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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council (EEAC) and Chamber of Commerce of the United States of America (Chamber) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae's* intention to file this brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

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 approximately 300 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 Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

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 em-

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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.

ployers, 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, EEAC and/or the Chamber 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 matter that has 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

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[2] *See, e.g., Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Burlington Northern & Santa Fe Rwy. v. White*, 548 U.S. 53 (2006); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

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 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 with this Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below, which held that plaintiffs suing for workplace retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, need prove only that retaliation was one of any number of factors in the challenged employment decision, deepens an already-persistent conflict in the courts regarding the extent to which the mixed-motive framework is available in non-Title VII discrimination cases in light of this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

In *Gross*, this Court held that plaintiffs alleging intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA) cannot proceed under a mixed-motive theory because doing so would impermissibly relieve them of the ultimate burden of proving that the challenged employment

action was taken "because of" age. Noting that Congress amended Title VII's nondiscrimination provisions in 1991 expressly to incorporate a "motivating factor" test but "neglected to add such a provision to the ADEA… even though it contemporaneously amended the ADEA in several ways," the Court concluded that it would be improper to import the burden-shifting scheme to the ADEA. *Gross*, 557 U.S. at 168. The Court 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. Furthermore, as the Court has explained, 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'

Id. at 174-75.

Significantly, Title VII's motivating factor test applies only to cases of discrimination on the basis of race, color, religion, sex or national origin, and does not extend to causes of action for unlawful retaliation. It follows then, applying *Gross*, that plaintiffs suing for unlawful retaliation cannot proceed under a mixed-motives theory, but rather must prove that retaliation was the "but-for" reason for the adverse employment action. The First, Sixth and Seventh Circuits adhere to the view that unless the statute states otherwise, a discrimination (or retaliation) plaintiff must establish "but-for" causation, while the Fifth and Eleventh Circuits limit the applicability of *Gross* strictly to ADEA cases.

Permitting Title VII 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 that both lawful and prohibited considerations played a role in the adverse action – would undermine the plain text of Title VII and contravene *Gross*. Moreover, permitting plaintiffs to manipulate the burdens of proof in this manner increases significantly their chances of avoiding summary judgment, and ultimately prevailing at trial, even where their evidence is very weak.

If left unresolved, this conflict will continue to lead to uneven application of employment law, with significant practical implications for the federal judiciary, as well as both plaintiffs and defendants alike. Accordingly, review of the decision below by this Court is warranted.

REASONS FOR GRANTING THE WRIT

REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Decision Below Is Directly Contrary To Title VII And This Court's Decision In *Gross*

1. 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 mak-

ing 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, "[t]he 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, Pub. L. No. 102-166, 105 Stat. 1071 (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). Section 107 explicitly makes the mixed-motive analysis available only to cases of *discrimination* on the basis of race, color, religion, sex or national origin, not to causes of action for unlawful *retaliation* under Section 704.

2. *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

In *Gross v. FBL Financial Services, Inc.*, this Court held that plaintiffs alleging intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, cannot proceed under a mixed-motive theory because doing so impermissibly would relieve them of the ultimate burden of proving that the challenged employment action was taken "because of" age. 557 U.S. 167, 175-76 (2009). The Court found particularly persuasive the fact that Congress declined to amend the ADEA, as it did portions of Title VII, to include a motivating factor test:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, 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. 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.

Gross, 557 U.S. at 174 (citations omitted). That same rationale also should be applied to foreclose mixed-motive claims where, as here, the underlying statute does not expressly authorize it. As the Seventh Circuit pointed out, "[a]lthough the *Gross* decision construed the ADEA, the importance that the [C]ourt 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).

As noted above, Title VII's motivating factor test applies only to causes of action alleging *discrimination* on the basis of race, color, religion, sex or national origin, and does not extend to those for unlawful retaliation. Lower courts properly applying *Gross* therefore would be expected to agree that plaintiffs suing for Title VII *retaliation* cannot proceed under a mixed-motives theory, but rather must prove that retaliation was the "but-for" reason for the adverse employment action. Indeed, *Gross* seemingly precludes the application of a mixed-motive standard to *any* case involving a statute that does not expressly relieve the plaintiff of the burden of persuasion. *See, e.g., Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) ("because of" language of Surface Transportation Assistance Act of

1982, 49 U.S.C. § 31105(a), would require but-for showing in light of *Gross*, except for 2007 amendments expressly incorporating a "contributing factor" test).

