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 NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
NICHOLAS H. MUELLER
National Education Association
1201 16th Street NW
Washington, DC 20036
(202) 822-7035
aobrien@nea.org

Counsel for Amicus Curiae National Education Association

April 10, 2013

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted, with the parties' consent,[1] by the National Education Association ("NEA"), a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing and eliminating employment discrimination and firmly supports the vigorous enforcement of Title VII of the Civil Rights Act of 1964, including full enforcement of the statute's anti-retaliation provisions. NEA is concerned that the "but-for" causation standard for retaliation claims that Petitioner urges this Court to adopt is an unsound reading of the statute and would weaken Title VII's protections against employment discrimination.

NEA submits this brief in support of Respondent to address the proper interpretation of Title VII and to rebut policy arguments made in the briefs *amicus curiae* filed by the National School Boards Association ("NSBA") and the American Council on Education and six other higher education organizations (collectively, the "ACE *amici*") in support of Petitioner.

SUMMARY OF ARGUMENT

I. Title VII's motivating factor standard of causation applies to Title VII retaliation claims. In its 1991

---

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

amendments to Title VII, Congress added Section 2000e-2(m), providing that a violation "is established when complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor" for an adverse employment action. That provision expressly applies to the entire subchapter of the statute—including the anti-retaliation provision, Section 2000e-3(a)—"except as otherwise provided." And nothing in the retaliation provision provides otherwise. Nothing in the text of Section 2000e-3(a) states that the motivating factor standard of Section 2000e-2(m) does not apply. And there is no sound basis for concluding that Section 2000e-3(a) "provide[s] otherwise" by implication. As this Court has long recognized, retaliation for raising complaints regarding discrimination on the basis of a protected characteristic *is* discrimination on the basis of the protected characteristic. Accordingly, Section 2000e-2(m)'s motivating factor standard encompasses Section 2000e-3(a)'s anti-retaliation provision. If an employer engages in retaliation prohibited by Section 2000e-3(a), then, in Section 2000e-2(m)'s terms, "race, color, religion, sex, or national origin was a motivating factor for" the employer's action.

II. There is no merit to the claims by NSBA and the ACE *amici* that adherence to the motivating factor standard in Title VII retaliation cases will impose particular burdens on educational institutions.

A. Adherence to the motivating factor standard for retaliation claims creates no special problems for educational institutions that provide procedural protections for adverse employment actions. The claim that educational institutions are particularly

vulnerable to meritless retaliation claims is, first of all, based on the groundless assumption that significant numbers of education professionals will abuse internal procedures by making unfounded discrimination complaints before their institutions finalize adverse employment actions against them. But even leaving that aside, NSBA and the ACE *amici* are wrong in assuming that the types of meritless retaliation claims that they assume education professionals will make can withstand summary judgment.

B. Neither academic freedom nor recent school reform measures are endangered by adherence to the mixed motive causation standard for retaliation claims.

1. There is no substance to contention that adhering to the motivating factor standard in Title VII retaliation cases, by leading to the disclosure of the reasons for academic employment decisions, endangers academic institution's First Amendment protected academic freedom. The First Amendment protects academic institutions' right to make decisions about who will teach, what subjects will be taught, and how teaching is conducted, but it does not protect institutions from disclosing the reasons for employment actions in Title VII enforcement proceedings.

2. Nor is there any merit to NSBA's claim that the use of the motivating factor standard of causation in retaliation cases entails special problems for elementary and secondary schools that are subject to school reform measures requiring frequent teacher reassignments. As an initial matter, only those actions that are likely to dissuade employees from complaining or assisting in complaints about discrimination can support retaliation claims. Moreover, there is

no reason to suppose that adherence to a motivating factor standard will expose schools to meritless retaliation claims in those instances where school-reform-driven teacher reassignments can be regarded as materially adverse. There is no basis for assuming that teachers who are reassigned as a result of school reform measures will contrive meritless retaliation claims by interposing unfounded discrimination claims prior to their reassignment—or that such contrived claims would, if made, generate significant litigation costs.

ARGUMENT

This case presents a question of statutory interpretation: whether a plaintiff alleging retaliation under Title VII can establish liability by proving that retaliation was a motivating factor for an adverse employment action, or whether such a plaintiff must prove that a retaliatory motive was the but-for cause of the adverse action.

As Respondent has shown, (1) a careful reading of the pertinent Title VII provisions reveals that the motivating factor standard of causation that Congress adopted in its 1991 amendments to the statute applies to retaliation claims (Respondent's Brief at 15-20), and (2) even if that were not the case, the causation standard for Title VII retaliation cases should be governed by the burden shifting scheme developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Respondent's Brief at 15-20). We elaborate on the first of those points in Part I below. In Part II, we address the policy arguments that NSBA and the ACE *amici* advance in support of Petitioner.

