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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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. It often files amicus briefs in cases pending before the Supreme Court, and has filed amicus briefs in cases directly relevant to the question presented by this case, such as *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of workers throughout the United States, provide goods and services to tens of millions of additional people, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have provided written consent to the filing of this amicus brief.

perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Amici's members are employers that are regulated by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other employment statutes that may be affected by this decision. They are potential defendants in retaliation suits like the one at issue in this case and thus have a strong interest in the proper resolution of this case. As discussed below, holding that an employer may be held liable for improperly considering one factor among many in a highly subjective employment decision would have significant negative impacts on how employers conduct business.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether Title VII's anti-retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation, or merely that an improper consideration is one among multiple motivating factors for an employer's decision. The Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), paves the answer to that question: a plaintiff must prove but-for causation. The same considerations on which this Court based its decision in *Gross*—that the Age Discrimination in Employment Act (ADEA) does not impose mixed-motive liability—apply to Title VII's anti-retaliation provision. If anything, these considerations apply with even greater force here because this case involves different provisions of the same statute: when Congress amended Title VII's anti-discrimination provision in 1991 to add mixed-motive liability, it chose *not* to amend Title VII's anti-retaliation provision to

add such liability. As in *Gross*, there is accordingly no reason to deviate from the traditional rule that requires the plaintiff to prove but-for causation. The Fifth Circuit decision therefore should be reversed.

Proper resolution of this issue is exceptionally important to the business community. Retaliation claims are already the fastest growing category of discrimination claims. A decision recognizing mixed-motive liability would expose employers to litigation—and potential liability—even when they made an employment decision for legitimate business reasons and would have made the exact same decision if they had not considered the improper factor. Moreover, adopting a mixed-motive regime would seriously impede summary judgment as a tool for weeding out meritless retaliation claims because a plaintiff's allegation that retaliation was *a* motive will be sufficient to defeat summary judgment even if the plaintiff cannot establish that it was the but-for motive. This, in turn, will force employers to settle baseless lawsuits to avoid the time and expense of trials and to implement unnecessary policies that will chill legitimate business decisions. At the same time, a decision reinvigorating the approach laid out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), would impose substantial costs on the court system. It would reignite conflicts in the lower courts and foster overly complex trials with confusing jury instructions.

This case itself aptly illustrates the high costs of such a rule. The defendant medical school was party to an affiliation agreement with the hospital where the plaintiff sought a job. Pet. App. 4. Under that agreement, the plaintiff could not work at the hospital unless he was a faculty member at the medical school,

at which he was no longer employed. *Id.* at 4-5. The defendant thus had a perfectly legitimate reason for opposing his employment at the hospital (the affiliation agreement)—and that reason was completely unrelated to the plaintiff's complaints of discrimination. *Id.* at 5. Nevertheless, under the Fifth Circuit rule that a mixed motive may subject the employer to liability, the case proceeded past summary judgment, a jury held the defendant liable under a mixed-motive instruction, *id.* at 6, 12 n.16, and the Fifth Circuit upheld the verdict on the retaliation claim, *id.* at 15. Nothing in the statute requires such an expansive rule of liability for retaliation claims, and the Court should not impose one.

ARGUMENT

The path for resolving this case is marked by the text and history of key provisions of Title VII of the Civil Rights Act of 1964 and this Court's precedent interpreting Title VII and analogous statutes. Title VII contains two substantive prohibitions relevant to this case. The anti-discrimination provision (§ 703) makes it unlawful for an employer to make certain employment decisions "*because of* [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). The anti-retaliation provision (§ 704) makes it unlawful for an employer to "discriminate against any of his employees or applicants for employees . . . *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 [§§ 2000e-2000e-17]." 42 U.S.C. § 2000e-3(a) (emphasis added).

