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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondent Naiel Nassar and the United States do not dispute that Title VII's retaliation provision is identical to the age-discrimination provision this Court construed in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Under *Gross*, therefore, Nassar must prove that retaliation was the but-for cause of the challenged employment action. Nassar and the United States attempt to sidestep *Gross* by arguing that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, specifically authorized mixed-motive Title VII retaliation claims. That contention is so weak that Nassar did not even raise it in his brief in opposition. Numerous courts of appeals have repeatedly and uniformly rejected it. And neither Nassar nor the United States is able to cite a single decision of any court accepting their position.

The reason is straightforward: The 1991 amendments authorize mixed-motive treatment for claims alleging discrimination on the basis of "race, color, religion, sex, or national origin"—not claims alleging retaliation, which Congress specifically addressed in a different Title VII provision. 42 U.S.C. § 2000e-2(m).

Nassar and the United States seek to override Title VII's plain text and structure by relying on a line of decisions holding that, when Congress has *not* specifically addressed retaliation, a broad, "general" prohibition on class-based discrimination can be construed to encompass retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). But as this Court has already determined, Title VII's

specificity makes it "vastly different" from such general provisions. *Id.* Construing "race, color, religion, sex, or national origin" to include retaliation in Title VII would render Title VII's separate retaliation provision, and portions of other statutory provisions that rely on it, surplusage. As *Gross* held and *Jackson* further acknowledged, Congress's tailoring must be given effect.

Nassar falls back to the position that the 1991 amendments did not need to authorize mixed-motive retaliation claims because *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), had already done so. That argument runs headlong into *Gross*. *Price Waterhouse* construed Title VII's prohibition against discrimination on the basis of race, color, religion, sex, or national origin—not its separate retaliation provision. After the 1991 mixed-motive amendments abrogated *Price Waterhouse*, *Gross* held that those amendments gave rise to the "strongest possible" inference that mixed-motive claims are permissible only to the extent that Congress has specifically authorized them. 557 U.S. at 175.

Under *Gross*, the plain language of the 1991 amendments is dispositive. Because those amendments do not authorize mixed-motive retaliation claims, Title VII's retaliation provision is indistinguishable from the identical provision this Court construed in *Gross*. Nassar's effort to revive *Price Waterhouse*, an effort the United States does *not* join, serves only to underscore the irreconcilability of his position with *Gross*.

ARGUMENT

I. *GROSS* CONTROLS THIS CASE.

For the reasons explained in the Medical School's opening brief, *Gross* is indistinguishable. Pet. Br. 21–24. Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a), and the Age Discrimination in Employment Act ("ADEA") provision construed in *Gross*, 29 U.S.C. § 623(a)(1), are identical. Indeed, Congress deliberately modeled one on the other. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985). Thus, they have the same meaning—a conclusion that is so undeniable that even some of Nassar's *amici* acknowledges the point. *See* Washington Lawyers Committee, *et al.* Br. 2 (urging the Court to overrule *Gross*).

Unlike those *amici*, Nassar has never argued that *Gross* was wrongly decided. The question before this Court, therefore, is whether to distinguish *Gross*, and open the door to interpretive chaos, by construing identical provisions differently. *Cf. S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Nassar attempts to evade the obvious answer to that question by grasping at two straws: the 1991 amendments and *Price Waterhouse*.[1]

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[1] Nassar's request that the Court dismiss the writ as improvidently granted rehashes the same meritless forfeiture arguments that formed the centerpiece of his brief in opposition. *See* Resp. Br. 14–15; Br. in Opp. 8–11. By granting the writ, the Court effectively rejected those arguments. *See Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991). There were multiple reasons for this Court to do so, the simplest being that the court of appeals unquestionably passed upon the issue, which is all this Court's pressed-*or*-passed upon standard requires. *See United*

A. The 1991 Amendments To Title VII Authorize Mixed-Motive Claims Only For Class-Based Discrimination, Not For Retaliation.

