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

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QUESTION PRESENTED

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

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JURISDICTION

The court of appeals entered its judgment on March 8, 2012. Pet. App. 1. Rehearing *en banc* was denied on July 19, 2012. *Id.* at 59–60. The petition for writ of *certiorari* was granted on January 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964 ("1964 CRA"), Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e *et seq.*), as amended by the Civil Rights Act of 1991 ("1991 CRA"), Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. §§ 2000e-2(a), 2000e-2(m), 2000e-3(a), 2000e-5(g)), are reproduced in the appendix to this brief at App. 2–6. Relevant provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a), and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a) (2007), as amended by the ADA of 2008, Pub. L. 110-325 § 5, 122 Stat. 3553, are reproduced in the appendix to this brief at App. 1, 7–8.

INTRODUCTION

If the question presented sounds familiar, the reason is that this Court already decided it. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177 (2009), this Court held that the Age Discrimination

in Employment Act requires a plaintiff to prove that age was the but-for cause of an employment action. This case concerns a materially identical statute, Title VII's retaliation provision. The parallelism between the two statutes is no accident: Congress deliberately copied the relevant Title VII language when it enacted the ADEA. Moreover, Congress later amended Title VII to authorize mixed-motive claims for some types of discrimination *but not retaliation*. Thus, Title VII's retaliation provision continues to require a plaintiff to prove but-for causation for precisely the same reasons the ADEA does.

Any other conclusion would run afoul of the most fundamental canons of construction by treating identical provisions differently absent some statutory language requiring differential treatment. Such an unprincipled approach to statutory construction would unleash chaos in the interpretation of the federal employment statutes (and perhaps all federal statutes). Congress, courts, and litigants could no longer presume that the same words, phrases, or provisions have the same meanings across related statutes.

In addition, relieving a plaintiff of the need to prove but-for causation would reopen a can of worms concerning the implementation of a mixed-motive regime that this Court sought to close in *Gross*. It would also invite abuse and unfairness, as this case demonstrates. Petitioner University of Texas Southwestern Medical Center (the "Medical School") made and announced the challenged decision well *before* respondent Naiel Nassar engaged in any protected activity, and thus well *before* any impetus

for actionable retaliation arose. Therefore, there is no question the Medical School would have taken the same action regardless of any additional, retaliatory motive. It actually did. But under a mixed-motive standard, it was held liable.

STATEMENT OF THE CASE

A. The Statutory Backdrop

Under Title VII, it is an "unlawful employment practice" to discriminate against an employee "because of [the] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It is also an "unlawful employment practice" to discriminate "because" an individual opposed a practice made unlawful under Title VII or participated in an investigation into allegedly unlawful conduct. *Id.* § 2000e-3(a). The latter type of discrimination is generally referred to as "retaliation." *Crawford v. Metro. Gov't*, 555 U.S. 271, 273 (2009).

This Court long understood § 2000e-2(a), the workhorse of Title VII's anti-discrimination provisions, to require an employee to prove that an unlawful consideration was outcome determinative. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). When an employee alleges that an employer's proffered reason for an employment action is pretextual, the burden of *production* may shift to the employer to articulate a legitimate, non-discriminatory reason for the action. *Burdine*, 450 U.S. at 253–56. If the employer does so,

the burden of production shifts back to the employee to disprove the proffered reason. *Id.* at 253. "The ultimate burden of *persuading* the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of this Court adopted another burden-shifting regime under 42 U.S.C. § 2000e-2(a)(1). The plurality concluded that, if an employee shows that an impermissible consideration played a certain role in the employer's decision, the burden of persuasion shifts to the employer to disprove but-for causation—*i.e.*, to "prov[e] that it would have made the same decision even if it had not allowed [the impermissible consideration] to play such a role." *Price Waterhouse*, 490 U.S. at 244–45; *id.* at 261 (White, J., concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment).

The Court divided over the circumstances in which the burden of proof would shift. Four Justices determined that the burden should shift when the plaintiff proved that discrimination was merely a "motivating" factor for the employment action, *id.* at 258 (plurality opinion); Justice White opined that the burden should shift when the plaintiff proved that discrimination was a "substantial factor," *id.* at 259–60; and Justice O'Connor concluded that the burden should shift only when the employee presented "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision," *id.* at 276.

In response, Congress partially codified and partially abrogated *Price Waterhouse*. The 1991 Civil

Rights Act amended Title VII's discrimination provision, 42 U.S.C. § 2000e-2, by stating that it is an unlawful employment practice to take an employment action motivated in part by the employee's membership in a protected class:

> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices**
>
> 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.

1991 CRA, § 107(a), 105 Stat. at 1075 (codified at 42 U.S.C. § 2000e-2(m)). Congress also established a limited affirmative defense to claims brought under that new provision:

> 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)), 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).

Id. § 107(b), 105 Stat. at 1075–76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). The 1991 CRA left Title VII's separate retaliation provision unchanged.

B. The Underlying Events

Nassar was an Assistant Professor of Internal Medicine and Infectious Diseases at the Medical School from November of 2001 until his resignation in July of 2006, effective September 1, 2006. Pet. App. 2, 5; JA 222.

1. *Nassar's Employment.* As a faculty member, Nassar worked full-time as the Associate Medical Director of the Amelia Court HIV-AIDS Clinic at Parkland Hospital, with which the Medical School was affiliated. Pet. App. 2; JA 168, 200. The clinic's Medical Director, Dr. Philip Keiser, supervised Nassar. Pet. App. 2; JA 179. Keiser's immediate supervisor was Dr. Beth Levine, the Chief of the Infectious Diseases Division of the Medical School. Pet. App. 2–3; JA 178. Levine oversaw the AIDS Clinic, but was seldom on site because she focused on research, not patient care. Pet. App. 3; JA 199–200.

