostile work environment case" and ignored multiple women's testimony that they resigned due to TSU's intolerably abusive environment. App. 26a-27a. A witness (PG) provided factual details of constant anti-white harassment causing her termination, which the court found "conclusory." App.26a-27a.

The District Court found that the law school is not a hostile environment, ignoring a wealth of evidence of extraordinary harassment that caused females enormous stress, physical illness, and constructive termination. Petitioner provided significant evidence that white women were harassed continually, forced to carry heavier workloads for far less pay, assaulted, screamed at, and forced to resign. The fact that multiple whites/females resigned involuntarily shows that Petitioner was in a class of persons who were subjected to a hostile environment. *See,*

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[21] *See* Kimberly Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, UNIVERSITY OF CHICAGO LEGAL FORUM: Vol. 1989, Iss.1, Article 8. The Complaint alleged that white women were targeted for the worst abuse at TSU. ROA.22-20474.251-252[¶¶22-23], ROA.22-20474.262-267[¶43].

e.g., *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 (2nd Cir. 1984) ("As in race discrimination cases, a plaintiff may through statistical evidence establish a pattern or practice of discharging or failing to promote" members in plaintiff's protected class) (citation omitted).

The District Court relied on its erroneous dismissal of TSU to dismiss Douglas: "Because Sacks has failed to produce evidence that she was subjected to a hostile work environment due to her race, there is no hostile work environment claim for which Douglas could be liable as her supervisor." App.30a. But Douglas is personally liable under §1983 and 29 U.S.C. § 215(a)(3) for his intentional discriminatory and retaliatory conduct regardless of TSU's hostile-environment liability.

The District Court then found that, even if there was a hostile environment, Douglas was not "objectively unreasonable" because "the summary judgment evidence shows that Douglas investigated Sacks's claims to some extent," relying on inconsistent evidence provided by Douglas. App.30a. This finding ignored another dean's testimony that Douglas was "dishonest or misleading" with ABA investigators concerning the exact same issue (how gender-discrimination complaints were handled) and other evidence that Douglas never investigated Petitioner's complaint, including Douglas's own deposition testimony.

The District Court ignored the fact that Douglas swore to critical facts in the summary judgment proceeding that were radically different from his deposition testimony two weeks prior–a textbook example of a "sham" summary judgment declaration. *See* Fed.R.Civ.P.56(c)(4),(h). For example, on August

28, 2020 Douglas testified that, as dean, he read Petitioner's 173-page 2016 assault/harassment/discrimination complaint and then handed it over to TSU's General Counsel, ROA.22-20474.2256. But when handed a portion of the complaint, Douglas asked, "Why would I have seen this document?" ROA.22-20474.2249.

Two weeks later Douglas swore in a summary judgment declaration that he read Petitioner's complaint "in detail" and conducted an investigation himself. ROA.22-20474.1054-1056[¶¶3-6]. This is a significant departure from his deposition testimony and further conflicts with Petitioner's evidence that Douglas never responded to the complaint, had no knowledge of its contents, and apparently never read it. *See* ROA.22-20474.1439-1448 (Petitioner's objections to Douglas's summary judgment declaration, comparing factual inconsistencies between Douglas's deposition and declaration). The court failed to rule on Plaintiff's objections to Douglas's declaration.[22]

Despite the disputed evidence concerning what Douglas actually did with Petitioner's 2016 complaint, his years-long hostile treatment of Petitioner, his racial animus/intent, and his history of discrimination against whites/women, the court relied on evidence provided by Douglas to find that Douglas's conduct was not "objectively unreasonable." App.30a-31a. The District Court further found that Douglas's conduct was not racially motivated, ignoring Petitioner's and

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[22] ROA.22-20474.1439-1440, ROA.22-20474.1422-1449. For the court's rulings on Petitioner's objections, *see* ROA.22-20474.2480-2483. The court addressed objections to Exhibits 2, 4, 9, and 13 only, not Exhibit 14 (Douglas's declaration).

other witnesses' considerable evidence of Douglas's entrenched decades-long anti-white/anti-female mind-set and behavior pattern.

The summary judgment evidence demonstrated multiple issues of disputed fact. The Fifth Circuit affirmed the District Court's improper fact-finding in conflict with this Court's summary judgment review standards. This Court should clarify dismissal standards and reaffirm that fact-finding in pretrial dismissal proceedings is improper post-*Iqbal*.

CONCLUSION

Petitioner respectfully requests that her Petition for Certiorari be granted.

Respectfully submitted,

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