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 *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS ET AL., IN SUPPORT OF RESPONDENT

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Park
Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@law.psu.edu

Rebecca Hamburg Cappy
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery St., 4th Flr.
San Francisco, CA 94104
(415) 296-7629
rcappy@nelahq.org

Lisa M. Bornstein
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
1629 K St., NW, 10th Flr.
Washington, DC 20006
(202) 466-3311
bornstein@civilrights.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTEREST OF *AMICI CURIAE*

Amici[1] are the National Employment Lawyers Association, the Leadership Conference on Civil and Human Rights and 18 organizations committed to furthering the goals of Title VII of the Civil Rights Act of 1964, and of statutes modeled on Title VII, to prevent and redress the effects of employment discrimination in workplaces across the nation. To that end, *Amici* are committed to providing assistance to the Court in maintaining standards of proof and causation that further these goals and that make sense to employees, employers, judges, and juries. The individual organizations are described in detail in the attached Appendix.

Federal courts continue to grapple with causation issues under federal employment discrimination statutes, sometimes reaching results out-of-step with the Court's foundational rulings and in conflict with Congress' intent in passing these laws. When these conflicts occur, employees' ability to prove unlawful discrimination is unduly restricted. Because the Court's decision in this case will directly affect the rights of employees who suffer workplace retaliation, the Court should take this opportunity to clarify its Title VII jurisprudence.

Amici respectfully submit that our day-to-day experience in employment discrimination litigation

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

and advocacy can assist this Court in resolving the issues before it. In particular, *Amici* are intimately familiar with the way in which lower courts have struggled to apply a consistent approach to proving intentional discrimination. This struggle is embodied in lower courts' confusion in applying *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), in light of the Court's prior rulings in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality decision); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

SUMMARY OF ARGUMENT

If employees' ability to claim and prove unlawful discrimination is subject to arbitrary and unreasonably high limits, Title VII's substantive protections and prohibitions ring hollow. The Court has repeatedly recognized this vital principle in a consistent line of cases extending from *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), through *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and most recently in *Thompson v. N. Am. Stainless*, 131 S. Ct. 863 (2011). Specifically, the Court has held that to effectively enforce Title VII's bar on discrimination, Title VII's antiretaliation provision must be broadly interpreted to ensure "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. *See Burlington N.*, 548 U.S. at 67. The Court has broadly construed the retaliation provisions of other

antidiscrimination laws modeled on Title VII. The Court has also found that retaliation is actionable even under antidiscrimination statutes that lack explicit antiretaliation provisions.

It is against this backdrop of the Court's robust protection against retaliation that the Court must view the issue before it: whether the "motivating factor" standard for establishing intentional discrimination based upon race, color, religion, sex, or national origin, added to Title VII in Section 703 of the 1991 Civil Rights Act, is different from the standard for proving unlawful retaliation under Title VII. *See* 42 U.S.C. §§ 2000e-2(m); 2000e-3(a) (2006). For these two closely related forms of intentional discrimination, Petitioner argues there should be different standards: one for proving the underlying discrimination and another, higher standard for proving retaliation. This argument makes no sense, either in the abstract or in practice, where it would confuse employers, employees, judges and juries. Petitioner's framing of the issue furthers this confusion. That is, Petitioner mistakenly attempts to divide employment discrimination cases into two categories: cases where discrimination is the only motive, and cases where discrimination is one of several motives driving an adverse employment decision. This framing ignores how the Court has addressed discrimination since the passage of the Civil Rights Act of 1964, while simultaneously ignoring the realities of the workplace and how employment decisions are made.

In resolving the issue presented, the Court should continue to reiterate, and indeed clarify, the principle it has applied since Title VII's passage: "it

is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Furthering this principle and entirely consistent with it, *Amici* ask the Court to expressly hold that Section 703(m)'s "motivating factor" standard is the appropriate causation standard in Title VII retaliation claims.

To be clear, this standard does not mean that Title VII is violated simply because the illegal consideration was in the air. The illegal consideration must have played a role in the adverse employment action. The Court has consistently held that the law is violated only when a protected characteristic, here the right to be free from retaliation, affects the employment decision. However, the Court has made it abundantly clear that while the illegal consideration must make a difference in an employment action, it need not be the sole factor. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (1989) (plurality decision) (Kennedy, J., dissenting) ("No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether . . . [it] must be *a* cause . . . . [E]ither by itself or in combination with other factors, it made a difference to the decision."). The Court's decisions merely reflect the workplace reality that adverse employment decisions often have multiple motives.