Levine consistently gave Nassar the highest evaluation ratings, praising his clinician skills and work at the AIDS Clinic. JA 222–25; JA 397–402. In the fall of 2005, Levine suggested to Nassar that he seek a promotion. Pet. App. 3; JA 181. Levine supported Nassar during his promotion process by submitting a recommendation letter and endorsing a

recommendation submitted by Dr. Gregory Fitz, the Medical School's Chair of Internal Medicine. JA 184–88; JA 332–37; JA 338–43.

Nassar felt singled out by Levine. JA 200–01. He objected to some comments she had allegedly made about Middle Easterners, Pet. App. 3; was dissatisfied with Levine's approach to drafting his recommendation letter, JA 212–13; believed Levine attempted to delay his promotion, JA 183–84; JA 202–03; JA 211–13; and felt that Levine overly scrutinized his billing practices and productivity, JA 206.

On March 1, 2006, the Medical School decided to promote Nassar to Associate Professor, effective September 1, 2006. Pet. App. 4; JA 226; JA 344–45.

2. *Nassar's Request.* In March 2006, Nassar sought to become an employee of the Hospital instead of the Medical School, in part so that Levine would no longer be one of his supervisors. JA 123–24; JA 213–14. Nassar wanted to continue performing "exactly the same job" in the AIDS Clinic, but to give up his Medical School faculty position and work directly for the Hospital instead. JA 213–14.

Nassar first proposed his plan to Dr. Samuel Ross, the Hospital's Executive Vice President and Chief Medical Officer. JA 292–93. Ross discussed the plan with Nassar, Fitz, Keiser, and Sylvia Moreno, the Hospital's Director of HIV Services. JA 293; JA 316; JA 396. Ross knew that the Medical School's faculty members provide all physician care at the Hospital, in keeping with its status as a teaching hospital. *See* JA 294–95; JA 352. The

Affiliation Agreement between the two institutions, as well as the Hospital's rules, regulations, and bylaws, require that physicians working within the Hospital's geography, including the AIDS Clinic, be faculty members of the Medical School. JA 143–45; JA 294; JA 352.

Beginning in late March 2006, Fitz, whose approval was required, declined to approve Nassar's request to work full-time at the AIDS clinic without being a Medical School faculty member. JA 157; JA 219–20; JA 346–47; JA 396. Fitz explained at that time that the Affiliation Agreement, which had been in effect for over 27 years, precluded Nassar's proposed arrangement. JA 123–24; JA 346–47; JA 348. Ross communicated Fitz's decision to Nassar by e-mail on April 17, 2006. JA 316; JA 396.

Fitz met with Nassar on April 27, 2006, and recounted that meeting in an e-mail he sent later that day. JA 164–66; JA 346–47. Fitz referred to his meeting with Ross "a month or so ago" and reiterated that, "[a]s per [that] discussion, it would be against our operating agreement with [the Hospital] to have them employ faculty directly." JA 164–66; JA 346–47. Fitz stated that Nassar was "OK with this." JA 346–47. After this meeting, Nassar did not again discuss his proposed plan with Fitz, and Fitz believed that the matter had been settled. JA 164–66.

Unknown to Fitz, Nassar continued to communicate with Moreno about working directly for the Hospital. JA 55–56. In an e-mail to Nassar on April 27, 2006, Moreno stated that "[n]othing appears to have changed from the previous communication," but she told Nassar that if he were to resign from the

Medical School, there would be "no reason for [the Hospital] not to employ" him. JA 346. Without Fitz's knowledge, Moreno worked from May through July 2006 to process paperwork for the Hospital to hire Nassar. JA 56; JA 83; *see also* JA 173–78; JA 175–76.

By July 3, 2006, Moreno's efforts resulted in the preparation of an unsigned and unsent offer letter from the Hospital setting July 10, 2006 as Nassar's tentative employment start date. *See* JA 67–69; JA 314–15; *see also* JA 385. Moreno believed that the Hospital would eventually hire Nassar. JA 60; JA 91–92.

3. *Nassar's Resignation*. On July 3, 2006, believing he had secured employment by the Hospital, Nassar wrote a letter accusing Levine of discrimination and resigning from the Medical School effective September 1, 2006. JA 216; JA 311–13. In his letter, Nassar thanked Fitz "for all [his] support," described all interactions with Fitz as "pleasant and positive," and called Fitz "a very honorable person" who "always kept [his] promises to" Nassar. JA 313.

Ross did not sign the Hospital offer letter by Nassar's tentative start date of July 10, 2006, because the authorizations required for Nassar to secure full-time employment at the AIDS Clinic had not been obtained, including Fitz's approval. JA 300–03; JA 385. On July 10, Nassar wrote to Moreno that he had received "no offer letters and heared [sic] nothing from Sam Ross," and was therefore "going West." JA 385. Ross e-mailed Nassar the next day to ask him not to commit to

another job while Ross sought an "acceptable solution for all parties." JA 387.

Before the Hospital took further action, Nassar accepted another position on July 29, 2006. JA 286. He continued to work at the Medical School until he began his new job in California on September 1, 2006. JA 395.

4. *Fitz's Reaction.* Fitz first learned that Nassar was accusing Levine of illegal discrimination when he received Nassar's resignation letter on July 7, 2006. JA 105; JA 189–90; JA 191; JA 384. Fitz was "very saddened" and "shocked" because he "had not been aware of this sentiment" by Nassar. JA 129. The letter "completely surprised" and "disappointed" Fitz, who was uncertain of the basis for the letter. JA 191.

Fitz and Ross later met to discuss the AIDS Clinic. JA 298–300. During that meeting, Fitz told Ross in a matter-of-fact manner that Nassar had alleged discrimination and that the Medical School was following up on Nassar's claim. JA 298–300.

