No. 12-484

In The
Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF EMPLOYMENT LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Title VII's retaliation provision requires a plaintiff to prove that protected conduct was a motivating factor in the decision, with a limitation on damages that applies if a defendant proves that it would have taken the same action regardless, or instead requires a plaintiff to prove "but for" causation (*i.e.*, that an employer would not have taken an adverse employment action "but for" a retaliatory motive).

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* professors have substantial expertise in federal discrimination law. Their expertise thus bears directly on the issues before the Court in this case. The interest of *Amici* in this case is to maintain consistency within Title VII jurisprudence and to advocate for an interpretation of Title VII's retaliation provision that provides adequate protection for individuals who complain about discrimination. A list of signatories may be found in Appendix A.

SUMMARY OF THE ARGUMENT

The analysis in this case is straightforward. The text of Title VII, its consistent interpretation over time, and a long line of cases holding that retaliation is encompassed within discrimination all confirm that a plaintiff can proceed under a motivating factor standard.

A plaintiff may establish an unlawful employment practice under Title VII by demonstrating "race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m) (2006). This Court consistently

[1] The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

interprets substantive prohibitions on discrimination to encompass prohibitions on retaliation. *Gomez-Perez v. Potter*, 553 U.S. 474, 480-81 (2008); *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005). This Court has already held that a different aspect of the 1991 amendments that similarly addressed explicitly only substantive discrimination *also encompassed retaliation*. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 446 (2008); Civil Rights Act of 1991, 105 Stat. 1071 (hereinafter "1991 amendments"). Under this well-established principle, § 2000e-2(m) governs retaliation claims.

A motivating factor standard is consistent with the opinion of a majority of Justices in *Price Waterhouse v. Hopkins* and Congress's response to that opinion. 42 U.S.C. § 2000e-2(m); 490 U.S. 228 (1989). Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a) (2006), parallels the primary operative language found in § 2000e-2(a). It prohibits "discrimination" "because" of protected conduct, just as the primary operative language prohibits "discrimination" "because" of certain protected traits. *Price Waterhouse* interpreted the word "because" in Title VII's core prohibition on discrimination, 42 U.S.C. § 2000e-2(a). 490 U.S. at 250. The Court held this term allows a plaintiff to establish that a protected trait was a motivating factor. *Id.* at 240; *id.* at 259 (White, J., concurring in the judgment); *id.* at 261, 263 (O'Connor, J., concurring in the judgment). It is a standard principle of statutory interpretation that identical phrases in the same statute bear a consistent

meaning. *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007). Title VII's retaliation provision, like its substantive discrimination provision, establishes a motivating factor standard.

Importantly, the motivating factor standard ultimately results in a determination of "but for" cause. The real question in this case is not what the ultimate causation standard should be, but rather, which party bears the responsibility for making certain proofs. If an employer demonstrates that it would have taken the same action notwithstanding retaliatory motives, Title VII precludes most monetary relief, as well as injunctive relief such as reinstatement, hiring, or promotion. 42 U.S.C. §§ 2000e-5(g) & 2000e-5(g)(2)(B) (2006). This result obtains whether applying Title VII's general remedial language or the 1991 amendments.

Petitioner's contention – that the retaliation provision requires the plaintiff prove "but for" causation – is contrary to *Price Waterhouse*, Congress's affirmation of this aspect of *Price Waterhouse*, and the well-established principle that discrimination provisions encompass retaliation. The reasoning in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), does not apply to the instant case. The Court in *Gross* expressly indicated the result would be different if it were considering the meaning of "because" under Title VII. *Id.* at 174.

The motivating factor standard, with the same decision defense as to remedies, advances Title VII's

underlying objectives. It protects the legitimate interests of employers while furthering the larger commitment to ending employment discrimination. *Cf. McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361-62 (1995). As this Court has repeatedly explained, Title VII's promise of fair employment practices can only be realized if employees feel secure in filing complaints and serving as witnesses regarding discriminatory conduct. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 868 (2011); *see also generally Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009). It is essential that this Court recognize the harm caused by adverse actions motivated even in part by retaliation; otherwise, reasonable workers will be dissuaded from filing complaints. *Burlington Northern*, 548 U.S. at 57. The motivating factor standard also comports with this Court's frequent exhortation that employees should be encouraged to internally report discrimination, so that employers can investigate and promptly address improper conduct. *See generally Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

Petitioner's contention is also problematic because it is premised on drawing a negative inference from Congressional inaction – and as such, it runs counter to a large body of case law establishing that Congressional inaction almost always lacks persuasive significance. *Pension Benefit Guaranty Corp. v.*

LTV Corp., 496 U.S. 633, 650 (1990). Moreover, Petitioner's interpretation is inconsistent with the common law's understanding of causation, which recognizes significant limitations with "but for" cause and embraces multiple causal constructs and orders of proof.

