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* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Directors and Trustees presently includes more than 200 of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country.

SUMMARY OF ARGUMENT

Strong arguments have been made by Respondent and many of its *amici* urging this Court to hold that Section 704 of the Civil Rights Act of 1964[2] is violated if retaliation is a motivating factor

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3. Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Section 704 of the Civil Rights Act states: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed, any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. 42 U.S.C. § 2000e-3(a).

in an adverse employment decision. We support these arguments. But we write to stress that "but for" causation - the standard urged by Petitioner - does not require a showing of sole cause.

Petitioner and at least two *amici* supporting petitioner wrongly suggest that a plaintiff cannot prevail under a "but for" standard unless a discriminatory reason is the sole cause of the employment decision. The retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq*., the provision at issue in this case, and other civil rights statutes require that the action taken was "because of" the protected trait. "Because of" has, at its narrowest, been interpreted to mean "but for" causation. "But for" causation requires that the illegal reason was a determinative reason for the action. It does not mean that the illegal reason must be the sole cause of the action. Petitioner frames the question presented to this Court as implying that there is a dichotomy between multiple causes and "but for" causation, and wrongly equates "but for" with sole cause.

This position is contrary to the statute, this Court's precedent construing the statute, and the meaning of "but for" in tort law. It is also contrary to the complex realities of the workplace to suggest that any decision to hire, fire, promote, or demote an employee was made for a single reason. Requiring that a plaintiff prove that an illegitimate reason was the sole cause of an employment decision would eviscerate the protections of Title VII's retaliation provisions.

ARGUMENT

I. Contrary to Petitioner's Suggestion, This Court Has Consistently Rejected Sole Cause As a Proper Interpretation Of "Because of" In Title VII and Other Civil Rights Statutes.

Petitioner and at least two *amici* supporting Petitioner wrongly suggest that a plaintiff cannot prevail unless a discriminatory reason is the sole cause of the employment decision. Petitioner frames the question presented to this Court as implying that there is a dichotomy between multiple causes and "but for" causation, and wrongly equates "but for" with sole cause. Petitioner further references Section 504 of the Rehabilitation Act[3] to explain that "solely by reason of" is "at least as strict a standard as but-for causation." Pet'r Br. at 29.

Amici reinforce this erroneous interpretation of "but for" causation. One *amicus* attempts to illustrate the difference between "but-for" and "motivating factor" jury instructions by providing a but for instruction requiring that the protected characteristic has to be "*the sole motivating factor*…" Br. of *Amicus Curiae* Voice of Defense Bar at 18 (emphasis in original). Another argues that section 704(a)'s "because of" language requires retaliation plaintiffs "to prove that they suffered an adverse

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[3] Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination." 29 U.S.C. § 794(a).

employment action directly as a result of, and for no reason other than, their statutorily protected conduct." Br. of *Amicus Curiae* Equal Employment Advisory Council, *et. al*. at 7.

This position is unsupported by this Court's precedent construing "because of" in Title VII and other civil rights statutes. Title VII's principal substantive provision, as initially enacted, prohibits employment decisions made "because of [an] individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2006). Likewise, Title VII's retaliation provision makes it an unlawful employment practice to discriminate against 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." 42 U.S.C. § 2000e-3(a).

In *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976), a Title VII pretext case, the Court explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination was the "sole cause" of the contested employment action under § 2000e-2(a)(1). The Court held: "the use of the term 'pretext' in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely because of his race…as [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a 'but for' cause." *McDonald*, 427 U.S. at 282 n. 10 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804 (1973)).

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 241 (1989) (plurality decision) the plurality opinion and both concurrences clearly rejected "because of" as meaning solely because of in finding that Title VII cases can involve mixed motives. Justice White's concurrence discussed the Court's previous rejection of the sole cause standard. *Id.* at 259 (White, J., concurring) ("Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action"). Justice O'Connor noted that the workplace environment makes it difficult for a plaintiff to show that a "decision [is] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. *Id.* at 268 (O'Connor, J., concurring).

Most importantly, Justice Kennedy, writing for the dissent, provided a thorough analysis of why "but for" causation did not require the plaintiff to demonstrate that the protected characteristic was the sole reason for the adverse employment decision:

> No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise,

> but merely a necessary element of the set of factors that caused the decision, *i.e.,* a but-for cause.

Id. at 284 (emphasis in original).

A number of courts have rejected a requirement of "sole cause" in other civil rights statutes that use "because of" language. All circuits, save one, which have addressed the causation issue under the Americans with Disabilities Act (ADA) have rejected a sole cause requirement. *See e.g., Head v. Glacier Northwest Inc.,* 413 F.3d 1053, 1065 (9th Cir. 2005) (holding that the motivating factor standard was the most consistent in light of the purpose and plain language of the ADA); *Pickerton v. Spellings,* 529 F.3d 513, 517-18 (5th Cir. 2008); *Parker v. Columbia Pictures Indus.,* 204 F.3d 1053, 1063-65 (2d Cir. 2000); *McNely v. Ocala Star-Banner Corp*., 99 F.3d 1068, 1073-75 (11th Cir. 1996) (rejecting the sole cause requirement for ADA cases finding that the "literal reliance" on the sole reason standard would lead to "absurd results"). *But see Fitzgerald v. Corrections Corp. of America,* 403 F.3d 1134, 1144 (10th Cir. 2005) (holding that a plaintiff is required to show he was denied "solely by reason of disability" in a Rehabilitation Act and ADA case).