Keiser also met with Fitz after Nassar's resignation. JA 39. At trial, Keiser testified that Fitz told him that he had put a stop to Nassar's effort to be employed by the Hospital. JA 40–43. Keiser construed Fitz's remark to mean that Fitz did so in retaliation. JA 43–44.

C. The District Court Proceedings

In August 2008, Nassar brought this action in the Northern District of Texas, claiming that the Medical School had constructively discharged and

retaliated against him in violation of Title VII. Pet. App. 6. The Medical School asked the district court to instruct the jury that it could find the Medical School liable for retaliation only if that was the "but-for" cause of Fitz's actions, *i.e.*, only if Fitz would have approved Nassar's proposed employment at the Hospital in the absence of retaliatory animus. Pet. App. 112–15, 119. Pursuant to the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the district court rejected the Medical School's request. Pet. App. 47, 119.

During the liability phase of a bifurcated trial, the district court instructed the jury that Nassar had to prove only that retaliation was a motivating factor for Fitz's actions, *i.e.*, that Fitz "acted at least in part to retaliate." Pet. App. 47, 119. The jury found the Medical School liable for constructive discharge and retaliation. Pet. App. 2.

At the conclusion of the subsequent damages phase of the trial, *see* Pet. App. 6–7, the district court instructed the jury that the Medical School "is not liable for damages for actions where it shows by a preponderance of the evidence that it would have taken the same action even if [it] had not considered inappropriate factors." Pet. App. 42; *see also* Pet. App. 43. The jury concluded that the Medical School had not carried its burden on that affirmative defense and awarded Nassar $3,625,667.66. Pet. App. 44; *id.* at 6–7. The district court reduced the damages award to $738,167.66 and awarded $489,927.50 in attorney's fees. Pet. App. 35, 57; JA 287–88.

D. The Appellate Proceedings

The court of appeals reversed the constructive-discharge verdict because it was unsupported by the evidence, but upheld the retaliation verdict. Pet. App. 8–12. After disallowing some of Nassar's claimed damages, the court remanded for a new trial on damages for retaliation. Pet. App. 14–15.

The Medical School had argued that Fitz's decision not to approve Nassar's proposed employment arrangement was "a routine application" of the Affiliation Agreement. Pet. App. 11. The court of appeals determined, however, that the jury could have concluded under the mixed-motive instruction that Fitz acted "to punish Nassar for his complaints about Levine." Pet. App. 11.

The Medical School had also argued that "the district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation," but acknowledged that the panel was bound by the contrary decision in *Smith*. Pet. App. 63 (quoting Pet. C.A. Br. 42). The panel rejected that contention by stating in a footnote that it was bound by *Smith*. Pet. App. 12 n.16.

By a 9–6 vote, the court of appeals denied rehearing *en banc* on the mixed-motive jury instruction. Pet. App. 60. Judge Smith's dissent from denial of rehearing *en banc* emphasized that *Smith* was "an erroneous interpretation of the statute and controlling caselaw," including this Court's decision in *Gross*. Pet. App. 67.

SUMMARY OF ARGUMENT

1. Title VII prohibits adverse employment actions taken "because" of retaliation. 42 U.S.C. § 2000e-3(a). The statutory text bears but one reading: A plaintiff must prove that retaliation was the "reason" for a challenged employment action, *i.e.*, was its "but-for" cause. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). That plain meaning comports with the settled, common-law default rule for tort suits.

The 1991 amendments to Title VII removed any doubt by specifically relieving plaintiffs of the burden of proving but-for causation for some types of discrimination, *but not retaliation*. Congress's selective tailoring of the 1991 amendments weighs heavily against construing Title VII's more general provisions to dispense with such a fundamental requirement.

In *Gross*, this Court already held that a materially identical employment statute requires plaintiffs to prove but-for causation. That decision controls.

2. Any other conclusion would restore chaos from order. Before *Gross*, the courts' efforts to apply mixed-motive burden shifting were plagued by uncertainties and practical difficulties. The need for a clearer, simpler system was widely recognized at the time, and *Gross* provided it. *Gross* likewise gave Congress clear drafting rules for expressing its intent if it wishes to amend the statutes. Nassar is now asking for a jurisprudential step backward.

3. A mixed-motive test for retaliation claims would also engender abuse and unfairness in a number of respects. This case illustrates those concerns. The undisputed, documentary evidence presented by both sides shows that the sole decisionmaker relied on a non-discriminatory policy to reach his decision, and announced that decision months *before* Nassar engaged in any protected activity that could support a retaliation claim. Yet Nassar prevailed under a mixed-motive standard.

ARGUMENT

I. A TITLE VII RETALIATION PLAINTIFF MUST PROVE THAT PROTECTED ACTIVITY WAS THE "BUT-FOR" CAUSE OF AN ADVERSE EMPLOYMENT DECISION.

A. Title VII's Text is Clear.

1. This case should begin and end with the statutory text. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009). Title VII prohibits retaliation "because" the employee had engaged in protected activity. 42 U.S.C. § 2000e-3(a). "[B]ecause" means "by reason of: on account of." *Gross*, 557 U.S. at 176 (quoting 1 Webster's Third New International Dictionary 194 (1966)); *accord* 2 Oxford English Dictionary 41 (2d ed. 1989) ("for the reason that"); Random House Dictionary of the English Language 132 (1966) ("by reason; on account"). Thus, retaliation must have been "the 'reason' that the employer decided to act." *Gross*, 557 U.S. at 176; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Under that ordinary meaning, "the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome," *Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting), *i.e.*, was its "'but-for' cause." *Gross*, 557 U.S. at 176–77; *accord Price Waterhouse*, at 262–63 (O'Connor, J., concurring in judgment); *see also Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 652–53 (2008); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007). If an employer took the same action it would have taken regardless of any retaliatory or discriminatory animus, it did exactly what the civil rights acts seek to achieve—equal treatment of all employees, regardless of whether they engaged in protected activity or belonged to a particular class. *See Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting) (citing, *e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983)); Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark and Case, 110 Cong. Rec. 7212, 7213 (Apr. 8, 1964).