In *Price Waterhouse*, a plurality interpreted Title VII's anti-discrimination provision to impose liability

when an improper consideration is a "motivating" factor in the employer's decision, and held that the employer could avoid liability only by proving the "affirmative defense" that it "would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 245-46, 258. Justice White concurred in the judgment, but he would have required the plaintiff to "show that the unlawful motive was a *substantial* factor in the adverse employment action" before imposing mixed-motive liability. *Id.* at 259. Justice O'Connor also concurred in the judgment and agreed with Justice White that the plaintiff must show the improper criterion was a "substantial" factor in the employment decision, *id.*, at 265, but she also would have required the plaintiff to come forward with "direct evidence" that the employer relied on the improper consideration, *id.* at 270-71.

Two years after *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991. Among other things, Congress amended Title VII's anti-discrimination provision to establish mixed-motive liability for discrimination—but *not* for retaliation. 42 U.S.C. § 2000e-2(m) ("[A]n 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."). Congress also effectively changed the *Price Waterhouse* "same decision" defense from an affirmative defense against liability to a defense only against damages. 42 U.S.C. § 2000e-5(g)(B). As part of the 1991 Amendments, Congress made various amendments to other provisions of Title VII, including

the anti-retaliation provision, as well as to other discrimination laws, including the ADEA.

The Court recently addressed this statutory history in *Gross*, 557 U.S. 167, when it held that the ADEA does not impose mixed-motive liability. The Court first recognized that it has never held that the *Price Waterhouse* "burden-shifting framework applies to ADEA claims." *Id.* at 174. In addition, the Court stressed that when Congress amended Title VII in 1991 to create "motivating factor" liability for discrimination claims, it did not add a similar provision to the ADEA, which indicates that Congress did not intend the ADEA to have mixed-motive liability. *Id.* Relying on the ordinary meaning of the ADEA liability provision and the general rule reflected in the Court's precedents, the Court held that the prohibition against discrimination "because of" age requires the plaintiff to prove that age was the "but for" cause of the employer's action. *Id.* at 175-78.

The question presented in this case is whether Title VII's anti-retaliation provision requires a plaintiff to prove but-for causation, or whether proof of a mixed-motive is sufficient. The text and history of Title VII's anti-retaliation provision—when considered under the reasoning of *Gross*—compel the conclusion that but-for causation is necessary. That conclusion is also supported by powerful practical considerations.

I. *GROSS* COMPELS THE CONCLUSION THAT THERE IS NO MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS

Gross controls this case. In *Gross*, this Court held that a "mixed-motives jury instruction" is "never

proper" in an ADEA suit. 557 U.S. at 169-70. The Court declined to follow its decisions construing Title VII's anti-discrimination provision, including *Price Waterhouse*. First, the Court noted that it had "never held that [the 'motivating factor'] burden-shifting framework applies to ADEA claims." *Id.* at 174. Second, the Court pointed to the fact that Congress amended Title VII's anti-discrimination provision in 1991 to adopt mixed-motive liability, but did "not make similar changes to the ADEA." *Id.* This was significant, the Court explained, because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.* Moreover, the "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted,'" which was true for the ADEA and Title VII in 1991. *Id.* at 175 (citation omitted).

The same reasoning compels the conclusion that Title VII's anti-retaliation provision requires but-for causation as well. First, just like the ADEA, this Court has never held that the motivating-factor standard applies to Title VII *retaliation* claims, 42 U.S.C. § 2000e-3(a). *Price Waterhouse* was grounded on an interpretation of the anti-discrimination provision of Title VII, 42 U.S.C. §2000e-2(a). *See Price Waterhouse*, 490 U.S. at 239-40. The decision did not interpret the separate anti-retaliation provision. And it is not sufficient to say that *Price Waterhouse* concerned the same *statute*, when its holding is tied to a completely different substantive provision. *Stare decisis*, regardless of its strength when it comes to

decisions interpreting statutes, is limited only to the provisions actually construed by this Court.

Second, just as was true for the ADEA, Congress did *not* amend Title VII's anti-retaliation provision to add mixed-motive liability in 1991. Indeed, the negative implication is even stronger here than in *Gross*. When Congress added § 2000e-2(m) to Title VII in the 1991 Amendments, it created mixed-motive liability *only* for claims based on "race, color, religion, sex, or national origin." Congress plainly *omitted* retaliation claims. The negative implication is at its height because Congress was amending the *same statute*—Title VII Moreover, Congress made other changes to Title VII's anti-retaliation provision at the same time. *See* Pub. L. No. 102-166, §§ 102, 109, 105 Stat. 1071, 1072, 1077 (1991) (amending § 704 of Title VII). The rationale of *Gross* thus makes clear that *Price Waterhouse* does not control this case.