B. Lower Courts Are In Profound Disagreement Regarding The Effect Of *Gross* On Non-ADEA Cases

Yet of the five federal courts of appeals to have addressed the availability of the mixed-motive framework under various employment laws since *Gross* was decided, two have deemed *Gross* essentially irrelevant outside of the ADEA context, while three others properly have applied the Court's reasoning to cases brought under analogous statutes. *Compare Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010); *Saridakis v. S. Broward Hosp. Dist.*, 468 Fed. Appx. 926 (11th Cir.), *cert. denied*, 184 L. Ed. 2d 255 (2012), *with Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*); *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). Without a course correction by this Court, the troubling conflict among the lower courts regarding the propriety of relieving a discrimination or retaliation plaintiff of the burden of persuasion will become even more pronounced.

1. The First, Sixth, and Seventh Circuits logically extend the rationale of *Gross* beyond the ADEA context

The First, Sixth, and Seventh Circuits correctly adhere to the view that, under *Gross*, a discrimination (or retaliation) plaintiff must establish "but-for" causation, unless the underlying statute expressly provides otherwise. In *Serwatka v. Rockwell Auto-*

mation, Inc., 591 F.3d 957 (7th Cir. 2010), the Seventh Circuit ruled that a plaintiff suing for employment discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, was not entitled to a mixed-motive jury instruction, because unlike Title VII, the ADA simply does not authorize recovery under a mixed-motive theory.

Although *Gross* examined the question of mixed-motive jury instructions in cases brought under the ADEA, the Seventh Circuit found its reasoning equally applicable to cases brought under the ADA, since Congress did not amend either statute expressly to incorporate a "motivating factor" test. In doing so, the appeals court reversed its own long-standing precedent that permitted mixed-motive jury instructions in ADA cases, concluding, in light of *Gross*, "that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute's 'because of' language demands proof that a forbidden consideration – here, the employee's perceived disability – was a 'but-for' cause of the adverse action complained of." *Serwatka*, 591 F.3d at 962. Similarly, in *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), the First Circuit held that the mixed-motive theory is not available to plaintiffs suing for disability discrimination under the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*, which also like the ADEA, does not contain a motivating factor provision.

The Sixth Circuit also held recently in *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*), that in the absence of express statutory language incorporating a motivating factor test, plaintiffs suing for discrimination under the ADA must prove that disability was the "but-for"

reason for the contested employment action. Before reaching that question, however, the court dismissed the notion that the Rehabilitation Act's more restrictive "sole factor" test applies to the ADA, concluding that while the two laws share common goals and purposes, key textual differences prevent them from being applied in an identical manner. 681 F.3d at 317. For example, while the ADA prohibits discrimination "because of" disability, the Rehabilitation Act bars discrimination "solely by reason of" disability, and despite having amended both laws many times over the years, Congress never saw fit to import the "solely by reason of" language into the ADA. *Id.* at 316-17.

For similar reasons and especially in view of *Gross*, the Sixth Circuit went on to find it inappropriate to apply Title VII's "motivating factor" test to the ADA, which does not itself contain, and has never been amended to add, such a burden-shifting scheme. *Id.* at 317. It rejected the plaintiff's contention that because the ADA specifically incorporates Title VII's enforcement and remedial provisions, it should be interpreted to allow for mixed-motives claims, observing in particular that while some of Title VII's remedies and procedures are made part of the ADA, the motivating factor provision, § 2000e-2(m), is not one of them. *Id.* at 319-20. The Sixth Circuit concluded that since both the ADEA and the ADA bar "because of" discrimination, and *Gross* established that "because of" age in the ADEA context means "but-for" age, it follows that "because of" disability can only mean the plaintiff's disability must be the "but-for" reason for the adverse employment action. *Id.* at 321.

