No. 06-1221

IN THE
Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Mendelsohn and her *amici* mischaracterize what the district court held, and indeed what this case is about. From these mischaracterizations flow their dire, but groundless, predictions about the effects of this case on deserving plaintiffs' ability to prove discrimination.

I. THE DISPUTED WITNESSES' TESTIMONY WAS IRRELEVANT

A. Mendelsohn Overlooks Both The *Burden* Of Proof, And The *Offer* Of Proof.

A threshold mischaracterization is what the district court held. There was no "blanket exclusionary order" or "per se rule of exclusion," as Mendelsohn and her *amici* repeatedly recite. The district court ruled *in limine*, but not *in the abstract*. At issue is what was in — and palpably absent from — Mendelsohn's response to Sprint's motion *in limine* and her offer of proof. If Mendelsohn thought that a logical nexus could be drawn between the disputed witnesses (and their decisionmakers) and herself (and her own, different decisionmaker(s)), the offer of proof was the place for her to articulate that nexus. She did not.

1. Mendelsohn overlooks the burden of proof.

The proponent of any evidence must lay a foundation for it. Where the relevance of one piece of evidence turns on the admission of another, Federal Rule of Evidence 104(b) requires the proponent to perfect the foundation for admission. The same rule applies where an offer of proof is at issue. "[A]n offer of proof must not only

include the evidence sought to be admitted but also any foundational evidence necessary to make the evidence admissible . . . . [T]he offer of proof must include evidence needed to prove any preliminary questions of fact required to make the evidence admissible under Rule 104." 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 2d § 5040, at 886 (2d ed. 2005).

Here Mendelsohn had a full and fair opportunity, following discovery, to lay a foundation of relevance, by showing that any possible bias of other supervisor(s) somehow had a nexus to Mendelsohn's own decisionmaker(s). As shown below, Mendelsohn's proffer was deficient.

2. Mendelsohn overlooks the deficiencies in her offer of proof.

Mendelsohn and her *amici* overlook the substantive omissions from Mendelsohn's written offer of proof (J.A. 342a-351a).

Federal Rule of Evidence 103(a)(2) provides that the party aggrieved by an evidentiary ruling must "ma[k]e known to the court by offer [of proof]" "the substance of the evidence [offered and excluded]." The proponent of evidence "'must express[] precisely the substance of the excluded evidence' to inform both the trial court and the appellate court why exclusion of the evidence was prejudicial error." *Polack v. Comm'r*, 366 F.3d 608, 612 (8th Cir. 2004) (citation omitted; alteration in original). Thus, we take her proffer as her best effort at

articulating what the disputed witnesses would say, and why that material is potentially relevant. *See, e.g.*, *Cal. Gas Producers Ass'n v. Fed. Power Comm'n*, 383 F.2d 645, 651 (9th Cir. 1967) (affirming trial court's exclusion of proffered evidence; "The time and place to [make the requisite evidentiary showing was] in the offer of proof . . . . Unless an offer of proof is complete enough to show that it was error to reject the proof, the offer is insufficient."); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1409 (10th Cir. 1991) (a trial court need not reexamine an earlier evidentiary ruling even if the significance of the excluded evidence later becomes apparent; requiring "some contemporaneity" between the offer of proof and the evidentiary ruling ensures "a proper decision *at the time* the evidence is offered" and "create[s] a clear record for [the appellate court] to review the trial court's decision") (emphasis in original).

Mendelsohn's own brief reveals the shortcomings in her proffer. Almost none of the "evidence" Mendelsohn now cites at pages 4-6 of her brief is in the offer of proof, and much of it is not contained anywhere in the trial court record at all. For example, most of what Mendelsohn claims at page 5 of her brief is nowhere in the record. Her appeal thus contends that the district court should be reversed based on a set of (alleged) facts that she withheld.

But even if the "evidence" she proffers belatedly were to be considered, the same result follows. We see facially defective quasi-statistics,[1] conclusory

[1] *E.g.*, "Mr. Hoopes noticed that 'the vast majority' of the former Sprint employees who attended Right Management (Cont'd)

assertions,[2] other claims bereft of foundation,[3] opinions based on limited personal experience,[4] and gripes about performance standards that are not discriminatory at all.[5]

(Cont'd)

[outplacement meetings] were over the age of 40." (Mendelsohn Br. 4 & n.6.) *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), exposes the fallacy in that contention. Without proof of the population from which the layoffs occurred, no inference of discrimination arises. *Id.* at 650 ("The proper comparison [is] between the . . . composition of [the at-issue jobs] and the . . . composition of the qualified . . . population in the relevant labor market.") (citations omitted), *superseded by statute on other grounds,* Civil Rights Act of 1991, Pub. L. No. 102-166, S. 1745, 105 Stat. 1071 (1991). In addition, the "statistic" Mr. Hoopes would testify about is not probative because it does not measure the incidence of the layoffs, only the composition of those who voluntarily chose to use the services of the outplacement center. *See id*. at 651-52 (individuals' voluntary choices, not discrimination, may account for what might seem to be statistical disparities).