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 . . . ." 42 U.S.C. § 2000e-2(m) (emphasis added). By authorizing mixed-motive treatment for class-based discrimination claims, that provision serves only to underscore the absence of any authorization for retaliation claims. *See Dean v. United States*, 556 U.S. 568, 573 (2009).

1. Title VII Clearly Distinguishes Between Retaliation And Class-Based Discrimination.

Title VII divides discrimination claims into two different categories addressed in two different sections: (1) discrimination "because of [an] individual's *race, color, religion, sex, or national origin,*" *i.e.*, discrimination based on membership in a protected class, 42 U.S.C. § 2000e-2(a) (emphasis added); and (2) discrimination "because [an individual] *has opposed any practice made an unlawful employment practice . . . or because he has . . . participated in any manner in an*[*y*] *investigation, proceeding, or hearing*" under Title VII,

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States v. Williams, 504 U.S. 36, 41 (1992); Pet. 23–25; Pet. Reply 1–4.

i.e., discrimination based on protected conduct, *id.* § 2000e-3(a) (emphasis added).

Title VII thereby identifies seven different prohibited bases for discrimination, each of which is an "unlawful employment practice"—five based on membership in a protected class, and two based on protected conduct. The mixed-motive amendment "conspicuously tracks" the five categories of class-based discrimination listed in § 2000e-2(a), "while making no mention of" the two other prohibited bases described in Title VII's retaliation provision, § 2000e-3(a). *Carter v. Luminant Power Servs. Co.*, No. 12-10642, --- F.3d ---, 2013 WL 1337365, at *1 (5th Cir. Apr. 3, 2013). That "is of great import," *id.*, because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Nassar's contrary contention—that discrimination on the basis of "race, color, religion, sex, or national origin" includes retaliation—would render Title VII's retaliation provision, § 2000e-3(a), superfluous. If Title VII's prohibition against discrimination on the basis of race, color, religion, sex, or national origin included retaliation, then its class-based discrimination provision, § 2000e-2(a), would cover retaliation, and Title VII's separate retaliation provision would be unnecessary. Similarly, if the 1991 amendment's prohibition on "employment practice[s] . . . motivated in part by 'race, color, religion, sex, or national origin'"

encompassed a "Title VII retaliation claim," U.S. Br. 12, the amendment would make § 2000e-3(a) superfluous a second time over.

Although the United States attempts to elide that point, it acknowledges that its position would render other provisions of Title VII superfluous and unnecessary. U.S. Br. 20. For example, Title VII limits the available remedies in certain circumstances where a defendant acted "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*." 42 U.S.C. § 2000e-5(g)(2)(A) (emphasis added). As the United States acknowledges, the italicized portion is superfluous under its view. U.S. Br. 20. The same would be true of similar language in Title VII's extraterritoriality provisions. 42 U.S.C. § 2000e-1(b) ("It shall not be unlawful under section 2000e-2 *or* 2000e-3 . . . ." (emphasis added)); *id.* § 2000e-1(c)(1) (referring to a "practice prohibited by section 2000e-2 *or* 2000e-3" (emphasis added)). The general civil rights damages statute likewise refers separately to violations of § 2000e-3 and § 2000e-2. 42 U.S.C. § 1981a(a)(1).

Of course, courts should construe statutory text to be surplusage only in those rare instances where a statute cannot reasonably be read to give effect to all of its provisions. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Here, a very reasonable construction effectuates all of Title VII's provisions—that Congress meant what it said in distinguishing between the two categories of discrimination.

The statute's structure confirms that plain meaning. Congress enacted the mixed-motive

provision as an amendment to § 2000e-2, which generally prohibits discrimination on the basis of membership in a protected class. Congress did *not* make a similar amendment to § 2000e-3, Title VII's retaliation provision. Nassar and the United States respond that this structural argument cannot overcome more direct interpretive evidence. *See* Resp. Br. 19; U.S. Br. 17. But as explained above, the plain statutory text refutes their position even before one considers the broader statutory structure.

