No. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, PETITIONER

v.

NAIEL NASSAR, M.D.

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND ELEVEN OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title VII's retaliation provision requires a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for a retaliatory motive), or instead requires only proof that the employer had a mixed motive (*i.e.*, that a retaliatory motive was one of multiple reasons for the employment action).

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INTEREST OF *AMICI CURIAE*

The *amici* states and their municipalities employ millions of Americans. States and municipalities as a whole employ nearly 20 million people, roughly 12.5% of the country's labor force. The *amici* states are also uniquely situated. While they are among the nation's largest employers, *amici* have adopted statutes, rules, and regulations prohibiting retaliation against employees who oppose unlawful discrimination in employment. And *amici* are among the 48 states that have fair-employment-practice agencies that have entered into workshare agreements with the EEOC to jointly enforce federal and state anti-discrimination laws and the attendant prohibitions on retaliation.

The Fifth Circuit's decision below allows plaintiffs asserting retaliation in violation of Title VII to prove only that retaliation was a motive for an adverse employment action, rather than that retaliation was the but-for cause of that action. That mixed-motive analysis is inconsistent with the text of Title VII's antiretaliation provision. And the *amici* states have learned that the mixed-motive analysis is also too difficult to apply in an even-handed fashion. Accordingly, the *amici* states seek reversal of the Fifth Circuit's decision and a holding that to prevail on a Title VII retaliation claim, a plaintiff must prove that a retaliatory motive was the but-for cause of an adverse employment action.

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the mixed-motives analysis adopted by a majority of the Court in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), Congress amended Title VII to make it unlawful for an employer to take an adverse employment action where race, ethnicity, religion, or gender is a motivating factor, even if the employer would have made the same decision in the absence of the discriminatory factor. In fact, Congress specifically adopted a burden-shifting analysis for such mixed-motives discrimination cases and tailored the remedies available when an employer has both legitimate and improper motives when taking an adverse employment action against an employee. Moreover, Congress adopted the same burden-shifting approach in the Uniformed Services Employment and Reemployment Rights Act, for both its non-discrimination *and* antiretaliation provisions. 38 U.S.C. § 4311(c).

But Congress did not similarly create a mixed-motives construct for Title VII's antiretaliation provision. As a result, Title VII's antiretaliation provision requires but-for causation. This Court reached the same conclusion, analyzing the same language ("because") in the Age Discrimination in Employment Act. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 179–80 (2009).

Other considerations militate against extending the *Price Waterhouse* mixed-motives analysis to statutes that impose a "because" standard. First, as members of this Court have repeatedly noted, correctly

applying the mixed-motives analysis is difficult for both judges and juries. Second, applying the mixed-motives analysis to retaliation claims threatens to make Title VII a thought-control statute by allowing the imposition of liability for bad thoughts instead of unlawful actions.

Interpreting the phrase "because of" in Title VII's antiretaliation provision differently from how this Court interpreted the same words in the ADEA will sow confusion and propagate additional litigation under nearly all of the major federal employment statutes. The language should be given a single, uniform interpretation, and the Fifth Circuit's decision should be reversed.

ARGUMENT

I. Title VII's antiretaliation provision requires but-for causation and does not incorporate a mixed-motive analysis.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibits two types of conduct: discrimination on the basis of race, ethnicity, religion, or gender and retaliation against an employee for attempting to advance or secure the Act's guaranty of a workplace free from such discrimination. *Burlington N. & Santa Fe Ry*. v. *White*, 548 U.S. 53, 63 (2006). The antiretaliation provision provides protection to employees for their conduct. *Id*. Specifically, the antiretaliation provision provides as follows:

> It shall be an unlawful employment practice 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) (emphasis added).]

Thus, the operative language in the antiretaliation provision prohibits employers from discriminating against employees "because" of protected activity.

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the Court considered how Title VII's because-of standard of causation for discrimination claims worked in mixed-motives cases. *Id*. at 232. Specifically, the Court construed the "because of" language in 42 U.S.C. § 2000e-2(a)(1) to determine whether an employer has liability to an employee under Title VII where improper and legitimate considerations both play a role in an adverse employment decision. *Ibid*. The plurality decision created a burden-shifting framework to determine causation in mixed-motives cases: "[I]f a Title VII plaintiff shows that discrimination was a "'motivating'" or a "'"substantial"' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration." *Gross*, 557 U.S. at 171–72 (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id*. at 259–260 (opinion of White, J.); *id*. at 276 (opinion of O'Connor, J.)).