Just as was true for the ADEA, the text and default rules of civil litigation compel the conclusion that Title VII's anti-retaliation provision does not allow mixed motive liability. The anti-retaliation provision makes it unlawful for "an employer to discriminate against any of his employees . . . *because* he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (emphasis added). The ordinary meaning of "because"—just like that of "because of"—is "by reason of: on account of." *Gross*, 557 U.S. at 176 (quoting *Webster's Third New International Dictionary* 194 (1966)). This Court has repeatedly interpreted the phrase "because of" as

requiring proof of "but for" causation. *Id.* (citing cases). There is no reason to interpret "because" any differently here. Accordingly, as in *Gross*, "[a] plaintiff must prove by a preponderance of the evidence" that retaliation "was the 'but-for' cause of the challenged employer decision." *Id.* at 177-78.

In *Gross*, the Court observed that it "'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Id.* at 174 (citation omitted). Here, such a "critical examination" shows that the rules applicable under Title VII's anti-discrimination provision do not apply to the separate anti-retaliation provision.[2]

II. MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS WILL IMPOSE SUBSTANTIAL COSTS ON EMPLOYERS

The Court need go no further to resolve this case. But important practical considerations nevertheless provide additional reason for this Court to tread carefully in this area and not extend mixed-motive

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[2] To be clear, *stare decisis* demands adherence to *Gross*, not *Price Waterhouse*, for purposes of resolving the question presented by this case. *Gross* is the more recent precedent of this Court and its reasoning applies directly to the question presented by this Court. Although *Price Waterhouse* involved Title VII, it did not involve Title VII's anti-retaliation provision. Therefore, reliance on *Price Waterhouse* here is just as misplaced as it was in *Gross* in interpreting the ADEA. Moreover, even as to Title VII, Congress overrode *Price Waterhouse* in relevant part in adopting a statutory mixed-motive provision in 1991 for discrimination claims. *See Gross*, 557 U.S. at 178 n.5. The *stare decisis* force of *Price Waterhouse* is therefore fleeting even as to the interpretation of Title VII's anti-discrimination provision.

liability to Title VII's anti-retaliation provision. Doing so would upset the balance that Congress struck in protecting the rights of employees from discrimination while respecting the managerial prerogatives of employers. Such a disruptive act should come, if at all, only from the conscious Act of Congress.

A. Mixed-Motive Liability Substantially Lowers The Bar For Retaliation Claims

Title VII's anti-retaliation provision unquestionably serves as an important component of the statute's protections against discrimination. But as this Court has recognized, Congress did not intend the anti-retaliation provision to trump all other interests. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm"). Adopting a mixed-motive regime for retaliation claims would expand the provision in a dramatic fashion that conflicts with the ordinary rules of civil litigation, would impose enormous costs on employers and the courts, and goes beyond Congress's express intent.

The Fifth Circuit rule that *Price Waterhouse* governs retaliation claims—and thus shifts the burden of proof to the employer in retaliation cases—is a stark departure from the general rule that the plaintiff bears the burden of proving his case. The "'conventional rule of civil litigation'" "requires a plaintiff to prove his case 'by a preponderance of the evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *see also* Restatement (Second) of Torts § 433B(1) (1965) ("[T]he burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff."). A plaintiff claiming discrimination thus

ordinarily has the burden of proving that the improper consideration was the "but for" cause of the employer's action. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976). And to meet that burden, the plaintiff must show that the improper consideration "actually played a role in that process and had a *determinative* influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000).

