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 *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council (EEAC), National Federation of Independent Business (NFIB) Small Business Legal Center and American Hospital Association (AHA) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical

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no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

impact on small businesses nationwide, such as the case before the Court in this action.

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. One way in which the AHA promotes the interests of its members is by participating as *amicus curiae* in cases with important and far ranging consequences for their members.

Some or all of *amici's* members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, *amici* have a substantial interest in the issue presented in this case regarding the availability of the mixed-motive standard of proof in Title VII retaliation and non-Title VII discrimination cases, in light of this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

Because of their interest in the application of the nation's fair employment laws, *amici* have filed numerous briefs as *amicus curiae* in cases before this

Court and the courts of appeals involving the proper construction and interpretation of Title VII and other federal laws.[2] Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

Amici seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Naiel Nassar began his employment with Petitioner, the University of Texas Southwestern Medical Center (UTSW), in 1995. Pet. App. 2. After taking three years off, he returned to UTSW in 2001 as Assistant Professor of Internal Medicine and Associate Medical Director of the Clinic. *Id.* His immediate supervisor was Dr. Phillip Keiser, who in turn reported to Dr. Beth Levine, Chief of Infectious Disease Medicine. *Id.*

Nassar complained that he allegedly was being harassed by Levine, and sought transfer to another role that would take him out of her line of supervision. Pet. App. 4. He stepped down from his

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[2] *See, e.g., Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

faculty post when he received a job offer working for an affiliated clinic (Parkland), effective July 10, 2006. Pet. App. 5. On July 3, he submitted a letter of resignation in which he asserted that his "primary reason" for resigning was because of Levine's harassing and discriminatory behavior. *Id.* Shortly thereafter, Parkland withdrew its job offer. *Id.*

Nassar brought suit in federal court, accusing UTSW of orchestrating Parkland's refusal to hire him in retaliation for his discrimination complaints, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Pet. App. 6. At trial, Nassar presented evidence suggesting that Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate supervisor, was upset by the accusations contained in Nassar's resignation letter, and set out to persuade Parkland not to hire him. Pet. App. 5. For its part, UTSW presented evidence that Parkland was contractually bound to hire only UTSW faculty to work in its clinic, and that Fitz was opposed to Nassar's placement there as early as April 2006 – well prior to his resignation. Pet. App. 4-5.

The jury found that UTSW constructively discharged and retaliated against Nassar, and awarded him $3.4 million in back pay and compensatory damages. Pet. App. 6-7. After the trial court denied its post-trial motion for judgment as a matter of law, UTSW appealed to a three-judge panel of the Fifth Circuit, arguing among other things that Nassar failed to prove that retaliation was the but-for cause of Parkland's decision not to hire him. Pet. App. 7.

Citing to its 2010 ruling in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) – which held that the mixed-motive framework is available to Title VII retaliation plaintiffs, even after this Court's 2009

ruling in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) – the panel, without further analysis, affirmed the district court's judgment regarding liability for retaliation. Pet. App. 12. After its requests for rehearing and rehearing *en banc* were denied, UTSW filed a Petition for a Writ of Certiorari, which this Court granted on January 18, 2013. 133 S. Ct. 978 (2013).

SUMMARY OF ARGUMENT

The decision below, which relieves plaintiffs suing under Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, of the burden of proving that unlawful retaliation was *the* reason for the challenged employment action, conflicts with the plain text of the statute and is irreconcilable with this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Therefore, it must be reversed.

Title VII contains two distinct workplace protection provisions: Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), prohibits employers from discriminating against any applicant or employee because of race, color, religion, sex or national origin, while Section 704(a), 42 U.S.C. § 2000e-3(a), makes it unlawful to retaliate against such an individual "because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]." Unlike substantive discrimination claims brought under Section 703(a)(1), Section 704(a) retaliation claims are not subject to the motivating factors burden-shifting scheme added

to the statute when Congress enacted the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991).