Moreover, the statutory structure is informative. The United States argues that two subsections in § 2000e-2 plainly apply to retaliation claims. U.S. Br. 17–18. But the reason is that those provisions say so. Unlike subsection (m) and numerous other subsections in § 2000e-2, those provisions are not expressly limited to discrimination based on race, color, religion, sex or national origin. To the contrary, § 2000e-2(n)—which Congress enacted at the same time as § 2000e-2(m) and placed directly after it—precludes collateral challenges to a judgment resolving "a claim of employment discrimination under the Constitution or Federal civil rights laws." 42 U.S.C § 2000e-2(n)(1)(A). Similarly, § 2000e-2(g) sets forth a broad national-security exemption to *any* otherwise "unlawful employment practice," without limitation.

Those provisions show that, when Congress has wanted a provision to govern all types of discrimination under Title VII, it has said so, in both the original Act and the 1991 amendments. In contrast, when Congress has wished to limit a

provision to either class-based discrimination or retaliation, it has done that.

Here, Congress chose to limit the mixed-motive provision, along with most of § 2000e-2, to class-based discrimination (*i.e.*, five of the seven prohibited bases for discrimination in Title VII). Thus, the United States' litany of things that Congress could have done, but did not do, is odd at best. U.S. Br. 14–15. Title VII contains provisions referring to all employment discrimination, to all unlawful employment practices, and to two different subsets thereof (class-based discrimination and retaliation). In the mixed-motive amendments, Congress chose to use the only one of those models that does not encompass retaliation.

So Nassar and the United States turn to the legislative history. Even if legislative history supported their position, it could not overcome the plain statutory text and structure. Pet. Br. 20–21. And it does not support their position. Nassar and the United States cite only general, aspirational statements, none of which address the specific question presented here. *See* Resp. Br. 18; U.S. Br. 24–26. As one court observed, "[t]he legislative history is at best unclear as to whether Congress intended that retaliation claims would be governed by [§ 2000e-2(m)]" and "fails even to mention [Title VII] retaliation claims specifically." *Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 (3d Cir. 1997).

The one thing the legislative history makes clear is that Congress was aware of retaliation. As Nassar highlights, the 1991 amendments amend 42 U.S.C. § 1981 to bring retaliation claims within its scope.

See Resp. Br. 18 (discussing H.R. Rep. No. 102-40 (II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 730–31). Congress also cross-referenced § 2000e-3 in § 1981a, which concerns the amount of recoverable damages for intentional discrimination. *See* 42 U.S.C. § 1981a(a)(1). The Congress that enacted the 1991 amendments thus demonstrated its awareness of Title VII's retaliation provision and referenced it when it wanted to. But Congress elected not to apply its mixed-motive amendments to Title VII retaliation claims.

2. The United States' Atextual Arguments Are Misplaced.

a. The United States relies on a line of cases holding that "a *general prohibition* on racial [or class-based] discrimination" may "cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson*, 544 U.S. at 176 (emphasis added); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008). As the United States acknowledges, however, those decisions are "grounded . . . in the text of the relevant statute[s]" they interpreted. U.S. Br. 13. In that same line of decisions, this Court has distinguished Title VII as being "vastly different." *Jackson*, 544 U.S. at 175.

Each decision in that line of cases addressed a statutory scheme that imposed a general ban on discrimination but did not specifically address retaliation. *See Sullivan*, 396 U.S. at 237 (construing 42 U.S.C. § 1982); *Jackson*, 544 U.S. at 173 (construing 20 U.S.C. § 1681(a)); *CBOCS*, 553 U.S. at

446–47 (construing 42 U.S.C. § 1981); *Gomez-Perez*, 553 U.S. at 486–88 (construing 29 U.S.C. § 633a(a)). In contrast to such a "broadly written general prohibition on discrimination," Title VII "spell[s] out in greater detail the conduct that constitutes discrimination in violation of" Title VII by identifying numerous distinct categories of "specific discriminatory practices." *Jackson*, 544 U.S. at 175.