2. The common-law backdrop confirms the statute's plain meaning. Unless it clearly indicates otherwise, Congress intends its legislation to incorporate traditional tort principles. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Thus, "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Under the common law, "[a]n act or omission is not regarded as a cause of an event if the particular event would have

occurred without it." *Gross*, 557 U.S. at 176–77 (quoting W. Keeton, et al., Prosser and Keeton on Law of Torts 265 (5th ed. 1984)).

The common law further confirms that the plaintiff bears the burden of proof. "Absent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005). Thus, "unless a statute provides otherwise, demonstrating but-for causation is [a] part of the plaintiff's burden in all suits under federal law." *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2008) (Easterbrook, J.).

Title VII is no exception, as this Court has "repeated[ly] admoni[shed] that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quoting *Aikens*, 460 U.S. at 716); *see also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). When Congress wishes to shift that burden for a Title VII provision, it either says so expressly, *see* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), or makes the provision an affirmative defense to liability, as opposed to an element of the plaintiff's case, *see id.* § 2000e-2(e)(1); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91–92 (2008) (holding that defendants typically bear the burden of proof on affirmative defenses). Here, Congress did neither.

3. In *Price Waterhouse*, this Court cast some doubt on that conclusion by shifting the burden of

proof on but-for causation to the defendant—*i.e.,* requiring the defendant to disprove but-for causation—in a Title VII discrimination case. 490 U.S. at 244 (plurality opinion). But Congress subsequently clarified the question in the 1991 CRA by specifically authorizing mixed-motive claims for discrimination under 42 U.S.C. § 2000e-2(a) *but not for retaliation* under 42 U.S.C. § 2000e-3(a). 42 U.S.C. § 2000e-2(m).

Under the 1991 amendments, "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." 1991 CRA, § 107(a), 105 Stat. at 1075, (codified at 42 U.S.C. § 2000e-2(m)). Critically, those prohibited motivating factors—"race, color, religion, sex, or national origin"—are the prohibited bases for discrimination under 42 U.S.C. § 2000e-2(a). They do not include retaliation under 42 U.S.C. § 2000e-3(a), the provision at issue here. Congress underscored that point by enacting this new mixed-motive prohibition as an amendment to Title VII's general discrimination provision, 42 U.S.C. § 2000e-2, and not to its retaliation provision, *id.* § 2000e-3(a).

That differential treatment is all the more notable because retaliation is itself a type of discrimination under Title VII. Section 2000e-2 forbids "discriminat[ion]" based on membership in the five protected classes noted above. *Id.* § 2000e-2(a). Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a)—which is entitled "[d]iscrimination for

making charges, testifying, assisting, or participating in enforcement proceedings"—prohibits employers from "discriminat[ing]" against two other categories of employees: those who opposed a practice made unlawful under Title VII or participated in an investigation into allegedly unlawful conduct. Thus, the 1991 amendments specifically single out one of the two types of Title VII "discrimination" for special, mixed-motive treatment.

Because that differential treatment must be given effect, the courts of appeals have repeatedly held that the 1991 mixed-motive amendments do not apply to retaliation claims. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Behne v. 3M Microtouch Sys., Inc.*, 11 F. App'x 856, 860 (9th Cir. 2001); *Norbeck v. Basin Elec. Power Coopinion*, 215 F.3d 848, 852 (8th Cir. 2000); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.8 (4th Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 551–52 (10th Cir. 1999); *McNutt v. Bd. of Tr. of Univ. of Ill.*, 141 F.3d 706, 708–09 (7th Cir. 1998); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 202–03 (D.C. Cir. 1997), *vacated in part on other grounds on panel rehearing by* 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996); *Cosgrove v. Sears, Roebuck, & Co.*, 9 F.3d 1033, 1040 (2d Cir. 1993).

Congress's specific authorization of mixed-motive claims for a subset of Title VII claims confirms that Title VII's more general language prohibiting against discrimination and retaliation "because" of improper

factors does not authorize mixed-motive claims. If it did, § 2000e-2(m)'s specific motivating-factor provision would be surplusage, and its exclusion of retaliation would be inexplicable. *See Gross*, 557 U.S. at 178 n.5. The 1991 amendments therefore give rise to the "strongest" of inferences that mixed-motive claims are available only to the extent specifically authorized by § 2000e-2(m). *See* i*d.* at 175 (quoting *Lindh v. Murphy*, 521 U.S.320, 330 (1997)).

Title VII is not unusual in this respect. When Congress has wished to authorize mixed-motive claims or to shift the burden of proof in such cases, it has done so expressly—not only in the 1991 amendments, but also in subsequent employment statutes. *See* Veterans' Benefits Improvement Act of 1996, Pub. L. No. 104-275, 110 Stat. 3322 (codified at 38 U.S.C. § 4311(c)) ("An employer shall be considered to have engaged in actions prohibited" if an employee's military service was "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership."); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 2010 (codified at 12 U.S.C. § 5567(c)(3)(C)) (providing that if the protected activity was a "contributing factor" in challenged employment action, the burden of proof shifts to the defendant).