Specifically, CRA Section 107 provides that after a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor" – along with other, legitimate considerations – for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may limit its liability significantly for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ...." 42 U.S.C. § 2000e-5(g)(2)(B). Plainly absent is any reference to "retaliation" or to 42 U.S.C. § 2000e-3(a), even though the CRA amended that provision in other important ways – including to provide for a right to jury trials and to authorize awards of compensatory and punitive damages. 42 U.S.C. §§ 1981a(a)(1), (b)(3)(D).

Accordingly, Title VII retaliation plaintiffs must prove, by a preponderance of the evidence, that they were subjected to a materially adverse employment action "because of" their statutorily-protected conduct – just as is the case for claims of intentional discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* The pertinent section of the ADEA prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1). Like Section 704(a), the ADEA never has been amended to incorporate the motivating factor test applicable to Title VII discrimination claims.

This Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which held that

the motivating factor test does not apply to claims brought under the ADEA, thus casts considerable doubt as to its availability under Section 704(a), or any statute that does not expressly allow for recovery based on motivating factors. As the Court observed in *Gross*, "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." 557 U.S. at 174. Because the court below disregarded both the plain text of Title VII, as well as this Court's interpretation of identical language in *Gross*, its decision should be reversed.

Strict adherence to the actual text of Title VII and to *Gross* is especially important now in light of the substantial increase over the last several years in Title VII retaliation litigation. *See, e.g.*, Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Petition for Writ of Certiorari, at 17. Permitting Title VII retaliation plaintiffs to proceed under a motivating factor framework in the absence of express statutory authorization would encourage frivolous lawsuits, only adding to an already heavy litigation burden placed on defendants and the courts.

ARGUMENT

I. THE FIFTH CIRCUIT'S RULING BELOW, WHICH PERMITS TITLE VII PLAINTIFFS TO PREVAIL AND RECOVER DAMAGES EVEN WHERE ALLEGED RETALIATION WAS BUT ONE OF MANY FACTORS CAUSING THE CHALLENGED EMPLOYMENT ACTION, IS DIRECTLY CONTRARY TO TITLE VII AND THIS COURT'S DECISION IN *GROSS*

A. The Plain Text Of Title VII Makes The Mixed-Motive Analysis Available Only In Cases Of Discrimination Because Of Race, Color, Religion, Sex Or National Origin

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, contains two distinct provisions making certain employment practices unlawful. "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)), whereas the anti-retaliation provision "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.*

As this Court has observed, Title VII's "substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Specifically, Section 703(a)(1) provides that:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). Separately, Section 704(a) makes it unlawful:

> for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a).

In *Price Waterhouse v. Hopkins*, this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII's anti-discrimination provision. 490 U.S. 228, 250 (1989). Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id*. at 249.

This method of proof has come to be referred to as the "mixed-motive[]" analysis, *id.* at 246, which recognizes the relatively rare circumstance in which there exists compelling, "smoking gun" evidence of discrimination, yet the employer contends that it

would have taken the same employment action in any event. *Id.* at 247. Under that test, if the plaintiff persuades the trier of fact that the employer actually considered an illegitimate factor, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246.

Two years after this Court decided *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), which established a "motivating factor" test applicable to mixed-motive cases brought under Title VII's nondiscrimination provision. Specifically, Section 107 of the 1991 Act provides that after a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor" – along with other, legitimate considerations – for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may limit its liability significantly for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ...." 42 U.S.C. § 2000e-5(g)(2)(B).

"Noticeably absent from this provision is a reference to retaliation claims," however. *McNutt v. Bd. of Trustees*, 141 F.3d 706, 707 (7th Cir. 1998). In fact, unlike Title VII's substantive discrimination provision, its anti-retaliation clause never was amended to incorporate a motivating factor test, and thus is similar to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., which makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

"[T]here is a longstanding principle that different language implies different meaning. This is a jumping off point rather than a rigid rule; a statute's context (both linguistic and historical) may show that different verbal formulations have the same meaning. We must start, however, with the enacted language ...." *Neal v. Honeywell Inc.*, 33 F.3d 860, 863 (7th Cir. 1994) (citation omitted), *overruled on other grounds*, *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005). Since the "enacted language" of Title VII's retaliation clause limits liability to actions taken "because of" an individual's protected activity, the court below improperly allowed the plaintiff to proceed – and recover substantial damages – under a mixed-motive theory.

