PUBLIC COPY--SEALED MATERIALS REDACTED

No. 24-638

9/10/2024

ORIGINAL

SUPREME COURT OF THE UNITED STATES

MEHDI MOINI,

Petitioner,

vs.

ELLEN M. GRANBERG,
In her official capacity as President,
George Washington University,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Mehdi Moini, Ph.D.
732 Ridge Dr.
McLean, VA 22101
Moini.mehdi@gmail.com
(512) 736-8650

Pro se

I. Questions Presented

The Civil Rights Act of 1964, 42 U.S.C. § 1981, was designed to eliminate discrimination in all employment levels; however, in the academic institution of higher education, two decisions by this Court ordered deference to a university's academic judgment that was based on "genuine professional judgment." *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). Ever since, courts have shown considerable deference to academic judgments even in intentional discrimination cases brought by faculty challenging denials of promotion or tenure, often dismissing the lawsuit or awarding summary judgment to the institution by dismissing all the evidence as insufficient in every step of the plaintiff's analysis of the discrimination or the breach of contract claims, rendering the statue ineffective.

The questions presented are:

Under §1981, is a Middle-Eastern Iranian a race? What evidence or characteristics does an appellant need to provide to prove his race? How to determine if an employer's reference to the employee's protected trait when making an unfavorable employment decision is direct discrimination? How to define "similarly situated" to show pretext at institutions of higher education with a tenure system, and if the Eleventh Circuit's examples of "a valid comparison" should be adopted by other courts to eliminate the arbitrary definition of "similarly situated" comparators by the courts? What determines if the university's published tenure

and promotion guidelines (T&P) and procedures are binding and if the post-hoc depositions of ex-university officials override the university's published guidelines and procedures? Finally, under §1981, should one read the discrimination broadly to include a retaliation theory? In particular, *because* there is no separate provision of section 1981 that prohibits retaliation, where it is difficult for any litigant (mainly a *pro se* plaintiff) to discern that theory, do they need to plead retaliation in a separate count in the complaint?

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

IV. PETITION FOR WRIT OF CERTIORARI

Dr. Mehdi Moini, a former tenure-track Associate Professor at the Department of Forensic Sciences ("Department") at the George Washington University ("University" or "GWU"), Proceeding *pro se,* respectfully petitions this court for a writ of certiorari to review the judgment of the U.S. Appeals Court for the D.C. Circuit ("D.C. circuit") (Case No. 22-7101). That Judgment is attached at Appendix ("A"), ¶ A-2.

V. OPINIONS BELOW

The decision by the D.C. circuit denying Dr. Moini's direct appeal is reported as *Moini v. Granberg,* in her official capacity as the President of the George Washington University, *Moini v. Granberg,* (2024). ¶ A-2. The D.C. circuit denied Dr. Moini's' petition for rehearing and rehearing *en banc* on June 12, 2024. ¶¶ A-16, A17.

VI. JURISDICTION

Dr. Moini's petition for a rehearing to the D.C. circuit was denied on June 12, 2024. ¶¶ A-16, A17. Dr. Moini invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the D.C. circuit's judgment.

VII. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

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.

VIII. STATEMENT OF THE CASE

Following ratification of the Fourteenth Amendment, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870, including § 1 of the 1866 Act. The statute was recodified in 1874, but its basic coverage did not change until 1991. It is now codified at 42 U.S.C. § 1981. The Civil Rights Act of 1964, 42 U.S.C. § 1981, was designed to eliminate discrimination in all employment levels. *See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e-I (1972))* note 14. Section 1981 statute "protects the equal right of 'all persons within the jurisdiction of the United States' to 'make and enforce contracts,'" including employment contracts, "without respect to race." *Domino's Pizza,* 2006, (quoting 42 U.S.C. § 1981(a)). Section 1981 "can be violated only by purposeful discrimination." *Gen. Bldg Contractors Ass'n* 1982. The Supreme Court has held that the statute also prohibits retaliation against persons who complain about racial discrimination prohibited by the statute.

The plaintiff can show unlawful discrimination with either direct or indirect evidence. An employee has direct evidence of unlawful discrimination if the employer "overtly refers to the employee's protected trait when making an unfavorable employment decision." Deppner v. Spectrum Health Care Res., Inc., 325 F. Supp. 3d 176, 187 (2018), (cleaned up). For example, "a statement that itself shows racial [ ] bias in the decision" qualifies as direct evidence. *Vatel v. All. of Auto. Mfrs.* (2011). Because direct evidence is "hard to come by," *Aka v. Wash. Hosp. Ctr.*, 156 (1998) (cleaned up), its presence "generally entitle[s] a plaintiff to a jury trial." *Vatel v. All. of Auto. Mfrs.*, 627 (2011).

When a plaintiff must instead rely on indirect evidence of discrimination, the United States Supreme Court has developed an analysis that can be used under these statutes. The analysis comes from the familiar *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green, 411 U.S. 802 (1973).* When the defendant articulates a non-discriminatory reason for the employment action, the plaintiff must then come forward with sufficient evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination. *Van See St. Mary's v. Hicks*, 509 U.S. at 510-11 (1993); *Fisher v. Vassar College*, 114 F.3d at 1336 (1995), *Van Zant v. KLM*, 80 F.3d 708, 714 (1996), (quoting *Woroski v. Nashua Corp.*, 31 F.3d 105, 110 (1994). The question becomes whether the evidence, taken as a whole,

supports a sufficient rational inference of intentional discrimination. *St. Mary's*, 509 U.S. at 519.[1]

In the academic institution of higher education, however, two decisions by this Court ordered deference to a university's academic judgment that was based on "genuine professional judgment." *Bd. of Curators, Univ. of Mo.* 435 U.S. 78 (1978); *Univ. of Mich.*, 474 U.S. 214 (1985). Ever since, courts have shown considerable deference to academic judgments in cases brought by faculty challenging denials of promotion or tenure, often dismissing the lawsuit or awarding summary judgment to the institution, seemingly without a thorough review of the institution's supporting evidence for its exercise of "genuine professional judgment." Although some judges have rejected judicial deference when discrimination claims are before the court, deference persists to this day in most, but not all, such litigation, rendering the Acts ineffective.