Indeed, when Congress created an affirmative defense to damages (but not other relief) for mixed-motive claims under Title VII, it limited that defense to "a claim in which an individual proves a violation

under section 2000e-2(m) of this title." 42 U.S.C. § 2000e-5(g)(2)(B). By limiting that defense to § 2000e-2(m) claims, Congress confirmed that mixed-motive claims are a creature of *that* specific statute, not of Title VII's more general sections, such as its retaliation provision. *See McNutt*, 141 F.3d at 708–09; *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Congress's decision not to adopt the *Price Waterhouse* holding, but instead to craft this more nuanced affirmative defense, further confirms that departing from traditional burdens of proof is a matter for legislative tailoring, not judicial construction. *See Gross*, 557 U.S. at 174–75.

4. In contrast to its clear statutory text, Title VII's legislative history contains something for everyone, as the *Price Waterhouse* opinions demonstrate. *Compare Price Waterhouse*, 490 U.S. at 243–44 (plurality opinion), *with* 490 U.S. at 262 (O'Connor, J., concurring in judgment), *with* 490 U.S. at 286–87 & n.3 (Kennedy, J., dissenting). Read as a whole, however, the legislative history of the 1964 CRA "bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action." *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring in judgment). Indeed, the interpretive memorandum submitted by the bill's sponsors provided that a Title VII "plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (Apr. 4, 1964) (emphasis added).

The legislative history of the 1991 amendments does not disturb that conclusion for Title VII retaliation claims. Nothing in that legislative history states that Congress intended its mixed-motive amendments to govern such claims. Even if it did, legislative history could not modify the plain statutory text. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011).

B. *Gross* Is Indistinguishable.

The analysis above is not new; most of it comes straight out of *Gross*. In that case, this Court construed the ADEA's provision that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

As this Court has long recognized, the relevant provisions of Title VII and the ADEA are identical. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985). That is no accident: Congress modeled the ADEA on Title VII to such an extent that "the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Id.* (internal quotation marks omitted). Thus, parties and *amici curiae* on both sides of *Gross*, as well as the dissent, emphasized that the "relevant language in the two statutes is identical." *Gross*, 557 U.S. at 183 (Stevens, J., dissenting); *see also, e.g.*, Brief for the United States at 20, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (Feb. 2, 2009), (No. 08-441) 2009 WL 253859.

As the Court observed, there is now one important textual difference between Title VII and the ADEA—the 1991 amendments authorize and tailor a mixed-motive analysis for some Title VII claims. As explained above, however, that difference does not affect Title VII retaliation claims. *See supra* at 17–20. Thus, the Title VII retaliation provision at issue here is indistinguishable from the ADEA provision construed in *Gross*. *Smith v. Xerox Corp.*, 602 F.3d 320, 336 (5th Cir. 2010) (Jolly, J., dissenting). Because they are identical, the two statutes must be construed the same—especially considering that they address closely related subject matter and that Congress modeled one after the other. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005); *see also Smith*, 602 F.3d at 336 (Jolly, J., dissenting). As Nassar himself has observed, Congress expects courts to construe identical language "in conformity." Br. in Opp. 15, 16 (quoting *Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008)).

Gross's reasoning confirms that conclusion. The Court relied on two main points. First, the "ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." 557 U.S. at 176. Second, "nothing in the statute's text indicates that Congress has carved out an exception" to the "general rule" that a plaintiff bears the burden of proving but-for causation. *Id.* at 177.

The same result follows here. Just as in *Gross*, the "ordinary meaning of the [statute's] requirement

that an employer took adverse action 'because of' [protected activity] is that [protected activity] was the 'reason' that the employer decided to act." 557 U.S. at 176. And just as in *Gross*, Congress did not extend its motivating-factor amendments in the 1991 CRA to the provision at issue here. *See supra* at 17.

Gross gave considerable weight to the latter point because "Congress' careful tailoring of the 'motivating factor' claims" under Title VII did not extend to the ADEA. 557 U.S. at 178 n.5. Especially since Congress "contemporaneously amended the ADEA in several ways," its choice not to "make similar changes to the ADEA" could not be "ignore[d]." *Id.* at 174. So too here, Congress amended Title VII's retaliation provisions in 1991, and it has applied Title VII's remedial and other provisions to retaliation claims when it has wished to do so, before and after 1991. *See* 1991 CRA, § 102(a), 105 Stat. at 1072 (authorizing punitive damages for claims brought under § 2000e-3); 42 U.S.C. § 2000e-5(g)(2)(A) (authorizing reinstatement or hiring of an individual to remedy either discrimination or a "violation of section 2000e-3(a)"). Here, it did not.

If this Court had not already drawn the "strongest" of negative inferences from the 1991 amendments to Title VII in *Gross*, the inference might be even stronger here. *See Gross*, 557 U.S. at 175. *Gross* held that the 1991 amendments' limited authorization of mixed-motive claims gives rise to an inference that such claims are generally not authorized even outside of Title VII. *Id.* at 174–75. There is no basis for treating the same inference as being weaker *within* Title VII.

Neither the court of appeals nor Nassar has identified a plausible basis for distinguishing *Gross*. To the contrary, the Fifth Circuit "recognize[d] that the *Gross* reasoning could be applied in a similar manner to" Title VII's retaliation provision. *Smith*, 602 F.3d at 328. The court's reliance on the fact that *Gross* is an ADEA case instead of a Title VII case "is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* at 337 (Jolly, J., dissenting).

To be sure, courts must "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Br. in Opp. 11 (quoting *Gross*, 557 U.S. at 175). But that commonplace notion is a "red herring" here, *Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012), because any "careful and critical" examination reveals that the statutes are identical, as explained above.

II. FAILING FAITHFULLY TO APPLY *GROSS* AND THE TRADITIONAL BURDEN OF PROOF WOULD CREATE A JURISPRUDENTIAL MORASS.

As explained above, *Gross* is controlling because it construed a materially identical statute. A contrary conclusion would not only run afoul of fundamental canons of construction, it would reopen, and even stir, a jurisprudential can of worms this Court wisely closed in *Gross*.