Congress reiterated and codified the Court's view that multiple considerations can, and do, influence employment decisions when it added "motivating factor" language to Title VII in the Civil

Rights Act of 1991. "Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695.

There is nothing in the Court's treatment of retaliation as an unlawful practice under Title VII, in the 1991 amendments, or in the legislative history of Title VII that reasonably leads to the conclusion that there should be one standard of causation for proving intentional discrimination based upon a protected classification, and another, higher standard for proving retaliation. To the contrary, by recognizing how vital Title VII's antiretaliation provision is to securing Title VII's antidiscrimination rights, the Court has consistently interpreted the antiretaliation provision more broadly than its antidiscrimination counterpart.

The decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) did nothing to change this history and does not counsel a different result. *Gross* held that Title VII's analysis could not be imported to Section 623 of the ADEA because that provision does not contain a "motivating factor" standard. *Id.* at 174. Here, however, that reasoning does not apply because "motivating factor" language is included within Title VII.

Imposing different standards for proving intentional discrimination under the same statute will only create confusion for the parties, courts, and juries. This concern is not merely theoretical, but practical; individual claims of retaliation, as well as mixed discrimination-retaliation cases have increased over the past decade.

The Court should clarify that if retaliation is a motivating factor for the adverse employment action, then the employer has violated the law, subject to the limited same decision defense set forth in Title VII. Ensuring that illegal factors are not considered in employment decisions will honor the intent and purpose of Title VII.

ARGUMENT

I. The Court Has Consistently Recognized The Vital Importance Of Broadly Interpreting The Antiretaliation Provision To Protect The Antidiscrimination Rights Contained In Title VII

The antiretaliation provision of Title VII is a crucial component of Congress' goal to protect a plaintiff's substantive right to challenge discrimination. For this reason, the Court has vigorously protected an employee's right to be free from retaliation. Specifically, the Court has consistently construed the antiretaliation provision broadly, explaining that it must extend beyond the discrimination provision to ensure employees the full protection of Title VII. *See, e.g.*, *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

The importance of the antiretaliation provision cannot be overstated. The provision's primary purpose is to secure compliance with the other provisions of Title VII, and it must be

interpreted in the context of Title VII's broader statutory scheme. Thus, although the prohibition on discrimination and antiretaliation provisions differ in purpose, they complement each other and should be read together. *See Burlington N.*, 548 U.S. at 63, 75 (Alito, J., concurring).

To that end, the Court has interpreted the protections of the antiretaliation provision to cover "a broad range of employer conduct." *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 868, 870 (2011) (citing *Burlington N.*, 548 U.S. 53 (2006)) (applying the protections of the antiretaliation provision to third parties who are in the zone of interests that Title VII seeks to protect); *see also Burlington N.*, 548 U.S. at 63, 67 (applying the protection of Title VII's antiretaliation provision to events that occur outside the workplace).

Moreover, the Court has recognized that retaliation is actionable even under statutes that do not expressly provide such protection. *See Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) ("[W]e interpret the ADEA federal-sector provision's prohibition of 'discrimination based on age' as likewise proscribing retaliation."); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) ("We consequently hold that 42 U.S.C. § 1981 encompasses claims of retaliation."); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

The Court's broad construction of antiretaliation protections under federal

employment discrimination statutes mirrors the Court's forceful protection of retaliation claims in other areas of federal employment law. *See N.L.R.B. v. Scrivener*, 405 U.S. 117, 121-22 (1972) (recognizing that retaliation is protected under the National Labor Relations Act); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("By the proscription of retaliatory acts set forth in [the Fair Labor Standards Act], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.").

The Court should continue protecting an employee's right to be free from workplace retaliation in the instant case.

II. Considering The Court's Robust Protection Against Retaliation, The Court Should Hold That Section 704 Is Violated If Retaliation Is A Motivating Factor For An Adverse Employment Decision

Title VII's principal substantive provision, Section 703, prohibits employment decisions made "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). The Court has interpreted "because of" with an express recognition that adverse employment decisions are often made based on a combination of legitimate and illegitimate motives. Congress codified this understanding when it amended Title VII by adding "motivating factor" language. "[T]he Committee intends to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment

decision may be the subject of liability." H.R. REP. NO. 102-40 (II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

Section 704 of the same statute prohibits discrimination against an employee, "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . . ." 42 U.S.C. § 2000e-3(a). Since Congress intended for Title VII's two key antidiscrimination provisions to be read together, there was no need for Congress to separately amend Section 704 in the 1991 amendments. Now this Court must determine whether Title VII's language provides one set of standards for proving intentional discrimination based upon a protected characteristic and a separate, higher standard for proving intentional retaliation.