To level the playing field, the Supreme Court has interfered in some cases for the tenure-track faculty's benefit (see, for example, *University of Pennsylvania* 493 U.S. 182 (1990)). The Supreme Court held that universities could be required to turn *over* confidential peer reviews to individuals alleging discrimination; see also *McAdams*, 974 N.W.2d 708 (2018) and *McConnell*, 818 F.2d 58 (1993). Despite a few rejections of deference to academic judgments concerning faculty employment issues, the courts, for the most part, have continued to rely on the "academic expertise" of faculty and

[1] The Supreme Court more recently reaffirmed this framework in Reeves.

administrative decision-makers. Throughout the 1990s and early 2000s, opinions using language deferential to academic judgments were far more frequent than those scrutinizing a defendants' justification for tenure denials either based on alleged discrimination or breach of contract.[2]

Concerning evidence of direct discrimination, the courts label even the clearest reference "to the employee's protected trait when making an unfavorable employment decision[]" as "insufficient" to avoid sending the case to the jury. *Moini v. Wrighton* 602, 162 (2022), *Moini v. Granberg*, (2024).

For evidence of indirect discrimination, the courts apply deference to the universities in all three aspects of the McDonnell Douglas framework: In establishing a *prima facie* case of discrimination, for example, the courts even make it difficult for a minority plaintiff to prove he is a member of a protected class, ignoring the Supreme Court ruling in several cases. *Moini v. Wrighton* 602, 162 (2022). On the other hand, it makes it easy for the universities to produce a "legitimate, non-discriminatory reason" for its actions. It seldom investigates if the "legitimate reason" was based on "genuine professional judgment." *Id.* Finally, to prove "sufficient evidence that the defendant's

---

[2] See, e.g., Tanik 1997, (summary judgment for the university, no trial); Villanueva 1991, (summary judgment for the college, no trial); Broussard-Norcross 1991, (summary judgment for the college, no trial); Brown 2002, (summary judgment for the university on plaintiff's breach of contract claim, no trial); Okruhlik 2005, (judgment notwithstanding the verdict for university after jury verdict for plaintiff); Qamhiyah 2008, (summary judgment for the university, no trial); Figal 2013, (summary judgment for the university, no trial); and Kouassi 2015, (summary judgment for the university, no trial).

proffered, non-discriminatory reason is a mere pretext," the courts raise the bar so high that it becomes impossible for a plaintiff to overcome. *Id.* For example, one way to show pretext for the plaintiff is to use comparators; however, there are significant differences among the courts regarding the definition of proper comparators at higher education institutions, rendering it arbitrary.

To "clean up, and clarify once and for all the proper standard for comparator evidence in intentional-discrimination cases," the Eleventh Circuit Court provided examples of similarities between a plaintiff and a proffered comparator that would support a valid comparison, including: "will have engaged in the same basic conduct (or misconduct) as the plaintiff"; "will have been subject to the same employment policy, guideline, or rule as the plaintiff"; "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff"; "will share the plaintiff's employment or disciplinary history"; and may not have precisely the same job functions. *Lewis v. Union City*, Eleventh *Circuit Court, (2019).* The Supreme Court ruling in *Miller-El v. Dretke, 545 U.S. 231,247 (2005)* also notes, "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects[.]" In *George v. Leavitt, 407 405,414, (2005), the court ruled*: "[t]he question of whether employees are similarly situated in order to show pretext 'ordinarily presents a question of fact for the jury.'" Still, each court follows its own arbitrary rules that favor universities, and a case is seldom sent to the jury.

The rationale behind judicial deference by the courts is that tenure decisions are too complex for them to intervene. An example of this was articulated particularly well in the case of *Keddie v. Pennsylvania State University,* 412 F. Supp. 1264 (1974); the court found that the professor's political activities had not influenced the decision to deny him tenure and stated:

> This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision. *The courts will not serve as a Super-Tenure Review Committee. Id.* at 1272 (emphasis added).

However, even the proponents of academic deference limit its applications in cases involving 1) discrimination (see e.g. *Mawakana v. Bd. of Trs. of Univ. 926 F.3d 859 (2019),* 2) "arbitrary, capricious, or an abuse of discretion[,]" (*N.Y.C.P.L.R.* § 7803 (2014)), and 3) when "a substantial departure from accepted academic norms or from procedural regularity, to demonstrate that the university did not actually exercise professional judgment," (*Tenn. App. LEXIS 656* (*Tenn. Ct. App.* Sept. 27, 2013)). But even in these cases, most courts find ways to circumvent the fact that Congress specifically removed the previous Title VII (and §1981) exemption for educational institutions in 1972 to

make them unquestionably subject to the general prohibitions. Yet, in some recent cases, the language of deference may not be as obvious. Still, courts continue to dismiss lawsuits or award summary judgment to defendant colleges and universities in promotion or tenure denial cases, although after what appears to be a "careful review" of the plaintiff's and the defendant's evidence.[3] Finally, to give deference to the universities, the courts deny individual components of a discrimination lawsuit as "insufficient" rather than taking the evidence as a whole, to see if it supports a sufficient rational inference of intentional discrimination. *St. Mary's Honor Center V. Hicks*, 509 U.S. at 510-11 (1993).[4]

Despite these clarifications, the lower courts' divergence from the original Supreme Court analysis indicates a weakness in the original analysis that has drastically reduced the rights of tenure-track faculty members under these statutes. Indeed, it is more important that courts apply these statutes to "high-level" positions because minorities and women have historically been kept out of high-level, high-paying, tenured positions and kept in entry-level positions such as Research Professors or Lecturers. The analysis must be altered to effectuate the congressional intent behind these statutes to ensure

---

[3] Maras 2020, (tenure denial); Seye 2020, aff'd, 830 Fed. App'x 778 (7th Cir. 2020) (tenure denial); Nguyen 2020, (tenure denial); Theidon 2020, (tenure denial); Davis 2016, aff'd, 695 Fed. App'x 696 (4th Cir. 2017) (tenure denial); Kouassi 2015 (tenure denial).

[4] The Supreme Court more recently reaffirmed this framework in Reeves. 120 S.Ct. 2097, at 2108.

that minority faculty members enjoy the protections they are entitled to under Title VII and §1981.