Congress's decision to limit the motivating factor test to discrimination claims plainly was deliberate, as is evidenced by the fact that it applied other parts of the 1991 CRA broadly to both types of claims. In particular, at the same time as it codified the motivating factor test in claims brought under Section 703(a)(1), Congress also amended Section 703(a)(1) *and* Section 704(a), as well as the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, to authorize awards of compensatory and punitive damages up to a maximum of $300,000 for employers with over 500 employees. 42 U.S.C. §§ 1981a(a)(1), (b)(3)(D). Congress's decision to apply some of the CRA's enhanced remedial provisions to Title VII's retaliation clause, but not the section that imposes liability based on motivating factors, thus cannot be said to have been inadvertent or unintentional.

On the contrary, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted); *see also Gross v. FBL Fin. Services., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally").

There are a number of federal statutes, including many whistleblower laws, in which Congress expressly incorporated a demonstrably lower standard of proof than the but-for causation standard that applies to Title VII retaliation and other non-Title VII discrimination claims. *See, e.g.*, Surface Transportation Assistance Act (STAA), Pub. L. No. 97- 424, 96 Stat. 2097 (1983); Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221 *et seq.*; Financial Institution Regulator Whistleblower Protection Act of 1993, 12 U.S.C. § 1831j(a)(1); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, 114 Stat. 61 (2000); Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002); and National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013). The Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. §§ 1221 *et seq*., for instance, authorizes the Merit Systems Protection Board to award relief to a federal employee or applicant who has proven that his or her whistleblower activities were "a contributing factor in the personnel action through circumstantial evidence ...." 5 U.S.C. § 1221(e)(1). In such a case, the district court applies a two-part analysis:

> (1) the plaintiff must establish a prima facie case of retaliation by showing that his or her disclosures were a contributing factor in adverse employment actions; then (2) the burden of persuasion shifts to the defendant to demonstrate by the high standard of clear and convincing evidence that it would have made the same employment decision in the absence of plaintiff's disclosures.

Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1207-08 (N.D. Iowa 1994) (emphasis omitted); *see also Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Both the Financial Institution Regulator Whistleblower Protection Act of 1993, 12 U.S.C. § 1831j(a)(1), and the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013), expressly incorporate the WPA's contributing factor proof scheme. 12 U.S.C. § 1831j(f).[3] Similarly, the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567, also merely require proof that the complainant's protected activity was a contributing factor in the adverse employment action. *See Bechtel v. Admin. Review Bd.*, __ F.3d __, 2013 U.S. App. LEXIS 4539 (2d Cir. Mar. 5, 2013); *see also* Uniformed Services Employment and Reemployment

[3] The WPA was an amendment to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which, while prohibiting retaliation against whistleblowers, placed a more onerous burden of proof on plaintiffs. When Congress enacted the WPA in 1989, it "substantially reduc[ed] a whistleblower's burden to establish his case …." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Rights Act (USERRA), 38 U.S.C. § 4311(c)(1), as amended (employer acts unlawfully if plaintiff's "membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action").