This Court has never read a prohibition on retaliation into a statute that specifically addresses that topic. In *Gomez-Perez*, for example, this Court construed the ADEA's public-sector provisions, which "contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." *Gomez-Perez*, 553 U.S. at 487. (The ADEA's private-sector provisions specifically address retaliation, 29 U.S.C. § 623, but its public-sector provision does not, *id.* § 633a.) Because Congress enacted that "broad, general ban" without specifically addressing retaliation, this Court concluded that Congress did not intend to deny public employees a remedy for retaliation without saying so. *Id.* at 487–88; *see also Jackson*, 544 U.S. at 176 ("[I]n *Sullivan* we interpreted a general prohibition.").

Where Congress has included a separate ban on retaliation, however, it must be given effect. *Carter*, 2013 WL 1337365, at *3. Indeed, the "commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992), has particular force where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway*

Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) (citations omitted).

In these circumstances—*i.e.*, "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former"—"the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." *United States v. Chase*, 135 U.S. 255, 260 (1890). Absent "express repeal, or an absolute incompatibility, . . . the special is intended to remain in force as an exception to the general." *Washington v. Miller*, 235 U.S. 422, 428 (1914).

In part for that reason, this Court has repeatedly recognized that the same word or phrase can carry a broader or narrower meaning depending on its context. In Title VII, for example, the term "employee" sometimes includes former employees and sometimes does not. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997). Similarly, the ADEA's prohibition on "age" discrimination refers only to discrimination against older workers, even though other ADEA provisions use the same term, "age," to include younger workers. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 595 (2004); *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). The presumption that a phrase generally carries the same meaning "is not rigid and *readily yields*" (even within the same statute) when there is a reason to believe, as there is here, that Congress has used the phrase differently in different

contexts. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (emphasis added).

Congress's decision to break out retaliation as a separate category of discrimination in Title VII is not unusual. The ADEA's private-sector provisions do so. *Compare* 29 U.S.C. § 623(a), *with id.* § 623(d). The Americans with Disabilities Act ("ADA"), which Congress enacted nearly contemporaneously with the 1991 amendments, does so. *Compare* 42 U.S.C. § 12112(a), *with id.* § 12203(a). The more recently enacted Genetic Information Nondiscrimination Act of 2008 ("GINA"), does so as well. *Compare* 42 U.S.C. § 2000ff-1(a), *with id.* § 2000ff-6(f). Congress codified retaliation in the ADA's "miscellaneous provisions," 42 U.S.C. ch. 126, subch. IV, and included GINA's retaliation provision in the statute's remedial section, *id.* § 2000ff-6. Congress thus follows two well-established models: sometimes it subsumes retaliation within a general discrimination provision; and sometimes it specifically breaks out retaliation as a different category of discrimination, as it did here.

Congress's tailoring of the various statutes deserves respect. For example, Congress specified as part of the 1991 amendments that plaintiffs may recover compensatory and punitive damages for violations of the ADA's prohibition on discrimination based on discrimination, but *not* for violations of its retaliation provision. 42 U.S.C. § 1981a(a)(2); *see Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1264, 1269-70 (9th Cir. 2009); *Kramer v. Banc of Am. Secs., LLC*, 355 F.3d 961, 965 (7th Cir. 2004). A plaintiff cannot evade that limitation on retaliation

damages by arguing that retaliation is a form of age discrimination. *See Alvarado*, 588 F.3d at 1269. For the same reasons, Title VII's prohibition on class-based discrimination cannot be read to encompass retaliation. Text has consequences.

b. In addition to arguing that "race, color, sex, religion, or national origin" includes retaliation in Title VII, the United States appears to argue that § 2000e-2(m) broadly applies to "any employment practice," and retaliation is an employment practice. U.S. Br. 11–12. If that were correct, much of § 2000e-2(m), including its listing of prohibited bases for discrimination, would be surplusage. It is not.