1. The Denial of Tenure and Promotion

A perfect example of the overreaching judicial deference is the case of *Moini v. Granberg*, in her official capacity as the President of the George Washington University. This case presents whether the lower courts bypassed the congressional intent behind the §1891 statute first by dismissing the evidence of direct discrimination against Moini. Second, by denying Moini's evidence of indirect discrimination, 1) denying Moini's comparators due to arbitrary differences; 2) ignoring the University's own Dispute Resolution Committee that decided the University decision against Moini was "arbitrary, capriciously" rather than based on a genuine academic reason; 3) ignoring that the University had substantially deviated from its rules, guidelines, and the accepted academic norms, 4) not viewing "the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor." *Mastro* 2006; and finally, 5) ignoring that for *pro se* litigants, the courts generally subject their pleadings to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner 404 U.S. 519 (1972)*, (cleaned up) and viewed all evidence favoring the University. Third, the court denied Moini's retaliation claim formulated by the court-appointed amicus curiae. Fourth, the courts denied Moini's breach of contract claims.

1a. Moini's Employment History Prior to GWU

Dr. Moini was born in Iran and moved to the United States in 1976. After obtaining his Ph.D. from Michigan State University in 1986 and a postdoctoral position at the University of Florida for about two years, Dr. Moini worked as a Senior Research Scientist, Lecturer, and Director at the University of Texas-Austin ("UT/Austin") from 12/1989-10/2008. When UT/Austin declined to offer Moini a tenure-track position and then declined to renew his employment, he filed a lawsuit alleging race, national origin, and age discrimination claims under Title VII and 42 U.S.C. § 1981. § 1983. *See Moini* 2011. The Western District of Texas granted summary judgment in favor of the University of Texas on June 2, 2011. *Moini* Supp. 2d 710, 714, 2011. Dr. Moini worked as a research professor at Texas State University for about two years. Then, from 01/2010-01/2014, he served in the US Government as a research scientist at the Smithsonian Institution. Dr. Moini received tenure at the Smithsonian in 01/2013.

1b. Dr. Moini's Application to George Washington University

In 2013, Dr. Moini applied to the GW's Department of Forensic Sciences ("Department") of the Columbian College of Arts and Sciences ("CCAS"). Dr. Moini was the "top candidate" for the role. With unanimous faculty support, Dr. Victor Weedn, the Chair of the Department of Forensic Sciences, recommended to administrators that Dr. Moini be hired as a tenured Full Professor. However, The University's Provost was unwilling to offer Dr. Moini a tenured position after they learned about his

prior discrimination lawsuit against UT/Austin. Dr. Moini eventually accepted an offer from the University for the position of Associate Professor on a fast track to tenure with a three-year tenure clock and a tenure deadline of "no later than June 30, 2016." Interim Dean Guenther on August 5 approved Dr. Moini's request for a delay, assuring him that "[n]o more formal request is needed" and that Dr. Moini could "[t]ake whatever time [he] need[ed]."[5] However, a few days after Dr. Moini started at GWU, the University Provost, without Dr. Moini's consent or signature, revised his contract by extending Dr. Moini's tenure clock by one year to June 30, 2017. During this lawsuit, the University claimed it was because Dr. Moini did not start in September 2016, but the University had already approved Dr. Moini to "[t]ake whatever time [he] need[ed]."

1c. Dr. Moini's Tenure Application

The University, relying on the revised offer, did not inform Dr. Moini of his tenure status by June 30, 2016, as promised in his original contract signed by both parties. According to the Faculty Code, if not informed by June 2016, Dr. Moini would automatically acquire tenure effective September 1,

---

[5] The parties dispute the date of Dr. Moini's acceptance and whether Dr. Moini's controlling tenure timeline was three or three-and-a-half years. *Compare* J.A. 133, *with* J.A. 143. These distinctions are immaterial to the arguments advanced by amicus here but are likely to be relevant to those presented by the other parties.

2016.[6] Instead, the University required Dr. Moini to prepare his T&P application and apply for tenure in September 2016. On April 1, 2016, the Department Chair, Dr. Weedn, was detailed to the Justice Department and assigned Dr. Walter Rowe as the acting Chair in charge of Dr. Moini's T&P dossier.

Dr. Rowe was biased against Dr. Moini. While in 2013, Dr. Rowe had voted for Dr. Moini's hiring (the Departmental vote was unanimous), but after he was informed that the provost would not approve Dr. Moini's tenured full professor position because of Dr. Moini's lawsuit against UT/Austin, he became hostile against Dr. Moini. During the entire Dr. Moini's probationary phase (three years), he systematically denigrated immigrants and foreigners in his conversations with Dr. Moini and belittled Dr. Moini in the classroom in front of students. Dr. Rowe was also the Director of Graduate Studies for Forensic Chemistry, a division of which Dr. Moini was a member. In the Fall of 2014, when Dr. Moini's teaching started, he assigned Dr. Moini to teach the forensic accreditation body mandated one credit problematic Graduate Seminar that Dr. Rowe called "a carrier killing course" because Dr. Rowe used to teach that course and had systematically received below Departmental averages student teaching evaluation scores. However, without informing Dr. Moini of the history of Graduate Seminars, he assigned them to Dr. Moini.

---

[6] Both the district court and the appeals court ignored the University's breach of contract and Moini's claim that based on the University's Faculty Code he should have granted tenure in September 2016.

The animosity of Dr. Rowe systematically increased against Dr. Moini until on or about January 2016, and after a mass shooting when an AR15 was used because of Dr. Moini's Middle-Eastern Iranian race, Dr. Rowe told Dr. Moini directly, "If you buy an AR15, the FBI will raid your house." This statement "overtly refers to the employee's protected trait[,]"*Deppner v. Spectrum Health Care Res* 2018, (cleaned up), and qualifies as evidence of direct discrimination, and entitles a plaintiff to a jury trial, *Vatel v. All. of Auto. Mfrs* 2011, because Dr. Rowe was the most senior member of the Department Personnel Committee deciding on Dr. Moini's T&P. Moreover, only three months later, Dr. Rowe became the acting Chair, directly in charge of preparing Dr. Moini's tenure/promotion dossier and writing a recommendation (transmittal letter) to the higher-level University leaders. As such, on April 28, 2016, the CCAS Dean's office informed Dr. Rowe of his duty to prepare Dr. Moini's T&P dossier and the mid-tenure review, stating: "Since you are interim chair, we'll have to give you access to the Chair's folder on the cloud. This folder has materials that would be beneficial for you during your term. In the meantime, attached are the guidelines for promotion and tenure as well as mid-tenure [reviews]." Dr. Rowe forwarded these Guidelines to Dr. Moini to prepare his T&P application. The Dean's office email clarifies that these guidelines were binding since Faculty Code 2015 warned the Department Personnel Committee that "[f]ailure to conform to *published tenure or promotion policies, procedures, and guidelines;*" may constitute "compelling reasons for a School-Wide [CCAS] Personnel Committee, a dean or the Provost to

independently concur or nonconcur with a faculty recommendation," emphasis added.

