No. 12-484

IN THE
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,
Petitioner,
v.

NAIEL NASSAR, M.D.,
Respondent.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether an employee alleging retaliation under Title VII must prove that retaliation was the but-for cause of the disputed employment decision, or whether the employee need only prove that the unlawful animus was a motivating factor in the disputed employment decision.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF states that, on February 26, 2013, counsel for the petitioner filed a general written consent with this Court to the filing of amicus briefs, in support of either or neither party. Moreover, on March 6, 2013, counsel for respondent provided NELF's counsel with written consent, by email, to the filing of NELF's brief, a copy of which is filed herewith.

NELF is committed to a balanced interpretation of federal statutes regulating the conduct of businesses as employers. In this connection, NELF recently filed an amicus brief on behalf of the employer in *Vance v. Ball State Univ.*, *cert. granted* 133 S. Ct. 23 (June 25, 2012) (No. 11-556), arguing for a reasonable interpretation of Title VII with respect to an employer's vicarious liability for a supervisor's creation of a hostile work environment.[2] Similarly, in this case, where Congress has not provided otherwise, NELF opposes an unduly expansive interpretation of causation under Title VII that would shift the burden of persuasion onto the employer to *disprove* its liability, rather than requiring the employee to carry the burden of persuasion on his or her claim of unlawful retaliation.

For these and other reasons discussed below, NELF believes that its brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

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[2] In addition *to Vance v. Ball State Univ.*, NELF has recently filed many other amicus briefs on behalf of business interests, arguing for a balanced interpretation of federal constitutional or statutory standards that regulate a business's conduct. *See, e.g., Am. Express. Co. v. Italian Colors Restaurant, cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12–133); *Spirit Airlines, Inc. v. Dep't of Transp.*, *petition for cert. filed* (Nov. 21, 2012) (No. 12-656); *DaimlerChrysler AG v. Bauman*, *petition for cert. filed* (Feb. 6, 2012) (No. 11-965); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); AT*&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

SUMMARY OF ARGUMENT

The issue here is *who*, as between the employee and employer, should bear the burden of proof with respect to but-for causation in a Title VII retaliation claim. This Court has already resolved that issue in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), which establishes that an employee must prove that the employer's unlawful animus is the but-for cause of an adverse employment action, unless Congress has expressly provided otherwise in the applicable statute. Title VII's retaliation section contains no such statutory language that modifies in any way the plaintiff's foundational burden of proving but-for causation.

The Fifth Circuit in this case has erroneously limited *Gross* to claims brought under the ADEA and has mistakenly applied *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), as the standard of causation and liability for Title VII retaliation claims. Contrary to the Fifth Circuit's view, *Gross* does *not* rest primarily on the distinction between the ADEA and Title VII. Instead, *Gross* is broadly based on this Court's interpretation of the Civil Rights Act of 1991, in which Congress apparently abrogated *Price Waterhouse* in its entirety as to all federal employment discrimination statutes, except for Title VII *discrimination* claims.

Gross is based on the salient fact that Congress responded to *Price Waterhouse* with *two* statutory provisions, the one authorizing "motivating factor" claims as a basis of liability for Title VII discrimination claims, and the other limiting the employer's *Price Waterhouse* "same decision"

affirmative defense to the remedies stage, rather than the liability stage, for such discrimination claims. If Congress had agreed with *Price Waterhouse*, then it would not have provided a "motivating factor" basis of liability and would have simply limited the employer's affirmative defense to such liability. Therefore, Congress apparently concluded in 1991 that *Price Waterhouse*'s "motivating factor" analysis had no textual basis in Title VII's "because of" causation language. For this reason, *Price Waterhouse* does not survive the 1991 Act and cannot apply to any other federal employment discrimination statute using the same, unadorned "because" language that was misinterpreted in *Price Waterhouse*, such as the ADEA section at issue in *Gross*, or Title VII's retaliation section at issue here.

Congress's abrogation of *Price Waterhouse*'s "motivating factor" analysis as the *default* standard of causation and liability in the federal employment discrimination statutes is consistent with the Court's well-established precedent that the ultimate burden of persuasion remains at all times with the employee. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The familiar *McDonnell Douglas-Burdine* ordering of proof is sufficiently broad and flexible to accommodate all claims of discrimination or retaliation, regardless of how one may choose to characterize the employee's evidence.

In sum, both Congress in the 1991 Act and this Court have recognized that there is generally no need or justification for a separate category of disparate treatment claims that departs from

McDonnell Douglas-Burdine and the foundational legal principle that a plaintiff must prove but-for causation, by shifting the burden of persuasion onto the employer to disprove its liability. Moreover, *Price Waterhouse* invites a legion of practical (and arguably unnecessary) difficulties, such as the thorny issue of how and when to classify a case as a so-called "mixed-motive" case falling under *Price Waterhouse*, as opposed to a so-called "pretext" case falling under *McDonnell Douglas-Burdine*.