A. *Price Waterhouse* Burden-Shifting Was Difficult And Confusing.

Justice Kennedy predicted more than 20 years ago that *Price Waterhouse*'s burden-shifting experiment would "result in confusion" and "more disarray in an area of the law already difficult for the bench and bar." 490 U.S. at 279 (Kennedy, J., dissenting). He was right: between *Price Waterhouse* and *Gross*, lower courts bemoaned "the murky water of shifting burdens in discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992). The *Gross* Court therefore recognized that it had "become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply." 557 U.S. at 178–79. Indeed, "the problems associated" with *Price Waterhouse* were reason enough not to extend its framework to the ADEA. *Id.* at 179. If those problems warranted the holding in *Gross*, they certainly warrant faithful application of *Gross* to identical statutes.

1. *Price Waterhouse* arose in a narrow context: denial of partnership in an accounting firm where 32 partners had provided input and voted on the plaintiff. 490 U.S. at 233. The exact holding of *Price Waterhouse* has never been clear, in part because the plurality opinion for four Justices was coupled with two different opinions concurring in the judgment that set forth different standards. In general, "lower courts basically followed Justice O'Connor's approach as suggested by [the dissenting opinion of] Justice Kennedy." Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead,*

Whither McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1910 (2004).

Although *Price Waterhouse* burden-shifting could have been "limited" to multiple-decisionmaker cases, *see* 490 U.S. at 280 (Kennedy, J., dissenting), it was not. And that produced unwarranted confusion and difficulty in a number of respects. *See Tyler*, 958 F.2d at 1180. Even commentators with pro-employee positions responded by calling for "a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard to differentiated rules regarding proof structures." Zimmer, *supra*, at 1891; *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 493 (2006).

The first problem was whether to apply the traditional *McDonnell Douglas* framework (under which the plaintiff retains the burden of persuasion) or, instead, to substitute *Price Waterhouse* burden-shifting in any given case. "At some point in the proceedings" the district court had to decide whether the case was a "pretext" case subject to the *McDonnell Douglas* framework or a "mixed-motive" case analyzed under *Price Waterhouse*. *See Price Waterhouse*, 490 U.S. at 247 n.12 (plurality opinion).

That was easier said than done, in part because "determining the precise holdings of *Price Waterhouse* is not an easy task." *Tyler*, 958 F.2d at 1182. The *Price Waterhouse* plurality and concurring opinions articulated different standards for when to shift the burden—*i.e.,* whether to do so when an

improper consideration was a "motivating" or "substantial" factor—and provided little guidance as to what qualified as "substantial." They likewise differed on the kind of evidence needed to support a finding of mixed motives, *i.e.*, whether that evidence must be "direct" or "substantial" (and what those terms mean), or whether any kind of evidence will do. *See Desert Palace*, 539 U.S. at 93–94; *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582–83 (1st Cir. 1999). The lower courts had great "difficulties" with "discerning when a case merits a burden-shifting instruction as opposed to a burden-retaining instruction." *See* Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 297 (2010).

Because *Price Waterhouse* involved a bench trial, it did not wrestle with the further impracticality of applying its framework in a jury trial. 490 U.S. at 292 (Kennedy, J., dissenting). The parties to such trials were generally in the dark about whether the jury would receive a mixed-motive instruction until the end of trial—the only time when the judge could determine whether the plaintiff had produced the right quantum and type of evidence to merit a *Price Waterhouse* instruction. *See id.* at 247 n.12. Judges also found it "difficult to craft" jury instructions that clearly articulated the parties' respective and shifting burdens, and juries struggled to apply them in a coherent manner. *See, e.g.*, *Gross*, 557 U.S. at 178.

For those reasons, verdicts in *Price Waterhouse* cases were "supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally." *Gross*,

557 U.S. at 179 (quoting *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (*en banc*) (Flaum, J., dissenting) (internal citation omitted) (discussing ADEA claims)).

B. *Gross* Established A Bright-Line, Easily Administrable Rule.

The complexity of *Price Waterhouse* stands in stark contrast to the simplicity of *Gross*. In individual cases, *Gross* is easy to apply. A plaintiff must prove that an improper factor was the but-for cause of an adverse employment action, and the familiar *McDonnell Douglas* framework governs that proof. There are no questions about whether to apply *McDonnell Douglas* or some other standard, no shifting in the burden of persuasion, and thus none of the uncertainties that dogged *Price Waterhouse*.

Under *Gross*, it is also easy to determine whether a plaintiff may proceed under a mixed-motive framework. Apart from the 1991 amendments to Title VII discussed above, all of the other major employment discrimination and retaliation statutes require a plaintiff to prove but-for causation.

Title VII retaliation, the ADEA, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act of 2008 all prohibit actions taken "because" of an improper motive. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Title VII); *id.* § 2000e-3(a) (Title VII); 29 U.S.C. § 623(a)(1) (ADEA); *id.* § 623(d) (ADEA); 42 U.S.C. § 12112(b)(4) (ADA); *id.* § 12203(a) (ADA); *id.* § 2000ff-1(a)(1) (GINA). Some of these statutes also prohibit discrimination "on the basis of"

a protected category or discrimination "based on" a protected activity. *See, e.g.*, 29 U.S.C. § 623(e) (ADEA); 42 U.S.C. § 12112(a) (ADA); *id.* § 2000e-2(e) (Title VII). As *Gross* held, the "statutory phrase, 'based on,' has the same meaning as the phrase, 'because of.'" *Gross*, 557 U.S. at 176 (discussing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.4 (2007)).