A fair reading of Title VII's text after the 1991 amendments should lead to the conclusion that the law is violated if an illegitimate consideration is a "motivating factor" in an adverse employment decision—regardless of whether that illegal consideration is the intent to discriminate based upon, for example, sex or unlawful retaliation. Resp't. Br. at 12, 16-19. *See generally* Br. of Emp't Law Professors of *Amici Curiae* in Support of Resp't.

Beyond that, however, this conclusion is compelled when the language of Section 704 is read in the context of the Court's robust protection of the right to be free from workplace retaliation and the legislative history of the Civil Rights Act of 1991. Even *Amici* for the Petitioner agree that "[t]he issue that confronts the Court is, at its core, one of

Congressional intent . . . ." Br. of *Amicus Curiae* The Voice of the Defense Bar in Support of Pet. at 6. To the extent there is a question regarding whether Section 703(m) should be interpreted to apply to retaliation claims, the Court has emphasized that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, *and the broader context of the statute as a whole*." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis added); *see also Dada v. Makasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute."). Thus, as this Court recently recognized, if a clause "read in isolation, leaves room for doubt," it is appropriate to consider the "the context and history" of the statute. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010). Honoring these standards, the Court should clarify that Section 703(m)'s "motivating factor" causation standard applies to claims of retaliation.

In holding that Section 703(m)'s "motivating factor" causation standard applies to Section 704, and to avoid further confusion, the Court should reiterate what it has consistently recognized: employment actions often have multiple causes and proof of intentional discrimination under Title VII does not require proof of a *sole* cause.

A. The Court Should Reject The Number Of Motives As A Criterion For Distinguishing Causation Because All Cases Are *Potentially* Multiple Motive Cases

"Mixed-motive" has become a term of art that has nothing to do with the number of motives an employer actually has for taking a specific employment action.[2] Courts need not distinguish between cases involving multiple motives and cases involving a single motive, because nothing in the statute rests on that distinction. Indeed, the Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination was the "sole cause" of the contested employment action under Section 2000e-2(a)(1). Relying on *McDonnell Douglas*, the Court held:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race . . . as [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a "but for" cause.

---

[2] With this usage, if a case is deemed a "mixed-motive" case, at the summary judgment stage, the focus is directed at proving that a protected characteristic was a motivating factor in the decision to take an adverse action. At trial, on the other hand, multiple motive cases require proof that an illegal reason was a motivating factor, subject to the limitations of the same decision affirmative defense. The determination of whether to apply a *McDonnell Douglas* burden shifting analysis or a "mixed-motive" analysis is generally based on the evidence adduced during the course of the litigation.

McDonald, 427 U.S. at 282 n.10 (emphasis added) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

Employment cases often involve multiple motives. Using the term "single-motive" or "pretext" to describe a case brought pursuant to Section 703 as opposed to "mixed-motives" to describe a case where the same decision affirmative defense is available is therefore inaccurate. This inaccurate use of "single-motive" and "pretext" fails to differentiate the case where the affirmative defense is available from one where it is not.

In every case the jury may decide: 1) that the legitimate reason motivated the employer, and that the illegal reason did not; 2) that the illegal reason motivated the employer and the legitimate reason did not, but was merely pretext; *or* 3) that both the illegal and legitimate reason motivated the employer. In this sense, every case is *potentially* a multiple or "mixed-motive" case. Indeed, Petitioner concedes this point. Pet. Br. at 32.

It is impractical and confusing to conclude that the number of motives involved determines the applicable culpability standard. Under both the "motivating factor" and "but-for" standard of causation, the number of causes involved is irrelevant because neither standard requires an employee to prove that an illegal reason was the only or sole reason for an adverse action. *See* discussion *infra* Section II.B. Instead, because every employment discrimination case potentially involves multiple motives, the relevant inquiry should be whether an illegal motive, even alongside other, legitimate motives, impacted the ultimate

employment decision. As Justice Kennedy articulated in his *Price Waterhouse* dissenting opinion, "[t]he words of Title VII are not obscure. . . . By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989).