Amici request that the Court interpret Title VII to require a plaintiff to establish that protected activity was a motivating factor in the employment decision. This interpretation affirms the consistent meaning of Title VII's provisions as expressed in Title VII's original language, this Court's precedent, and the 1991 amendments. It is also the standard that best advances the underlying purpose of the retaliation provision.

ARGUMENT

I. The Text of Title VII Applies a "Motivating Factor" Standard to Retaliation Claims.

A. Section 2000e-2(m) Applies to Retaliation Claims.

The only statute at issue in this case is Title VII. The text of that statute provides that plaintiffs can proceed on a retaliation claim under the "motivating factor" standard. 42 U.S.C. § 2000e-2(m). A long line of cases confirms that when Congress uses the word "discriminate" that term encompasses retaliation.

As initially enacted, the primary operative language of Title VII makes it an "unlawful employment practice" for an employer to "discriminate against" an employee "because" of an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2006). In 1991, Congress re-affirmed that the term "because" in Title VII allows a plaintiff to prevail under a motivating factor standard. 42 U.S.C. § 2000e-2(m) provides:

> 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.

As explained more fully below, this provision does not create a new cause of action under Title VII. It simply makes explicit that the word "because" in Title VII allows a plaintiff to proceed under a motivating factor standard. Both before and after 1991, this Court has consistently affirmed that statutory prohibitions on discrimination on the basis of a protected trait *include retaliation claims* stemming from complaints related to such discrimination. Under this well-established principle, § 2000e-2(m) applies to retaliation claims.

In *Gomez-Perez v. Potter*, Justice Alito, writing for the majority, correctly interpreted the ADEA's federal sector provision's prohibition on discrimination on the basis of age to include retaliation. 553

U.S. at 481 ("[W]e interpret the . . . provision's prohibition of 'discrimination based on age,' as likewise proscribing retaliation.") The Court explained that this interpretation flowed naturally from *Jackson v. Birmingham Board of Education*, in which the Court had likewise interpreted Title IX's prohibition on "discrimination" "on the basis of sex" to encompass retaliation. *Id.* at 480-81 ("[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex.'") (quoting *Jackson*, 544 U.S. 167, 173-74 (2005)). Both *Gomez-Perez* and *Jackson* relied on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which the Court had interpreted § 1982's language regarding discrimination to encompass retaliation. Importantly, the Court in *Gomez-Perez* held the prohibition on age discrimination encompassed retaliation even though a different portion of the ADEA, enacted earlier, separately and explicitly addressed retaliation, reasoning that it was "appropriate" and "realistic" to presume that the later Congress expected its prohibition of "discrimination based on age" to be interpreted consistently with *Sullivan*. 553 U.S. at 485 (internal quotes omitted).

This Court *has already held* that a different provision of the 1991 amendments that similarly addressed explicitly only substantive discrimination *also encompassed retaliation*. *See CBOCS West*, 553 U.S. at 446. The issue in *CBOCS* arose from an earlier decision, *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989), in which the Court had

held that § 1981 did not permit claims of race discrimination, such as harassment, that post-dated formation of the employment relationship. In the 1991 Act, Congress superseded *Patterson* by amending § 1981 to permit post-formation claims concerning substantive *discrimination*, but the new language did not explicitly address retaliation. Civil Rights Act of 1991 § 101, codified at 42 U.S.C. § 1981(b). The employer in *CBOCS*, like petitioner here, argued that Congress's "failure" to address retaliation should be deemed an explicit choice to exclude retaliation claims from § 1981, pointing out that Congress had included explicit anti-retaliation provisions in other civil rights statutes. *CBOCS*, 553 U.S. at 453-54. This Court, however, emphatically rejected that position. It held that the 1991 Act "nullif[ied] *Patterson*" and that rather than intending to exclude retaliation claims, it was "far more plausible" that Congress "intended . . . to embrace pre-*Patterson* law," including prior decisions permitting retaliation claims – most notably *Sullivan*'s interpretation of § 1982, which was analogous to the language found in § 1981. *Id.* at 454.

The Court has consistently held that prohibitions on substantive discrimination encompass retaliation stemming from complaints regarding such discrimination. Section 2000e-2(m) applies to retaliation claims.

B. *Price Waterhouse* and Title VII's 1991 Amendments Confirm that the Motivating Factor Standard Applies to Retaliation Claims.

Even if this Court were to hold that § 2000e-2(m) does not directly govern the causal standard in retaliation claims, the Court should conclude that retaliation claims brought pursuant to § 2000e-3 are subject to a "motivating factor" standard. This interpretation maintains consistency within Title VII by confirming that the word "because" has the same meaning throughout the statute, a meaning that is driven by *Price Waterhouse v. Hopkins* and Congress's affirmation of the "motivating factor" standard in Title VII's 1991 amendments.