The Third Circuit recently had occasion to examine the relatively light burden that employees bear in some whistleblower cases, there under the Federal Rail Safety Act (FRSA), 49 U.S.C. §§ 20101 *et seq*. *Araujo v. N.J. Transit Rail Operations, Inc.*, __ F.3d __, 2013 U.S. App. LEXIS 3380, at *15-*20 (3d Cir. Feb. 19, 2013). It observed:

> [T]he ... burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard. As the Eleventh Circuit noted in a case under the Energy Reorganization Act, a statute that uses a similar burden-shifting framework, "[f]or employers, this is a tough standard, and not by accident" … because Congress intended for companies in the nuclear industry to "face a difficult time defending themselves," due to a history of whistleblower harassment and retaliation in the industry.
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> * * *
>
> The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. … We simply note this history to emphasize that, as it did with other statutes that utilize the "contributing factor" and "clear and convincing

> evidence" burden-shifting framework, Congress intended to be protective of plaintiff-employees.

Id. at *17-*20 (citations and footnote omitted).

The plain text and legislative history of these laws demonstrate clearly that when Congress seeks to lower a plaintiff's burden of proof, it has no difficulty expressly incorporating language to that effect into the subject statute. Furthermore, as the Seventh Circuit has observed:

> [T]here is no rule that all statutes addressing related topics mean the same thing--let alone that all statutes should receive the reading most favorable to whistleblowers. Why not treat all whistleblower laws as identical to the statute most favorable to employers, or treat all as if they were right in the middle? Instead there is a longstanding principle that different language implies different meaning.

Neal v. Honeywell Inc., 33 F.3d at 863.

Because Title VII explicitly makes the motivating factor test available only to claims of *discrimination* on the basis of race, color, religion, sex or national origin under Section 703, not to causes of action for unlawful *retaliation* under Section 704, there is no basis for importing the test into the retaliation context. Therefore, it was improper for the court below to allow the plaintiff to proceed on that basis, and in doing so to relieve him of the ultimate burden of proving but-for causation.[4]

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[4] If the plain text of § 107 were not enough, the legislative history of the CRA confirms that the motivating factor amendment was intended to apply only to Title VII discrimination, not retaliation, claims. In a section-by-section analysis of

B. *Gross* Casts Considerable Doubt On, If Not Forecloses Entirely, The Availability Of The Mixed-Motive Theory Where The Underlying Statute Does Not Expressly Authorize It

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus [absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quotations and citations omitted); *see also Gross v. FBL Financial Services*, *Inc.*, 557 U.S. 167, 175-76 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 458 (2008) (Thomas, J., dissenting) ("It is unexceptional in our case law that '[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'") (citations omitted).

In *Gross*, this Court ruled that the term "because of" age as used in the ADEA means "that age was the 'reason' that the employer decided to act." 557 U.S. at 175-76. And since the statute does not permit

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the bill that was to become the 1991 CRA, for instance, Senator Dole described § 107 as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).

recovery based on the existence of both permissible and impermissible reasons, as Title VII does, the Court concluded that ADEA plaintiffs alleging intentional age discrimination may not proceed under a mixed-motive theory. Rather, such plaintiffs retain the ultimate burden of proving that the challenged employment action would not have occurred but-for the employer's unlawful consideration of age. *Id.*

In doing so, the Court implicitly rejected the notion that simply because the ADEA and Title VII share a common goal – the elimination of workplace discrimination – they both should be construed to permit recovery on a mixed-motive theory, pointing out that when Congress added the motivating factor test to Title VII in 1991, it did so only with respect to claims of unlawful discrimination based on race, color, religion, sex or national origin. Because the plain text of the ADEA does not authorize mixed-motive claims, and "Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways," the Court found no basis for permitting ADEA plaintiffs to proceed under such a theory. *Gross*, 557 U.S. at 174 (citations omitted). It observed, "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.*

Properly applied, *Gross* therefore must foreclose mixed-motive recovery in Title VII retaliation claims, or for that matter in any other non-Title VII discrimination suit in which the underlying statute does not expressly contain a motivating factor burden-shifting

scheme. As the Seventh Circuit reasoned, "Although the *Gross* decision construed the ADEA, the importance that the Court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010); *see also Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) ("Shared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters") (*en banc*).