Two years after *Price Waterhouse*, Congress amended Title VII to expressly incorporate the "motivating factor" mixed-motive analysis into Title VII's nondiscrimination provision. The Civil Rights Act of 1991 provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice." Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)) (emphasis added). The amendment provides a limited affirmative defense when the respondent can show that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 107(b), 105 Stat. at 1075–76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). If the respondent succeeds on this defense, the complaining party is entitled to attorney fees and costs but cannot obtain damages or an injunction requiring hiring, reinstatement, or promotion. *Id.*

Notably, the Civil Rights Act of 1991 did not address mixed motives in connection with Title VII's antiretaliation provision. In other words, Congress did not amend Title VII to allow a plaintiff to establish an unlawful employment practice where a plaintiff establishes that protected activity "was a motivating factor for any employment practice, even though other factors also motivated that practice."

In *Gross*, the Court again addressed the meaning of the "because of" causation standard, this time in the context of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1). Even though the ADEA and Title VII both concern employment discrimination, and both

use the same "because of" language, the Court declined to apply Title VII's motivating-factor analysis to the ADEA. *Gross*, 557 U.S. at 173. The Court reasoned that because Congress did not incorporate the motivating-factor language into the ADEA at the same time it amended Title VII, Congress intended that the ADEA's causation standard would remain unchanged. *Id*. at 175.

The Court in *Gross* focused on the text of the ADEA, and specifically on what the "because of" causation standard requires. *Id*. at 175–76. The Court determined that Congress's use of the words "because of" means that it intended to impose liability where a person's disability was the but-for cause of an adverse employment decision. *Id*. at 176–77. The Court noted that this interpretation is consistent with "'the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Id*. at 177 (quoting *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005)). The reasoning in *Gross* applies at least equally to the causation standard for Title VII retaliation claims.

First, Congress expressly incorporated the mixed-motive analysis into Title VII. But Congress did so only as to the nondiscrimination provision, *not* the antiretaliation provision. If Congress intended both the nondiscrimination and antiretaliation provisions to incorporate a mixed-motive causation, Congress would have said so. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("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 purposefully in the disparate inclusion or exclusion") (internal quotation

marks and citations omitted). This Court should not rewrite the statute to do what Congress chose not to do. See *Dodd* v. *United States*, 545 U.S. 353, 359–60 (2005).

Moreover, Congress's partial amendment of Title VII provides the evidence of congressional intent that Justice O'Connor found lacking in Title VII's nondiscrimination provision in 1989. In her *Price Waterhouse* concurrence, Justice O'Connor opined that "nothing in the language, history, or purpose of Title VII prohibits adoption" of the burden-shifting approach. *Price Waterhouse*, 490 U.S. at 269 (O'Connor, J. concurring).

Post *Price Waterhouse*, Congress partially adopted the mixed-motives analysis, but only as to Title VII's nondiscrimination provision. Congress's decision not to apply its mixed-motive amendment to Title VII's antiretaliation provision is the very type of evidence that Justice O'Connor concluded was missing from Title VII. Thus under Justice O'Connor's analysis in *Price Waterhouse*, the language and history of Title VII prohibits the adoption of the mixed-motive burden-shifting analysis to retaliation claims.

This evidence of congressional intent is heightened by the Uniformed Services Employment and Reemployment Rights Act of 1994. Congress adopted USERRA to amend and recodify the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 3021–27 (later recodified at 38 U.S.C. §§ 4301–07). See Pub. L. No. 103-353, 108 Stat. 3149. In USERRA, Congress specifically adopted the mixed-motives analysis in both the statute's non-discrimination *and* antiretaliation provisions. Congress defined actions

prohibited by USERRA to include taking adverse employment action in which "the person'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." 38 U.S.C. § 4311(c)(1) (emphasis added). An employer also violates USERRA if a person's action to enforce the Act, participation in a proceeding or investigation to enforce the Act, or exercise of a right under the Act "*is a motivating factor* in the employer's action."[1] 38 U.S.C. § 4311(c)(2) (emphasis added).

Congress is aware of the potential application of the mixed-motives burden-shifting framework to antiretaliation provisions. And Congress has chosen not to apply the framework to antiretaliation provisions in other statutes, including Title VII.