Section 2000e-2(m) does not prohibit mixed-motive employment practices generally; as discussed above, it prohibits an employment practice motivated in part by race, color, religion, sex, or national origin. In context, therefore, an "employment practice" simply refers to an employment decision, such as firing or transferring an employee. If discrimination on a basis enumerated in § 2000e-2(m) motivates or causes "any employment practice," that practice may be unlawful. *See, e.g.*, 42 U.S.C. § 2000e-2(k) (prohibiting an "employment practice" that "causes a disparate impact on the basis of race, color, religion, sex, or national origin"). But that does not change the enumerated bases for prohibited discrimination. Congress prohibited employment practices motivated by discrimination based on the five listed factors, not on others.

3. The EEOC's Informal Guidance Is Not Entitled To Deference.

Nassar suggests that the EEOC's enforcement guidance is entitled to *Skidmore* deference, under which this Court defers to agency views that the Court finds to be persuasive. Resp. Br. 19–20; *see Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149–50 (2008); *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 (2011) (Scalia, J., dissenting). Because the agency's guidance is at odds with the plain statutory text, no deference is warranted. *See Ky. Ret. Sys.*, 554 U.S. at 149–50; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642–43 n.11 (2007).

Moreover, the EEOC's guidance, which addresses all "claims of retaliation under the statutes enforced by the EEOC," concludes that the 1991 amendments provide a "basis for finding 'cause' whenever there is . . . direct evidence of a retaliatory motive" under any of those employment discrimination statutes—not only under Title VII. 2 *EEOC Compliance Manual* at 1, § 8-II(E)(1) & n.45 (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.pdf. *Gross* already rejected that broad, atextual "interpretation." Even the United States, which is supporting legislation to overrule *Gross* as applied to all of the major federal employment statutes, does not defend the EEOC's conclusion. *See* Pet. Br. 30. Instead, the United States put together the narrower, though equally incorrect, construction discussed above.

Even apart from its indefensible bottom line, the EEOC's guidance is remarkably unpersuasive. The

EEOC has addressed the question only in footnotes to informal guidance. *See, e.g.*, *Noviello v. City of Boston*, 398 F.3d 76, 90 n.3 (1st Cir. 2005). Neither footnote analyzes the controlling statutory language. The 1992 document—the only contemporaneous guidance—is, as the government hints (at 28, n.11), a mere expression of the EEOC's intent to continue its pre-1991 position for policy reasons even though the 1991 amendments did "not specify retaliation as a basis for finding liability." EEOC, *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355, at *6 n.14 (July 14, 1992). The 1998 document essentially states that mixed-motive retaliation claims were viable under Title VII before 1991, and they should stay that way for policy reasons. *See Compliance Manual* § 8-II(E)(1) & n.45.

Put to the choice between the plain statutory text and the EEOC's atextual, wishful thinking, every court of appeals to consider this question has held that the 1991 mixed-motive amendments do not apply to retaliation claims. *See Carter*, 2013 WL 1337365, at *2 n.13; Pet. Br. 18. No one—neither Nassar nor any of his *amici*—has cited a single decision to the contrary. The courts "'must assume that Congress meant what it said'—and heed what it did not." *Id.* at *2 n.13 (quoting *Pinter v. Dahl*, 486 U.S. 622, 653 (1988)). And they have.

B. *Gross* Provides The Interpretive Baseline, Not *Price Waterhouse*.

Although the United States implicitly recognizes that the 1991 amendments are dispositive under *Gross*, Nassar falls back to *Price Waterhouse*. He

argues that, if the 1991 amendments do not authorize Title VII mixed-motive retaliation claims, this Court should do so by reviving the muddled *Price Waterhouse* framework. Resp. Br. 21–27. Nassar's effort to turn back the clock and reopen all of the jurisprudential and practical problems associated with *Price Waterhouse* falters on both *Gross* and the 1991 amendments.