Because intentional discrimination is often an "elusive factual question," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981), the Court has adopted a burden-shifting framework to help plaintiffs meet their burden in discrimination cases by "forcing the defendant to come forward" with an explanation for its action, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993). This framework, which is "intended progressively to sharpen the inquiry" in a way that ultimately helps plaintiffs, *Burdine*, 450 U.S. at 256 n.8, but it does so within the confines of the traditional rule that the plaintiff bears the burden of proving his case. The Court has been careful repeatedly to emphasize that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253; *Reeves*, 530 U.S. at 143 (quoting *Burdine*); *Hicks*, 509 U.S. at 507 (same).

By contrast, the Fifth Circuit's rule fundamentally changes the nature of the lawsuit: rather than the plaintiff having to prove discrimination, the defendant has to prove that it did not discriminate. Under the Fifth Circuit's rule, the plaintiff needs to show only that the impermissible factor was a "'motivating' or

'substantial' factor in the employer's decision," and then the "burden of persuasion ... shift[s] to the defendant" to show by a "preponderance of evidence that it would have taken the same employment action even without consideration of the prohibited factor." *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010).

This standard is improperly lax in two key respects. First, the plaintiff's required showing is reduced: the plaintiff needs to show only that the impermissible factor was a *motivating* factor, as opposed to a *determinative* factor. Second, the ultimate burden shifts to the defendant: the *defendant* has to prove that it would have reached the same decision, as opposed to the *plaintiff* having to prove that the defendant's legitimate reason was pretextual or that the improper reason "more likely" motivated the employer, *Burdine*, 450 U.S. at 256. In other words, employers have to prove the negative—never an easy task. *Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative ...."). For several reasons, these change will have enormous consequences for employers.

First, going from "but-for" to "motivating" factor makes it significantly easier for plaintiffs to allege—and harder for defendants to defend against—retaliation claims. Under this standard, virtually every employee who engages in protected activity and later suffers an adverse action will be able to allege retaliation under Title VII. Employment decisions are invariably subjective in some measure. So lower courts may well accept that retaliation was *a* motivating factor based simply on a showing that the employer knew that the plaintiff engaged in protected activity—knowledge that often exists but hardly establishes an

intent to retaliate for engaging in protected activity.

A mixed-motive liability regime for retaliation claims would have particularly severe consequences for large corporations and retailers with geographically dispersed operations. These employers rely on the enforcement of neutral written policies to govern employment decisions to help prevent discrimination. Yet, as this case illustrates—under the mixed-motive liability rule—even when an employer fires an employee pursuant to a neutral policy, an employee may prevail at trial simply by showing a supervisor was *also* motivated by retaliation. Congress would not have intended that result. Title VII "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259 (citation omitted).

Second, transforming causation from an element of the plaintiff's claim to an affirmative defense for the defendant will make it more difficult to weed out baseless claims before trial. If a complaint failed to allege sufficient "factual content" regarding but-for causation to cross "'the line from conceivable to plausible,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), it would be subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). Under a mixed-motive rule, it will be easier for a plaintiff to allege facts sufficient to cross that line. Moreover, an employer may not be able to move to dismiss on the ground that it would have taken the same action regardless of the improper factor because that is an "affirmative defense" under *Price Waterhouse*, 490 U.S. at 246, requiring factual development that would preclude a Rule 12(b)(6) motion. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

Procedure § 1357 (3d ed. 2004); 2 James Wm. Moore, *Moore's Federal Practice* § 12.34 (3d ed. 2012).

For similar reasons, a mixed-motive liability regime will impact the resolution of cases on summary judgment. Summary judgment is "an integral part of the Federal Rules," "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Its "principal purpose" "is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 323-24. It is beneficial for litigants and the court system—it "prevent[s] vexation and delay, improve[s] the machinery of justice, promote[s] the expeditious disposition of cases, and avoid[s] unnecessary trials." 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2712 (1998) (footnote omitted).

