No. 12-484

In The Supreme Court of the United States

UNIVERSITY OF TEXAS,
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae[1] the American Association of University Professors ("AAUP" or "Association") is a national membership organization of 40,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, AAUP is the nation's oldest and largest body dedicated to promoting the academic profession by defining fundamental professional values and standards for higher education, advancing the rights of academics, particularly as those rights pertain to academic freedom and shared governance, and promoting the interests of higher education and research.

One of AAUP's principal tasks, often undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life. State and federal courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Bd. of Regents v.*

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[1] Pursuant to SUP. CT. R. 37.6, *Amicus* submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than AAUP, has made any monetary contribution to the preparation and submission of this document. Pursuant to SUP. CT. R. 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk of the Court.

Roth, 408 U.S. 564, 579 n.17 (1972). The seminal 1940 Statement of Principles on Academic Freedom and Tenure, prepared jointly by AAUP and the Association of American Colleges and Universities, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 679 (4th Cir. 1978); *see also Cohen v. Bd. of Trs.*, 867 F.2d 1455, 1469 (3d Cir. 1989) (en banc). In 1970, Interpretive Comments were developed to supplement the 1940 statement.[2] (The term "1940 Statement" includes the 1970 Interpretive Comments). Over two hundred educational organizations and learned societies have endorsed the 1940 Statement.[3]

In 1971, AAUP adopted Recommended Institutional Regulations on Academic Freedom and Tenure, setting forth procedures to safeguard against decisions adversely affecting a faculty member that would violate principles of academic freedom, impermissibly discriminate, or be based on insufficient consideration(referred to herein as "Recommended Institutional Regulations").[4]

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[2] The 1940 Statement and the 1970 Interpretative Comments were developed by representatives of AAUP and the Association of American Colleges, now called the Association of American Colleges and Universities ("AACU"). The AACU is not a party to this brief.

[3] AM. ASS'N OF UNIV. PROFESSORS, *1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS*, AAUP: POLICY DOCUMENTS & REPORTS 3, 7-11 (10th ed. 2006), *available at* http://www.aaup.org/endorsers1940-statement..

[4] AM. ASS'N OF UNIV. PROFESSORS, *RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM*, BULL. OF THE AM. ASS'N OF UNIV. PROFESSORS, VOL. 96, 2010, AT 101, 106, *available at* www.aaup.org/file/regulations-academic-freedom-tenure.pdf

Commensurate with AAUP's concern about procedures for faculty evaluation is its deep interest in the academic employment relationship and its historic commitment to the elimination of discrimination based on national origin, race, sex, and any factors not directly relevant to professional performance. AM. ASS'N OF UNIV. PROFESSORS, AAUP: POLICY DOCUMENTS & REPORTS 229 (10th ed. 2006).

AAUP frequently submits *amicus* briefs in the Supreme Court and the federal circuits in cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Adams v. Trs. of the Univ. of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Hong v. Grant*, 403 Fed. Appx. 236 (9th Cir. 2010); *Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed. Appx. 640 (9th Cir. 2010). Additionally, AAUP's well-established policy related to an academic institution's internal grievance procedure is mischaracterized in this instant case in an *amicus* brief filed by the American Council on Education (hereinafter referred to as "ACE"). ACE *Amicus* Br. 13–14. Therefore, AAUP stands uniquely situated to provide clarification to this Court regarding this AAUP policy and to support the Respondent's position that both the law and AAUP policies support use of a mixed motive standard of proof in Title VII retaliation cases.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals correctly held that a mixed motive standard of proof should apply in Title VII retaliation cases. Neither the law nor any policies cited in the briefs of the Petitioner or *amici* support application of a "but for" causation standard in such retaliation cases.