I. Title VII's motivating factor standard applies to Title VII's protection against retaliation.

The principal statutory interpretation question presented in this case is whether the Title VII's motivating factor standard of causation applies to the statute's prohibition against discrimination against employees for opposing practices prohibited by Title VII or participating in Title VII proceedings. We submit that the text and structure of Title VII make plain that that the answer to this question is "yes."

In Title VII, Congress prohibited employers from engaging in discrimination "because of [an employee's] race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). And, to ensure the effectiveness of that basic prohibition, Congress also prohibited employers from engaging in discrimination "because [an employee] has opposed any practice" prohibited by Title VII "or … made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. *Id.* § 2000e-3(a).

In 1991, Congress—reacting to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)— amended Title VII to add § 2000e-2(m), which it titled "[i]mpermissible consideration of race, color, religion, sex, or national origin in employment practices." That provision states:

> Except as otherwise provided in this subchapter, 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. [*Id.*]

On its face, then, Section 2000e-2(m)'s motivating factor standard of causation expressly applies to "this subchapter" "except as otherwise provided." Because the anti-retaliation provision, Section 2000e-3(a), is in the same subchapter, the motivating factor standard applies to it unless the anti-retaliation provision "provide[s] otherwise." A careful reading of the statute shows that it does not.

As an initial matter, there is certainly nothing in the anti-retaliation provision of Section 2000e-3(a) expressly providing that the motivating factor standard of Section 2000e-2(m) does not apply. Given Congress's silence on this matter, the argument against application of the motivating factor standard to the anti-retaliation claims necessarily depends on the notion that Section 2000e-3(a) "provide[s] otherwise" by implication.

There is no sound basis for drawing such an implication. Section 2000e-2(m) provides that liability is established when a plaintiff proves that "race, color, religion, sex, or national origin was a motivating factor" in an adverse employment action. As this Court has long recognized, retaliation for raising complaints regarding discrimination on the basis of a protected characteristic *is* discrimination on the basis of the protected characteristic. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[R]etaliation [for complaining about sex discrimination] is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.");

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 267 (1969) (holding that 42 U.S.C. § 1982's prohibition against racial discrimination in real property transactions encompassed a claim for retaliation based on "advocacy of [an African American person's] cause" relating to the lease of property).

Section 2000e-2(m)'s motivating factor standard thus encompasses Section 2000e-3(a)'s anti-retaliation provision. If an employer engages in retaliation prohibited by Section 2000e-3(a), then, in Section 2000e-2(m)'s terms, "race, color, religion, sex, or national origin was a motivating factor for" the employer's action.

Consequently, there is no textual reason to suppose that the motivating factor standard of Section 2000e-2(m) does not apply to Section 2000e-3(a) retaliation claims and every reason to suppose that it does. It follows that this Court's decision in *Gross v FBL Financial Services, Inc.*, 557 U.S. 167 (2009), has no application here. In *Gross*, this Court construed the word "because" as used in the Age Discrimination in Employment Act ("ADEA") and concluded that, given the absence of any express provision applying a motivating factor standard such as that set forth in Title VII, the ADEA requires a plaintiff to show but-for causation. Because the text of Title VII shows that retaliation claims are governed by the motivating factor standard—providing a statutory gloss on the use of the word "because" in both Section 2000e-2(a) and Section 2000e-3(a)—*Gross*'s interpretation of "because" for the purposes of the ADEA has no work to do here. Indeed, the suggestion that *Gross*'s interpretation of "because" as

used in the ADEA should apply to Title VII's Section 2000e-3(a) anti-retaliation provision, while the motivating factor provision governs Title VII's 2000e-2(a) anti-discrimination provision, runs afoul of the principle that "[i]dentical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007).

II. Adherence to the motivating factor standard for Title VII retaliation claims would impose no undue burden on educational institutions.

A. The motivating factor standard for retaliation claims creates no special problems for employers that provide procedural protections for adverse employment actions.