A mixed-motive rule will make it more difficult to resolve cases on summary judgment. To survive summary judgment under conventional but-for causation principles, a plaintiff must show that a jury could conclude that the employer would not have taken the action but for the alleged discriminatory purpose. By contrast, under the mixed-motive liability regime, the defendant bears the burden of proving an *absence* of causation—that the improper factor did *not* cause its decision. A plaintiff therefore can thwart a motion for summary judgment simply by showing that there is a material issue of fact over whether the allegedly discriminatory purpose was *a* motivating fact—a much easier showing. Once the plaintiff makes that showing, the defendant can prevail only by showing that there is no evidence from which a jury could find the employer would not have taken the action, even if it had not considered the improper factor. It is no wonder, then,

that the dissenters in *Smith* observed that the mixed-motive liability rule "allows virtually every pretext case to be given to the jury as a mixed-motive case." 602 F.3d at 339 (Jolly, J., dissenting); *see also Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

Finally, the effects of a mixed-motive liability rule will be even more detrimental if courts limit the "same decision" defense to being a defense against damages, as in 42 U.S.C. § 2000e-5(g)(2)(B), rather than a defense against liability in general (including on other forms of relief), as the district court did here. *See* Pet. App. 42-44.[3] Section 2000e-5(g)(2)(B) provides that when "an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor," the court may grant injunctive relief, attorney's fees, and costs—but not damages. By its terms, § 2000e-5(g)(2)(B) does not apply to retaliation claims because § 2000e-2(m) covers only those claims based on "race, color, religion, sex, or national origin."

Despite the clear textual limits on § 2000e-5(g)(2)(B), the district court below made the "same decision" defense a defense only to damages for the retaliation claim—and not to all forms of liability,

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[3] The EEOC has also taken the position that § 2000e-5(g)(2)(B) applies to Title VII retaliation claims. *See* EEOC, EEOC Directives Transmittal No. 915.003, Compliance Manual, Section 8: Retaliation, at § 8-16 (May 20, 1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf ("If there is direct evidence that retaliation was a motive for the adverse action, 'cause' should be found. Evidence as to any additional legitimate motive would be relevant only to relief, under a mixed-motives analysis."). That position should be rejected.

including injunctive relief. Pet. App. 42-44. If courts improperly apply § 2000e-5(g)(2)(B) to retaliation claims, they will hold employers liable for injunctive relief, attorney's fees, and costs even when the employer would have taken the same action regardless of the fact that the employee engaged in protected activity. This expansion of *liability* is clearly not the balance Congress struck when it enacted § 2000e-5(g)(2)(B) to apply only to discrimination claims.

B. The Spike In Retaliation Claims Generally Magnifies These Concerns

Holding that *Gross* does not apply to Title VII's retaliation provision could have profound effects on all discrimination statutes that use the "because of" standard. Indeed, it would threaten to overturn decisions holding that mixed motive liability is not available under § 1983, *see Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010); the Americans with Disabilities Act (ADA), *see, e.g.*, *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012); and the Rehabilitation Act, *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). But the effects will be most far-reaching in the context of retaliation claims, such as the one at issue in this case.

Retaliation claims have increased at an astounding rate. According to EEOC statistics, in Fiscal Year 1997, individuals filed 16,394 charges based on Title VII's retaliation provision.[4] In Fiscal Year 2012, individuals filed almost double the number of charges—

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[4] All EEOC statistics cited in the following discussion are found at EEOC, Charge Statistics FY 1997-FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last visited Mar. 8, 2013).

31,208—based on Title VII's retaliation provision. As a percentage of all charges, the number of Title VII retaliation charges increased from 20.3% in Fiscal Year 1997 to 31.4% in Fiscal Year 2012. When charges made under the ADA, the ADEA, and the Equal Pay Act's retaliation provisions are included, the statistics are even more dramatic. In Fiscal Year 1997, the total number of retaliation charges under all statutes was 18,198, which accounted for 22.6% of all charges. In Fiscal Year 2012, the total number of retaliation charges under all statutes was 37,836—accounting for *38.1%* of all charges. Since Fiscal Year 2009, the number of total retaliation charges has consistently been the highest number of charges. And yet, while the number of retaliation charges has skyrocketed, the EEOC has concluded that the large majority of these charges are unfounded. In Fiscal Year 2012, for example, the EEOC found reasonable cause in only 1,800 of the charges that proceeded to a reasonable cause determination. By contrast, the EEOC found that 27,077 of the charges *lacked* reasonable cause.