Price Waterhouse certainly has no remaining *stare decisis* effect. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). As Nassar acknowledges, *Price Waterhouse* construed Title VII's prohibition on discrimination based on race, color, sex, religion, and national origin, 42 U.S.C. § 2000e-2(a), not its separate retaliation provision, *id.* § 2000e-3(a). Resp. Br. 22; *see also* 490 U.S. at 240 (discussing 42 U.S.C. § 2000e-2(a)(1), (2)). *Price Waterhouse* does not even mention Title VII's retaliation provision.

Even as to the provision it did address, *Price Waterhouse* is no longer good law because Congress abrogated it in the 1991 amendments. *See Gross*, 557 U.S. at 179 n.5. *Gross* then held, contrary to *Price Waterhouse*, that other statutory provisions (including identical provisions like the ADEA) presumptively require a plaintiff to prove but-for causation. Pet. Br. 21–23. After *Gross* and the 1991 amendments, there is nothing left of *Price Waterhouse*.

Moreover, the reasons *Gross* gave for rejecting the fractured *Price Waterhouse* opinions are fully applicable here. Pet. Br. 21–24. *First*, the statutory texts of Title VII's retaliation provision and the ADEA are identical, as are the common-law

backdrops against which Congress enacted the statutes. *See Gross*, 557 U.S. at 176–77; *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013).

Second, Congress's careful tailoring of the 1991 amendments gives rise to the strongest possible implication that only Title VII class-based discrimination claims are subject to mixed-motive analysis. Pet. Br. 23. Congress's decision to leave Title VII's retaliation provision "unchanged," *id.* at 6, while amending the standard for Title VII class-based discrimination claims, provides valuable contextual evidence for construing the retaliation provision. *See Gross*, 557 U.S. at 175; *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Indeed, any other reading would render § 2000e-2(m) surplusage. If Nassar were right that *Price Waterhouse* authorized mixed-motive claims for discrimination and retaliation generally, there would have been no need for Congress to enact § 2000e-2(m). To the extent that Congress sought to alter this Court's treatment of mixed-motive claims, it could have done that by enacting § 2000e-5(g)(2)(B) alone.

Finally, if Nassar had his way, the practical difficulties posed by the *Price Waterhouse* opinions would be worse than ever. *See* Pet. Br. 25–28; *Gross,* 557 U.S. at 178–79; *Price Waterhouse*, 490 U.S. at 279–80 (Kennedy, J., dissenting). Nassar is correct (at 19) that having to apply different standards to different types of employment-discrimination claims is not ideal from an administrability standpoint. Under any reading of the 1991 amendments,

however, that is unavoidable now that Congress has enacted a special regime for some but not all discrimination claims. *See* Pet. Br. 29–30 & n.1. Reviving *Price Waterhouse* would be the worst of all worlds because courts and juries would then have to apply three different standards (*Gross*, the 1991 amendments, and *Price Waterhouse*) to different employment claims.

Nassar responds that "ADEA claims and Title VII retaliation claims are substantially different." Resp. Br. 26. They do not differ in any way that is relevant to the holding or reasoning of *Gross*, as discussed above. Nassar relies on the ADEA's inclusion of an affirmative defense that permits an employer to prove that an "otherwise prohibited" action was "based on" a "reasonable factor[] other than age." 29 U.S.C. § 623(f). That defense, which *Gross* did not even mention, is limited to disparate impact claims. "[I]f an employer in fact acted on a factor other than age, the action would not be [disparate treatment] in the first place." *Smith v. City of Jackson*, 544 U.S. 228, 238 (2005). For that reason as well, it is irrelevant here.