Because Congress has not separately authorized mixed-motive claims for any of those statutes, they all require a plaintiff to prove but-for causation under *Gross*. *See, e.g.*, *Lewis*, 681 F.3d at 318 (ADA); *Barton v. Zimmer*, 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011) (ADA); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010) (ADA). The Rehabilitation Act of 1973 similarly prohibits discrimination "solely by reason of [an individual's] disability," 29 U.S.C. § 294(a), which is at least as strict a standard as but-for causation. *See Lewis*, 681 F.3d at 314–15; *Palmquist*, 689 F.3d at 73–74.

Especially considering the relative simplicity of this statutory structure, resurrecting *Price Waterhouse* as an additional alternative would introduce an unwarranted amount of confusion and disparity in the system.[1] If Congress wished to

[1] Because Congress enacted a specific burden-shifting regime for Title VII discrimination claims, juries now confront two different burdens of proof in cases where a plaintiff alleges violations of Title VII's discrimination prohibition and an additional statute, such as the ADEA. *See, e.g.*, *Anderson v. Durham D & M, LLC*, 606 F.3d 513, 515 & n.2 (8th Cir. 2010) (plaintiff brought claims of race discrimination under Title VII, § 1981, and the ADEA, as well as retaliation claims under § 1981, Title VII, and the ADEA); *Dowling v. Citizens Bank*, 295

amend the employment laws in this respect, it could easily and accurately express its intent so long as the drafting rules were clear, as they are under *Gross*. Instead, Congress has rejected proposals that would have abrogated *Gross* by authorizing mixed-motive claims under all of the major employment acts. *See* Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (2009); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009); Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. (2012).

C. Burden Shifting Invites Abuse and Unfairness.

Discrimination and retaliation laws are supposed to be "a shield against overtly illegal employer conduct, and not . . . a sword to threaten employers into wasteful prophylactic actions." Joseph J. Ward, *A Call for* Price Waterhouse *II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 663 (1997); *see also Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir. 2004). Mixed-motive claims often fall on the wrong side of that line, fundamentally transforming

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F. App'x 499, 502 n.1 (3d Cir. 2008) (plaintiff brought claims under the ADEA, Title VII, the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.*, and the ADA); *Joseph v. City of Dallas*, 277 F. App'x 436, 438 (5th Cir. 2008) (plaintiff brought claims under the ADEA, Title VII, and § 1983). Reviving the *Price Waterhouse* approach would increase the number of cases involving two or more different burdens of proof.

employment suits, driving up the cost of litigation, and forcing settlements of even meritless suits. While Congress is entitled to authorize such claims, the courts should not do so absent specific congressional authorization.

1. Mixed motives are easy to allege—any "stray remark" or hint of discriminatory animus might suffice. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting). But they are difficult for defendants to disprove, in part because many employment decisions are inherently subjective.

Thus, "there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production." *Meacham*, 554 U.S. at 101. Empirical evidence confirms that plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 944 (2010).

The difficulty of disproving subjective intent is compounded by the difficulty of securing summary judgment in mixed-motive cases. *See Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1519 (11th Cir. 1990). Mixed-motive claims are generally not susceptible to summary judgment because the plaintiff's burden is "so light." David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA 391, 432 (2001); *see also White v. Baxter*

Healthcare Corp., 533 F.3d 381, 402 (6th Cir. 2008); *Staten v. New Place Casino, LLC*, 187 F. App'x 350, 361–62 (5th Cir. 2006). Absent summary judgment, an employer must incur the full costs and risks of trial, where outcomes are uncertain. *See also* Katz, *Fundamental Incoherence*, *supra*, at 493. As such, employers face tremendous financial pressures to settle even meritless mixed-motive suits; failing to do so can be even more wasteful.

Instead of being a limited exception, moreover, mixed-motive suits could become the norm. Employment decisions "are almost always mixed-motive decisions turning on many factors." *See* Cathcart & Snyderman, *supra*, at 432. Thus, "every plaintiff is certain to ask for a" mixed-motive instruction. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting); *see also Smith*, 602 F.3d at 333. Plaintiffs have little reason to shoulder the burden of proving "pretext" under *McDonnell Douglas* when they could instead rely on the "easier burden of persuasion" that allows "plaintiffs [to] win more." Zimmer, *supra*, at 1922 n.152, 1943.

Thus, between this Court's decisions in *Price Waterhouse* and *Gross*, commentators predicted the death of the *McDonnell Douglas* framework. *See* Zimmer, *supra*; William R. Corbett, McDonnell Douglas*, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the*

Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003).

2. These problems are especially acute in the retaliation context. While an employee's membership in a protected class is generally outside of his or her control, the decision to engage in protected activity is not, and can be manipulated to the employee's advantage. *All* employees could seek to protect themselves against adverse employment actions by alleging discrimination (against themselves or others, *see Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579–80 (6th Cir. 2000)), thereby bringing themselves within the protection of § 2000e-3(a). Their claims may be wholly without merit. But the timing of their allegations and the circumstances of any adverse employment actions (even seemingly innocuous ones) may allow a jury to infer retaliation—which is what happened in this case. *See infra* at 35–37.

This concern is accentuated by the recent proliferation of retaliation claims. *See Crawford v. Metro. Gov't of Nashville & Davidson Cnty. Tenn.*, 555 U.S. 271, 283 (2009) (Alito, J., concurring). In Fiscal Year (FY) 2009, 36% of all charges filed with the EEOC included allegations of retaliation in the workplace, surpassing for the first time the number of charges of race discrimination. U.S. E.E.O.C., Charge Statistics FY 1997-FY 2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 4, 2013). That trend has continued; the following year, for example, retaliation charges increased by nearly 8%, and last year 38.1%

of all charges filed contained retaliation allegations. U.S. E.E.O.C., Retaliation Based Charges FY 1997-FY 2012, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited Mar. 4, 2013). Allegations of retaliatory animus should not become an easy means of forcing employers to trial.

