NO. 12-484

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Whether the federal employment statutes generally require a plaintiff to prove but-for causation under *Gross v. FBL Financial Services*, 557 U.S. 167 (2009) — or instead to show only that the employer had a mixed motive under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) — is an exceptionally important question that recurs frequently and has percolated thoroughly in the courts of appeals. Nassar does not dispute these points, which suffice by themselves to warrant a grant of *certiorari*.

Nor does Nassar dispute that numerous appellate judges, district judges, and commentators have acknowledged a deepening circuit split on this question. Nassar argues there is no circuit split if one considers only Title VII's retaliation provision in isolation. But the question presented concerns the general rule for *all* of the employment statutes that do not specifically address mixed motives, which is one of the reasons the question is so important. Nassar points to no material distinction in the relevant statutes, and there is none.

Now that this issue has received such extensive consideration in the lower courts and the academy, the Court should grant review to determine which of its own precedents governs the question.

I. THE QUESTION PRESENTED IS PROPERLY BEFORE THIS COURT.

Nassar's attempt to avoid the question presented by focusing heavily on waiver is telling, but misplaced. Everyone appears to agree that the

Medical School raised its objection on the record at least once before the closing arguments and jury instructions, and that both lower courts passed upon the objection. For each of these reasons, the issue is properly presented. Pet. 23–25.

As the petition explains, this Court reviews issues that were either pressed or passed upon in the court of appeals. Pet. 23 (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). The court of appeals addressed the question on its merits, "find[ing] no error" in the relevant jury instructions in light of that court's earlier decision in *Smith v. Xerox*, 602 F.3d 320 (5th Cir. 2010). Pet. App. 12 n.16. Thus, "even if this were a claim not raised by petitioner below, [this Court] would ordinarily feel free to address it since it was addressed by the court below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *accord United States v. Wells*, 519 U.S. 482, 488 (1997); *Williams*, 504 U.S. at 41; *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991).

Nassar emphasizes that the court of appeals chose *not* to address his waiver argument. Br. in Opp. 8. But that is the Medical School's point: just as in *Williams* and the other cases cited above, the court of appeals resolved the issue on the merits without addressing a waiver argument, and for that reason alone, the issue is now properly before this Court. Nassar ignores that well-established legal standard and cites a few irrelevant authorities: *Morrison v. Olson*, 487 U.S. 654, 669–70 (1988), in which the court of appeals considered the relevant

issue forfeited and did *not* pass upon it; *Adams v. Robertson*, 520 U.S. 83, 83 (1997), which applied the different standards applicable to this Court's jurisdiction to review *state court* decisions (*see also, e.g.*, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435–36 (1940)); and a provision from a civil procedure treatise that does not even address *this Court's* preservation standards, 9B Wright, et al., *Federal Practice and Procedure Civil* § 2472 (3d ed. 1998 & Supp. 2012).

In any event, it is undisputed that the Medical School raised its objection on the record on Monday, May 24, 2010, "just *before* the jury was to be charged." Br. in Opp. 5 (emphasis added); *see also, e.g., id.* at 10–11; Pet. App. 112 ("the burden shifting . . . should not be in the charge"); Pet. 23–25. By making that objection "before the instructions and arguments [we]re delivered," Fed. R. Civ. P. 51(b)(2) & (c), the Medical School preserved the objection in exactly the manner Rule 51 dictates. Nassar cites no authority, and the Medical School is aware of none, requiring anything more. Even the district court did not find or rely on waiver, though it did express displeasure with the timing of the objection. *See* Pet. App. 114; *see also* R. 3348 ("I guess I wouldn't necessarily fault you for it").[1]

Nassar's other arguments are beside the point because they relate only to a *third* reason the question presented is properly before this Court: the Medical School's earlier objection during the May 21,

[1] The "R." citations refer to the record on appeal in the Fifth Circuit.

2010, charge conference. At the conference, the Medical School preserved the issue by arguing that "the plaintiff must show that [retaliation] is the sole motive of the defendant." Pet. App. 119; *see also* Pet. 24. Nassar essentially disputes whether that objection was sufficiently clear, or is best construed as advocating a third, middle-ground position. *See* Br. in Opp. 9–11. But the proof is in the pudding, because the district court itself understood at that time that the Medical School was "taking the position [that] it's but-for," and rejected the Medical School's position based on the court's "understanding" that the law "is still at a motivating factor for retaliation." Pet. App. 120; *see Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 305 n.6 (1986).

II. THE COURTS OF APPEALS ARE DIVIDED.

The reason for Nassar's heavy reliance on such a weak procedural argument is clear enough: this is a paradigmatic case for *certiorari*, as it presents an exceptionally important question of statutory construction on which the courts of appeals are divided. In his response to the Medical School's *en banc* petition, Nassar did not even dispute that there was a circuit split. He had good company: appellate judges, district judges, and commentators alike have recognized the circuit split. Pet. 16–18.

Now, however, Nassar argues that there is no split because only two courts of appeals "have considered whether Title VII retaliation claims may proceed under a mixed-motive theory after *Gross*," and those courts agree. Br. in Opp. 11. The circuit split is not sidestepped so easily.