[2] *E.g.*, "It was pretty much a general understanding . . . ." (Mendelsohn Br. 5.)

[3] *E.g.*, "[There was] a set of expectations of how people are to operate . . . ." (Mendelsohn Br. 5.)

[4] *E.g.*, "[B]ased on the people that I know that have been RIF'd . . . ." (Mendelsohn Br. 4.)

[5] *E.g.*, "[T]hose who couldn't or wouldn't keep up would be gone . . . ." (Mendelsohn Br. 5.)

Mendelsohn's offer of proof comprises assaults by, and on, persons who were not alleged ever to have spoken with, or even known, Mendelsohn's decisionmaker(s):

Bonnie Hoopes would have contended that her duties were absorbed by three somewhat-younger employees. She heard one or more persons mention that she was the oldest, or most senior, employee in her work group. Ms. Hoopes would have testified that she heard her own former supervisor, Sharon Vorhies, make two discriminatory remarks. (J.A. 343a-344a.)

If such remarks were made, Sprint condemns them. But none of this had anything to do with Mendelsohn. As Sprint pointed out to the district court in response (J.A. 353a-354a), Ms. Hoopes' supervisor was someone named Chrystal Cone, who reported to Allen Winters, who in turn reported to Tony Castanon. Ms. Hoopes did not work in the Business Development Strategy group, and she did not report to anyone in (and indeed never had worked within) the Fee-Reddick-Blessing chain of command. Ms. Hoopes admitted that she knew nothing of Mendelsohn's employment (other than hearing Mendelsohn's admission that she had received unfavorable performance feedback, J.A. 377a). Mendelsohn never contended that Vorhies, who supposedly had made discriminatory remarks, had anything to do with Mendelsohn's own layoff, or that Vorhies interacted with Fee, Reddick or Blessing.

Yvonne Wood would have claimed that she believed that Sprint's "Staff Associate Program," involving "intern[s]," effectuated age discrimination. (J.A. 344a-

345a.) Wood also would have testified that she saw a spreadsheet from a supervisor named Dan Kennedy noting the ages of certain employees, and that (based on hearsay) she understands that someone named Ted Stock once had made a discriminatory remark.

None of this had anything to do with Mendelsohn. Wood did not work in the Business Development Strategy group. She reported to Roberta King, who reported to Stock, who reported to Mike Miller, who reported to Jerry Batt. There was no nexus to the Fee-Reddick-Blessing chain of command that supervised Mendelsohn. In particular, Kennedy (the supervisor who supposedly had the spreadsheet) and Stock (who supposedly made the discriminatory remark) had nothing to do with Mendelsohn's work or layoff, and Mendelsohn never alleged that the presence of interns had any bearing on her own layoff.

Sharon Miller reported to Noel Strong, who in turn reported to Stock. (J.A. 355a.) Miller would have testified that Stock made several age-derogatory comments. (J.A. 346a.) If true that is deplorable, but it also is wholly irrelevant to Mendelsohn. Neither Miller nor Stock had any relationship to Fee, Reddick, Blessing, or anyone else in the Business Development Strategy group. (J.A. 354a-355a.)

John Borel would have alleged that a younger female handled some of his former duties after Borel was laid off. Borel also would have testified that his supervisor, Janet Mathus, once told him that her own supervisor, Mohammad Hussain, had instructed Mathus to give

Borel an adverse performance rating. Finally, Borel would have alleged that he heard that an older worker, Carol Kippes, claimed discrimination based on age. (J.A. 347a.)

None of this had anything to do with Mendelsohn. None of the supervisors or managers he mentioned — not Cole, not Mathus, not Hussain — worked in the Business Development Strategy group. There is no allegation that Cole, Mathus, or Hussain played any role in any decision involving Mendelsohn, and their supervisory chains of command bore no relationship to Mendelsohn's. Borel reported to Mathus, then up to Hussain, then to someone that the record identifies only as "Mihwa," who in turn reported to a Dennis Huber. Borel, like the others, simply worked in a different part of the vast Sprint world.

John Hoopes, who reported to Terri Reynolds, would have testified that a younger, female manager assumed some of his duties. (J.A. 348a.) Mr. Hoopes would have testified that he noticed that others receiving outplacement assistance from Right Management also were older than 40. (J.A. 348a-349a.) Finally, Mr. Hoopes also would have recalled that, once, an (unnamed) employee in an (undescribed) function called "UMV" asked Mr. Hoopes why he was hiring someone 48 years old for a particular job. (J.A. 125a, 348a.)

None of this has anything to do with Mendelsohn. Mr. Hoopes' supervisor, Reynolds, had no nexus to Fee, Reddick, or Blessing. There is no allegation that

Reynolds or anyone else Mr. Hoopes mentioned had anything to do with Mendelsohn's layoff.

While Sprint can (and must) take the offer of proof to be true for present purposes, this Court can (and must) hold Mendelsohn to the deficiencies in it. Perhaps one or more of the five disputed witnesses had enough evidence to raise a triable question of discrimination as to himself or herself. Mendelsohn never alleged in her proffer anything suggesting a nexus to Mendelsohn's decisionmaker(s) or Mendelsohn's layoff.