C. There Is No Sound Policy Reason To Limit *Gross* Or Expand The 1991 Amendments.

Congress had good reason to limit mixed-motive treatment to class-based discrimination. Title VII's provisions concerning discrimination based on membership in a protected class, and discrimination due to retaliation, "differ not only in language but [in] purpose as well." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). Section § 2000e-

2(a) accomplishes Title VII's "primary objective"—"seek[ing] a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Id.* Section 2000e-3(a) is a derivative, prophylactic measure that "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.*

If the *amicus* briefs demonstrate anything, it is that there are pros and cons to authorizing mixed-motive claims. And the cons are significant. *See, e.g.*, Pet. Br. 30–35. Congress was entitled to decide that the pros outweigh the cons for core, class-based discrimination claims, but not for retaliation claims.

Mixed-motive retaliation claims do not directly serve the statute's primary objective, and they give rise to additional concerns. Section 2000e-3(a) has a far broader scope than Section 2000e-2(a). Unlike Section 2000e-2(a), Section 2000e-3(a) extends beyond the workplace. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67. The class of individuals protected by § 2000e-3(a) is also broader, for the statute covers any person who engages in protected activity, including former employees, *Robinson*, 519 U.S. at 346, and even individuals with a connection to a current or former employee, *see Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869–70 (2011). Given the breadth of conduct and actors covered by this prophylactic protection, as well as the extent to which it extends beyond the traditional workplace, Congress had excellent reasons not to relieve

plaintiffs of the traditional burden of proving their claims.

Indeed, retaliation claims pose particular danger of abuse. Because of their breadth, any disaffected employee can unilaterally opt-in to such a claim by choosing to engage in protected conduct, no matter how baseless his or her allegations may be. Statistics show that retaliation claims have recently become the single-most litigated type of discrimination claim. *See* Chamber of Commerce Br. 16–17. Yet, "while the number of retaliation charges has skyrocketed, the EEOC has concluded that the large majority of these charges are unfounded." *Id.* at 17. The EEOC found reasonable cause in less than 5% of retaliation charges that proceeded to a reasonable cause determination; the number of actually meritorious claims is, of course, even lower. *Id.*

The costs of defending these mostly meritless claims can be staggering. *See id.* 18–19. And flipping the burden of proof to the defendant would drive up the costs even further. By requiring the defendant to try to prove a negative, a mixed-motive framework precludes summary judgment in most cases and compels many defendants to pay out wasteful settlements to avoid the greater waste of a costly trial followed by an unpredictable jury verdict. *See* Pet. Br. 31–32; Chamber of Commerce Br. 19–20. As the Medical School's opening brief explains and even one of Nassar's *amici* has acknowledged, it is far easier for a plaintiff to prevail on a mixed-motive theory. *See* Pet. Br. 32 (discussing Michael J. Zimmer, *The New Discrimination Law:* Price

Waterhouse *is Dead, whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1922 n.152, 1943 (2004)).

A more relaxed standard of proof for retaliation claims would also threaten to transform Title VII's retaliation provision into a "thought control bill." Michigan Br. 11 (citing 100 Cong. Rec. 7254 (1964) (Sen. Ervin)). When a supervisor is falsely accused of acting on alleged bias, the accusation naturally brings up "feelings of anger, hurt, and resentment." *Id.* at 12. If the supervisor acknowledges those feelings, the timing of that admission alone "has likely created a sufficient issue of material fact to allow the accuser's retaliation claim to proceed to trial if the mixed-motives standard applies." *Id.* at. 13. "The net result is that imposing the mixed-motives burden-shifting analysis punishes employers for 'bad' but entirely predictable thoughts, where those thoughts cannot be said to have actually caused an adverse employment action." *Id.* Flipping the burden of proof "would amount to a presumption of malfeasance" in the context of routine employment decisions—a context where there is no basis for any such presumption. *Id.* at 14.