As the petition explains, the question on which the courts of appeals are divided is whether *Gross* or *Price Waterhouse* establishes the general rule for federal employment statutes that do not specifically address mixed-motive claims. Pet. 11–16. This fundamental disagreement is not limited to any one statute. Either *Gross* is a "uniform principle" directing that "the mixed-motive analysis is no longer applicable outside of Title VII discrimination" unless Congress specifically indicates otherwise, or it is not. *Smith*, 602 F.3d at 336–37 (Jolly, J., dissenting). Indeed, Nassar points to *nothing* in the text or history of Title VII's retaliation provision that distinguishes it from the discrimination and retaliation provisions of the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), or the Rehabilitation Act.

The circuit split is especially evident in the Seventh Circuit's broad holding that "*Gross* . . . holds that, unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law," *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (Easterbrook, J.) (emphasis added) — specifically including suits under the ADA's discrimination and retaliation provisions, as well as 42 U.S.C. § 1983. Pet. 11–12. Such a holding is irreconcilable with the Fifth Circuit's holdings in this case and *Smith* that *Gross* does not govern Title VII's retaliation provision, even though that provision is materially identical to the ADEA provision this Court construed in *Gross*. Pet. 11–14.

Indeed, the *Smith* majority expressly disagreed with the Seventh Circuit's "broad" holding, and the dissents in *Smith* and this case expressly acknowledged the circuit split. Pet. 13. So did the Eleventh Circuit when it sided with the Fifth Circuit over the Seventh in another Title VII retaliation case. Pet. 14.[2]

Nassar emphasizes that the majorities in two other circuits, which followed the "same path" as the Seventh Circuit, stated that their decisions were reconcilable with *Smith*. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012); *Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012). But the petition, as well as dissenting judges in those cases, already showed why the majorities' efforts to distinguish *Smith* are so unconvincing that they only confirm the split. Pet. 14–16. Nassar does not even acknowledge this showing.

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[2] Even before *Gross*, the Seventh Circuit held that the mixed-motive amendments to Title VII apply only to discrimination claims, not retaliation claims like Nassar's, and that a Title VII retaliation plaintiff must therefore "establish that the alleged discrimination was the 'but for' cause of a disputed employment action." *McNutt v. Bd. of Trustees of the Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir. 1998). The Seventh Circuit subsequently held that, under both *Gross* and *McNutt*, a plaintiff can prevail "[o]nly by proving that a forbidden criterion was a but-for cause of the decision," and "[i]n *that* respect, *McNutt* is consistent with . . . *Gross*." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963 (7th Cir. 2010) (emphasis added). The Seventh Circuit's continuing endorsement of *McNutt*'s use of a but-for test in the Title VII retaliation context further confirms the division between the Fifth and Seventh Circuits.

Since the Medical School filed its petition, more district courts have taken sides. The Western District of Oklahoma allowed (but found insufficient) a claim that a plaintiff's disability had been "a motivating factor" in a hiring decision, *Hamilton v. Oklahoma City University*, No. CIV-10-1254-D, 2012 WL 5949122, at *6 (Nov. 28, 2012); meanwhile, the District of Maryland applied *Gross* to an ADA claim, *Blind Industries & Services of Maryland v. Route 40 Paintball Park.*, No. WMN-11-3562, 2012 WL 6087489, at *3 (Dec. 5, 2012). Courts will continue to choose sides until this Court settles this frequently recurring question.

III. THE DECISION BELOW CONFLICTS WITH *GROSS*.

Gross expressly rejected *all* of Nassar's merits arguments, which are lifted from the *dissent* in that case. *Compare* Br. in Opp. 15–17, *with Gross*, 557 U.S. at 185–87 (Stevens, J., dissenting). Nassar argues that when Congress amended Title VII's discrimination provision in 1991 in response to *Price Waterhouse*, it made no relevant change to Title VII's retaliation provision. But the same is true of the ADEA.

When Congress amended Title VII's discrimination provision, it "contemporaneously amended the ADEA in several ways" as well. *Gross*, 557 U.S. at 174. This Court determined that Congress's decision to authorize mixed-motive claims in Title VII's discrimination provision, but "not make similar changes to the ADEA," weighed *against* recognizing mixed-motive claims in the ADEA. *Id.*

That conclusion has at least as much force in this case as in *Gross*. Congress's 1991 amendments to Title VII specifically authorized mixed-motive claims in one provision (discrimination), but not another (retaliation), *in the same statute.* Pet. 18–19.

Nassar argues that construing Title VII's discrimination and retaliation provisions to be the same — even though they are textually different — would nonetheless "ensur[e] that the statutory scheme is coherent and consistent." Br. in Opp. 17 (citation omitted). That gets things backwards. *Gross* declined to give the same interpretation to two differently worded statutory provisions (the ADEA and Title VII's discrimination provision) precisely because differences in statutory provisions must be given effect. *Gross*, 557 U.S. at 174–75. Thus, the "coherent and consistent" course is to construe Title VII's retaliation provision to have the same meaning as the similarly worded provision in the ADEA, and a different meaning from the differently worded one in Title VII's discrimination provision — not the other way around.