The retaliation provision and the primary discrimination provision use the same words. These provisions make it an "unlawful employment practice" for an employer to "discriminate against" an employee "because" of certain protected traits or because he has engaged in protected activity. 42 U.S.C. §§ 2000e-2(a)(1) & e-3(a).

In *Price Waterhouse*, a majority of the Court held that "because" in Title VII does not require the plaintiff to prove "but for" cause. 490 U.S. at 240 (plurality); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). Six justices agreed that "because" in Title VII was properly interpreted to require that a plaintiff prove that her status was a "motivating" or "substantial"

factor in the decision and that if she made this showing, the burden would shift to the defendant to prove it would have taken the same action without considering the impermissible characteristic. *Id.* at 245 (plurality); *id.* at 259 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring). This consensus was clear, with the disagreement between the plurality and concurrences turning on whether direct evidence was required to shift the burden. Moreover, this interpretation of "because" was grounded in prior Title VII cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise."). It was also consistent with the interpretation of "because" and similar causal language in other employment-related statutes, as well as the burden-shifting regime developed by this Court to resolve First Amendment retaliation claims. *Price Waterhouse*, 490 U.S. at 248-50 (discussing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment) and *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (National Labor Relations Act)).

Retaliation claims brought pursuant to § 2000e-3 are subject to a "motivating factor" standard. The word "because" in § 2000e-3 of Title VII is the same word found in § 2000e-2 of Title VII that this Court interpreted in *Price Waterhouse v. Hopkins* to include a "motivating factor" standard. Both are in the same statute and both were there when Congress enacted Title VII in 1964. "[I]dentical words and phrases

within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Services*, 551 U.S. 224, 232 (2007) (emphasis added); *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning."); *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). *Price Waterhouse*'s interpretation of "because" in § 2000e-2 applies equally to "because" in § 2000e-3. *Gross* is simply inapposite, because it refused to extend *Price Waterhouse*'s interpretation of "because" in § 2000e-2 to a *different* statute (the ADEA) enacted years later by a different Congress.

Congress's 1991 amendments clarify and codify the Court's prior interpretation of this causal language. In the 1991 amendments, Congress signaled it agreed with the *Price Waterhouse* plurality and concurrences that showing that a protected trait was a "motivating" factor in a decision could be sufficient to establish liability and clarified that either direct or circumstantial evidence could be used to make this showing. *See Desert Palace*, 539 U.S. at 98-99. Congress superseded *Price Waterhouse* only to the extent that *Price Waterhouse* had held that a showing by the defendant that it would have taken the same action even if it had not considered the impermissible factor

was an absolute defense rather than a limitation on remedies.

In so doing, Congress re-instituted a common interpretation of Title VII's pre-existing language.[2] The limitation on damages that Congress added simply makes explicit the result that naturally flows from Title VII's general remedial instruction to provide "appropriate" relief. 42 U.S.C. § 2000e-5(g). In any instance in which an employer proves it would have taken the same action notwithstanding any consideration of an illicit factor, providing the employee with back pay or reinstatement would go beyond "appropriate" relief. *Cf. McKennon*, 513 U.S. at 361-62 ("It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."). That said, there is an independent and important value in establishing

[2] Prior to *Price Waterhouse*, several circuits had held that a victim of discrimination could establish liability under Title VII by showing her protected status or conduct was a motivating or substantial factor in a decision, but that she would not be eligible for back pay or reinstatement if the employer could prove that it would have made the same decision absent discrimination. *See, e.g.*, *Bibbs v. Block*, 778 F.2d 1318, 1321-22 (8th Cir. 1985); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1166-67 (9th Cir. 1984); *Patterson v. Greenwood School District 50*, 696 F.2d 293, 295 (4th Cir. 1982); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). The House Report for the 1991 Act cites to several of these prior decisions with approval and characterizes Congress's action as "restor[ing]" this understanding of the law. H.R. Rep. No. 102-40 (II), at 17-19, 48 (1991).

that the employer should not have allowed protected conduct to play a motivating role in an adverse decision. *Cf. id.* at 361 ("[W]e must recognize the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the Act."). Thus, even if the Court were to conclude that § 2000e-2(m), and the affiliated remedial language in § 2000e-5(g)(2)(B), does not apply directly to retaliation claims, application of Title VII's general remedial language – which unquestionably applies to retaliation claims – would yield the same result. Declaratory relief might be appropriate, but damages and most injunctive relief would not be.