The tenure and promotion guidelines discussed various documents that should be included in the candidate dossier. It stated: "For more details about describing the different aspects of teaching contributions, please reference the document: **Evaluating Teaching for Promotion and Tenure: "*What Should a Dossier Contain?*" by the University Teaching & Learning Center (TLC)**. (Original emphasis). The T&P guidelines, the mid-tenure procedure, and the TLC guidelines required the Department to conduct internal peer evaluation of teaching and required Dr. Moini's student evaluations of teaching to be compared "with similar courses (with similar enrollments) taught by others." This comparison was also requested in the Chair of College Personnel Committee (Dr. Duff) recommendations: "Please provide quantitative teaching data; also please indicate how that data compares to others teaching the same or similar courses."

Moreover, the Faculty Code 2015 required "[s]o that faculty members may assess their potential for achieving tenure each school, and where appropriate, each department, shall establish and publish written procedures to provide reviews to guide faculty members concerning progress toward tenure." *J.A.448*. As a result in December 2015, the College published its mid-tenure review guidelines for "full-time tenure-track faculty members." *Appellant-final-brief, P25*. In addition, based on the Faculty Code above, the Department Constitution also required, "[a] personnel committee composed of at least one member from each of the divisions of

Forensic Sciences will a. evaluate annually tenure-track faculty and inform them of their progress toward tenure[.]" *Id.*

Dr. Rowe did not conduct any of Dr. Moini's required tenure reviews (multiple internal peer evaluation of Dr. Moini's teaching by tenured faculty, review by a Department Personnel Committee, and the mid-tenure review) and did not compare Dr. Moini's student evaluations of Graduate Seminar courses with his own teaching of the same courses. The TLC Guidelines also required external peer reviews of Dr. Moini's teaching. As such, Dr. Moini asked the TLC to peer review his teaching in the problematic Graduate Seminar class. In April 2016, three faculty from the center visited Dr. Moini's Graduate Seminar, conducted a peer review, and wrote a very positive recommendation for Dr. Moini's teaching. The letter had strongly complemented Dr. Moini's efforts to engage students in the problematic course. Dr. Rowe did not include this letter in Dr. Moini's dossier. The TLC fourth (4a) item is "student letters supplied by the candidate." Dr. Moini had received strong letters of support from all five of his graduate students, who had also taken at least 3-4 non-research courses with him, including two Graduate Seminar courses, and had completed their degrees under his supervision. These students were able attest to Dr. Moini's excellence not just in teaching but also in mentoring, guidance, advising, and job placement. Against the TLC guidelines, Drs. Rowe and Podini told Dr. Moini to remove those from his application so they could request them directly from students, even though student letters sought by the Department is a separate item (4b). Moreover, they intentionally did not even include the two

letters they received at their request. The evidence shows a third student had asked them when to send her a letter, but they did not even bother responding.

In addition, based on the Department Chair's comments on Dr. Moini's annual reviews, Dr. Moini received two merit raises above 3% for two years before his tenure review. In his letter to Chairs, Dean Arnesen stated: "Please remember that the comments you submit [on faculty annual review] will later become the basis for the annual salary merit recommendations." The merit raises letters stated: "Once again, we provide this [merit] pool to reward individual performance rather than as an across-the-board salary increase. We remain committed to rewarding faculty and staff for excellent work." Indicating chair reports on Dr. Moini's annual reviews were "excellent." Such indicia of positive performance support an inference of pretext because the employer gave positive performance reviews to Dr. Moini just before denying his tenure. *See, e.g., George v. Leavitt, 407* (2005).

Moreover, Dr. Rowe did not discuss Dr. Moini's excellent job in his other courses that he had discussed in Dr. Moini's annual report 2015-2016 only four months before denying Dr. Moini's tenure and promotion, stating, "[Dr. Moini's] teaching in core forensic chemistry courses is well regarded[,]" and "[t]he students recognize his expertise and appreciate the depth and rigor of his lecture." Therefore, secret from Dr. Moini, Dr. Rowe intentionally did not add any teaching-related evidence to Dr. Moini's dossier that could have helped Dr. Moini to showcase his teaching excellence, nor did he discuss those in his

transmittal letter, substantially deviating from the University's established norm and procedures, and submitted Dr. Moini's dossier without these critical components of teaching excellence. While Dr. Rowe was not the ultimate decision maker, "The actions of a discriminatory supervisor that feed into and causally influence the decision-maker's ultimate determination may also be the proximate cause of an adverse employment action." See *Steele v. Mattis, 899 943, 950 (2018).*

In mid-November 2016, the Forensics Department's Personnel Committee undertook the first review of Dr. Moini's dossier that Dr. Rowe had prepared. The Committee noted that Dr. Moini had a "strong research program . . . in which he [ ] involved [the Department's] master's degree candidates" and received "strongly positive" external reviews from peers in his field. J.A. 388. However, the Committee was initially unwilling to vote in favor of Dr. Moini's tenure "at this time" because student evaluations of his teaching in one-credit graduate seminar classes were relatively low. *Id.* Because the Committee wanted to retain Dr. Moini, they asked the Vice Dean for Faculty and Administration, Eric Arnesen, to extend Dr. Moini's abbreviated tenure clock to give him the opportunity to "improve his teaching skills," which they believed he would be able to do. *Id.*