Like the ADEA, Title VII's retaliation provision benefited from some, but not all, of the 1991 Amendments: while plaintiffs suing under Section 704 were given the right to a jury trial and could recover compensatory and punitive damages, Congress saw fit not to allow them to establish liability utilizing a mixed-motive theory. Accordingly, as this Court concluded with respect to the ADEA in *Gross*, Section 704(a)'s "because of" language must be construed as requiring retaliation plaintiffs to prove that they suffered a materially adverse employment action directly as a result of, and for no reason other than, their statutorily-protected conduct.

II. PERMITTING NON-TITLE VII DISCRIMINATION PLAINTIFFS TO PROCEED UNDER A MOTIVATING FACTOR FRAMEWORK WOULD ENCOURAGE FRIVOLOUS LAWSUITS, THUS INCREASING SUBSTANTIALLY AN ALREADY HEAVY LITIGATION BURDEN PLACED ON DEFENDANTS AND THE COURTS

An employer should not be held legally responsible for alleged workplace retaliation – and subject to liability for compensatory and punitive damages – where the plaintiff is unable to establish a direct, causal connection between his protected conduct and a materially adverse employment action. If the motivating factor test were applied to retaliation cases, any employee who ever (1) has participated as a witness in an internal EEO complaint, external EEOC charge investigation, or lawsuit; (2) has assisted another to complain; (3) personally filed formal or informal charges; or (4) was (or is) "close" to someone who has engaged in such protected conduct would, as a practical matter, be able to avoid virtually any adverse employment action simply by claiming that both legitimate and unlawful retaliatory motives were at play. Such an expansive interpretation of Section 704(a) would greatly impair the ability of employers to take legitimate action against any employee without first ruling out, in every instance, the possibility that the individual (or someone with whom he or she has a close personal relationship) may have engaged in protected activity at some point in the past.

In light of the substantial increase in Title VII retaliation charge activity and litigation over the last several years, the possibility that many, if not most,

employees at some point will have complained about EEO violations (or been close to others who have) is far from remote. As Justice Alito observed in *Crawford v. Metropolitan Government of Nashville*, "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years." 555 U.S. 271, 283 (2009) (Alito, J., concurring); *see also* Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Petition for Writ of Certiorari, at 17.

The availability of the mixed-motive framework likely will preclude summary judgment in most cases, ultimately making it far easier to establish liability for unlawful retaliation. And opportunistic plaintiff's counsel eager to win their cases – or negotiate generous settlement packages with "deep-pocketed" corporate defendants – will plead every conceivable retaliation claim under both a single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent.

As one commentator observed:

> Employment decisions ... are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor–a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. ... Summary judgment will be less

> frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). Permitting retaliation plaintiffs to pursue claims under a mixed-motive theory, a significantly less onerous standard that shifts the burden of proof to the employer upon a showing by the employee that both lawful and allegedly retaliatory considerations played a role in the adverse action, thus would encourage the filing of potentially frivolous, preemptive lawsuits, increasing substantially an already heavy litigation burden placed on defendants and the courts.

Furthermore, frivolous mixed-motive claims divert attention and resources away from the development of proactive corporate nondiscrimination and anti-retaliation measures. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997).

The prospect of turning every Title VII retaliation claim into a mixed-motive case is especially problematic because employment decisions often provide fertile grounds for both discrimination and retaliation claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic and/or unlawful retaliation was *a* motivating factor, as opposed to *the* motivation. As the Seventh Circuit aptly observed:

> Some employees will cry "fraud" to make pests of themselves, in the hope of being bought off with higher salaries or more desirable assignments. Others will perceive the disappointments of daily life as "retaliation" and file suits that have some settlement value because of the high costs of litigation and the possibility of error. Careless cries of fraud are less culpable, but may be no less costly, than extortionate ones.

Neal v. Honeywell, 33 F.3d at 863. Simply put, "[d]ealing with false alarms drains time from productive activities." *Id.*

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the district court and court of appeals below should be reversed.

Respectfully submitted,

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