3. None of the circumstances in which other-supervisor evidence is admissible exist here.

Of course there are cases in which a witness (though working for a different supervisor) nevertheless can shed light on the discriminatory motivations of plaintiff's decisionmaker — or the discriminatory motivations of someone else, that were *imposed on* plaintiff's decisionmaker. Admissible evidence involving other supervisors might include statements like:

- "I was instructed by top management to bring the average age down."

- "Human Resources told me that, in making layoff decisions, to resolve close cases in favor of the employee with the least seniority."

Evidence like this of course is potentially relevant. A reasonable jury perhaps could infer that the decisions

of plaintiff's own decisionmaker may have been tainted by similar instructions. Such evidence is potentially relevant because it suggests discriminatory intent by the *effective* decisionmaker ("top management" and "Human Resources," respectively) imposed on the *nominal* decisionmaker. Such evidence could be relevant whether or not the testifying witness was subject to an adverse employment action. The witness' testimony has relevance, not because he or she was laid off, but because he or she has something relevant to say about the motivations of (or those imposed upon) the plaintiff's decisionmaker.

Such a witness, however, is not the kind of "me, too" witness now at issue. Here we simply have nonparties who wish to tell their personal stories. Such evidence is not admissible unless it sheds light on the motivations of the plaintiff's decisionmaker. Sprint is not contending that evidence involving "other supervisors" is inherently irrelevant. Sprint is contending that evidence involving others is irrelevant *absent a foundational showing of nexus to plaintiff's decisionmaker*.

Consider a hypothetical case in which plaintiff, an employee in the U.S. Department of Labor's Wage and Hour Division, alleges that she was denied a promotion based on gender. She seeks to call as a witness another aggrieved female who worked in DOL's Office of Federal Contract Compliance Programs, another who worked in the DOL's Mine Safety Division, and two others, who worked at the Equal Employment Opportunity Commission and National Labor Relations Board, respectively. All propose to testify that they, too, believe

that they were discriminated against in promotions based on gender. All earn a paycheck from the United States government, just as the disputed witnesses here all earned a paycheck from Sprint. But there is no more nexus between the proffered witnesses and the plaintiff in that hypothetical than there was between Mendelsohn's proffered witnesses and Mendelsohn herself. In both cases there is no contention of a common decisionmaker; in both cases there is no foundational proof of any common scheme or plan. The witnesses may (or may not) have plausible discrimination claims of their own. But they have nothing relevant to say about the merits of the *plaintiff's* claims.

B. Mendelsohn's Cited Authorities Reinforce Rather Than Undermine The Principle That Nexus To A Decisionmaker Must Be Shown.

The cases Mendelsohn and her *amici* rely upon are inapposite. In each of them foundation — nexus to the decisionmaker — existed. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), a jury-selection case, the petitioner produced relevant evidence to support his claim of discrimination, including statistics showing a pattern or practice of discrimination by the District Attorney's office as a whole. *Id.* at 334-35. This Court found the evidence relevant because a foundation for it had been laid: statistical evidence (not mere anecdotes), showing a widespread pattern or practice, reinforced by proof of formal training about the importance of excluding minorities from juries and the techniques for doing so. *Id.* at 334-35, 347. No comparable foundation was laid here.

Ryder v. Westinghouse Electric Corp., 128 F.3d 128 (3d Cir. 1997), and *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003), similarly are inapposite. Those cases involved potentially relevant evidence concerning the views of top management that may have influenced the nominal decisionmakers. In *Ryder*, at issue was the "Chairman's Initiative Memorandum" authored by the CEO and containing ageist comments by the CEO himself and managers speaking for him. 128 F.3d at 131-33. The evidence was relevant because it directly demonstrated possible animus by upper management, imposed on decisionmakers. Similarly, in *Palasota*, the district court erred in excluding alleged age-related remarks by the company's President (Bracken) and National Sales Manager (Burks). The comments were relevant, "even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision. Bracken and Burks, both members of upper management, were in such a position." 342 F.3d at 578 (citation omitted).

Mendelsohn miscites Judge Posner's opinion in *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987), to the effect that evidentiary rulings should not "keep out probative evidence." The key word there was "probative." *Riordan*, a pay discrimination case under the Equal Pay Act and 42 U.S.C. Section 1983, held that the district court erred in excluding proffered statistical and anecdotal evidence of pay disparities between male and female employees — in effect denying plaintiff the opportunity to lay a proper foundation of nexus. *Id.* The Seventh Circuit correctly held that such evidence could be relevant upon a sufficient showing of proof

demonstrating a nexus with the plaintiff's supervisor, Randolph: "If it turned out that Randolph always recommended higher pay for men than women, this would be *some* evidence that Riordan hadn't gotten the raise she wanted because she was a woman." *Id.* (emphasis in original). *Riordan*, in sum, was a case in which the district court erroneously declined to consider the possibility of a foundation of nexus, even though the proffered evidence directly pertained to plaintiff's decisionmaker. The instant case, by contrast, is one in which Mendelsohn through her offer of proof revealed that she could not lay a similar — or any — foundation.[6]