The so-called "mixed-motive" provision and associated remedial limitations should not be interpreted to provide a separate cause of action under Title VII. Nor does it add a "new" causal standard to Title VII. Section 2000e-2(m) explains one evidentiary route that a plaintiff may use to prevail on a Title VII claim. It is best understood as an interpretive gloss that clarifies and confirms the *Price Waterhouse* Court's holding that Title VII's substantive prohibition on discrimination "because" of protected traits, 42 U.S.C. § 2000e-2(a), requires that an employee prove that an illicit factor was a motivating cause of an adverse employment action – and this meaning of "because" should remain consistent in the parallel prohibition on "discrimination" "because" of protected action found in 42 U.S.C. § 2000e-3(a).

As this Court frequently recognizes, *stare decisis* has special force in the statutory interpretation context. *See CBOCS*, 553 U.S. at 451-52 (citing cases). Adhering to past precedent in this case is all the more important, since Congress itself ratified the relevant portion of the prior interpretation. Allowing a plaintiff to prevail if she establishes that her protected activity is a motivating factor in a decision comports with both the text and history of Title VII.

II. A Motivating Factor Standard Is the Most Workable Standard and Properly Balances the Concerns of Employers and Employees.

Applying a motivating factor standard to Title VII discrimination and retaliation cases is far more workable than interpreting retaliation claims to require a showing of "but for" causation. The standard maintains consistency within Title VII and correctly balances the interests of employers and employees.

There is already considerable confusion in the lower courts because the causal standards under the ADEA and Title VII are now different. This causes significant problems any time a plaintiff pleads discrimination under both statutes,[3] or in cases that

[3] Some courts have taken the (erroneous) position that the necessary implication of *Gross* is that a plaintiff cannot simultaneously challenge a decision under both the ADEA and Title VII because the existence of the Title VII claim suggests that age was not the "but for" cause of the decision. *See, e.g.*, *Culver v.*

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are brought under state laws that prohibit discrimination on the basis of age in the *same statute* as discrimination on the basis of race, sex, religion, or national origin.[4]

Contrary to the petitioner's assertion, interpreting Title VII's retaliation provisions to require a showing of "but for" causation would not clarify the situation – rather, it would make the existing landscape far *more* confusing. This is because Title VII's substantive claims would continue to be governed by the motivating factor standard, and it is common for plaintiffs in Title VII lawsuits to allege violations of both § 2000e-2 and § 2000e-3. If the Court were to hold that retaliation claims require a plaintiff to prove "but for" causation, juries in all such cases would need to be charged on two distinct causal standards. Moreover, they would be tasked with what might well be an impossible exercise of trying to parse the extent to which retaliatory motive, as opposed to substantive discrimination, motivated a particular adverse action. Indeed, in some cases, the

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Birmingham Board of Education, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009). Even when courts properly permit both claims to advance, juries in such intersectional cases must be charged on two different causal standards.

[4] *See Smith v. Anchorage School District*, 240 P.3d 834, 842 (Ala. 2010) (refusing to apply *Gross* to state law age claims); *see also, e.g.*, *Baker v. Silver Oak Senior Living Mgmt. Co., L.C.*, 581 F.3d 684, 689-90 (8th Cir. 2009) (same under Missouri law); *Gross v. FBL Financial Services, Inc.*, 588 F.3d 614, 621 (8th Cir. 2009) (same under Iowa law).

same employer action is both discriminatory and retaliatory (*i.e.*, when an employee rejects a sexual advance by a supervisor and is terminated for the refusal).

Requiring a plaintiff to establish "but for" cause will allow some employers who retaliate against employees to escape liability for the retaliation. *See* Martin J. Katz, Gross *Disunity*, 114 Penn State L. Rev. 857, 884 (2010). If an employer has a retaliatory motive, but also has a second sufficient reason for taking an action, the employer will escape liability under a "but for" standard. *Id.* This undermines the effectiveness of Title VII's retaliation provisions.

Petitioner's and its *amici*'s claim that interpreting the retaliation provisions to permit mixed-motive claims would open the floodgates to frivolous claims and nuisance settlements is unsupported. Under a motivating factor standard, plaintiffs are still required to establish that protected activity played a role in an employment decision. If, upon weighing the evidence, a court determines that no reasonable fact finder could conclude that retaliation was a motivating factor in an adverse action, summary judgment would remain appropriate.[5] *Cf. Clark County School*

[5] Even in cases in which a factual question regarding whether retaliation may have played at least a motivating role in a decision precludes a grant of full summary judgment, a court could grant partial summary judgment as to back pay or reinstatement if an employer demonstrated that there was no

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District v. Breeden, 532 U.S. 268, 273 (2001) (holding summary judgment warranted where adverse action was taken twenty months after protected activity). Indeed, a motivating factor standard has been available under Title VII for more than twenty years; nonetheless, when warranted, courts grant employers' motions for summary judgment, including in cases decided under the motivating factor standard. *See, e.g.*, *Hampton v. Vilsack*, 685 F.3d 1096 (D.C. Cir. 2012); *Wright v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006); *cf.* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 556 (2001) (discussing how courts sometimes suggest that discrimination claims are easy to win, when evidence demonstrates plaintiffs have a low success rate).