Congress explicitly recognized that employment decisions usually involve multiple motives, but that a discriminatory "motivating factor" should never be tolerated and must be purged entirely from the employment process. "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2006).[3]

Amici are not asking the Court to adopt a new standard of causation, rather, we ask the Court to affirm the standard adopted by the Civil Rights Act of 1991, which reflects similar standards used by the appellate courts before *Price Waterhouse* was

---

[3] In *Price Waterhouse*, 490 U.S. at 241 n.7, the Court pointed out that when considering the bill that eventually became Title VII, "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'" in § 2000e-2(a)(1). *Id.* (citing 110 CONG. REC. 2728, 13837 (1964)). As Senator Clifford Case, the Republican floor manager of Title VII, stated in explaining why such a requirement should be rejected, "[i]f anyone ever had an action that was motivated by a single cause, he is a different animal from any I know of." 110 CONG. REC. 13, 837-38 (1964). Adding the word "solely" to Title VII would, according to Senator Case, "render Title VII nugatory." *Id.*

decided. More than a decade before the phrase "motivating factor" was used in *Price Waterhouse*, the Supreme Court acknowledged that the law is violated when an unlawful consideration joins with one or more lawful considerations to cause harm. *See, e.g.*, *Bd. of Cnty. Comm'rs, Wabaunsee Cnty.*, *Kan. v. Umbehr*, 518 U.S. 668, 674 (1996); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977). The courts also applied this type of analysis in Title VII cases. For example, in *Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (Kennedy, J.), the Ninth Circuit reasoned that,

> Where employment discrimination affects the applicant's score or the evaluative process, it suffices to impose initial liability to find that [the protected characteristic] was a significant factor in the decision . . . . *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L.Ed. 2d 207 (1981) (plaintiff may succeed "by persuading the court that a discriminatory reason more likely motivated the employer"); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

Courts are adept at handling cases with multiple motives and have applied the "motivating factor" standard routinely in Title VII cases. Despite

Petitioner and its supporting *Amici*'s policy argument to the contrary, Congress codified the motivating factor analysis in the Civil Rights Act of 1991. Petitioner fails to explain how applying this same analysis to retaliation will cause any difficulty.

Despite the confusion among the lower courts regarding the proper application of Title VII,[4] the plain language of the Civil Rights Act of 1991 does not distinguish between cases involving a single motive or multiple motives. The language of the statute does not permit the application of the "motivating factor" standard *only* when other factors also motivated the employer's decision. Rather, it applies *even though* or *regardless of whether* other factors motivated the employer's decision. *See* 42 U.S.C. § 2000e-2(m).

B. The Causation Standard Under Title VII's Antiretaliation Provision Does Not Require A Showing Of Sole Cause

At its heart, this case requires the Court to determine how much intentional workplace retaliation an employee must endure—not how many causes there must be for the adverse action—before

---

[4] *See*, *e.g.*, *Ginger v. District of Columbia,* 527 F.3d 1340, 1345-46 (D.C. Cir. 2008), *overruled by Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012) (explaining that Title VII provides two ways to establish liability: "single-motive" or "pretext" theory, and a "mixed-motive" theory); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 396 (6th Cir. 2008) (stating discrimination claims "are traditionally categorized as either single-motive claims . . . or mixed-motive claims"); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc), *aff'd,* 539 U.S. 90 (2003) (stating *McDonnell Douglas* may be used "where a single motive is at issue . . . [or in] a circumstance in which mixed motives are at issue.").

Title VII is violated. Thus, retaliation need not be the sole cause and the law may be violated if retaliation played a role in the employment decision, even though other, legitimate motives were also in play. Petitioner's argument, while confusing, clearly demonstrates its belief that "but-for" cause means sole cause. Petitioner references the "solely by reason of" language in Section 504 of the Rehabilitation Act, explaining that this standard "is at least as strict a standard as but-for causation." Pet. Br. at 29. Why draw this parallel at all unless the Petitioner's true contention is that the standard must be sole cause? Petitioner's *Amici* reinforce this point where, for example, they cite to *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995) to illustrate the difference between "but-for" and "motivating factor" jury instructions while emphasizing that the protected characteristic has to be "the sole motivating factor . . . ." Br. of *Amicus Curiae* The Voice of Defense Bar in Support of Pet. at 18. Sole cause is a wholly inappropriate standard and one the Court has never required.