C. There Was No Proof Of A Pattern Of Discrimination.

Mendelsohn now claims that there was a pattern of discrimination, but her "pattern" is just a few anecdotes. The way to demonstrate a pattern of discrimination, suggestive of a practice, is statistics. *Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("[B]ecause it alleged a systemwide pattern or practice [of discrimination], the

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[6] *Amicus* AARP's reliance on a racial harassment case, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), is similarly misplaced. The court in *Hunter* merely eschewed a "flat rule" excluding all evidence of other acts under Rule 403. *Id.* at 1423. The Seventh Circuit upheld the admission of evidence of alleged harassment by other African-American workers. A hostile work environment harassment case like that one — in which the injury is the environment and the defendant's liability turns on its knowledge and remedial actions — differs from a disparate treatment case such as this, in which the injury is an adverse employment action and the defendant's liability turns on the intent of the identifiable decisionmaker(s).

Government ultimately had to prove more than the mere occurrence of isolated or . . . sporadic discriminatory acts."; here the Government did that, through powerful statistical proof). Mendelsohn did not present any statistics at all, let alone statistics focused on the Business Development Strategy Group. The only statistical evidence was Sprint's demonstration that the number of over-50 workers in Reddick's organization *increased* following the layoffs. (J.A. 335a, 337a.)

Mendelsohn contends that, under *Teamsters*, she was entitled to present what she calls "discrete decisions" to demonstrate a discriminatory policy. (Mendelsohn Br. 22.) She not only misreads *Teamsters* — which explained that "isolated or . . . sporadic discriminatory acts" do *not* reveal a pattern or practice, 431 U.S. at 336 — she miscites it entirely. *Teamsters* set the rules for class actions, not individual cases. *See id.* at 357-58 (differentiating class proof from individual proof). *Teamsters* permits a *class* plaintiff to present anecdotal evidence to "br[ing] the cold [statistical] numbers convincingly to life," *id.* at 339, but that kind of anecdotal proof necessarily follows, rather than precedes, the demonstration of a classwide pattern or practice. Mendelsohn, like the court of appeals majority, relies on circular reasoning: "me, too" witnesses are admissible if there is a pattern or practice, and a pattern or practice exists if there are "me, too" witnesses.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), provides no more support for Mendelsohn's position. Under *McDonnell Douglas*, evidence of a "general policy and practice" — "statistics," said the Court, not anecdotes — may be "helpful to a

determination of whether [the alleged adverse action] in this case conformed to a general pattern of discrimination." *Id.* at 805. *McDonnell Douglas* does not hold that a discrimination plaintiff can rely on anecdotes involving others.[7]

Mendelsohn contends that the Sprint layoffs were conducted pursuant to what she calls "enterprise-wide reduction-in-force rules and guidelines," with decisions made "at the highest management level at Sprint." (Mendelsohn Br. 1; *see also id.* at 48.) Her misstatement of the record is extreme. Senior management of course determined how much money the business needed to save in cutbacks (J.A. 319a-322a; 333a-334a); it was management's job to grapple with keeping the business solvent amidst the telecommunications industry's

[7] Mendelsohn complains that she would be criticized for presenting too few anecdotes (because they are insufficient) or too many anecdotes (because they are too time-consuming). (Mendelsohn Br. 31-32 n.46.) The complaint is glib but nonresponsive. Anecdotes are anecdotes. Relevant statistical proof, and a nexus to plaintiff's decisionmaker, remain the touchstones. Contrary to Mendelsohn's contention, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), does not hold that a defendant indiscriminately may introduce evidence of the circumstances of others without a foundational showing of nexus. *Cooper* simply did not discuss what foundational showing would be required. Mendelsohn also errs in relying on *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Both cases suggested that appropriate statistical proof could be probative. Neither case analyzed the proper foundation for statistical proof, and the Court need not do so here, because Mendelsohn did not present any.

implosion in 2002.[8] But it is undisputed that individual managers — in Mendelsohn's case, Reddick — decided, on a decentralized basis, which individuals would be laid off. (J.A. 337a-341a.) The only company-wide policy cited by Mendelsohn is Sprint's Displacement Guidelines (J.A. 334a), but nothing in them is even arguably discriminatory. To the contrary, the guidelines invited supervisors in making close retention decisions to give weight to length of service with Sprint. (Mendelsohn Cert. Opp. App. 1b-2b.) That if anything gives a leg up to older workers, because length of service normally correlates positively with age. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 686 (4th ed. 2007).[9]

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[8] Mendelsohn stipulated at trial that she did not dispute the validity of the layoffs as a whole. (J.A. 317a-318a.)