On November 18, 2016, Arnesen emailed then-Vice Provost for Faculty Affairs Christopher Bracey, asking him to "rule on the request." J.A. 392. Bracey then emailed Dianne Martin, the former Vice Provost, to request her counsel. He stated, "I'm inclined to reach out to the candidate and suggest that he request an extension, which might solve the

problem for everyone for the time being" before prompting Martin: "Thoughts?" J.A. 391. Martin responded on November 19. "I recall this case," she wrote. *Id.* "It was a [sic] very controversial due to issues at a previous institution in Texas. *You can Google to see more about that.* . . . [Provost] Forrest [Maltzman] could grant extension if faculty requested it. *Do the Google before you discuss with Forrest.*" *Id.* (emphasis added). Bracey had intended, before learning of the University of Texas lawsuit, to suggest that Dr. Moini request a tenure clock extension himself. But nine days later, on November 28, 2016, after discovering the discrimination lawsuit through Martin's "Do the Google" email, Bracey wrote to Provost Forrest Maltzman that he was "about to deny" the tenure clock extension request but wanted to get Maltzman's input before doing so. J.A. 393. Tellingly, Bracey's email referred to Dr. Moini's discrimination lawsuit as relevant to the pending extension request: "*For reference, this is a faculty member who previously sued (and lost) a case against U Texas. Google him.* In any case, he's up for tenure THIS YEAR . . . ." *Id.* (emphasis added). At his deposition, Maltzman admitted that he had "known that there was some lawsuit against the University of Texas involving [Dr. Moini]." J.A. 953. The University ultimately denied the requested extension. J.A. 1058. This was the second time that the University had overtly referred to the Dr. Moini's protected trait when making an unfavorable employment decision. *Deppner v. Spectrum Health Care Res., Inc.*, 187, (2018) (cleaned up). The second evidence of direct discrimination, *Vatel* 1245, 1247, 2011, should have also entitled Dr. Moini to a jury trial. *Id.* 1247.

However, both courts refused to accept this evidence of direct discrimination.

On December 18, 2016, after the extension denial, the Forensics Department held two formal votes—one, by its four tenured faculty members, on Dr. Moini's tenure, and the other, by its two more senior faculty members, on Dr. Moini's promotion to full professor. Each vote was unanimous in Dr. Moini's favor. J.A. 413; *see also* J.A. 410–12. Under the Faculty Code, the Department's tenure recommendation could not be overruled unless there were "compelling reasons" to do so, such as flaws in the decision-making process or reasoning behind the decision. *See* J.A. 311, 324, 454–55.

On February 14, 2017, the CCAS Promotion and Tenure Committee, comprised of tenured Arts and Sciences professors outside of the Forensics Department, headed by Dr. Duff (Professor of Religion), voted to "not concur" with the Department's tenure recommendation because "the fact that Prof. Moini's [student evaluation] scores are below the department's average[.]" J.A. 425. On March 7, 2017, CCAS Dean (Vinson) made a similar case against Dr. Moini's tenure directly to Maltzman. J.A. 426–29. The next reviewer was Provost Maltzman, whom Bracey had consulted regarding the potential extension of Dr. Moini's tenure clock four months earlier. On April 10, 2017, Maltzman emailed Dr. Moini to inform him that he did not concur with the Department's tenure recommendation. J.A. 440. On May 9, 2017, the Faculty Senate Executive Committee recommended that Provost Maltzman extend Dr. Moini's tenure track by two years to give him adequate time to demonstrate "excellence in teaching." J.A. 455–57.

However, on June 6, 2017, then-President Steven Knapp asked Maltzman to discuss Dr. Moini's tenure application and the Faculty Senate Executive Committee's recommendation to extend Dr. Moini's tenure clock [redacted] J.A. 471–73. On June 22, 2017, Provost Maltzman informed Dr. Moini that he would not be receiving tenure and that his appointment for the 2017-2018 school year would be his last at the University. J.A. 624.

1d. Dr. Moini's Grievance of his Tenure Denial

In November 2017, Dr. Moini submitted his grievance to the Faculty Dispute Resolution Committee. J.A. 478–83. First, the Hearing Panel, comprised of three faculty members from across the University, voted two to one to uphold Dr. Moini's tenure denial, finding that it was not arbitrary and capricious, stating, "There is no serious challenge to his record of research and scholarship. The principal evidence against Dr. Moini comes from the student evaluations of his teaching of the one-credit Graduate Seminar course required of all incoming students in the program and then repeated at the end of their program." J.A. 620. The chair of the panel dissented. J.A. 621–23. Dr. Moini appealed the Hearing Panel's decision to the Dispute Resolution Committee's Appeals Panel. On June 1, 2018, with Dr. Moini again representing himself and Bracey representing the University, *Vice Provost Bracey claimed, "the poor student evaluations in that [one credit Graduate Seminar course] were sufficient to demonstrate lack of excellence in teaching[.]" J.A.626.* Emphasis added. The University's Dispute Resolution Committee disagreed, and on June 12,

the Appeals Panel—comprised of eight faculty members from across the University—"unanimously f[ound] the decision of the Hearing Panel to be seriously erroneous and overrule[d] the decision." J.A. 625. The panel stated, "to rely solely on the student evaluations of this one [credit] course, and disregard every other metric upon which teaching should be evaluated to deny tenure and promotion, as the reviewing entities did, is arbitrary and capricious[.]" Specifically, "[t]he Appeals Panel recommend[ed] that the non-concurrence of the university reviewing entities, challenged by Dr. Moini, be reversed and that Dr. Moini be granted tenure and promoted to Full Professor consistent with the recommendation of the Department Personnel Committee." J.A. 625. Once again, however, Provost Maltzman interceded, and on July 23, 2018, concluded that there were "compelling reasons" not to implement the Appeals Committee's recommendation and therefore rejected it because *"Moini has scored roughly at or below departmental averages."* [J.A.630]. Emphasis added. On September 17, 2018, the Executive Committee of the Board of Trustees sided with the Provost. J.A. 665 (Email Summarizing Meeting).

During the discovery phase of this lawsuit, it became clear that both Vice Provost Bracey and Provost Maltzman had misspoken. Several of the tenure-track faculty whose student evaluation scores were provided by the University had received significantly below their departmental average student evaluation scores in several of their courses, and their average student evaluations were all below their departmental averages, indicating "at or below departmental averages student evaluation scores" as

the barometer for tenure denial was a pretext only to deny Dr. Moini's T&P. Both courts ignored this pretext.

1e. Dr. Moini's Complaint to the District Court for the District of Columbia

In October 2019, Dr. Moini filed this *pro se* Complaint against the President (Case No. 1:19-cv-03126). He alleged that denying tenure constituted discrimination in violation of Title VII, a D.C. human rights statute, and 42 U.S.C. 1981. He also alleged that the University had violated its contractual obligations during Dr. Moini's tenure and grievance processes. *Moini v. LeBlanc* 456 F. Supp. 3d 34 (2020).