The principal substantive provision of Title VII prohibits adverse employment actions "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). This provision is consistent with the antiretaliation provision of Title VII, which does not contain any restrictive language signifying congressional intent to limit the analysis to sole cause culpability. As noted above, when Congress enacted Title VII, it purposefully rejected an amendment where the word "solely" was placed in front of the words "because of." *See* 110 CONG. REC. 2728, 13837 (1964); *see also*

Price Waterhouse, 490 U.S. 228, 241 n.7 (1989). In fact, with one exception, [5] none of the federal employment discrimination statutes contain any language suggesting a requirement to show sole cause.[6]

The Justices who directly addressed this point in *Price Waterhouse* all agreed that the "because of" language under Title VII does not mean sole cause. Justice Brennan, writing for the plurality, stated unequivocally that "we know that the words 'because of' do not mean '*solely* because of' . . . ." *Price Waterhouse,* 490 U.S. at 241. In his concurrence, Justice White noted that the Court previously rejected a sole cause standard. *Id.* at 259. Justice O'Connor, in her concurrence, reiterated that the

---

[5] Section 504 states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination . . . ." 29 U.S.C. § 794(a) (2006).

[6] In 1990, moreover, Congress explained that "sole cause" is the causation standard under neither the ADA nor Section 504 because "literal reliance" on 504's phrasing "leads to absurd results." S. REP. NO. 101-116, 142-43 (1989); *see also* H.R. REP. NO. 101-485 (II), 85-86 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368 ("In sum, the existence of non-disability related factors in [an adverse employment] decision does not immunize employers. The entire . . . procedure must be reviewed to determine if the disability was improperly considered[,]" discussing with approval *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1386-87 (10th Cir. 1981)). Hence, despite off-base suggestions to the contrary, *see* Pet. Br. at 29, causation standards under one or more of the Rehabilitation Act's multiple antidiscrimination provisions is not before the Court in this case, and thus, need not and should not be addressed, but rather, should be subject to a "careful and critical" examination in another appropriate case. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 374 (2009).

Court previously rejected attempts to require the plaintiff to prove sole cause under Title VII. Indeed, Justice O'Connor noted that "[r]arely can it be said that . . . a decision [is] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id.* at 268. Furthermore, Justice Kennedy understood and agreed that Title VII's causation standard did not require the plaintiff to demonstrate that the protected characteristic was the sole reason for the adverse employment decision. Instead, Justice Kennedy proposed that "[the protected characteristic] is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. *Discrimination need not be the sole cause in order for liability to arise* . . . ." *Id.* at 284 (emphasis added).

The Court has noted that "because of" provides for the balancing of multiple motives. *Id.* at 241; *see also Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163, 1165 (9th Cir. 1984) (Kennedy, J.) (holding that liability is imposed against a defendant where "sex was *a significant factor* in the [employment] decision . . . .") (emphasis added). The Court has consistently found that a violation of Title VII can occur where the adverse action was "because of" discrimination or retaliation, although other causes may have existed.

Even *Gross*, upon which Petitioner and its supporting *Amici* strongly rely, did not define "but-for" causation as sole cause, reiterating the workplace reality that adverse employment actions can have multiple motives. "[T]he burden of

persuasion necessary to establish employer liability is the same in alleged mixed-motive cases as in any other ADEA disparate-treatment action." *Gross*, 557 U.S. at 177.

The Court in *Gross* began by stating that "[t]he ordinary meaning of the ADEA's requirement that an employer took an adverse action 'because of' age is that age was the 'reason' that the employer decided to act." *Id.* at 176. Crucially, the Court then referenced its previous decision in *Hazen Paper Co. v. Biggins* to further explain its understanding of the "but-for" standard: "[T]he employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*." *Gross*, 557 U.S. at 176 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The Court in *Gross* essentially highlighted that the illegitimate consideration must be significant enough to be "determinative." Even this narrow interpretation of the "because of" standard under the ADEA provides for multiple motives and does not require the language to be interpreted as "solely by reason of." *Cf.* Pet. Br. at 29.

Despite the appearance of differing culpability standards under "but-for," "because of," and "motivating factor," one thing remains clear: a plaintiff is not required to show that an illegal motive was the "sole cause" of an adverse employment action. To curtail any continuing confusion, *Amici* ask the Court to affirmatively "banish the word 'sole' from [the] Title VII lexicon." *Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012).