[9] The only other common practice that Mendelsohn alleges is Sprint's introduction of a new employee rating system, "Alpha," in the year that preceded most of the layoffs. The problem that Sprint (like many employers) faced is that the ratings previously given had not differentiated meaningfully among the performance of various persons. Alpha ratings, which were based on a forced distribution, effectuated that differentiation. There is nothing discriminatory in assessing employees' relative performance. During the first year of the new forced-distribution system, Alpha ratings for non-executive managers were not intended to be recorded in the formal personnel file. This phase-in period allowed supevisors to test the system and advise underperforming employees on how to improve before Alpha became the sole evaluation methodology. Layoff decisions were made within Blessing's Business Development Strategy group,

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D. The Evidence Was Not Relevant As "Background" Or To Show A Discriminatory "Culture" Or "Atmosphere."

1. Allegations of a discriminatory "culture" or "atmosphere" must have the requisite foundation.

As Sprint anticipated, Mendelsohn and her *amici* attempt to justify the court of appeals' decision based on foggy concepts of relevance. Here again the offer of proof provides the dispositive response.

At issue in the offer of proof is the anecdotal testimony of five persons, principally assailing three or four Sprint supervisors — Vorhies, Kennedy, Stock and (perhaps) Hussain — none of whom had anything to do with Mendelsohn or the Fee-Reddick-Blessing chain of command. From these, Mendelsohn tells us, a jury could find an "atmosphere" of age discrimination.

Anecdotes do not make an atmosphere. "[T]here is a wide gap" separating "an individual's claim that he has been [mistreated] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982). "One [case] is an anecdote, and several cases are several anecdotes. Judges do not

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(Cont'd)
not in consultation with managers elsewhere, and without reference to Alpha rankings given elsewhere. Nothing in the Alpha system reveals any common scheme or plan to discriminate.

find discrimination on such a thin basis." *Kuhn v. Ball State Univ.*, 78 F.3d 330, 332 (7th Cir. 1996); *see also Teamsters*, 431 U.S. at 336 ("sporadic discriminatory acts" do not establish a pattern or practice). Nexus to plaintiff's decisionmaker — foundation — must be shown.

Mendelsohn and her *amici* hypothesize about a rogue employer, with odious and rampant discriminatory practices, in which one supervisor infers a license or instruction to discriminate based on the words or conduct of others. (Mendelsohn Br. 14, 41.) The defect in this hypothetical is that it bears no relationship to Mendelsohn's proffer here, or the proof in the normal run of cases. We may assume, in an extreme case in which the plaintiff has laid the proper evidentiary foundation, that some relevance potentially might exist. Here, though, Mendelsohn assailed just a handful of supervisors in a 70,000-employee organization. Amidst layoffs affecting some 15,000 persons, Mendelsohn alleged only "isolated or . . . sporadic discriminatory acts," *Teamsters*, 431 U.S. at 336. Her witnesses at the very worst would have shown that Sprint's record of equal employment opportunity had "bruise[s]" in departments far removed from Mendelsohn's own, not that Sprint was "rotten to the core," *Cooper v. Federal Reserve Bank*, 467 U.S. at 880.[10]

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[10] Mendelsohn errs in relying on Justice Thomas' opinion in a desegregation case, *Missouri v. Jenkins*, 515 U.S. 70 (1995). Justice Thomas, concurring, observed that "laws from the Jim Crow era created 'an atmosphere in which . . . private individuals could justify their bias and prejudice against blacks . . . .'" (Cont'd)

The proof in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), cited by Mendelsohn, dramatically differs from her proffer here. There the trial court excluded age-biased remarks by (i) Gallagher, the Vice President in charge of plaintiff's division, who was involved in the decision to terminate (rather than transfer) the plaintiff, *id.* at 355; (ii) Hewitt, the Finance Director for the division, who reported directly to Gallagher, *id.* at 356; and (iii) Campbell, the former Director of Human Resources, who also reported directly to Gallagher. The Sixth Circuit found that the evidence should have been admitted because it pertained to the plaintiff's decisionmaker and two senior managers who reported to him within plaintiff's division. *Id.* at 357. Mendelsohn made no comparable showing.

Abrams v. Lightolier Inc., 50 F.3d 1204 (3d Cir. 1995), does not stand for the proposition that anecdotes, untethered to the plaintiff's circumstances, establish a discriminatory "corporate atmosphere." In that case at issue were ageist remarks allegedly made by Richard Kurtz, plaintiff's supervisor and termination decisionmaker. *Id.* at 1214. The Third Circuit correctly affirmed the admission of the alleged remarks by Kurtz, as well as the testimony of five other employees who believed that they also had been mistreated by Kurtz on the basis of age. *Id.* at 1214-15. *Abrams* involved alleged

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(Cont'd)

Id. at 116 (alteration in original). No reasonable person would dispute that there was an atmosphere of discrimination in the Jim Crow South. Mendelsohn's implication — that the isolated anecdotes she alleges at Sprint demonstrate a comparable discriminatory atmosphere — requires no response.

discriminatory remarks and acts by the plaintiff's decisionmaker. The disputed witnesses there (unlike the disputed witnesses here) had something relevant to say.

Sprint here has offered a governing principle of relevance: foundational nexus to the decisionmaker. Mendelsohn offers no governing principle at all. According to her, a single-plaintiff disparate treatment plaintiff in substantially every case can admit "me, too" anecdotes simply by reciting the words "background," "atmosphere" or "culture." The vast majority of court of appeals cases have rejected that contention, and this Court should do so as well.