NSBA and the ACE *amici* urge that the procedural safeguards that educational institutions typically follow in personnel matters, when combined with the motivating cause standard, make such institutions especially vulnerable to meritless retaliation claims and the litigation expenses such claims entail.[2] NSBA and the ACE *amici* posit that the education profes-

[2] NSBA cites procedures that elementary and secondary school employers follow when taking adverse employment actions against certain professional employees pursuant to constitutional requirements, state statutory mandates, contractual obligations, and/or school district policies, NSBA Brief at 5, 11-17, while the ACE *amici* point to internal procedures adopted by colleges and universities relating to faculty employment, including those modeled on the *Recommended Institutional Regulations on Academic Freedom and Tenure* developed by the American Association of University Professors, ACE Brief at 13-14. Although these

sionals who have the benefit of such procedures will abuse them by making unfounded discrimination complaints before their institutions finalize adverse employment actions against them; these claims, so the argument continues, will result in retaliation claims that, under a motivating factor standard, will be difficult to dispose of short of trial.

As we show in what follows, this argument is meritless, as it is based entirely on a chain of unwarranted assumptions.

The abuse-of-internal-procedures argument is based, first of all, on broad and unsupported assumptions about the behavior of education professionals who have the benefit of the procedural safeguards summarized in n.2 above. NSBA posits that due process procedures requiring public school employers to "notify employees of forthcoming adverse employment decisions" before those decisions are finally effectuated encourage education professionals to "engage *strategically* in protected activity in anticipation of … adverse employment decision[s]." NSBA Brief at 5, 8. In the same vein, the ACE *amici* postulate that "disgruntled employees will invoke" college and university grievance procedures "to create the appearance of retaliation." ACE Brief at 14.

---

various procedural systems differ to some degree in their particulars, for present purposes, it suffices to note that they share two basic features. First, they require that an employee be provided notice of any contemplated adverse action and of the grounds upon which such action is to be based. Second, they require that the employee be afforded an opportunity to dispute the grounds for the proposed action and/or the appropriateness of the proposed action in light of the employee's conduct.

Amici offer no empirical support for these claims, but instead simply assume an astonishing amount of bad-faith behavior on the part of education professionals. To agree with the proposition that educational institutions are particularly vulnerable to meritless retaliation claims by reason of the procedural safeguards they have adopted, it is necessary to take it on faith that a significant number of education professionals will abuse those procedural safeguards by making groundless discrimination complaints, *after* it is apparent that adverse action is in the offing, and thereby contrive meritless Title VII retaliation claims. That extraordinary and uncharitable set of assumptions strains credulity on its face, and in any event is asserted without any foundation in fact, providing reason enough to reject the abuse-of-internal-procedures argument at the threshold.

But even if we leave the foregoing objection to one side, the abuse-of-internal-procedures argument fails because it also depends on a demonstrably erroneous assumption as to how the courts will treat the type of meritless claims that NSBA and the ACE *amici* assume significant numbers of education professionals will make. Specifically, NSBA and the ACE *amici* contend that under the motivating factor standard for retaliation claims, courts will routinely allow these hypothesized meritless retaliation claims to go forward to trial on the ground that that the timing of the adverse actions is sufficient to establish causation. *See* NSBA Brief at 8 ("[A] mixed motive standard would make summary judgment in … cases [based on purely strategic protected activities] far more difficult for defendants to obtain, subjecting employers to the expense and time of trials."); *id.* at

12 ("In some cases the timing of such protected activities … in relation to the adverse actions may create a presumption of causation."); ACE Brief at 14 ("In a mixed-motive regime, the invocation of … procedures [for raising complaints of discrimination] prior to an adverse employment action could be proof enough to … compel a trial.").

That proposition is belied by an examination of how courts actually handle claims of the kind postulated by NSBA and the ACE *amici*.

As this Court has made clear, "Employers need not suspend previously planned transfers upon discovering that [an employee has engaged in protected activity], and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001).[3] In keeping with that admonition, the lower courts routinely conclude that a plaintiff has failed to establish that retaliation motivated an adverse action in those situations where the plaintiff complained about discriminatory conduct only *after* the employer initiated a process leading to adverse action. *See*, *e.g.*, *Hervey v. Cnty.*

[3] NSBA over-reads *Clark* in urging that temporal proximity can suffice to establish causation. NSBA Brief at 12. *Clark* establishes that the circumstances in which temporal proximity can establish causation are narrow by emphasizing that the courts "uniformly hold that the temporal proximity must be 'very close'" and pointing to examples to illustrate that the passage of a few months between protected activity and adverse action can render the temporal connection too remote to establish causation. 532 U.S. at 273.

of Koochiching, 527 F.3d 711, 723 (8th Cir. 2008); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001).[4]

As the Second Circuit explained in affirming summary judgment to an employer in just such a case: "Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." 248 F.3d at 95. The court's application of this principle is instructive here:

> [Plaintiff] claims that his placement on probation and his subsequent firing followed his complaints closely enough to support an inference of retaliation. It is, of course, true that temporal proximity can demonstrate a causal nexus. But in this case