Second, Title VII's antiretaliation provision uses the same "because" standard to define causation that this Court most recently interpreted in *Gross*. Although, as the dissent noted in *Gross*, similar language was construed in *Price Waterhouse*, no single view of the causation standard imposed by "because" garnered a majority of the Court. See *Gross*, 557 U.S. at 183 (Stevens, J. dissenting). Since then, a majority of this Court has concluded that "because" means but-for causation, consistent with the ordinary meaning of that word. *Gross*, 557 U.S. at 176–77; *accord Price Waterhouse*, 490 U.S. at 281 (Kennedy, J. dissenting).

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[1] In USERRA, Congress adopted the mixed-motives burden-shifting framework without providing for the imposition of declaratory relief, injunctive relief, and attorney fees as provided in Title VII where an employer succeeds in proving the affirmative defense. See 42 U.S.C. § 2000e-5(g)(2)(B).

Further, as the Court noted in *Gross* and the dissent noted in *Price Waterhouse*, when statutory text is silent on the allocation of the burden of proof, Congress is presumed to have intended that the plaintiff will carry the burden of proof. *Meacham* v. *Knolls Atomic Power Lab*., 554 U.S. 84, 91–92 (2008) ("Absent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden persuasion lies where it usually falls, upon the party seeking relief." (internal quotations omitted)); *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56–57 (2005) ("We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." (citations omitted)).

This presumption, in tandem with the normal meaning of the word "because," convinced the Court in *Gross* that "the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action." 557 U.S. at 177–78. The Court should reach the same conclusion based on the same analysis of the same word in Title VII's antiretaliation provision.

Accordingly, a plaintiff seeking to impose liability on an employer for retaliation in Title VII must prove but-for causation. Proof of a mixed motive is legally insufficient.

II. The mixed-motives burden-shifting analysis adopted in *Price Waterhouse* should not be applied to retaliation claims.

As enforcers of state and federal civil rights laws, the *amici* states have come to appreciate that the mixed-motives burden-shifting analysis suffers from significant defects. The dissent in *Price Waterhouse* correctly predicted precisely what the Court later observed in *Gross*—that the mixed-motives burden-shifting analysis adopted in *Price Waterhouse* is difficult to apply. Further, applying the mixed-motives analysis in the retaliation context is likely to punish employers for bad thoughts rather than prohibited conduct.

A. The mixed-motives burden-shifting analysis is difficult to apply correctly.

From the outset, the mixed-motives burden-shifting analysis adopted by Justice O'Connor in *Price Waterhouse* was criticized for providing little practical benefit "at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect result." *Price Waterhouse*, 490 U.S. at 287 (Kennedy, J. dissenting); see also *ibid*. at 292. This critique has been borne out.

In *Gross*, the Court observed that "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply." 557 U.S. at 179. The federal courts of appeals have repeatedly noted the difficulty in correctly instructing juries on the mixed-motives framework.

E.g., *Townshend* v. *Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1239–43 (10th Cir. 2002) (the mixed-motive framework "is a difficult matter for courts, and would certainly be difficult for a jury"); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1179–87 (2d Cir. 1992) (defendant's "challenge to the '*Price Waterhouse*' instruction given to the jury draws us into the murky water of shifting burdens in discrimination cases"); *Visser* v. *Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J. dissenting).

Thus, to the extent that the burden-shifting analysis adopted in *Price Waterhouse* provides any benefit, it is more than offset by the endemic problems of applying the mixed-motives analysis.

B. The mixed-motive burden-shifting analysis has an increased risk of transforming Title VII into a thought-control bill when applied to retaliation claims.

Before its adoption, Title VII was criticized as a "thought control bill" that created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (Sen. Ervin). Proponents of the act clarified that the intent of Title VII was to eradicate discriminatory *actions* in the employment setting, not mere discriminatory thoughts. *Ibid.* ("There must be some specific external act, more than a mental act. Only if [an employer] does the act because of the grounds stated in the bill would there be any legal consequences." (Sen. Case)).

The *Price Waterhouse* dissent properly concluded that "Congress' manifest concern with preventing the

imposition of liability in cases where discriminatory animus did not actually cause an adverse action . . . suggests . . . that an affirmative showing of causation should be required." *Price Waterhouse*, 490 U.S. at 282 (Kennedy, J. dissenting). Title VII's legislative history suggests that the antiretaliation provision should also require an affirmative showing of causation. But imposing liability on employers for mixed-motives in the context of retaliation is more troubling than doing so in the context of the antidiscrimination clause because of the nature of retaliation claims.