Indeed, even an employer that clearly articulates non-discriminatory policies in writing, and ensures that its supervisors apply those policies to all employees, could be held liable if a jury found that a mid-level supervisor harbored some subjective, retaliatory animus in the course of faithfully applying an objective, written policy. In such a case, the plaintiff would have been treated exactly the same as anyone else, but would prevail on the ground that he or she did not receive *special* treatment.

Although Congress is entitled to override the employment laws' fundamental objective to ensure *equal* treatment in that manner, the courts are not. *See* Pet. Br. 34–35.

II. THE MEDICAL SCHOOL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Nassar argues that the correct remedy is to "remand[] for a new trial under the new standard." Resp. Br. 35. This Court should, instead, exercise its discretion to apply the correct legal standard to the undisputed facts of this case and grant judgment as a matter of law.[2] Pet. Br. 37–38.

The facts of this case vividly illustrate the problems with a mixed-motive approach and the reasons to reject it. Nassar challenges the Medical School's determination that he had to remain a Medical School faculty member to retain his position as a full-time physician at the Hospital's AIDS Clinic. Pet. Br. 35–37; Resp. Br. 33. The objective, documentary evidence presented at trial by both the Medical School and Nassar showed that Fitz made that determination and announced it—twice—before the alleged impetus for retaliation even arose. JA 346–47; JA 396. Accordingly, even if retaliation later became an additional motive, there is no genuine dispute that the Medical School would have made the same decision even absent retaliation. JA 346–47; JA 396.

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[2] Nassar (at 1) suggests that the Medical School has conflated "but-for" causation with "sole" causation. To the contrary, the Medical School's opening brief expressly articulated, advocated, and applied "but-for" causation. *See* Pet. Br. 15.

Everything else is an irrelevant diversion. Nassar does not dispute that Fitz's purported admission of retaliatory animus—the only evidence of which was the dubious testimony of a disaffected former employee—came *after* Nassar resigned, and thus well *after* Fitz had announced his decision. *See* Resp. Br. 34. Although Nassar attempts to back-date his protected activity to a time before Fitz made the relevant decision, he does not and cannot respond to the Medical School's refutation of that argument in its opening brief. *See* Pet. Br. 37.

Nassar contends that actions of Hospital personnel call the timing or correctness of Fitz's decision into question. As explained in the Medical School's opening brief, however, none of those contentions goes to *Fitz's* subjective state of mind or refutes the clear written record of when and why he acted. *See* Pet. Br. 36–37; JA 120–24; JA 157–58; JA 316; JA 346–47; JA 396. Nassar contends, for example, that Sylvia Moreno, a subordinate employee at the Hospital, continued to attempt to hire Nassar even after Fitz made and twice announced his decision. Resp. Br. 34. But Nassar does not dispute that Moreno had no authority to hire hospital physicians and understood that Fitz had withheld the required approval. JA 77–87; JA 91–95; JA 316; JA 346–47. Nor does he dispute that Moreno's superiors never approved her efforts. JA 93–95; JA 294–97; JA 300–03; JA 314–15; JA 385.

Fitz also claims that his "replacement" was not a Medical School faculty member. Resp. Br. 35. But he does not dispute that, as the Medical School proved at trial, the Hospital hired that person for a

different job that was not within the scope of the operating agreement between the Hospital and the Medical School (JA 108–09; JA 169–71; JA 213–14; JA 227–29; JA 232–41)—a job that Nassar had rejected (JA 213–14; JA 243–44; JA 282–84).

In the end, all that matters is Fitz's state of mind, and the objective, documentary evidence shows without contradiction that Fitz enforced a written, nondiscriminatory policy—exactly what he should have done—before the alleged impetus for retaliation arose. Even under an incorrect legal standard, the district court recognized that Medical School "put forth a strong defense." Pet. App. 115. Under the correct legal standard, it is a winning defense.

CONCLUSION

For these reasons, this Court should vacate and remand for entry of judgment as a matter of law or a new trial.

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