The impact of allowing mixed-motive claims is amplified in the retaliation context because Title VII's anti-retaliation provision already covers more potential plaintiffs and actions than the core anti-discrimination provisions. There are inherently a larger number of potential retaliation plaintiffs than discrimination plaintiffs because a retaliation plaintiff does not have to be a member of a protected group. Indeed, in the wake of this Court's recent cases, potential plaintiffs now include employees who engage in a broad definition of protected conduct (*see Crawford v. Metropolitan Government*, 555 U.S. 271, 273 (2009); *Burlington Northern*, 548 U.S. at 57), former employees who

engaged in protected conduct (*see Robinson v. Shell Oil Co.* 519 U.S. 337, 346 (1997)), and employees who have some connection with someone in either of those two groups (*see Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 869-70 (2011)). Furthermore, under this Court's precedent, liability can be predicated on an employer's action that affects an employee in the workplace *or* outside of it (*see Burlington Northern*, 548 U.S. at 57). The scope of retaliation coverage under Title VII therefore is already much more expansive than discrimination coverage. Of course, that is attributable in part to the different purpose of an anti-retaliation provision. But the broader scope of coverage nevertheless magnifies the impact of this case on retaliation claims.

The large majority of retaliation charges prove to be unfounded. *Supra* at 17. But the explosion of retaliation claims in the past few years has imposed added costs and litigation burdens on employers trying to make ends meet in challenging economic times.

C. The Increase In Retaliation Charges Will Impose Significant Costs On Employers

The increase in retaliation and other claims due to the recognition of mixed-motive liability would impose significant direct and indirect costs on employers.

The direct costs would be substantial. Litigation is costly—and it is not getting cheaper. As one commentator observed: "The Rand Institute estimated in 1988 that defense costs in wrongful discharge actions averaged over $80,000. By 1994, costs were estimated to have increased to $124,000." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 31 (1998)

(footnote omitted). Another study estimates that "an employer may spend close to $100,000 to defend against an individual claim of discrimination." Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333, 340 (2008). And others have estimated that "it costs employers (1) between $4000 and $10,000 to defend an EEOC charge, (2) at least $75,000 to take a case to summary judgment, and (3) at least $125,000 and possibly over $500,000 to defend a case at trial." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005) (footnote omitted).

The increase in retaliation claims due to the recognition of mixed-motive liability would also impose substantial indirect costs on employers. Public court battles in discrimination or retaliation suits affect the public perception of businesses—even when businesses prevail in the underlying suits. They also exact a toll on businesses, taking employees away from work to testify or help prepare for trial, lowering employee morale, and diverting often scarce resources.

Given the high cost of defending against an employment suit and the reputational costs of trial, employers have significant incentives to settle, even when they are confident they would ultimately prevail at trial. Commentators have noted the "discrimination '*de facto* severance system'" whereby employers pay employees who file even meritless EEOC charges to avoid the costs of defending against discrimination charges. Sherwyn, 57 Stan. L. Rev. at 1579; *see also* Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining*

The Scope Of The Third-Party Retaliation Doctrine, 63 Hastings L.J. 521, 545 (2012) ("Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title VII discrimination or retaliation suit—even where the suit ultimately proves to be without merit."); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 82 (1999) ("[E]mployees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations.") (footnote omitted).

The increase in mixed-motive suits will also impose indirect costs by chilling legitimate business practices. Almost any employee who engages in protected activity could file a mixed-motive retaliation claim. Employers will be overly reticent to take any action regarding such employees, regardless of the existence of perfectly legitimate business reasons to do so, such as application of the sort of neutral policies at issue in this case. Commentators have warned against the "slippery slope" of liability and "the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability." Fink, 63 Hastings L. J. at 545. That concern is paramount in the context of retaliation

where the potential plaintiffs extend beyond those who engage in protected activities and to employer actions beyond those at the workplace.