---

[4] *See also Wofsy v. Palmshores Ret. Cmty.*, 285 F. App'x 631, 635 (11th Cir. 2008) ("Because Wofsy received warnings months before he made his request for accommodation that his hours and position could change if he did not accept the new driver position, Wofsy failed to establish a causal connection between his demotion and his request."); *Weston–Brown v. Bank of Am. Corp.*, 167 F. App'x 76, 81 (11th Cir. 2006) ("[W]hen an employer makes a tentative decision before protected activity occurs, the fact that an employer proceeds with such a decision is *not* evidence of causation."); *Nicastro v. N.Y. City Dep't of Design & Constr.*, 125 F. App'x 357, 358 (2d Cir. 2005) ("Although 'temporal proximity can demonstrate a causal nexus,' such proximity must be close. And '[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well *before* the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.'" (Citations omitted)).

> the adverse employment actions were both part, and the ultimate product, of "an extensive period of progressive discipline" which began when [the employer] diminished [plaintiff's] job responsibilities a full five months prior to his [protected activity]. [*Id.* (citation omitted).]

Addressing the same issue, the Eighth Circuit likewise held that:

> Generally … more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. The wisdom of this rule is evident in a case such as this, where the employee was accused of insubordination before she notified the employer of her protected activity. Insubordinate employees may not insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action. [*Hervey*, 527 F.3d at 723 (citations and internal quotation marks omitted).]

The appellate decisions cited above—and the raft of similar trial court decisions that we refrain from citing so as not to belabor the point—refute the assumption that meritless retaliation claims pose any particular danger to educational institutions under the motivating cause standard.

Nor is the line of authority discussed above the only bulwark against meritless retaliation claims of the kind postulated by NSBA and the ACE *amici*. At the most basic level, the lower courts hold that a plaintiff raising a Title VII retaliation claim based on opposition to discriminatory practices (*e.g.*, an

internal complaint regarding discrimination) must prove a good-faith, objectively reasonable, belief that the employer in fact engaged in conduct that violates Title VII.[5] "Because the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law." *Jordan*, 458 F.3d at 339.

This threshold requirement for retaliation cases—while not calling for proof that the complained-of conduct actually violates Title VII—does demand evidence to support an objectively reasonable belief that the employer engaged in unlawful discrimination. It certainly is a stringent enough standard to permit courts to reject "meritless" retaliation claims based purely on the "strategic use of protected activity" before trial.

In sum, the courts have ample tools for weeding out the kinds of "meritless" retaliation claims that NSBA and the ACE *amici* raise as a potential concern, without the addition of a but-for causation requirement.

B. Neither academic freedom nor recent school reform measures are endangered by adherence to the motivating factor standard for retaliation claims.

NSBA and the ACE *amici* also argue that adhering to the motivating factor standard in Title VII retaliation

---

[5] *See,e.g.*, *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 227 (1st Cir. 2012); *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012); *Barker v. Mo. Dep't of Corr.*, 513 F.3d 831, 834 (8th Cir. 2008); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988).

cases threatens certain institutional prerogatives and imperatives. Specifically, the ACE *amici* claim that use of that standard for retaliation claims entails judicial "intrusion" into academic employment "in a manner that will endanger academic freedom." ACE Brief at 13, 17. For its part, NSBA contends that use of the motivating factor standard will interfere with state and federal school reforms insofar as their implementation involves teacher reassignments. Neither claim withstands scrutiny.

1. The judicial "intrusion" into institutions' academic freedom that the ACE *amici* assert will be occasioned by adherence to a motivating factor standard consists entirely of this: in cases where a plaintiff demonstrates that retaliation was a motivation for an adverse employment decision, "academic institutions will be forced to *disclose* and submit to judicial scrutiny sensitive academic matters that the First Amendment protects." ACE Brief at 13 (emphasis added). *See also id.* at 17 (contending that adherence to the mixed motive standard "would force [educational] institutions to disclose and explain the constitutionally protected reasons for their actions.").[6]

This contention fundamentally misconceives what the First Amendment does and does not protect against in this setting.

---

[6] Like the arguments addressed in Part I.A above, the "academic freedom" argument also rests on the purported ease with which plaintiffs can "advance *meritless* retaliation claims," ACE Brief at 17, under a motivating cause standard. We have already shown that it is not, in fact, easy to advance such meritless claims.

It is certainly correct that educational institutions have the freedom to set academic priorities—"to make decisions about how and what to teach," *Bd. of Regents of Univ. Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in judgment)—and to make decisions on staffing based upon these independently determined academic priorities, *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234 (1957). Those incidents of academic freedom come into play as "against governmental attempts to influence the content of academic speech through the selection of faculty or by other means." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 (1990).