2. Evidence lacking the proper nexus to the plaintiff is improper character evidence.

Mendelsohn and her *amici* suggest that the disputed evidence should be admitted as "character" evidence, but they overlook whose "character" is at issue.

Mendelsohn was permitted full access to the conventional types of discrimination proof:

- direct evidence of decisionmaker bias;
- comparative evidence of the decisionmaker's treatment of similarly situated persons;
- statistics;

- inferences of discrimination derived from "false reasons," revealing decisionmaker mendacity.

(*See* Sprint Op. Br. 26-27.) Mendelsohn's problem was that she had little or no evidence of discrimination under these usual forms of proof, as the district court specifically found.[11]

Mendelsohn therefore sought to try the cases *of others* to the jury, something that the trial judge rightly refused to allow. Admissibility depends on proof of some relationship between the proffered evidence and the decisionmaker at issue:

> [T]he [plaintiff] may [not] parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the [individual] only by unsubstantiated innuendo. . . . [S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred *and that the [individual] was the actor*.

Huddleston v. United States, 485 U.S. 681, 689 (1988) (emphasis added).

Tellingly, the word "decisionmaker" is virtually nowhere to be found in Mendelsohn's brief or those of

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[11] The district judge remarked: "[I]t was my view that [the disputed] testimony would not have affected the outcome of the case in any way . . . . I visited with the jury afterwards and they did not believe this was a close case." (J.A. 452a.)

her *amici*, despite this Court's consistent teaching that disparate treatment is proven (or not) by focusing on that person. (*See* Sprint Op. Br. 11-21.) Mendelsohn instead engages in an assault based on the (supposed) sins of nondecisionmakers, an argument resting on guilt by (attenuated) association. But where — as here — the proffered evidence does not have the requisite foundational link to the decisionmaker, courts of appeals properly have excluded it as improper character evidence. *E.g.*, *Kline v. City of Kansas City*, 175 F.3d 660, 668 (8th Cir. 1999) ("We agree with the trial court that the acts of people who did not supervise or allegedly discriminate against the plaintiffs (and who in most cases did not even work in the same area as the plaintiffs) are not probative of the city's motive, opportunity, intent, or knowledge."); *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 182, 185 (3d Cir. 2000) (it was reversible error to admit evidence about the employment circumstances of others; plaintiff claimed that his supervisors, Goldsmith and Victor, directed customers to "trump up" complaints against him to establish a pretext for his age-based termination, and sought to offer evidence that a different manager, Ramey, had solicited assistance in fabricating similar evidence against another employee to facilitate termination; the Third Circuit reversed, ordering a new trial, because different decisionmakers were at issue; the proffered evidence was not probative of any "plan" by ARCO as a whole because there was no showing of nexus).

The disputed evidence here does not pass the Rule 401 relevance test because it does not shed light on the motivations of those who acted for Sprint in choosing

Mendelsohn for layoff.[12] And, in assailing the "corporate character" of Sprint, rather than testing Mendelsohn's decisionmaker(s), Mendelsohn offered inadmissible character evidence.

II. ALTERNATIVELY, THE EVIDENCE WAS INADMISSIBLE UNDER RULE 403

Mendelsohn has little to say on the Rule 403 issue. Given the deference accorded trial judges' evidentiary rulings, it cannot be said to have been reversible error to exclude the evidence here, even assuming *arguendo* some peripheral relevance.

A. "Me, Too" Evidence Produces Trials-Within-A-Trial, Unduly Consuming Trial Time.

If "me, too" evidence is admitted for the plaintiff, so must "not you, either" evidence be admitted for the defense. That means that trial time will be consumed on trials-within-a-trial over the claims of nonparties.

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[12] Mendelsohn misstates the district court's reasoning in suggesting that the evidence was excluded simply because the district judge did not personally find it very probative. (Mendelsohn Br. 50.) The district court excluded it because she found it *inadmissible*, lacking a foundation of nexus to Mendelsohn and her decisionmaker. Evaluating admissibility is what trial judges do. Mendelsohn and her *amici* suggest, however, that the test for relevance is so low as not to be a test at all. They are incorrect; the relevance test may be a liberal one, but it is not without substance. *United States v. Hollister*, 746 F.2d 420, 422 (8th Cir. 1984) ("Although the definition of 'relevant evidence' given in Federal Rule of Evidence 401 is broad, it does have limits.").