ARGUMENT

I. ABSENT EXPRESS STATUTORY AUTHORITY TO THE CONTRARY, AN EMPLOYEE MUST ALWAYS PROVE THAT AN EMPLOYER'S UNLAWFUL ANIMUS WAS THE BUT-FOR CAUSE OF AN ADVERSE EMPLOYMENT ACTION.

At issue in this case is whether an employee alleging retaliation for having raised a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), must prove that his protected activity was the but-for cause of the adverse employment action, or whether the employee need only prove that retaliation was a "motivating factor" in the decision.[3] In essence, the issue is *who*,

[3] Section 2000e-3(a) of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *becaus*e he has made a charge, testified, assisted, or participated

as between the employee and employer, should bear the burden of proof with respect to but-for causation in a Title VII retaliation claim. Must the employee prove but-for causation to prevail, or must the employer disprove but-for causation to avoid liability?

In NELF's view, this Court has already answered this question. In *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), the Court held that an employee must prove that the employer's unlawful animus is the but-for cause of the adverse employment action, unless Congress has expressly provided otherwise in the applicable statute. *See Gross*, 557 U.S. at 174-77 & 178 n.5. As with the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a), at issue in *Gross*, Title VII's retaliation section contains no such statutory language that modifies in any way the plaintiff's foundational burden of proving but-for causation.[4] Therefore, "[a]bsent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Gross*, 557 U.S. at 177 (citation and internal quotation marks omitted).

Despite *Gross*'s clear holding, the Fifth Circuit in this case has nevertheless affirmed the trial

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> in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

[4] *See* n.3, above.

court's jury instruction, derived from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), which shifted the burden of persuasion onto the employer to disprove but-for causation. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012) (citing *Smith v. Xerox Corp.,* 602 F.3d 320, 330 (5th Cir. 2010)). In *Price Waterhouse*, a plurality of this Court held that, once an employee proves that an unlawful animus was a motivating factor in the challenged employment action, the burden of persuasion shifts to the employer to prove that it would have made the same decision regardless of the unlawful motive. *Id.*, 490 U.S. at 244-45. The Fifth Circuit has concluded that *Gross* is limited to claims brought under the ADEA and, therefore, that *Price Waterhouse* defines the standard of causation and liability for Title VII retaliation claims. *See Smith v. Xerox Corp.*, 602 F.3d at 329-30.

The Fifth Circuit has misinterpreted *Gross*. That case does *not* rest primarily on the distinction between the ADEA and Title VII for the purpose of determining the applicable standard of causation and liability. Instead, *Gross* is broadly based on this Court's interpretation of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, in which Congress authorized *Price Waterhouse* "motivating factor" claims solely with respect to Title VII *discrimination* claims[5] and apparently abrogated

[5] *See* 42 U.S.C. § 2000e-2(m) ("Impermissible consideration of race, color, religion, sex, or national origin in employment practices"), which provides:

Price Waterhouse in its entirety for all other federal employment discrimination statutes, including for the Title VII *retaliation* claim at issue here. *See Gross*, 557 U.S. at 174-75 & 178 n.5.

The *Gross* Court based its interpretation of the 1991 Act on the salient fact that Congress responded to *Price Waterhouse* with *two* statutory provisions, the one authorizing "motivating factor" claims as a basis of liability for Title VII discrimination claims,[6] and the other limiting the employer's *Price Waterhouse* "same decision" affirmative defense to the remedies stage, rather than the liability stage, for such discrimination claims.[7] *See Gross*, 557 U.S.

> 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.

(emphasis added).

[6] *See* n.5, above.

[7] 42 U.S.C. § 2000e-5(g)(2)(B) provides:

> (B) On a claim in which 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--
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)),

at 178 n.5. The *Gross* Court reasoned that, if Congress had agreed with *Price Waterhouse* that "such 'motivating factor' claims were already part of Title VII," *id.*, then Congress would not have deemed it necessary to provide a "motivating factor" basis of liability. Instead, if Congress had in fact agreed with *Price Waterhouse*'s "motivating factor" interpretation of Title VII's "because of" causation language, then "the addition of § 2000e-5(g)(2)(B) alone would have been sufficient" to achieve Congress's objective of restricting the employer's *Price Waterhouse* defense to the remedies stage of a case. *Gross*, 557 U.S. at 178 n.5.

The *Gross* Court therefore concluded that, according to Congress in the 1991 Act, *Price Waterhouse*'s "motivating factor" claims had no textual basis in the "because of" causation language occurring in Title VII's discrimination section. *See Gross*, 557 U.S. at 178 n.5. That is, *Price Waterhouse* had misinterpreted Congress's intent. For this reason, *Price Waterhouse* cannot survive the 1991 Act and apply to any other federal employment discrimination statute using the same, unadorned "because" language that was misinterpreted in *Price*

> and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) *shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment*, described in subparagraph (A).
>
> (emphasis added).

Waterhouse, such as the ADEA section at issue in *Gross*, or Title VII's retaliation section at issue here.