The President moved to dismiss the Complaint, while the Court held that Dr. Moini's Title VII and D.C. law claims were time-barred, it denied the motion as to Dr. Moini's contractual claims and his claims under § 1981. *See id.* After discovery, both parties moved for summary judgment. The Court found that "the University propounded a legitimate reason for denying tenure: That Dr. Moini had not met the requisite standard for teaching." However, the court could not show any evidence that at or above departmental averages was a prerequisite for tenure and promotion. The court found Dr. Moini's evidence of Middle-Eastern race and evidence of direct discrimination were insufficient. The court also denied Dr. Moini's comparators, stating "none of Moini's proffered comparators present employment situations that were "nearly identical" to his." For example, the court stated, "Jones taught in a different department

[within CCAS] than Moini." The court also dismissed Dr. Moini's demographic statistics stating, "[W]ithout more," this kind of demographic information "does not support an inference of discrimination." It also denied Dr. Moini's merit raises because "Moini gives no evidence about these raises, including their size or timing[,]" by refusing to see Dr. Moini's one page exhibit that included this information, stating because the "Court is not required 'to sift through hundreds of pages of the record[.]" *Id.* The district court denied the University guidelines and procedures, even those sent by the Dean's office, as "non-binding," stating they were not "established policies and procedures." *Id.* Against the University guidelines, the court even justified the University removing Dr. Moini's student letters of support from his T&P applications, stating this "anomaly" shows "no discriminatory motive." *Id.* In short, the court failed to see that the evidence, *taken as a whole*, supports a sufficient rational inference of intentional discrimination.

2. Direct Appeal

On 2023, Dr. Moini submitted his briefs (original briefs), alleging that the district court's decision to grant the University's motion for summary judgment and deny his cross-motion was in error. Dr. Moini alleged that the University's denial of his tenure and promotion to a full professor violated §1981 and breached his contract. *Moini v. Granberg*, No. 22-7101 (2024). Dr. Moini claimed discrimination, disparate treatment, and breach of contract. *Id.*

After the original briefs, the court-appointed amicus curiae and ordered a re-briefing ("final briefs"). May 8, 2023 Order Appointing Amicus Curiae. The D.C. circuit ordered the parties to address (1) whether "Middle Eastern" is a race for the purpose of a claim under 42 U.S.C. § 1981, and if so, whether a reasonable jury could conclude that appellant is a member of such a race; and (2) whether a plaintiff advancing a claim under § 1981 based on alleged employment discrimination is required to establish a breach of contract. *Id.* It also specified that the parties are "not otherwise limited" in their briefing. *Id.*

Because there was only limited space left after addressing the court's two race questions, amicus only addressed a third issue: "3. Whether a reasonable jury could conclude that the University retaliated against Dr. Moini, in violation of section 1981, for his protected activity of filing a race discrimination lawsuit against the University of Texas-Austin [UT/Austin]." *Amicus-final-brief, P2.* Amicus *easily* concluded, "through both direct and indirect evidence, that Dr. Moini faced retaliation for a protected activity. Documents the University turned over during discovery would permit a reasonable jury to find that the University rejected an extension to Dr. Moini's tenure clock and ultimately denied him tenure because he had litigated a discrimination lawsuit against a former employer. Even standing alone, this issue would demand reversal in part and remand for a jury trial." *Id., P15.*

On May 1, 2024, with regard to Dr. Moini's evidence of direct intentional discrimination, the court of appeals concluded:

> A plaintiff can prove intentional discrimination through direct or indirect evidence. Direct evidence includes any statement that "itself shows racial . . . bias in the [employment] decision." *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011). Dr. Moini has not identified such a statement. Before the district court, he cited comments by Dr. Walter Rowe that allegedly denigrated immigrants and foreigners. Such general remarks, however, do not show "bias in the [employment] decision." *Id.*

However, Dr. Moini identified two such statements in his original briefs, his lower court filings, and his final brief, including 1) by Dr. Rowe regarding his "AR15" comment and 2) by Drs. Bracey/Maltzman denying Dr. Moini's tenure clock extension because of his race-based lawsuit against UT/Austin. 2 *J.A.391, J.A.393.* Therefore, the appeal court erred, ignoring these undisputed comments as evidence of direct discrimination that should have entitled Dr. Moini to a jury trial. *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (2011).

Concerning Dr. Rowe and the University not conducting Dr. Moini's three tenure reviews, the Panel only responded that "the decision not to provide Dr. Moini with an official mid-tenure review was made by Dr. Victor Weedn, the preceding Department Chair, based on a representation by Associate Dean Eric Arnesen[.]" *Judgment, P5.* But, on April 11, 2016, Dr. Weedn wrote the email (J.A.344), while he was detailed to the Justice Department and before April had transferred all of

his responsibility to Dr. Rowe ("Weedn was Department Chair before April 2016." *Appellee's-final-brief pp11,37, Appellant-final-reply-brief, P35).* Moreover, on April 28, 2016, the Dean's office sent Dr. Rowe the T&P Guidelines and the mid-tenure and other procedures. J.A.347. In addition, Dr. Weedn was not tenured and was ineligible to conduct mid-tenure evaluations. *J.A.34* (mid-tenure guidelines stated, "[m]ultiple peer reviews by *tenured faculty* of the candidate's teaching are required." *J.A.157,* (italic emphasis added)). Moreover, on or about year 2020, the University has admitted that "a mid-tenure review of Plaintiff was not done," *J.A.721(Response-7),* and "[t]he previous department chair did not arrange for peer reviews of Professor Moini's teaching." *Appellant-original-brief, P26.* Additionally, the D.C. circuit ignored that Dr. Moini's 2016-2017 *annual* review was not conducted. *J.A.722, (Response 10).* The claims about the University's obligations during a particular academic year accrued on the final day of that academic year. *Mawakana v. UDC (2019).* Since Dr. Moini applied for tenure in September 2016, when the academic year 2016-2017 had already started (Compl. Ex26 ¶82), the final day was May 31, 2017, well within the 3-year limit. But Dr. Rowe testified that it "[n]ever occurred to me to do [the reviews]." *Id., P44.*