C. The Court Should Clarify That The Causation Standard For Title VII Retaliation Claims Is Section 703(m)'s "Motivating Factor" Standard

In light of the Court's consistent and robust protection of employees from workplace retaliation and the legislative history of the Civil Rights Act of 1991 discussed *infra* at Section III, *Amici* urge the Court to clarify that the appropriate causation standard for Title VII retaliation claims is the same as that for violations of Title VII's principal antidiscrimination provision. Therefore, the Court should adopt Section 703(m)'s "motivating factor" standard and should apply the same decision defense from Section 706(g)(2)(B)(i) to retaliation claims.

Congress added the "motivating factor" language to Title VII to eliminate the confusion surrounding the causation standard for intentional discrimination. To give effect to Congress' intent, this single standard should be applied to all cases under Title VII, including claims under the antiretaliation provision.

Through the 1991 amendments, Congress sent a clear message that discrimination or retaliation must not motivate an adverse employment action. The intent was to entirely remove illegal considerations from the employment equation. Congress also recognized, however, that the law should not allow monetary damages for economic harms when the unlawful action resulted in no economic loss; this is why Congress codified the same decision defense as a limitation on remedies. The two concepts strike a tight balance. They protect

employees by guaranteeing a workplace free from discrimination and retaliation, while simultaneously protecting employers who can prove that the illegal consideration did not affect their ultimate decision.

The issue before the Court is whether the "motivating factor" language in Title VII's substantive provision applies in cases of retaliation. Petitioner and its supporting *Amici* attempt to focus the Court on the supposed problems associated with shifting the burden of proof to the employer, but this is a point Congress has already addressed.

Price Waterhouse introduced a burden shifting proof structure that allowed an employer to "avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). Congress disagreed with the Court's decision to absolve employers completely of liability when the plaintiff had established intentional discrimination. Therefore, by enacting the Civil Rights Act of 1991, Congress mandated that if the plaintiff proves intentional discrimination, the burden shifts to the employer to prove the same decision defense. However, if the employer succeeds in establishing that it would have made the same decision absent an illegal consideration, such proof does not absolve the employer of liability, but only limits the relief available to the employee. *See infra* Section III; 42 U.S.C. § 2000e-5(g)(2)(B) (2006). The speculative problems raised by Petitioner and its supporting *Amici* surrounding the burden shifting analysis in Title VII cases have long been resolved by Congress.

III. Under Title VII, Consideration Of The Protected Characteristic Was To Play No Role In The Adverse Employment Decision

In enacting the Civil Rights Act of 1991, Congress had two primary purposes. First, Congress reaffirmed its commitment to the fundamental tenets of Title VII: to "eradicate discrimination in the workplace" by condemning and "prohibit[ing] all invidious discrimination of sex, race, color, religion, or national origin in employment decisions." H.R. REP. NO. 102-40 (II), at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710. *See McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 357 (1995). President Bush, who signed the Civil Rights Act of 1991 into law, concurred, noting that "discrimination whether on the basis of race, national origin, sex, religion, or disability is worse than wrong. It's an evil that strikes at the very heart of the American ideal." George H.W. Bush, President of the United States, Remarks on the Civil Rights Act of 1991 (Nov. 21, 1991).

Second, Congress understood and intended the Civil Rights Act of 1991 to respond to certain cases in the Court's Title VII jurisprudence and to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991). In particular, Congress was concerned about the effect *Price Waterhouse* would have on the scope of protections available to victims of discrimination under Title VII. *Price Waterhouse* "sen[t] a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action."

H.R. REP. NO. 102-40 (I), at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585. Congress perceived the Court's decision in *Price Waterhouse* to eliminate all liability if the employer proved the same decision defense as "severely undermin[ing]" the protections of Title VII, because it seemed to allow illegal discrimination to go unpunished, thus making it a hollow right for victims of employment discrimination. H.R. REP. NO. 102-40 (II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

Congress understood that "[for Title VII to be] meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions." H.R. REP. NO. 102-40 (I), at 47, *reprinted in* 1991 U.S.C.C.A.N. 549, 585. To address this point, Congress rejected *Price Waterhouse's* holding that proof of the same decision defense is a complete bar to liability, but explicitly codified *Price Waterhouse's* causation standard, thus "reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2, *reprinted in* 1991 U.S.C.C.A.N. 694, 695. *See Smith v. Xerox Corp.*, 584 F. Supp. 2d 905, 909 (N.D. Tex. 2008), *aff'd*, 602 F.3d 320 (5th Cir. 2010). Congress did so by specifically adding the "motivating factor" language into Title VII.