2. Adhering to pre-*Gross* precedent, the Fifth and Eleventh Circuits continue to apply the mixed-motive framework mechanically to non-ADEA claims

In contrast, the Fifth and Eleventh Circuits have limited the applicability of *Gross* strictly to ADEA cases. *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010); *Saridakis v. S. Broward Hosp. Dist.*, 468 Fed. Appx. 926 (11th Cir.), *cert. denied*, 184 L. Ed. 2d (2012). In *Smith v. Xerox Corp.*, for instance, a divided Fifth Circuit panel ruled that the mixed-motive framework continues to be available to Title VII retaliation plaintiffs, despite this Court's strong suggestion to the contrary in *Gross*. It acknowledged, as the Court in *Gross* found, that unlike Title VII, the text of the ADEA does not authorize a motivating factor test, and conceded that Congress similarly declined to make it available to Title VII *retaliation* plaintiffs. While "recogniz[ing] that the *Gross* reasoning could be applied in a similar manner to the instant case," 602 F.3d at 328, the *Smith* panel majority nevertheless concluded that "such a simplified application of *Gross* is incorrect." *Id*. (footnote omitted). "To state the obvious, *Gross* is an ADEA case, not a Title VII case." *Id.* at 329; *accord Saridakis*, 468 Fed. Appx. at 931 ("*Gross* is not controlling because it is an ADEA case …").

Dismissing *Gross* as thus simply inapplicable, the majority fell back on *Price Waterhouse* and its own pre-*Gross* precedent to allow the plaintiff to recover under a mixed-motive theory. "It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court." *Smith*, 602 F.3d at 330. Bound by *Smith*, the

court below thus upheld the jury verdict in favor of the plaintiff on his mixed-motive Title VII retaliation claim.

District courts also are in disagreement as to the applicability of *Gross* beyond the ADEA context. In the absence of binding circuit court precedent, for instance, *see Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009), District of Columbia district courts struggle specifically with "whether to extend the *Gross* analysis to Title VII's retaliation provision," *Beckham v. AMTRAK*, 736 F. Supp. 2d 130, 145 (D.D.C. 2010), one court boldly suggesting that the answer to the question "is both yes and no, depending on a plaintiff's allegations and the evidence." *Id.; but compare Hayes v. Sebelius*, 762 F. Supp. 2d 90, 111 (D.D.C. 2011) (*Gross* "resolves any doubt: Title VII plaintiffs may bring neither mixed-motives retaliation claims under *Price Waterhouse* nor motivating-factor retaliation claims under the 1991 Act").

C. The Inconsistency In The Courts Regarding The Applicability Of The Mixed-Motive Proof Scheme To Non-Title VII Discrimination Claims Significantly Disadvantages Employers With Multijurisdictional Operations

Continued inconsistency in this area of the law will have a profound effect on the business community in general, but in particular on large companies that operate and employ staff across the United States and thus necessarily experience higher volumes of employment litigation activity than smaller employers. Companies doing business within the Fifth and Eleventh Circuits must now brace for even more Title VII retaliation charge and litigation activity, even

where legitimate, non-retaliatory justifications unquestionably exist for the challenged employment action.

"The number of retaliation claims filed with the EEOC has proliferated in recent years." *Crawford v. Metro. Gov't. of Nashville*, 555 U.S. 271, 283 (2009) (Alito, J., concurring). In Fiscal Year (FY) 2009, for instance, 36% of all charges filed with the EEOC contained allegations of workplace retaliation, surpassing for the first time the number of race discrimination charges received by the agency; to that point, race had always been the most commonly cited basis for unlawful workplace discrimination. That trend has continued unabated.[3] In FY 2010, the EEOC received a total of 36,258 retaliation charges, a percentage increase of 7.9% over the previous year,[4] and in FY 2011, 37.4% of all charges filed contained retaliation allegations.[5] Although the EEOC consistently finds cause in less than 10% of the retaliation charges filed with it each year, *id.* at n.3, respondents to such charges invariably are forced to devote significant time and resources responding to each charge and cooperating with the EEOC's administrative investigation.

The availability of the mixed-motive framework likely will preclude summary judgment in most cases,

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[3] U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997-FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 16, 2012).

[4] U.S. Equal Employment Opportunity Comm'n, Retaliation-Based Charges FY 1997-FY 2012, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited Nov. 16, 2012).

[5] U.S. Equal Employment Opportunity Comm'n, *supra* note 3.

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. 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-motives 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-motives 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 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). Without definitive guidance from this Court regarding the availability of the mixed-motive framework in non-ADEA and non-Title VII discrimination cases, the risk of litigation abuse – and general confusion – remains substantial.

CONCLUSION

Accordingly, the *amici curiae* respectfully request the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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