Further, unlike traditional tort cases, plaintiffs in retaliation cases are required to prove several additional requirements that limit plaintiffs' ability to sue: a plaintiff must be a protected individual under the statute, 42 U.S.C. § 2000e(f); the defendant must be the kind of entity that is liable under Title VII, 42 U.S.C. § 2000e(b); the plaintiff must establish that her conduct falls within that protected by the statute, 42 U.S.C. § 2000e-3(a); the plaintiff must suffer a type of injury that is compensable, *Burlington Northern*, 548 U.S. at 68; and the plaintiff must meet Title VII's administrative exhaustion

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issue of material fact as to whether it ultimately would have taken the same action anyway.

requirements, including its narrow window for filing administrative charges, 42 U.S.C. § 2000e-5(e)(1). And, as explained above, in any case in which a defendant ultimately establishes that it would have taken the same action notwithstanding any retaliatory motives, remedies would be sharply curtailed.

It is particularly important to recognize the harm that arises when retaliatory motives play a role in an adverse action because this Court has recognized that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford*, 555 U.S. at 279 (citing Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005); *see also* Brake, *supra*, at 37 & n. 58 (compiling studies)). "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern*, 548 U.S. at 67; *Thompson*, 131 S. Ct. at 868. Moreover, this Court has frequently recognized that Title VII should be interpreted so as to encourage internal reports of discrimination that alert employers to potential problems and allow them to promptly address and end discrimination or harassment. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

Retaliatory actions by an employer do not simply harm the specific employee involved in the incident. They cause an additional harm in that they can deter other employees from bringing up concerns. An employer thus violates the statute if it retaliates against an employee by taking acts that a "reasonable

employee" would find to be "materially adverse." *Burlington Northern*, 548 U.S. at 68. If an employer can lawfully punish an employee because she made a complaint of discrimination (even if there are additional legitimate justifications for the employer's action), other employees will be further deterred from sharing concerns regarding potentially discriminatory conduct.

III. Petitioner's Argument Rests on an Unwarranted Inference of Congressional "Intent" from Congressional Silence.

Petitioner's argument ignores the plain meaning of Title VII, its consistent interpretation over time, and a long line of cases holding that retaliation is encompassed within discrimination. It also would require the Court to hold that not only did Congress not address retaliation in 1991, but that Congress intended its silence to somehow embrace "but for" cause. This argument is deeply flawed because it is premised on drawing a negative inference from Congressional inaction.

As the Court has explained, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit*, 496 U.S. at 650 (internal citations omitted); *see also, e.g.*, *DePierre v. United States*, 131 S. Ct. 2225, 2236 n. 13 (2011) ("Ordinarily, we resist

reading congressional intent into congressional inaction.") (internal citations omitted); *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("[C]ongressional inaction is a canard."). As explained above, it is reasonable to assume that Congress intended the motivating factor standard enunciated in § 2000e-2(m) to govern retaliation claims. But even if the Court rejects this interpretation, it is undeniable that Congress, in enacting the 1991 Act, did not make any *affirmative* indication that it intended Title VII's retaliation provisions to be governed by a different causation standard than its substantive anti-discrimination provisions. At best, this is a negative inference drawn from Congressional inaction.

To be sure, the challenge of "reading the tea leaves of congressional inaction," *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality), in this case differs from cases in which a bill responding to a prior judicial or administrative interpretation is introduced but not enacted. In those situations, the concerns typically voiced are that many members of Congress may not have known about the relevant decision or that they may have had other higher priorities. *Id.* at 750. Here, members of Congress obviously were aware of *Price Waterhouse*. But that does not resolve what inference to draw from the fact that Congress amended the section containing the substantive discrimination provision actually *interpreted in the prior decision* but did not explicitly amend the retaliation provisions that had not been at

issue in the prior case. Moreover, the actions, and inactions, of the 102nd Congress obviously have no bearing on the intent and purpose of the 88th Congress that enacted § 2000e-3. *Cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) ("The relationship between the actions and inactions of the 95th Congress and the intent of the 92nd Congress . . . [is] considerably attenuated.")[6]

Petitioner claims the "inaction" should be interpreted as a purposive choice to adopt a different causation standard for the retaliation claims than for claims of discrimination based on protected traits. Pet'r Br. 17. But it is at least as plausible that Congress expected that the new language would also govern retaliation claims. Indeed, the committee report suggests that it would be used to reinterpret the causal standard in other similar statutes as well. H.R. Rep. No. 102-40 (II), at 4 (1991) ("The Committee intends that . . . [other laws that have been