The Court has previously recognized that "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business" and "demanded as a price for their support that 'management prerogatives . . . be left undisturbed to the greatest extent possible.'" *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 (1979) (quoting H.R. Rep. No. 88-914, at 29 (1963)). In 1991, Congress determined that mixed-motive liability was appropriate for Title VII discrimination claims. But Congress—which chose not to make any similar amendment in 1991 to Title VII's anti-retaliation provision—quite evidently has not made that judgment for retaliation claims.

Especially in light of the significant practical consequences of extending mixed-motive liability to already skyrocketing retaliation claims, the Fifth Circuit was wrong to *infer* that Congress intended to adopt such a regime when it did not expressly do so.

III. MIXED-MOTIVE LIABILITY FOR TITLE VII RETALIATION CLAIMS ALSO WOULD CREATE A HOST OF OTHER ISSUES

In concluding that mixed-motive liability extended to retaliation claims under Title VII, the Fifth Circuit reasoned that *Price Waterhouse* governed such claims. *See Smith*, 602 F.3d at 330 (holding that *Price Waterhouse* is "our guiding light"). That reasoning is flawed for the reasons discussed above. But it is also important to recognize that adopting that rationale

would invite a host of different issues that have previously divided the lower courts and would add unnecessary complexity to retaliation trials.

A. Adopting Mixed-Motive Liability Will Invite If Not Exacerbate The Confusion That Followed *Price Waterhouse*

The Court's decision in *Price Waterhouse* left open and raised a number of questions regarding mixed-motive liability, which engendered confusion in the lower courts. Congress tried to eliminate some of the confusion by expressly establishing mixed-motive liability in the 1991 Amendments to Title VII's discrimination provision. If the Court takes a step backwards and returns to *Price Waterhouse* here, the prior questions will resurface—and new ones will surely develop—including the following:

Does the plaintiff have to come forward with direct evidence of discrimination? A conflict arose after *Price Waterhouse* over whether mixed-motive liability was always available or whether it was available only when the plaintiff came forward with direct evidence of discrimination. *See Desert Palace*, 539 U.S. at 95 (noting circuit conflict on this issue). Justice O'Connor would have required "direct evidence that an illegitimate criterion was a substantial factor in the decision," *Price Waterhouse*, 490 U.S. at 276, but the plurality, *id.* at 251-52, and Justice White, *id.* at 259, would have allowed the plaintiff to use direct or circumstantial evidence. *See Desert Palace*, 539 U.S. at 93-94. In *Desert Palace*, the Court resolved the issue for Title VII discrimination claims primarily based on the text of the 1991 Amendments, 42 U.S.C. § 2000e-2(m), but also cited background principles of civil and criminal law that allow the use of both direct and

circumstantial evidence. *See Desert Palace*, 539 U.S. at 98-101. After *Desert Palace*, lower courts remain divided on whether direct evidence is required in discrimination cases under statutes other than Title VII. *See* James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 Tex. J. on C.L. & C.R. 43, 63-67 (2011). Holding that mixed-motive liability applies to Title VII retaliation claims under *Price Waterhouse* will only increase the confusion.[5]

Does the plaintiff have to show that the impermissible factor was a "motivating factor" or a "substantial" factor? It was unclear after *Price Waterhouse* whether the plaintiff had to show that discrimination was a "motivating" factor or a "substantial" factor in order to receive a mixed motive instruction. The plurality in *Price Waterhouse* would have required the plaintiff to show only that the improper consideration was a "motivating part in an employment decision," 490 U.S. at 258, but Justices

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[5] In our view, the answer to this question is that the 1991 Amendments did not change Title VII's anti-retaliation provision, so *Desert Palace* is inapplicable. The Court recognized in *Gross* that "the textual differences between Title VII and the ADEA . . . prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims," and the same reasoning applies to Title VII retaliation claims. *See supra* at 6-9. If the Court found mixed-motive liability for Title VII retaliation claims based on *Price Waterhouse*, direct evidence would be required under Justice O'Connor's opinion, which controls because it was the narrowest ground of decision. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when there is no majority, the narrowest ground of decision controls). But one way or the other, the lower courts, and perhaps ultimately this Court, will have to sort this out if the Court holds that mixed-motive liability applies to Title VII retaliation claims.