I. Both the law and AAUP policies support use of a mixed motive standard of proof in Title VII retaliation cases. In its *amicus* brief to this Court, ACE relied on AAUP's policies for internal grievance procedures at educational institutions to buttress its claim that a higher "but for" standard of proof should be utilized in Title VII retaliation cases. There is no support for that contention. AAUP policies espouse the use of a mixed motive standard of proof entirely consistent with the mixed motive standard in Title VII cases.

In addition, the mixed motive standard of proof operates as the appropriate standard in the context of claims involving educational institutions. Specifically, the AAUP policies cited in ACE's *amicus* brief focus extensively on procedural protections for faculty. Such procedures encourage the fundamental goals of preventing and remedying discrimination, harassment, and retaliation. Utilizing AAUP's policies as a justification to impose a higher burden on retaliation claims betrays the basic purpose of these policies and is not supported by the law, legislative history or case precedent.

As a matter of law, there is no basis for creating a different standard of proof in cases where a Plaintiff alleges that they have been discriminated against in violation of Title VII than in cases where

a Plaintiff alleges that they have been retaliated against in violation of Title VII. Resp't Br. 15–20. Rather, the legislative history and the Court's prior opinions support the use of one unitary standard for any claims brought pursuant to Title VII.

II. There is no support for the proposition that principles of academic freedom warrant the imposition of a "but for" standard of causation in Title VII retaliation cases. ACE claims that academic freedom principles demand the application of a differential standard of proof in Title VII retaliation cases. This argument is baseless. Courts repeatedly have distinguished between the principle that the judiciary will not intrude into the affairs of an educational institution in matters related to academics as opposed to the need for judicial review of employment discrimination claims at educational institutions. Academic freedom principles do not provide educational institutions with the freedom to discriminate or retaliate against their employees. Courts have rejected previous efforts to insulate academic institutions from court review of discrimination claims and the Petitioner and *amici* have not presented the Court with any reason to do otherwise in this case.

ARGUMENT

I. The Mixed Motive Standard is Appropriate in Retaliation Cases Under Title VII

The mixed motive standard is appropriate in Title VII retaliation cases. Ensuring that complaints regarding such retaliatory discrimination are protected is essential to ferreting out invidious

discrimination. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997); s*ee Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends").

There is no basis for creating a different standard of proof in cases where a Plaintiff alleges that they have been discriminated against in violation of Title VII than in cases where a Plaintiff alleges that they have been retaliated against in violation of Title VII. Resp't Br. 15–20. Rather, the legislative history and the Court's prior opinions support the use of one unitary standard for proving violations of Title VII.

The decision in *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009), does not dictate a change in the standard for Title VII retaliation cases. The *Gross* Court made clear that its focus was on ADEA claims. *See Gross*, 557 U.S. at 174 ("This Court has never held that this burden-shifting framework [of *Price Waterhouse*] applies to ADEA claims. And, we decline to do so now."). Moreover, this Court previously has emphasized that each statute must be read in its own context. Determining the appropriate burden of proof in cases where a Plaintiff alleges retaliation under Title VII rests within the context of Title VII.

The mixed motive standard of proof clearly serves as the appropriate standard in the context of claims involving educational institutions. While ACE's *amicus* brief relies on AAUP policies to support the use of the higher "but for" standard, the opposite holds true. ACE *Amicus* Br. 13–14. As ACE

correctly states, AAUP policies have been widely adopted at most colleges and universities, *supra* at 13, and those policies support the use of a mixed motive standard in discrimination and retaliation cases.

AAUP's recommended policies directly oppose discrimination in employment, much like the substantive provisions in Title VII. For instance, AAUP's procedural policies emphasize the importance of investigating and addressing complaints of discrimination in academia. As the Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments explains: "The possibility of a violation of academic freedom or of improper discrimination is of vital concern to the institution as a whole, and where either is alleged it is of cardinal importance to the faculty and the administration to determine whether substantial grounds for the allegation exist." AM. ASS'N OF UNIV. PROFESSORS, AAUP: POLICY DOCUMENTS & REPORTS 19 (10th ed. 2006).