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[6] For similar reasons, the fact that bills that would override *Gross* have been proposed but not passed should not be deemed to establish that Congress agrees with *Gross*'s interpretation of the ADEA. Likewise, the fact that some statutes enacted after 1991 explicitly include burden-shifting language like that added to Title VII in 1991 sheds little light on the interpretation of Title VII's earlier language. *Cf. Kasten v. St. Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332-33 (2011) ("[T]he use of broader language elsewhere *may* mean (1) that Congress wanted to limit the scope of the phrase before us . . . , or (2) that Congress did not believe the different phraseology made a significant difference in this respect.") (emphasis in original).

modeled after Title VII] be interpreted consistently in a manner consistent with Title VII as amended by this Act.") Or it is plausible that Congress assumed and preferred that *Price Waterhouse* – which interpreted the language quite similarly to the 1991 amendments – would continue to control the interpretation of causal language elsewhere in Title VII or other statutes. *Cf. Gross*, 557 U.S. at 185-86 (Stevens, J., dissenting).

Overrides often pose such interpretive dilemmas because the text of the override rarely addresses all potential applications of the precedent to which Congress is responding.[7] Indeed, in recent decisions interpreting the 1991 Act, the Court has adopted a variety of approaches to resolving these thorny questions. Petitioner, of course, points to *Gross*, where the Court deemed the fact that the 1991 Act did not amend the ADEA to be highly significant. Pet'r Br. 22-23. But, as noted above, *CBOCS West* addressed a very similar issue – and in that case the Court reached the opposite conclusion: It deemed insignificant Congress's "failure" to explicitly address retaliation in the override since prior precedent had interpreted retaliation to be implicit in prohibitions on status-based discrimination. 553 U.S. at 454.

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[7] *See generally* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L. Rev. 511 (2009); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex. L. Rev. 859 (2012).

Similar issues were also posed in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In that case, the Court held that the 1991 Act's override of aspects of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), changed the disparate impact standard for Title VII but that *Wards Cove*'s interpretation remained applicable to the ADEA. *Id.* at 240; *see also Gross*, 557 U.S. at 186 (Stevens, J., dissenting) (arguing reasoning in *Smith* suggested *Price Waterhouse* should have controlled interpretation of the ADEA). In short, recent precedents support several approaches to resolving the interpretive questions posed by this case, confirming the dangers of guessing Congressional "intent" from Congressional inaction.

Likewise, this Court has appropriately emphasized that it is essential to consider context when determining what import to ascribe to differences between generally similar statutory provisions. Thus, while the Court has reasonably concluded that it is sometimes appropriate to "presume[ ] that Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of language, *Rusello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted), it has cautioned that this inference is strongest when applied to "contrasting statutory sections *originally enacted simultaneously* in relevant respects." *Field v. Mans*, 516 U.S. 59, 75 (1995) (emphasis added). Even when addressing sections simultaneously enacted, the Court has observed that where provisions "evolve[ ] separately in the congressional process, only to be passed together at the last

minute," there is a risk that, "in the rough-and-tumble," Congress does not consider the significance of differences among sections. *Lindh v. Murphy*, 521 U.S. 320, 329 (1997). As noted above, when initially enacted, § 2000e-2 and § 2000e-3 were consistent in their structure. The so-called "meaningful" difference at issue in this case is the result of a later amendment made to codify and clarify a judicial interpretation of that common language, an interpretation that is wholly consistent with the common pre-existing language.

Frequently, the Court suggests that if Congress disagrees with statutory interpretation by the courts, it may amend the relevant statute. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all of this, it is . . . to be remedied by the Congress and not by the Court); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court.") This potential for dialogue between the courts and Congress is recognized by the Court and by commentators as essential for maintaining the democratic accountability of statutory law. *See generally* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L. Rev. 511, 518-21 (2009) (collecting sources). Already, the efficacy of this dialogue is severely challenged by increasing gridlock in Congress. *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme*

Court, and Congress, 86 U.C.L.A. L. Rev. ___ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130190 (finding sharp decrease in the number of overrides enacted since 1991). It could break down entirely if a judicially-created canon of interpretation requires that Congress, if it disagrees with a judicial interpretation of a statute, amend not only the statute actually interpreted in the specific decision but also any and all other statutes, scattered throughout the Code, that include similar language.