Mendelsohn denies that there would be trials-within-a-trial had her witnesses been admitted, citing a colloquy between counsel in anticipation of a retrial. (Mendelsohn Br. 59.) She is incorrect. The district court recognized that it would have to give Sprint substantial latitude to rebut the claims of the additional witnesses. "I assume if you're doing all these additional witnesses, then we would be looking at a trial which is *ten times as long, five times as long*?," the court asked. (J.A. 444a; emphasis added.) The length of the retrial would "depend[] on how much detail the[] [company] want[s] to get into . . . refuting whatever the[] [new witnesses'] testimony is." (J.A. 444a.) It is true that Sprint in this particular case decided to try to limit the expanded scope of the retrial. (J.A. 445a ("So maybe ten days [o]f trial — if it was eight [days] last time.").) The particular strategic choices by trial counsel here have no bearing on the broader legal issue this Court granted *certiorari* to resolve. The rule of law resulting from this case will be applied in every other. Whatever the scope of any retrial here, the Tenth Circuit's rule, if applied in future cases, assures undue consumption of trial time on trials-within-a-trial.

B. "Me, Too" Evidence Risks Jury Confusion.

Mendelsohn's proffered "me, too" evidence would have distracted the jury from its proper focus: the circumstances of *Mendelsohn's* layoff. Mendelsohn inadvertently concedes the point in her brief, in saying that "a reasonable trier of fact . . . *could care about* age discrimination by other Sprint supervisors." (Mendelsohn Br. 29 (emphasis added); *accord id.* at 31 (a jury "might want to know"); *id.* at 39 ("could . . . want

to know").) Doubtless so, and that is exactly Sprint's point. The Federal Rules of Evidence were not designed to admit whatever a jury "could care about" or "want to know," but rather to focus the jury's attention on what is fairly probative of the plaintiff's own claim. *See*, *e.g.*, *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 188 (3d Cir. 1990) ("Evidence that a party committed wrongs other than those at issue in a case often creates a danger of 'unfair prejudice' because such evidence may influence a jury to return a verdict based on a desire to punish for the other wrongs.") (citation omitted). Rule 403 exists precisely to prevent such confusing and unfairly prejudicial testimony. *See Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006) (judges may "exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'") (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)) (some quotation marks omitted; alteration in original); *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (same); *Huddleston*, 485 U.S. at 687 (same).

Mendelsohn contends, however, that sometimes two or more plaintiffs sue in a single action. If that can occur, says Mendelsohn, then there is no difference in having nonparty witnesses testify about their own circumstances. (Mendelsohn Br. 60-61.) The dispositive response is that unfair prejudice can exist in multiple-plaintiff cases, too. Courts routinely grant separate trials where separation is necessary to prevent the claims of Plaintiff A from tainting a jury's analysis of separate proof pertaining to Plaintiff B. As the Ninth Circuit observed, in affirming a district court's decision to hold separate trials for 10 employees terminated in a series

of reductions-in-force: "The district court properly considered the potential prejudice to [the employer] created by the parade of terminated employees and the possibility of factual and legal confusion on the part of the jury."[13]

C. "Me, Too" Evidence Causes Unfair Prejudice.

Mendelsohn insists that jury instructions will constrain jurors from improper use of possibly inflammatory claims dangled before them. (Mendelsohn Br. 58.) Respectfully, that is not real-world, particularly in a reduction-in-force case — where, axiomatically, substantially all persons laid off are adequately performing incumbents. Each will have a sympathetic story about how it could have been "he, not me" selected

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[13] *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000); *accord, e.g., Wynn v. NBC,* 234 F. Supp. 2d 1067, 1089 (C.D. Cal. 2002) ("Severance is also appropriate here for the more compelling reason of preventing unfair prejudice . . . . [T]here is a substantial risk that one [party] will be tainted by the alleged misdeeds of another, unfairly resulting in guilt by association."); *Bailey v. Northern Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000) (severing five claims; "A single trial would require the jury to keep separate each plaintiff's individualized claim . . . presenting the jury with the 'hopeless task of trying to discern who did and said what to whom and for what reason.'") (citation omitted); *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) (severing 11 plaintiffs' claims; "[The] need to focus the jury's attention on the merits of each individual plaintiff's case . . . counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally . . . .").

for layoff.[14] Juror sympathy to these individuals is inevitable, and Rule 403 exists to prevent unfair prejudice. As the Sixth Circuit explained in an oft-cited case:

> [T]he impact of the two former employees' testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided — whether [plaintiff] was discharged because of his age — this testimony [supplied] an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff]'s favor.

Schrand v. Fed. Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988); *accord Haskell v. Kaman Corp.*, 743 F.2d 113, 133 (2d Cir. 1984) ("'[E]ven the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age.'") (citation omitted).

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[14] Even in this Court, Mendelsohn does much the same thing, complaining that, following her layoff, someone else assumed her former duties. (Mendelsohn Br. 48 & n.75.) That is what *always* happens in a layoff; the employer for economic reasons finds it necessary to make do with a smaller staff.

III. NO REMAND IS NECESSARY

The Brief for the United States contends that the district judge should be given an additional opportunity to explain her reasoning. No remand is necessary.

Sprint agrees with much of what the Solicitor General says in his brief. He acknowledges that "If the plaintiff *fails to articulate* a reasonable basis for concluding that other-supervisor evidence would make discrimination against the plaintiff more likely, such evidence may be properly excluded." (U.S. Br. 17-18; emphasis added.) That "articulate[d] . . . reasonable basis" might be foundational proof that discrimination is "the employer's standard operating procedure" (*id.* at 18), or discrimination so rampant as to send a message to all supervisors that age discrimination is "acceptable" (*id.* at 19, 21). The evidence is potentially relevant only "[i]f such a foundation is laid." (*Id.* at 21; *accord id.* at 22.)