The D.C. circuit also overlooked that these established procedures had been applied to Dr. Moini's non-Middle-Eastern tenure-track comparators at the College (such as Jones in 2016 and [redacted]), and at the Department (Podini in 2014 and Marginean and 2019), who were properly reviewed. *Original-reply-brief, P26.* [redacted]

[redacted] providing direct evidence of disparate treatment. Appelant-o*riginal-reply-brief, P20.* Demonstrating the University was substantially not in compliance with its own rules (See *Kakaes v. George Washington Univ., 790, 583 (2002). See also Brady v. Off. of Sergeant at Arms*, 490, 493 (2008), which establishes a material breach of contract. See *Reeves, supra 140-141.* In other rulings, the D.C. circuit affirmed the district court's instruction that the contract promised a formal appraisal. *Howard Univ. v. Roberts-Williams,* 37 A.3d 896, 907, 913 (2012). Therefore, the Panel contradicts the ruling of this circuit. In addition, the D.C. circuit has stated that — absent a showing of unlawful discrimination — review of academic promotion disputes is ordinarily limited to determining "whether there has been substantial compliance with" the University's internal rules and procedures for evaluating applicants for advancement. *Allworth v. Howard Univ.,* 890 A.2d 194,202 (2006). Other appeals courts have established that institutions such as GWU are held to the standard of "substantial compliance" in following its own rules and procedures (*see Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652,660 (1980); *Matter of Pamilla v. Hospital for Special Surgery*, 223 A.D.2d 508(1996)). The Panel's Judgment that Dr. Rowe's action doesn't qualify for evidence of intentional discrimination contradicts these courts' rulings. On these records, the jury could reasonably find that the deviation from established rules by Dr. Rowe and the University in conjunction with Dr. Rowe's and Provosts Bracey/Maltzman's racial comments to Dr.

Moini in proximity to his tenure review "is adequate to sustain a finding of liability for intentional discrimination." See *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 140-141 (2000).*

The court-appointed amicus argued that §1981's implied cause of action also encompasses retaliation claims, *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 446 (2008), the University response to Department extension request, and the University changing position after realizing Dr. Moini's discrimination lawsuit against the UT/Austin through Martin's and Bracey's' emails, and explicitly referring to Dr. Moini's protected activity, are evidence of direct retaliation sufficient, standing alone, to merit a jury trial on this claim. But the court rejected this claim, stating, "Dr. Moini has forfeited any § 1981 retaliation claim he may have had by failing to raise it in his complaint. *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039 (2003) (declining to address the merits of an argument "raised for the first time on appeal")." *Judgment,* ¶ App-1. But, court-appointed amicus had argued that Dr. Moini had discussed the retaliation in several sections of his filings and it was easily identifiable. Therefore, the use of the word retaliation was justifiable and sufficient. Amicus stated "Moini raised a retaliation claim in his summary-judgment brief and the "Factual Background" section that a different Dean and Provost in 2013 denied a recommendation "that Moini be hired as a tenured professor because of his lawsuit against University of Texas." *Appellee's_brief, P47*, internal parentheses omitted. Amicus also points to a paragraph in Dr. Moini's Declaration stating that "my lawsuit based on my

Middle-Eastern race played a major role "in the denial of his tenure application." Amicus also argued that we can find a retaliation claim in Dr. Moini's complaint because it asked the court to "enjoin Defendant from any further acts of discrimination and/or *retaliation* against Plaintiff." *J.A. 112 (emphasis added).* Amicus also argues that Dr. Moini made a retaliation claim in his summary-judgment briefing, where he referenced events related to his UT/Austin lawsuit in his Statement of Undisputed Facts. But the D.C. circuit stated that "the district court was not required to infer new legal claims from such factual references." *Moini v. Granberg*, No. 22-7101 (2024). However, the amicus argued that the Appellant's claim under section 1981 should be read broadly and to include a retaliation theory. In particular, they argued that *because* there is no separate provision of section 1981 that prohibits retaliation, it would be difficult for any litigant (mainly a *pro se* plaintiff) to discern that they needed to plead retaliation in a separate count in the complaint. *Amicus-reply-brief (at 24-26).* The Panel not addressing the court-appointed amicus argument is an error.

Even if we accept the Panel's contention that Dr. Moini's evidence regarding the retaliation claim was insufficient, Dr. Moini still had evidence of direct discrimination regarding his tenure-clock extension denial and Dr. Rowe's statement of racial bias. The evidence, taken as a whole, shows that Dr. Moini has done enough that a reasonable jury could conclude that Dr. Moini has a valid claim under §1981. This should be irrespective of whether the harm was caused by retaliation or discrimination since courts generally have not distinguished

between retaliatory and discriminatory discharge when determining whether § 1981 applies to an employee's claim, as the harm caused by either type of termination is the same. *See, Carter v. South Cent. Bell Tel. Co.,* 912 F.2d 832, 840-41 (1990). The Supreme Court felt that making such a distinction would be pointless. Since termination harms the employee regardless of the employer's motive, the Court determined there was no need to differentiate between discriminatory and retaliatory discharge. *Id.* The Supreme Court in *CBOCS West, Inc. v. Humphries* held that §1981 protects against both direct racial discrimination and retaliation *based on complaints of discrimination.* Relying on *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court explicitly rejected the notion that a cause of action for discrimination materially differs from a cause of action for retaliation. The Panel denying Dr. Moini's (a *pro se* litigant) evidence of direct discrimination is an error.

IX. REASONS FOR GRANTING THE WRIT

A. To avoid erroneous deprivations of the right of a tenure-track faculty member who is denied tenure because of his race, this Court should clarify standards for what constitutes direct discrimination and indirect discrimination under McDonald-Douglas analysis, including (1) whether "Middle Eastern" is a race for a claim under 42 U.S.C. § 1981, and if so, whether a reasonable jury could conclude that appellant is a member of such a race; what evidence is needed to establish a race; and whether a plaintiff advancing a claim under § 1981 based on

alleged employment discrimination is required to establish a breach of contract or whether discrimination itself is a breach of contract. (2) At higher education institutions where tenure decisions are made at the University level, who is considered proper comparators, and if being from a different department or teaching different courses, excludes other tenure-track faculty members as comparators. (3) Are the University's published tenure and promotion guidelines and procedures binding by the parties? (4) Under section 1981, should one read the discrimination broadly to include a retaliation theory? In particular, *because* there is no separate provision of section 1981 that prohibits retaliation, where it is difficult for any litigant (mainly a *pro se* plaintiff) to discern that theory, do they need to plead retaliation in a separate count in the complaint?