Gross establishes, then, that Congress abrogated *Price Waterhouse*'s "motivating factor" interpretation of causation, except for Title VII *discrimination* claims, codified at 42 U.S.C. § 2000e-2(m). After all, Congress chose in 1991 to add *Price Waterhouse* "motivating factor" claims to Title VII's discrimination section, while at the same time choosing not to add any such provision to Title VII's retaliation section. Under *Gross*, when Congress includes "motivating factor" claims in one statutory section but omits the same claims in another section of the same statute, the omission can only be deliberate. As the Court explained, the omnibus 1991 Act "contemporaneously amended [the related employment discrimination statutes] in several ways . . . . When Congress amends one statutory provision but not another, it is presumed to have acted *intentionally*." *Gross*, 557 U.S. at 174 (emphasis added).

Gross therefore instructs that the "because" causation language used in both the ADEA and Title VII's retaliation section means that the employee must prove but-for causation. *See Gross*, 557 U.S. at 176-77. Under that standard of causation, the burden of persuasion remains at all times with the employee to prove that the disputed employment action would not have occurred absent the retaliatory animus. *See id.*, 557 U.S. at 177-78. Accordingly, the Fifth Circuit erred in approving a jury instruction that failed to conform to the *Gross* standard of proof and that instead followed the *Price*

Waterhouse "motivating factor" standard--the very standard that Congress apparently rejected in the 1991 Act for Title VII retaliation claims. A vacatur and remand is therefore in order to enforce *Gross*'s standard of but-for causation.

Finally, Congress's abrogation of *Price Waterhouse*'s "motivating factor" analysis as the *default* standard of causation and liability in the federal employment discrimination statutes is consistent with the Court's well-established precedent 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*." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added). In this connection, the familiar ordering of proof set forth in *Burdine* and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), under which the plaintiff always retains the burden of persuasion on the ultimate issue of discrimination, is a sufficiently broad and flexible model to accommodate all claims of discrimination or retaliation.[8] This is so regardless of the nature of the employee's evidence--whether it is so-called "circumstantial" or "direct" evidence of an unlawful animus, or a combination of

[8] Under the *McDonnell Douglas-Burdine* burden-shifting scheme, the employee must first prove a *prima facie* case of discrimination, a non-onerous burden that creates a presumption of liability and requires the employer to *articulate* (but not prove) a legitimate, nondiscriminatory reason or reasons for the disputed decision. At that point, the presumption of discrimination falls away, and the employee must prove discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

both categories. It should be noted that *Price Waterhouse's* rationale was, according to one prominent concurring opinion, based on this evidentiary distinction. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show *by direct evidence* that an illegitimate criterion was a substantial factor in the decision.") (emphasis added).

However, as the Court observed in *Gross*, the burden of persuasion on the ultimate issue of discrimination should always remain with the employee, *regardless* of how one may choose to characterize the employee's evidence:

> [T]he burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives [*Price Waterhouse*] cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be *direct or circumstantial*), that age was the "but-for" cause of the challenged employer decision.

Gross, 557 U.S. at 177-78 (emphasis added). Nor is *Gross* the first time that this Court has acknowledged the broad range of evidence accommodated by the *McDonnell Douglas-Burdine* model. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case [of Title VII

discrimination] by *direct or circumstantial evidence*. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.") (emphasis added); *Burdine*, 450 U.S. at 256 ("[The employee] may succeed in [proving intentional discrimination] *either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered explanation is unworthy of credence.") (emphasis added); *Price Waterhouse*, 490 U.S. at 287-88 (Kennedy, J., dissenting) (discussing *Aikens* and *Burdin*e).

In short, both Congress in the 1991 Act and this Court have recognized that there is generally no need or justification for a separate category of disparate treatment claims that departs from *McDonnell Douglas-Burdine* and the foundational legal principle that a plaintiff must prove but-for causation, by shifting the burden of persuasion onto the employer to *disprove* its liability. *See Gross*, 557 U.S. at 178-79 (discussing shortcomings of *Price Waterhouse*). *See also Gross*, 557 U.S. at 176-77 (discussing bedrock principle of but-for causation, and noting "ordinary default rule that plaintiffs bear the risk of failing to prove their claims.") (citation and internal quotation marks omitted).

Moreover, application of *Price Waterhouse*'s burden-shifting scheme would invite a legion of practical (and arguably unnecessary) difficulties, not the least of which is the thorny issue of how and when to classify a case as a so-called "mixed-motive" case falling under *Price Waterhouse*, as opposed to a so-called "pretext" case falling under *McDonnell*

Douglas-Burdine, let alone instructing a jury on such elusive matters. As the Court observed in *Gross*, "it has become evident in the years since that case [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply. . . . [C]ourts have found it particularly difficult to craft an instruction to explain its burden-shifting framework [to a jury]. . . ." *Gross*, 557 U.S. at 179.

In sum, both Congress and the Court in *Gross* have apparently recognized the doctrinal and practical confusion created by the *Price Waterhouse* scheme. Congress has therefore chosen to restrict the application of *Price Waterhouse* solely to Title VII discrimination claims. Unless and until Congress provides otherwise, the employee raising any other claim of discrimination or retaliation must always retain the burden of proving but-for causation.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court vacate the judgment below and remand this case for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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