No such foundational allegations were made here. Neither in Mendelsohn's offer of proof (J.A. 342a-351a), nor in her opposition to Sprint's motion *in limine* (J.A. 208a-212a), did Mendelsohn allege a discriminatory "standard operating procedure"; only a handful of anecdotes were alleged, none involving any person who had anything to do with the persons who selected Mendelsohn for layoff. Nothing was "articulate[d]" showing any nexus to Mendelsohn, and (as the Solicitor General acknowledges) "without anything reasonable to connect [a witness'] experience to plaintiff's, the evidence would not be relevant" (U.S. Br. 10), because "'isolated or sporadic' examples of alleged

discrimination" fail to "create an inference that discrimination is an employer's standard operating procedure" (*id.* at 19).

The disputed witnesses here are manifestly inadmissible under the test that the Solicitor General correctly articulates. The Solicitor General evidently would have preferred that the district court acknowledge and distinguish hypothetical circumstances in which other-supervisor evidence could have been potentially relevant, but that kind of dictum would have been hypothetical here indeed. The "'isolated or sporadic' examples of alleged discrimination" proffered by Mendelsohn (*id.* at 19) nowhere approach "discriminatory standard operating procedure" proof.

Consider the hypothetical in Section II.A.3 above, the gender-promotion lawsuit against the United States government. If the district court in that hypothetical case issued a succinct order excluding the proffered witnesses — "Evidence excluded; no nexus" — that would be manifestly correct and require no elaboration. With all respect, Sprint disagrees that a busy trial judge should be required to say more.

District judges need not write treatises in support of their evidentiary rulings. Evidentiary disputes in trials are commonplace. It is unreasonable to expect a district judge to write a detailed ruling each time a disputed issue arises. *E.g.*, *United States v. McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998) (affirming the district court's exclusion of evidence; there is no "per se abuse of discretion simply because a trial court failed to make

explicit, on-the-record findings"); *United States v. Graham*, 83 F.3d 1466, 1473 (D.C. Cir. 1996) (trial courts do not commit reversible error by failing to make an on-the-record balancing "'if the considerations germane to balancing probative value versus prejudicial effect are readily apparent from the record'") (citation omitted).

Here the district judge amply explained her reasoning. She said that she was prepared to admit all testimony from fellow employees, provided that there was a foundational nexus ("similarly situated") to plaintiff and her decisionmaker. (Pet. App. 24a.) The judge stated that she intended to ensure that the jury focused on the layoff decision of the plaintiff (*see* J.A. 287a), without being confused by other persons' claims. There was no "per se" or "blanket" exclusion of anything — other than the specific evidence Mendelsohn proffered in opposing the motion and in her offer of proof.

The district judge was entitled to base her decision on what was in — and conspicuously absent from — Mendelsohn's proffer. It is too late in the going for anyone now to second-guess the district judge for not analyzing a hypothetical evidentiary foundation that Mendelsohn never laid. Sprint respectfully suggests that there is nothing to criticize in the district judge's articulation of her reasoning.

And even if the Solicitor General were correct in suggesting that the district court applied an incorrect legal standard, there still would be no need for a remand. The case cited by the Solicitor General, *Koon v. United States*, 518 U.S. 81 (1996), is inapposite; it involves the exercise of discretion in criminal sentencing. Evidentiary

decisions in civil cases, by contrast, are governed by the harmless-error standard articulated in Federal Rule of Evidence 103(a) and Federal Rule of Civl Procedure 61. Appellate courts may not overturn an incorrect evidentiary ruling unless it is "inconsistent with substantial justice," FED. R. CIV. P. 61, or "unless a substantial right of the party is affected," FED. R. EVID. 103(a). No ground for reversal exists where a court *incorrectly* excludes evidence, but no prejudice results. *E.g.*, *McInnis v. Fairfield Cmtys.*, *Inc.*, 458 F.3d 1129, 1142 (10th Cir. 2006) ("Even assuming the district court abused its discretion in excluding evidence, we must also determine whether the exclusion was harmless error . . . ."). *A fortiori* no ground for reversal exists where a court *correctly* excludes evidence — albeit for an incorrectly articulated reason. *E.g., Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (10th Cir. 1984) (affirming the trial court's evidentiary rulings; appellate courts are "not bound by the evidentiary basis relied upon by the trial court").

For the reasons set forth above Mendelsohn's evidence manifestly was inadmissible under Rule 401, and certainly under Rule 403. There was no error in the judge's articulation of her reasoning, but even if there was it was harmless. There is no need for remand.

CONCLUSION

The offer of proof failed to reveal any logical nexus between the disputed evidence and Mendelsohn's decisionmaker. It would have been reversible error for the district court to admit the disputed evidence here. Certainly, and at a minimum, the district court did not abuse its discretion in excluding it.

Respectfully submitted,

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