But academic freedom does *not* protect educational institutions from disclosing those priorities to show that an adverse employment was based on legitimate academic reasons, and not discriminatory or retaliatory reasons. That is the lesson of *University of Pennsylvania*, *supra*, where this Court squarely rejected the claim that higher education institutions have "an *expanded* right of academic freedom to protect confidential peer review materials from disclosure" pursuant to a subpoena issued by the Equal Employment Opportunity Commission in Title VII enforcement proceedings. *Id.* at 199. This Court's reasons for doing so are sound and apply with full force to the "academic freedom" argument here.

First, any "infringement" on academic freedom owing to the disclosure of the reasons for academic personnel decisions "is extremely attenuated." *Id.* Disclosure of the reasons for taking a particular employment action does not, of course, directly

impinge on an institution's decisions as to who will teach, what subjects will be taught, or how teaching will be conducted. *Id.* at 198. The most that can possibly be said is that the possibility of disclosure "undermines the confidentiality" of the decision-making process in such a way as to inhibit candid discussion. *Id.* at 199. As this Court aptly concluded, "To verbalize the claim is to recognize how distant the burden is from the asserted right." *Id.* at 200.

Second, any putative "injury to academic freedom" arising from such disclosure "is also speculative." *Id.* As this Court found in relation to the tenure review process, "confidentiality is not the norm" in tenure decisions, and "some disclosure of peer evaluations would take place" regardless of Title VII litigation. *Id.* What is true of tenure decisions is, if anything, even more true of discipline and discharge decisions. Indeed, the very procedural safeguards that the ACE *amici* highlight in their brief require that academic institutions, before discharging or disciplining faculty members, provide (1) notice of "specific charges," (2) a hearing that can be open to the public, and (3) the production of documents and other evidence by the institution.[7] To the extent that an academic institution can be said to suffer any injury from disclosing its reasons for an adverse employment action, it is fanciful to suppose that subsequent re-disclosure of those reasons in a Title VII lawsuit will augment that injury in any meaningful way.

---

[7] *See* AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* at 5-6, available at http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf.

Finally, there is no substance to the contention that adherence to the motivating factor standard in retaliation cases places "[j]udges and juries in a position to second-guess academic decisions concerning tenure, administrative appointments, or research funding." ACE Brief at 13. To state the obvious, in a Title VII retaliation case, the issue is not whether an institution's academic reasons for taking an adverse action were themselves sound as a matter of academic policy; it is whether an impermissible retaliatory motive was a factor in the decision to take the action. Nothing in that inquiry goes to the soundness or unsoundness of "*legitimate* academic decisionmaking." *Univ. of Pa.*, 493 U.S. at 199. *See also id.* at 1998 ("The Commission is not providing criteria that petitioner must use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those-including race, sex, and national origin-that are proscribed under Title VII.").

In sum, the First Amendment quite simply does not protect academic institutions against disclosure of their reasons for taking adverse employment actions in Title VII proceedings. Accordingly, there is no merit to the contention that adherence to the motivating factor standard threatens the academic freedom of educational institutions.

2. There is no substance to NSBA's claim that the use of the motivating factor standard of causation in retaliation cases entails "special problems" for elementary and secondary schools, once again in the form of the potential for "meritless" retaliation claims, in light of recent school reform measures that lead to frequent teacher reassignments.

As an initial matter, it must be stressed that not every reassignment is an adverse action that can support a Title VII retaliation claim. Rather, only materially adverse actions—those that "are likely to dissuade employees from complaining or assisting in complaints about discrimination"—can support retaliation claims. *Burlington Northern & Santa Fe Railway Co. v White*, 548 U.S. 53, 70 (2006). Moreover, there is no reason to suppose that adherence to the motivating factor standard will expose schools to meritless retaliation claims in those instances where school-reform-driven teacher reassignments can be regarded as materially adverse. For the reasons set forth in Part II.A above, there is no basis for assuming that teachers who are reassigned as a result of school reform measures will contrive meritless retaliation claims by interposing unfounded discrimination claims prior to their reassignment—or that such contrived claims would, if made, generate significant litigation costs.

CONCLUSION

For the forgoing reasons, *amicus* NEA requests that this Court conclude that Title VII's motivating factor standard applies to Title VII retaliation claims.

Respectfully submitted,

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
NICHOLAS H. MUELLER
National Education Association
1201 16th Street NW, Washington, DC 20036
(202) 822-7035
aobrien@nea.org
Counsel for Amicus Curiae National Education Association
April 10, 2013