IV. Placing the Burden on Plaintiff to Establish "But For" Cause Is Contrary to Common Law Notions of Cause.

One of the petitioner's central arguments is that the word "because" means that the plaintiff must establish "but for" cause, and Petitioner suggests that this interpretation stems from common law understandings of causation. This is incorrect.[8] Common law ideas of factual cause have long embraced numerous causal formulations because of the inherent limits of "but for" cause. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 Reporter's Note (2010). In fact, tort law does not rely

[8] This Court is not bound by tort formulations of causation. *See* Sandra F. Sperino, *The Tort Label*, 65 Fla. L. Rev. ___ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200990 (demonstrating that Title VII does not derive from common law torts).

heavily on factual cause when a plaintiff is able to establish intent, as plaintiffs often do in retaliation cases.

The word "because" is not a magic word that signifies "but for" cause to the exclusion of other causal formulations. At common law, the factual cause inquiry considers what connection must exist between the defendant's conduct and the resulting harm. The common law does not rely on "but for" cause as the only way of thinking about the factual cause inquiry. Rather, it has long recognized that "but for" cause is sometimes problematic when more than one actor or factor contributed to the harm. *See, e.g.*, Restatement (Third) of Torts, *supra*, at § 27 (noting that a different factual cause standard exists when multiple sufficient causes exist); *id.* at § 27 Reporter's Note (stating that there is nearly universal recognition that the "but for" standard is inappropriate when multiple sufficient causes exist); Restatement (First) of Torts § 9, cmt. b (1934) (defining a legal cause as one that is a "substantial factor in bringing about the harm"); Restatement (Second) of Torts § 430, cmt. d (1965) (noting there can be more than one source of harm); Restatement (Second), *supra* at § 432 (noting that plaintiff can still establish factual cause when more than one actor causes harm).

Tort law does not respond to the shortcomings of "but for" cause by denying liability entirely. Rather, tort law contains a robust idea of factual cause that incorporates varying standards and evidentiary orders to accommodate the underlying cause of action

and to apportion responsibility for harm appropriately. *See, e.g.*, *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948); *Sindell v. Abbott Laboratories*, 607 P.2d 924, 928 (Cal. 1980) (discussing ways that plaintiff could recover despite being unable to establish which defendant caused plaintiff's harm); Restatement (Third) of Torts, *supra*, at § 27.

One common scenario where "but for" cause yields unsatisfactory results is when an event is overdetermined; *i.e.*, when two separate physical forces create an injury and either alone would be sufficient to cause the injury. *See id.*; Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 Vand. L. Rev. 675, 722 (2011). This idea is sometimes referred to as multiple, sufficient causes. Under a "but for" analysis in this situation, a plaintiff would not be able to prevail on a retaliation claim if the reason for the employment decision is overdetermined – if the employer terminated the employee for both a retaliatory reason and a reason acceptable under the at-will doctrine, and either reason, standing alone, would have led to the termination. Tort law rejects "but for" cause in multiple, sufficient cause cases and allows the plaintiff to establish that either sufficient cause created the injury. Restatement (Third) of Torts, *supra*, at § 27. This standard is akin to the plaintiff's initial burden in the motivating factor analysis adopted in *Price Waterhouse* and the 1991 amendments to Title VII.

The motivating factor analysis, and the related shift of the burden to the defendant to prove that it

would have taken the same action anyway, is also superior because it understands that plaintiffs may not have the best access to information regarding why an employer made a decision. This is especially true in today's work environment in which multiple individuals may contribute to an employment decision. The motivating factor standard does require the plaintiff to show that retaliation played a role in a decision. However, it also recognizes that the employer is the entity that has the best access to evidence related to its decisions. *Summers*, 199 P.2d at 3 (shifting burden to defendants to show which one caused the harm); *Sindell*, 607 P.2d at 928.

Retaliation cases present even more compelling reasons in support of a motivating factor standard than traditional tort cases because they often turn on intent. The tort causation analysis developed in negligence cases relating to physical events, such as car and train accidents, in which it is comparatively easy to determine what caused injury. By contrast, in retaliation cases, courts are often asked to determine animus or intent contained within the mind of a decisionmaker or set of decisionmakers. It may be difficult to separate retaliatory from non-retaliatory motives, as people often act for more than one reason.

Tort law de-prioritizes the factual cause inquiry when a defendant intends a particular action. Restatement (First) of Torts, *supra*, § 279, cmt. c (explaining that the definition of cause changes depending upon whether the tort is negligence or an intentional tort); *id.* at § 280. In these cases,

requiring the plaintiff to establish "but for" cause is unnecessary because evidence of intent diminishes the need for a strong causal standard. *See, e.g.*, Restatement (Second) of Torts, *supra*, § 13 (describing the elements of battery without discussing causation). The motivating factor standard, with appropriate reductions in damages if an employer proves it would nonetheless have taken the same action, is far more reflective of common law approaches to causation than a "but for" standard.