IV. NASSAR DOES NOT DISPUTE THE EXCEPTIONAL IMPORTANCE OF THE ISSUE PRESENTED.

Even apart from the circuit split and the lower courts' departure from *Gross*, the "profound" importance of the question presented is reason enough to grant the petition. *See Amici* Br. 16. The petition, the *amici* brief filed by the Equal Employment Advisory Council and the Chamber of Commerce, and the scholarly commentary cited in the petition all explain in detail why this frequently

recurring question has, in the dissent's words, such "exceptional importance in employment law." Pet. App. 63; Pet. 19–23; *Amici* Br. 16–19.

Nassar's failure to rebut this extensive showing of practical importance should not obscure it. Mixed motives are easy to allege, hard to disprove, and hard to dispose of on pre-trial motions. Pet. 19–21; *Amici* Br. 17–19. The mixed-motive approach therefore skews the litigation system heavily in plaintiffs' favor, regardless of whether their claims are legitimate. Pet. 20; *Amici* Br. 7, 18. And even if an employer proves as an affirmative defense that it would have taken a challenged employment action regardless of any improper motive, it remains liable and subject to extensive equitable relief and attorneys' fees, as well as reputational consequences stemming from the finding of liability. Pet. 20.

Moreover, this case stands to impact *all* types of employment claims, and perhaps other types of claims as well, because causation is a traditional element of most causes of action. Pet. 21. The frequently recurring nature of the issue means it has percolated thoroughly. Pet. 21–22. And with the number of retaliation claims alone rising sharply, as *amici* explain, the issue will recur even more frequently going forward, until this Court resolves it. *Amici* Br. 17.

V. THIS CASE ILLUSTRATES THE ISSUE'S IMPORTANCE.

Nassar contends that the burden of proof is "almost certainly" irrelevant to the outcome of this case because the burden "only matters where the

evidence is balanced," and the jury in this case "heard conflicting evidence." Br. in Opp. 14. Even on its own terms, Nassar's argument makes little sense. The presence of "conflicting evidence" is more suggestive of balanced evidence than of evidence so one-sided as to make the burden of proof irrelevant.

Moreover, Nassar is wrong about both the evidence and the practical significance of the burden of proof to this case. Under the correct legal standard — which has not yet been applied by any jury or court — the evidence was one-sided in *the Medical School's* favor. The brief in opposition contains a number of factual mischaracterizations that are irrelevant for present purposes and beyond the scope of this brief. (Indeed, much of Nassar's factual discussion relates to the discrimination claim he *lost*, not to his retaliation claim.) The crucial fact is that the undisputed documentary evidence showed the employee charged with retaliation, Dr. Fitz, took the same action Nassar later claimed to be retaliatory *well before* Nassar engaged in any protected activity, and thus *well before* any impetus for retaliation. Medical School's opening brief, No. 11-10338, at 12–13 (5th Cir. June 13, 2011); Pet. 6–8. That evidence shows the School would have — and in fact did — take the same action regardless of any retaliatory motive. Pet. 26.

Nassar responds with evidence that, "*after* Fitz received Nassar's resignation" letter, Fitz expressed a retaliatory animus based on allegations of discrimination that Nassar made in the letter. Br. in Opp. 5. But that only confirms that any retaliatory motive arose, at the earliest, upon Nassar's

resignation in July 2006 — well after Fitz made and announced his decision in March 2006. *See* Pet. 6–7.

Nassar now attempts to back-date his protected activity by alleging that he complained to Fitz in 2005 and early 2006. But those earlier complaints about a supervisor's treatment of Nassar did not allege discrimination on the basis of his race, ethnicity, or religion, and thus did not constitute protected activity as a matter of law. *See, e.g.*, *Fallon v. Potter*, 277 F. App'x 422, 426 (5th Cir. 2008); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 F. App'x 913, 916 (5th Cir. 2006). Presumably for that reason, Nassar did not charge the Medical School with any retaliation based on those complaints; instead, he specifically cited his resignation letter as the protected impetus for retaliation. *See, e.g.* R. 1899 (pretrial order); R. 3533 (Nassar's EEOC complaint).

Not surprisingly, the district court observed that the Medical School "put forth a strong defense" on this issue. Pet. App. 115. At a bare minimum, the evidence was not so one-sided in *Nassar's* favor that switching the burden of proof to the Medical School could be considered harmless.

Nassar is also wrong about the practical significance of the burden of proof. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and *frequently* may be dispositive to the outcome of the litigation or application." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993) (citations omitted; emphasis added); *see also Addington v. Texas*, 441 U.S. 418, 424 (1979).

Mixed-motive cases like this one are no exception. Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases*, 34 VAND. L. REV. 1205, 1207–08 (1981). An empirical study recently showed that "differing burdens of proof produce different results," and that plaintiffs prevail "significantly more often" under a mixed-motive instruction than under a but-for standard. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof*, 42 ARIZ. ST. L.J. 901, 938, 944 (2010). That is one of the reasons the issue is so important and ripe for this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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