Not following the institution's own procedures is strong evidence of indirect discrimination. This is especially true in institutions of higher learning, where a university has adopted rules or guidelines in such areas. In this situation, the courts will only intervene where there has not been substantial compliance with those procedures. For example, in *Sackman v. Alfred University*, 717 N.Y.S.2d 461 (2000), the court found that such a substantial deviation in procedures had occurred that the university was required to start its tenure process all over again. The court stated that it "may not substitute its judgment for the judgment and discretion of Alfred University, but may determine whether Alfred University's action in denying tenure to Dr. Sackman violated the Handbook and was arbitrary and capricious" *Id.* at 464. The handbook

required that the chairperson shall "through classroom visitations" keep up-to-date on the teaching of a tenure candidate. Yet the department chair only visited Dr. Sackman's classroom one time, and the P&T committee found the information on teaching skills lacking.

In strikingly similar circumstances in *Howard Univ. 896, 913, 2012*, it had stated,

> Because Professor Roberts–Williams did not receive a proper formal evaluation,... A reasonable jury could conclude that [plaintiff] would have approached her scholarly work and her tenure application differently if she had known that the [one] Project would be considered insufficient. *Id.*

The D.C. circuit Arbitrary Defined the Comparators' Characteristics

The Supreme Court has stated that one relevant example to proving that the employer's stated reason is a pretext to see if the candidate was treated differently from similarly qualified candidates. One option for the comparative approach is for a faculty member to claim that her or his credentials are at least as good as those of the faculty members who have already been promoted or tenured. As stated, the Eleventh Circuit Court has provided examples of similarities between a plaintiff and a proffered comparator that would support a valid comparison, *Lewis v. Union City*, Eleventh *Circuit Court,* No. 15-11362 (2019). But still, the D.C. circuit arbitrarily defined its qualifications. It dismissed Dr. Moini's comparators because "the

proposed comparators differed in the timing of their tenure decisions, the composition of their teaching loads, and the discernable upward trajectory in their student evaluations."

Indeed, Dr. Moini's comparators (Jones 2016 and [redacted]) were tenured within a year of Dr. Moini (2017), had the same teaching loads (two courses per semester), *J.A.567*, were under the same University rule (Faculty Code 2015-teaching excellence criterion), *J.A.567*, and the same decision maker, Provost Maltzman. *Appellant-final-reply-brief, P27.* Moreover, the lower court admitted that "Jones's student evaluations mirror[ed] Moini's." *J.A.35.* Moreover, for Dr. Moini, the court accepted the University's reason for his tenure denial (below-average student teaching evaluations) but remained silent on Jones's below average student evaluations. (See "Jones received tenure in 2016 despite below-average student evaluations." *Id.*.) Dr. Moini also showed that the lower court miscalculated Dr. Moini's averages and had averaged Moini's one credit Graduate Seminar with his three credits forensic classes giving them equal weight, but the weighted averages for the first half and the second half of Jones and Dr. Moini's probationary period were, nearly identical. However, the D.C. circuit ignored this miscalculation and repeated the district court error that "the discernable upward trajectory in their student evaluations" was a reason for comparators not to be nearly identical. *Judgment, P 5* . Therefore, the D.C. circuit evidence that Dr. Moini's comparator had "the discernable upward trajectory" is invalid. The Panel's unreliable evidence contradicted the U.S. Supreme Court's ruling that calls upon judges to assess the reliability and

validity of scientific evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Supreme Court eschewed any notion that comparators must be "identical" for the examples to be probative of disparate treatment in a case assessing a *Batson* challenge to alleged discriminatory jury selection at trial. *Miller-El v. Dretke*, 545 U.S. 231,247 (2005). ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." *Id.*, at 247.

Dr. Moini was also more qualified than his comparators because he was on fast-track and received two merit raises of above 3%, which were based on chair comments on his annual reports. [J.A.459-461]. [J.A.459]. There is no evidence that the comparators had these achievements. The University admitted that [redacted]." [J.A.725, #23].

The Court simply did not view the evidence in the light most favorable to Dr. Moini when analyzing the Defendant's summary judgment. Indeed, one would struggle to find a single example in the D.C. circuit judgment (or the district court Memorandum of Opinion 2022) where the court resolved a disputed fact or inference in Dr. Moini's favor. [J.A.13].

Plaintiffs can, for example, present evidence that the defendant's stated reasons for taking the adverse action were false; the defendant acted contrary to a written policy setting forth the action

the defendant should have taken under the circumstances, or the defendant acted contrary to an unwritten policy or practice when making the decision. (See *Plotke v. White*, 405 F.3d 1092, 1102 (2005). A plaintiff may also show pretext through evidence that the "employer's proffered non-discriminatory reasons [were] either a post hoc fabrication or otherwise did not actually motivate the employment action ...." *Fuentes v. Perskie*, 32 F.3d at 764 (1994). Therefore, the D.C. circuit, at the least, should have remanded Dr. Moini's case to the district court for further proceedings, which should include providing Dr. Moini the opportunity to amend his complaint by pleading a § 1981 retaliation claim. See *Bolden v. City of Topeka* 441 F.3d at 1137 (2006), (remanding so the plaintiff could seek leave to amend to cure his complaint's Jett violation).

This case presents this Court with an opportunity to level the field by clarifying or removing the "judicial deference" to academic institutions of higher education. This is especially important now that tenure in many institutions is no longer permanent, and tenured faculty are required to pass a performance filter every five years or so. Absent intervention by this Court, the D.C. circuit published decision will work to undermine the carefully crafted procedural safeguards that this Court has spent the past 50 years developing.

X. CONCLUSION

For the preceding reasons, Dr. Moini respectfully requests that this Court issue a writ of

certiorari to review the United States Court of Appeals for the District of Columbia's judgment.

//

DATED this 25th day of October, 2024.

Respectfully submitted,

Mehdi Moini, Ph.D.

Petitioner
Pro se

Mehdi Moini, Ph.D.
732 Ridge Dr.
McLean, VA 22101
Moini.mehdi@gmail.com
Phone: (512) 736-8650