It is a testament to the effectiveness of the civil rights laws that racial and sex discrimination are subject to considerable moral opprobrium. But as a consequence of that success, false accusations of discrimination naturally engender in the falsely accused feelings of anger, hurt, and resentment. If an employer subsequently takes an adverse employment action against the accuser—an action justified by legitimate considerations—a retaliation claim is likely to follow. Cf. EEOC Charge Statistics, Fiscal Year 1997 Through Fiscal Year 2012, http://www.eeoc.gov/eeoc/statistics /enforcement/ charges.cfm (last visited Mar. 5, 2013) (retaliation claims are the most frequently asserted claims since 2009, showing up in more than 35% of all charges).

A supervisor who feels wrongly accused of discrimination and owns up to such feelings pretrial has likely created a sufficient issue of material fact to allow the accuser's retaliation claim to proceed to trial if the mixed-motives standard applies. This increases the pressure on employers to settle such claims instead of risking an adverse determination by a jury. And such an adverse determination is all the more likely in the mixed-motive context because the jury will be instructed that the employee must show only that retaliatory animus was one factor in an adverse-employment decision.

The net result is that imposing the mixed-motives burden-shifting analysis punishes employers for "bad" but entirely predictable thoughts, where those thoughts cannot be said to have actually caused an adverse-employment action. This is precisely the sort of result that Congress intended to avoid when it enacted Title VII.

There are also two practical concerns that are especially pronounced by mixed-motives liability in the public sector. To begin, state governments, because of their size, often adopt generally applicable rules and rely on individual supervisors to follow and enforce them. When (as in this case) they do so, the system works as it is supposed to. It is unfair to charge the state with retaliation or discrimination based on the subjective thought process of a supervisor who did his job properly, whatever other thoughts he may have had in his head.

In addition, decisions about who to hire for many public service positions are subjective, and thus subject to second-guessing even when there has been no

wrongdoing. That makes it especially unreasonable to shift the burden of proof to the defendant. When the government has done something it is otherwise entitled to do (e.g., demote or fire an employee), and the government has considerable discretion in making that decision, see *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 606 (2008), there is no basis for flipping the traditional burden of proof. That would amount to a presumption of malfeasance, contrary to the normal presumption of regularity of government action. If the plaintiff cannot prove causation, it cannot prove wrongdoing.

III. The word "because" should be given a uniform interpretation to promote uniform expectations of statutory terms by employers and employees.

Disparate interpretations of the same word, "because," created the circuit split that is the subject of this case. As the petition notes, the First, Sixth, and Seventh Circuits, as well as numerous district courts, have interpreted *Gross* to mean that when Congress uses "because" to set the level of causation required by an employment statute, Congress intended but-for causation. Pet. 11–12, 14–17. The Fifth Circuit and the Eleventh Circuit have taken the countervailing view, along with at least two district courts. (*Id.* at 12–14, 17.) But concluding that the word "because" means the mixed-motive burden-shifting analysis for purposes of Title VII's antiretaliation provision (while the exact same word in the ADEA does not) will inevitably create additional confusion among employers, employees, and the lower courts.

This is not just a Title VII/ADEA problem. Consider the following federal statutes, each using the term "because" to establish the causation requirement for retaliation or interference claims:

- Americans with Disabilities Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

- Fair Labor Standards Act: "[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee *because* such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (emphasis added).

- Family Medical Leave Act: "It shall be unlawful for any person to discharge or in any other manner discriminate against any individual *because* such individual" has engaged in activity protected by the FMLA. 29 U.S.C. § 2615(b) (emphasis added).

- Genetic Information Nondiscrimination Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or *because* such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 2000ff-6(f) (emphasis added).

- National Labor Relations Act: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a) (emphasis added).

- Occupational Safety & Health Act: "No person shall discharge or in any manner discriminate against any employee *because* such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." 29 U.S.C. § 660(c)(1) (emphasis added).

- Rehabilitation Act: "No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

- Sarbanes-Oxley Act: No covered company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against employee in the terms and conditions of employment *because* of any lawful act done by the employee" to engage in activity protected by the Act. 18 U.S.C. § 1514A(a) (emphasis added).

It is neither necessary nor desirable for the term "because" to connote different standards of causation, where other statutory language does not require this result. E.g., 38 U.S.C. § 4311(c); 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Differing meanings create more litigation and frustrate the efforts of employers and employees to regulate their own employment relationships. Accordingly, the *amici* states ask this Court to reverse the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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