White, *id.* at 259, and O'Connor, *id.* at 276, would have required that it be a "substantial factor" in the adverse employment action. *See Desert Palace*, 539 U.S. at 93-94. The 1991 Amendments adopted the "motivating factor" test, but only for discrimination claims, 42 U.S.C. § 2000e-2(m). If the Court were to return to *Price Waterhouse* for Title VII retaliation claims, this question therefore would reemerge.[6]

If the defendant shows that it would have reached the same decision without consideration of the improper factor, is the defendant exonerated from liability or merely damages? The Court held in *Price Waterhouse* that the "same decision" defense absolved the defendant of liability. *See* 490 U.S. at 258 (plurality); *id.* at 259-60 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.). The 1991 Amendment made the "same decision" defense a defense only against damages (not against liability). *See* 42 U.S.C. § 2000e-5(g)(2)(B). For the retaliation claim at issue here, the district court treated the "same decision" defense as the more limited defense to damages, as in § 2000e-5(g)(2)(B), and that is the EEOC's position. *See supra* at 15-16 & n.3. A decision allowing a mixed-motive theory for retaliation claims would invite confusion on the scope of the "same decision" defense.[7]

How would mixed-motive liability interact with the McDonnell Douglas *framework*? *Price Waterhouse* left

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[6] In our view, the correct answer under *Marks* would be the higher "substantial factor" test adopted by Justices White and O'Connor because it represents a narrower ground of decision.

[7] In our view, the correct answer is that the 1991 Amendments do not change Title VII's anti-retaliation provision, so the "same decision" defense would exonerate the defendant from liability under *Price Waterhouse*.

open the questions of how the two frameworks interact and whether a plaintiff has to specify whether his case is a pretext or mixed-motive case, or whether he can proceed on both theories. The plurality noted that "[a]t some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." 490 U.S. at 247 n.12. Justice O'Connor's view was contingent on the direct evidence requirement: once "all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*." *Id.* at 278. There is "widespread confusion" in the lower courts, which have taken various approaches to which framework applies, who decides (the plaintiff or the court), and at what stage in the litigation. *See* Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed Motive Framework*, 26 A.B.A. J. Lab. & Emp. L. 461, 464-65 (2010).[8]

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[8] *See also* Scott Park, *Mixed-Motive Discrimination Cases And Summary Judgment*, 57 United States Attorneys' Bulletin 25, 27-29 (May 2009), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5702.pdf; David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment*

In sum, reintroducing the *Price Waterhouse* rule will likely result in confusion among the lower courts on a number of related legal issues that no doubt will require the intervention of this Court. In addition to being costly for the court system, the lack of uniformity will make it difficult for businesses with multi-jurisdictional operations to order their behavior. That is all the more reason to avoid a ruling that returns the courts to the *Price Waterhouse* chaos.

B. Adopting Mixed-Motive Liability Will Unnecessarily Complicate Trials

Not only will mixed-motive liability engender conflicts among the lower courts over the governing legal principles under *Price Waterhouse*, it will be difficult for trial courts to *implement* the principles. Justice Kennedy recognized in *Price Waterhouse* that lower courts will "be saddled with the task" of implementing the standards that trigger mixed-motive liability: they will have to "generat[e] a jurisprudence of the meaning of 'substantial factor'" and "will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." 490 U.S. at 291. Indeed, as Justice Kennedy observed, "[l]ower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process." *Id.* Ultimately, as Justice Kennedy added: "The Court's attempt at

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Discrimination Case Outcomes, 42 Ariz. St. L.J. 900, 918-20 (2010).

refinement provides limited practical benefits 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 decision." 490 U.S. at 287; *see also id.* at 290.

Justice Kennedy's dissent proved prophetic. As this Court observed in *Gross*, "it has become evident in the years since [*Price Waterhouse*] that its burden-shifting framework is difficult to apply." 557 U.S. at 179. Specifically, "in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework." *Id.* Indeed, "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." *Id.* The same goes for extending it to Title VII retaliation claims.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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