V. The Question Presented Is Overbroad and Contains False Assumptions Suggesting that "But For" Causation Means Sole Cause.

Petitioner's framing of the question presented is problematic in two important respects. First, Petitioner asks the Court to apply *Gross* to all statutes that are "similarly worded" to Title VII, both within and outside the field of employment discrimination law. Applying *Gross* so broadly would radically alter existing understandings of the effect of Congressional silence and principles regarding how courts determine which statutes should be interpreted *in pari materia*. Second, the question presented implies that there is always a dichotomy between multiple motives and "but for" cause. It improperly equates "but for" cause with sole causation.

Petitioner never fully defines the statutes that it considers to be "similarly worded" to the primary

operative language of Title VII. The extreme breadth of the question presented is demonstrated by even a quick list of the provisions and statutes – scattered throughout the Code and under the jurisdiction of numerous different Congressional committees – that prohibit conduct "because" of an individual's status or actions or that use similar causal language. This could include the criminal bribery statute, 18 U.S.C. § 201(c)(1) (2006) (prohibiting receipt of anything of value "because" of official acts); the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1)(A)-(B) (2006) (prohibiting discrimination against an employee "because" of national origin or citizenship status); the Family Medical Leave Act, 29 U.S.C. § 2615(b) (2006) (prohibiting discrimination "because" of protected conduct); the False Claims Act, 31 U.S.C. § 3730(h)(1) (prohibiting discrimination "because" of protected conduct); the Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (2006) (prohibiting discrimination "because" of protected conduct); and the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651 (2006) (prohibiting discrimination "because" an employee made a complaint). It could also reach statutes far outside the employment context, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (prohibiting programs receiving federal financial assistance from discrimination "on the ground" of various traits); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3605, 3606 (2006) (prohibiting various kinds of housing discrimination "because" of various traits); and Title IX of the Education Amendments Act of 1972, 20

U.S.C. § 1681 (2006) (prohibiting discrimination "on the basis of" sex by education programs receiving federal financial assistance).

Many of these statutes are structured differently than the ADEA and Title VII, use different causal language, and do not derive solely or primarily from Title VII or the ADEA. It would stretch a Congressional silence argument to absurdity to suggest that Congress somehow intended to express its desires about causation in all then-existing and future statutory regimes when it amended Title VII in 1991.[9]

The question presented is also confusing in that it suggests that a plaintiff cannot prevail under a "but for" cause standard when there are mixed motives. The question presented thus seems to equate "but for" cause with sole causation. *See also* Pet'r Br. 29 (arguing for a sole causation standard). Congress

[9] Using reasoning from *Gross* to resolve questions under the Americans with Disabilities Act ("ADA") would be highly problematic. 42 U.S.C. § 12101 *et seq.* (2006), as amended. Contrary to petitioner's assertions, the ADA's primary provision does not use the same words as the ADEA. The ADA contains a multi-part definitional section that explains what Congress meant in the main operative language, and these definitions do not rely on notions of "but for" cause. Rather, they incorporate such varied concepts as a failure to make reasonable accommodations or denial of a job or benefits to an individual because of her relationship with an individual with a disability. *Id.* at § 12112(b). Moreover, the ADA explicitly incorporates Title VII's remedial provisions, including the modification of those provisions made in the 1991 Act. *Id.* at § 12117.

explicitly rejected a sole causation standard under Title VII. *See Price Waterhouse*, 490 U.S. at 241 n. 7.

"But for" cause means that the cause was a necessary condition of the harm. *See, e.g.*, Restatement (Third) of Torts, *supra*, § 26 cmt. b. An act can be a necessary condition of harm even when multiple acts are necessary to cause the harm. *Id.* at cmt. b & c. Take the following example. Assume that a supervisor was considering firing an employee for some kind of mistake but was reluctant to terminate the employee because in other respects she had been a fine worker. The supervisor then learns that the employee submitted a discrimination complaint against the supervisor, and this news gives the supervisor the impetus to terminate the employee. Even though there are potentially two motives at issue, the terminated employee may well be able to establish that her protected activity was a "but for" cause of her termination. *Cf. id.* at cmt. b ("An act can also be a factual cause in accelerating an outcome that otherwise would have occurred at a later time."). In such an instance, she should be able to recover on a retaliation claim even though her mistake may also have been a factor in the decision to terminate her. But for her protected conduct, she would not have been terminated.

Even if this Court were to interpret Title VII's retaliation provisions to require a plaintiff prove "but for" causation, the Court should make clear that this does not require a plaintiff prove that retaliation was the *sole* cause of any adverse action against her. Since

an employer would in numerous instances be able to identify at least some infraction that might justify an adverse action against an employee, a sole causation standard would render the retaliation provisions almost meaningless.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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