3. Mixed-motive retaliation claims pose an especially serious problem where, as here, an employer took action based on a straightforward and non-discriminatory written policy, but an employee claims that one of his or her supervisors felt some improper animus. *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193–94 (2011). Activity protected by the retaliation statutes may well upset some of the people involved. Indeed, in the modern workplace, "it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor." Cathcart & Snyderman, *supra* at 432. But Title VII does not prohibit feelings (which are generally protected by the First Amendment); it prohibits actual acts of retaliation. 42 U.S.C. § 2000e-3(a); *see Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring in judgment); *id.* at 282 (Kennedy, J., dissenting).

If inferences of retaliation could be drawn based on an individual supervisor's emotional reaction to an accusation of wrongdoing—even when a written policy *required* the supervisor to take the action in question—there is little an employer could do to protect itself from costly lawsuits and settlements, short of giving preferential treatment to anyone who

had engaged in protected activity (or even belonged to a protected class). But the laws require only evenhanded, not preferential, treatment. *See Burdine*, 450 U.S. at 259; *see also Price Waterhouse*, 490 U.S. at 274 (O'Connor, J., concurring in judgment); 42 U.S.C. § 2000e-2(j). An unrealistic burden of proof should not be used to effectively change that substantive standard of care, especially considering that Title VII draws a careful balance between deterring discrimination and retaliation, on the one hand, while "preserv[ing] . . . an employer's remaining freedom of choice," on the other. *Price Waterhouse*, 490 U.S. at 242 (plurality opinion).

III. UNDER A BUT-FOR STANDARD OF CAUSATION, THE MEDICAL SCHOOL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

This case illustrates the problems with a mixed-motive approach. Nassar was able to secure a sizeable recovery on a retaliation claim even though he pursued no viable discrimination claim and even though the evidence showed that the Medical School would have taken the same action regardless of his protected activity—indeed, the Medical School had previously done just that.

1. The Medical School presented undisputed documentary evidence that, before any alleged impetus for retaliation ever arose, it had consistently opposed Nassar's desire to work for the Hospital's AIDS Clinic without being a Medical School faculty member. *See supra* at 7–9. Indeed, Nassar introduced and relied upon the same evidence. *Compare* JA 316 *with* JA 396. The Medical School

based its decision on the Affiliation Agreement between the Medical School and the Hospital, an agreement that is, without question, a non-discriminatory policy. JA 346–47; JA 352.

Fitz, the employee charged with retaliation, first announced his determination in March 2006. JA 220–21; JA 346–47; JA 396. At that time, Fitz informed Nassar that the Affiliation Agreement, as well as the Hospital's bylaws, rules, and regulations, required that a physician seeking regular employment within the Hospital's geography (including the AIDS Clinic) be employed by the Medical School. JA 123–24; JA 346–47. He discussed that decision with Nassar again at the end of April 2006. JA 346–47.

It is also uncontroverted that Fitz did not learn that Nassar had claimed illegal discrimination until he received Nassar's resignation letter on July 7, 2006. Pet. App. 5–6; JA 129; JA 189–90; JA 191; JA 384. Even if Fitz developed any retaliatory animus against Nassar at that time, it came months after he had made and (at least twice) announced his decision. JA 346–47.

In the lower courts, Nassar questioned whether Fitz had correctly construed the Affiliation Agreement and the settled course of conduct between the Hospital and the Medical School. *See, e.g.*, JA 108–09; JA 114. Fitz did. JA 346–47. But even if he had not, that would be irrelevant—the question turns on why Fitz made his decision, not on whether his understanding of the agreement was correct. Title VII prohibits actions made in retaliation, not in error. *See, e.g.*, *Pulczinski v. Trinity Structural*

Towers, Inc., 691 F.3d 996, 1003 (8th Cir. 2012); *Giannapoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 4406, 410–11 (7th Cir. 1997). As explained above, Fitz made and announced his decision before any occasion for retaliation even entered the picture.

In post-trial briefing, Nassar tried to back-date his protected activity by alleging that he complained about Levine in late 2005 and early 2006 before Fitz made and announced his decision in March 2006. *See* Br. in Opp. at 6. But Nassar never charged the Medical School with retaliation based on those complaints; he cited only his subsequent resignation letter and a complaint to Fitz at the end of April 2006 as the protected impetuses for retaliation. *See, e.g.*, JA 33–35; JA 258; JA 391–94. And he did so for good reason: Those earlier complaints did not allege discrimination on the basis of race, ethnicity, or religion, and thus did not constitute protected activity as a matter of law. *See, e.g.*, *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 349 (5th Cir. 2007); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006).

2. Even under an erroneous mixed-motive standard, the district court observed that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." Pet. App. 115. Under the correct legal standard, it should have been a winning defense, and the Medical School is entitled to judgment as a matter of law. Although the question presented concerns the correct legal standard, this Court has discretion to apply that standard and direct the entry of judgment as a matter of law. *See Consolidated Rail Corp. v.*

Gottshall, 512 U.S. 532, 558 (1994); *Strickland v. Washington*, 466 U.S. 668, 698–701 (1984); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 716 (1986) (Stevens, J., dissenting). The Court should do so to demonstrate the reasons for rejecting a mixed-motive approach and because the correct result is so clear.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand.

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STATUTORY APPENDIX

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29 U.S.C. § 623

Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

42 U.S.C. § 2000e-2(a)

Unlawful Employment Practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m)

Unlawful Employment Practices

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

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.

42 U.S.C. § 2000e-3(a)

Other Unlawful Employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5(g)

Enforcement Provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex,

or national origin or in violation of section 2000e-3(a) of this title.

(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)),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).

42 U.S.C. § 12112(a)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2007)

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.