More importantly here, the AAUP policies cited in ACE's *amicus* brief focus extensively on procedural protections for faculty. These procedural protections apply broadly to general employment matters involving faculty and include provisions on providing notice to faculty of potentially adverse employment actions and for appeal mechanisms in the event of an adverse employment action.

Such notice and appeal procedures encourage the fundamental goals of preventing and remedying discrimination, harassment, and even retaliation. As ACE explains, "[s]uch internal processes are an effective and efficient means of remedying and deterring discriminatory conduct within the

academy." ACE *Amicus* Br. 14. These mechanisms allow employers and employees to jointly resolve their disputes. Moreover, they allow the employer to affirmatively correct discrimination or retaliation at an early stage. This protects the interests of the employee and also often limits or prevents illegal actions from occurring.[5]

Using AAUP's policies as a justification to impose a higher burden on retaliation claims by employees of academic institutions betrays the fundamental purpose of these policies. Moreover, employees and employers may cease using AAUP's policies as problem solving tools if they perceive that the policies will be utilized to defeat retaliation claims. Under such conditions, employees may no longer support, and in fact may oppose the use of AAUP's policies, thereby undercutting the adoption, use and benefits of such policies for employees, employers, and society in general.

AAUP policies provide no support for the argument that a "but for" causation standard should be applied in Title VII retaliation cases rather than a mixed motive standard. For example, AAUP's Recommended Institutional Regulations 10 "Complaints of Violation of Academic Freedom or of Discrimination in Nonreappointment" – which ACE relies on as a policy adopted at most colleges and universities – specifically states that "[i]f the faculty member succeeds in establishing a prima facie case,

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[5] ACE claims that the facts in this case support the notion of academic employees fabricating retaliation. In the instant case, however, there was no appeal, invocation of a grievance procedure, or application of AAUP's remedial procedures. ACE presents no factual basis or legal support for this claim.

it is incumbent upon those who made the decision against reappointment to come forward with evidence in support of their decision." AM. ASS'N OF UNIVERSITY PROFESSORS, *supra*, at 106. AAUP policies support the use of a mixed motive standard for both discrimination and retaliation cases, a standard entirely consistent with the traditional standard of proof under Title VII.

II. Policies Specific to Educational Institutions do not Justify the "but for" Standard of Proof in Retaliation Cases

Here, Petitioners, and numerous *amici*, argue that the higher "but for" causation standard should be applied in Title VII retaliation cases and that the "but for" causation standard is particularly appropriate for educational institution employers. *See* ACE *Amicus* Br. 11–12. ("This Court has long held that the academic freedom of colleges and universities is entitled to robust constitutional protection. . . Adopting a mixed-motive, burden shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom. . ."); *see also* NSBA *Amicus* Br. 30 (stating that, in the absence of the "but for" standard, "school districts…[must] choose between avoiding crippling litigation costs and taking non-retaliatory actions to advance their educational goals"). In doing so, ACE makes numerous arguments narrowly applicable to educational institutions. Such arguments miss the point.

The central issue in this case is the interpretation of a statute that applies to most employers across the country. While this includes educational institutions, the statute does not treat educational institutions differently from any other employer. The question before the Court in this case is the standard of proof that would be applicable to cases involving *any* covered employer. *Amici* have failed to present any compelling support for the use of a "but for" causation standard in retaliation cases.

First, no argument has been advanced that any matters related to educational institutions bear upon the legislative intent behind the anti-retaliation provision of Title VII. There is neither citation to any relevant statutory language specifically addressing educational institutions nor any citation to any legislative history involving educational institutions that would illustrate the legislative intent of Congress.

Second, ACE's *amicus* brief does not argue that there should be a different standard for educational institutions. ACE fails to provide any evidence or substantiation for a differential standard of proof for educational institutions, nor does ACE articulate the specific circumstances or dividing lines in which such a differential standard could be applied. ACE has provided no compelling reason to apply a different standard of proof to educational institutions, and the language of the statute does not provide such justification.