Last year, the Sixth Circuit overruled its previous requirement of "sole cause" under the ADA. *Lewis v. Humboldt Acquisition Corp., Inc*., 681 F.3d 312 (6th Cir. 2012) (*en banc).*[4] The Sixth Circuit was

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[4] The ADA does not contain the word "solely;" it prohibits employers from "discriminat[ing] against a qualified individual

one of only two circuits that required proof of "sole cause" in order to prevail in an ADA case. This requirement derived from the only civil rights statute to actually require sole cause in the text of the law, Section 504 of the Rehabilitation Act.[5]

In *Lewis*, the court reasoned that the Rehabilitation Act's "sole cause" standard does not apply to ADA claims because the text of the ADA does not provide that a plaintiff must prove that his or her disability was the "sole" cause" but rather contains a "because of" standard of causation.

Similarly, "but for" causation does not mean sole cause under the Age Discrimination in Employment Act (ADEA).[6] In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), this Court held that "because of" in an ADEA case means "but for" causation, to require the plaintiff to prove that "the employee's protected trait actually played a role in [the employer's decision making process] *and had a determinative influence on the outcome*." 557 U.S. at 176 (emphasis in the original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). That standard does not require proof of sole cause. In *Gross*, this Court found that the illegitimate

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with a disability because of the disability of such individual." 42 U.S.C. § 12112(a).

[5] *See supra* note 2.

[6] The Age Discrimination in Employment Act of 1967 makes it "unlawful for an employer…to fail or refuse to hire or 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).

consideration must be significant enough to be determinative, but does not require solely by reason of and provides for multiple motives. *Id.*

Indeed the Tenth Circuit interpreted *Gross* to hold that the ADEA requires "but for" causation but not "sole" causation. *Jones v. Oklahoma City Public Schools,* 617 F.3d 1273, 1277-78 (10th Cir. 2010). In doing so, the Court specifically rejected the employer's argument that "but for" causation means "sole cause." *Id.*

In addition, the Fourteenth Amendment's standard for showing unconstitutional discrimination also rejects a sole cause requirement. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow the construction of low-income integrated housing was racially motivated. The Court noted that "rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265 (discussing *Washington v. Davis*, 426 U.S. 229 (1976)).

Similarly in *Personnel Adm'r v. Feeney*, 442 U.S. 256, 277 (1979), the Court noted the problem of ascertaining the collective motivation of a legislative or administrative body which is similar to many personnel decisions. The Court explained "[discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular

cause of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.* at 279.

II. Tort Law Recognizes That "But For" Causation Does Not Mean Sole Cause.

This court has looked to tort law for guidance on the nature of "but for" causation. *See e.g., Price Waterhouse,* 490 U.S. at 266 (O'Connor, J. concurring) (characterizing cause-in-fact in tort law as "analogous to cause-in-fact in disparate treatment law); *Id.* at 286 (Kennedy, J dissenting); *Gross,* 557 U.S. at 176-77 (citing W. Keeton, *et. al.,* Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). The Restatement (Third) of Torts explicitly recognizes that "but for" causation does not mean sole cause and that there will be multiple causes-in-fact for almost any event. The Restatement describes cause-in-fact as "a necessary condition for the outcome" at issue even though many other factual causes were also present. *See* Restatement (Third) at § 26 cmt. c. *See also* Brian S. Clarke, *A Better Route Through The Swamp: Causal Coherence in Disparate Treatment Doctrine,* Rutgers L. Rev. at 40 *(forthcoming 2013), available at* http://ssrn.com/abstract=2211778.

III. Title VII's Legislative History Supports the Fact That "But For" Does Not Mean Sole Cause.

During the debates over the original passage of Title VII, the Senate rejected a proposed amendment that would have explicitly made liability contingent on a protected characteristic being the sole basis for the employer's decision. This

amendment was rejected because it would render the statute, in the words of Senator Clifford Case, the Republican floor manager of Title VII, "totally nugatory." 110 Cong. Rec. 13, 837-38 (1964). Senator Case continued "[if] anyone ever had an action motivated by a single cause, he is a different animal from any I know of." 110 Cong. Rec. 13, 837-38.

IV. A Sole Cause Requirement Would Create an Insurmountable Barrier to Proving Retaliation and Would Severely Impact the Ability to Enforce Fair Employment Practices.

A sole cause standard in retaliation claims would eviscerate enforcement of Title VII's retaliation provision. An employer would prevail merely by identifying one reason other than discrimination that might have played a role in the decision to take the adverse action against the employee. If the promise of protection from retaliation was rendered meaningless, enforcement of the substantive provisions of Title VII would be substantially undercut.

This Court has repeatedly recognized that Title VII's promise of fair employment practices can only be realized if employees feel secure in filing complaints and acting as witnesses regarding discriminatory conduct. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also Thompson v. North American Stainless, LP.*, 131 S. Ct. 863, 868 (2011). When retaliatory motives play a role in an adverse action, this Court has recognized that "[f]ear of retaliation is the leading reason why

people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.,* 555 U.S. 271, 279 (2009) (citing Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)).

The Court should make clear that "but for" causation does not mean sole cause and that there may be multiple causes for an adverse action so long as the illegal cause was a determinative factor in the decision.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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