Third, there are no specific policies related to educational institutions that would justify a disparate interpretation of the Title VII retaliation provision. The Title VII retaliation provision applies to employees throughout the country. As noted by

ACE, educational institutions account for less than 3% of all employees in the United States. Allowing specific issues related to educational institutions to determine the interpretation of statutory provisions applicable to all employees is misguided.

In any event, there is no basis for arguing that educational institutions have any specific circumstances justifying either the application of a higher standard in cases involving educational institutions in particular or a different standard of proof for academic institutions as opposed to other employers. While ACE seeks to use the status of educational institutions to justify application of a higher or differential standard of proof, it provides no persuasive support for why this is necessary.

ACE also claims that the principles of academic freedom warrant the application of a higher or differential standard of proof. ACE *Amicus* Br. 5 ("Adopting a mixed-motive, burden-shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom. . ."). From the perspective of AAUP, an organization deeply committed to the protection of academic freedom, this case does not present issues related to the complex constitutional meaning of academic freedom, which includes the academic freedom of professors and of universities. Academic freedom principles assure the freedom of faculty to speak out on matters of institutional as well as public concern. *See generally* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009). Moreover, while constitutional academic freedom argues for judicial deference to university decisions made on academic grounds, it

has never been understood to insulate universities against judicial review of employment discrimination or of violations of constitutionally protected expression. The Second Circuit aptly explained this distinction in a Title VII case involving an educational institution: "It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior." *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir. 1978). Academic freedom does not encompass the freedom to discriminate against employees of the institution.

While judicial deference to peer review committees is appropriate to the extent that they base their decision on professional grounds, courts must intervene when peer review committees or university administrators violate the law. Accordingly, the Third Circuit held in a First Amendment case that while courts are not "part of an appellate review process for state university tenure termination proceedings," courts must adjudicate matters involving legal issues in such cases and "[t]he central inquiry in this case involves not a 'substantial evidence' or 'arbitrary and capricious' scrutiny of the [internal university] Judicial Committee proceedings but 'an independent examination of the record . . . in order that the controlling legal principles may be applied to the actual facts of the case.'" *Johnson v. Lincoln Univ.*, 776 F.2d 443, 449–50 (3d Cir. 1985) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

Similarly, in *Haimowitz v. University of Nevada*, 579 F.2d 526 (9th Cir. 1978), an assistant professor who was denied tenure asserted that his faculty colleagues retaliated against him based on

protected speech. The court rejected the district court's conclusion that the faculty Personnel Committee was only "advisory" and therefore that "the improper bias is too far removed from the final decisionmaking to be of constitutional moment." *Id.* at 530. The court emphasized that faculty "input is critical" in tenure decisions. It concluded that "[t]he recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision." *Id.* The court remanded with instructions that the lower court follow *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which provided "the proper method for resolving claims of retaliatory termination." *Id.*

ACE also argues that adoption of a higher or differential standard is necessary to avoid intrusion into the academic decision-making process. *See* ACE *Amicus* Br. 12–13. There is no evidence that a higher or differential standard of proof in retaliation cases is necessary to preserve academic decision-making, and ACE has provided none in its brief beyond its bare assertion. Rote reference to the rights of academic institutions does not suffice to support a higher or differential standard of proof. Neither ACE nor any other party has provided substantive support for a higher or differential standard for educational institutions in this case on the basis of academic freedom principles.

Amicus curiae AAUP submits that the burden-shifting approach this Court has applied to retaliation claims under the First Amendment should be equally applicable to Title VII retaliation claims brought by faculty members. The burden-shifting approach adopted by AAUP in its policies

more than two generations ago has proven its value and practicality over the ensuing decades.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's decision that "motivating factor" analysis is the appropriate standard in Title VII retaliation claims.

Respectfully submitted on April 10, 2013.

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