Through the addition of this language, Congress acknowledged the reality of the modern workplace: employment decisions can be influenced by a host of legitimate and illegitimate factors. By codifying this "motivating factor" language, Congress required the complaining party to "demonstrate that

discrimination was a contributing factor [7] in the employment decision i.e., that discrimination actually contributed to the employer's decision with respect to the complaining party." H.R. REP. NO. 102-40 (II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 694, 711. Congress did not, however, "make mere discriminatory thoughts actionable." *Id.*

Although the legislative history primarily discusses race and sex discrimination, there is nothing to suggest that Congress intended to create one standard of causation under Title VII's substantive provision and another, higher standard under Title VII's antiretaliation provision. Furthermore, there is nothing in the legislative history of the Civil Rights Act of 1964 or the 1991 amendments suggesting that Congress intended to have different standards for proving discrimination based on a protected classification and retaliation. Indeed, the declared purpose of the 1991 amendments was to protect employee rights and ensure that "any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40 (II), at 2, *reprinted in* 1991 U.S.C.C.A.N. 694, 695. No one can reasonably dispute that "prejudice" encompasses illegal retaliation against an employee who opposed discrimination. In fact, retaliation against an employee who engaged in protected activity is a form of intentional discrimination

---

[7] The initial versions of the Civil Rights Act of 1991 used the term "contributing factor." In a late amendment, Congress substituted that term for "motivating factor," but the House report at the time of passage said that "[t]his change is cosmetic and will not materially change the courts' findings." 137 CONG. REC. 13537-38 (1991).

encompassed by Title VII. Faced with employment actions motivated by both legitimate and illegitimate factors, Congress intended any discrimination contributing to an employment decision to be illegal.

Recognizing that Title VII's antiretaliation provision protects and ensures Title VII's principal antidiscrimination rights, it is fair to conclude that Congress intended employees to be equally, if not more, protected against unlawful retaliation. *See supra* Section I. It is nonsensical to assume that Congress would design a more rigorous culpability standard for proving unlawful retaliation than for other forms of intentional discrimination. Consistent with the context and purpose of the 1991 amendments, this Court should adopt a uniform application of Title VII's substantive and antiretaliation provisions, thus providing clarity and predictability to the rights and remedies of employees and employers.

IV. The Court's Analysis In *Gross* Does Not Control Whether There Is A Motivating Factor Claim Under The Antiretaliation Provision of Title VII

The Court can find that "motivating factor" analysis applies to retaliation claims under Title VII without contradicting the analysis employed in *Gross* and without relying upon the *Price Waterhouse* analysis, which the majority in *Gross* found of limited utility. Because *Gross* involved an interpretation of a different statute and Congress did not add the "motivating factor" language to the ADEA, the Court held that it could not transport this language across statutes, and that the ADEA's "because of" language required an employee to prove "but-for" cause.

In fact, the Court in *Gross* explicitly warned against transferring rules among statutes without caution. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)) ("[W]e 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"). Petitioner contends that this argument is a "red herring" and that the *Gross* standard controls in this instance since the Court "construed a materially identical statute." Pet. Br. at 24. However, the Court's reasoning in *Gross* is in direct conflict with Petitioner's proposition. In regard to the language at issue in this case, the Court in *Gross* ruled that Title VII is not identical to the ADEA. Rather, the Court found that previous Supreme Court precedent interpreting Title VII did not govern the interpretation of the ADEA because Congress failed to amend the ADEA in the same fashion as Title VII. *Gross*, 557 U.S. at 174. Unlike Title VII, the ADEA does not contain language regarding a "motivating factor" standard or the same decision defense.

In analyzing the ADEA, the Court noted that Congress properly holds the power to decide the standard of causation in a federal employment discrimination statute. The Court's role is to "give effect to Congress' choice." *Gross*, 557 U.S. at 177 n.3. Congress already made a choice regarding Title VII by adding the "motivating factor" language. As discussed *supra* in Section III, Congress was legislating broadly when it added this "motivating factor" language because it was considering Title VII as a whole.

In addition to the ADEA, Petitioner argues that *Gross*' "but-for" causation standard should apply to other federal anti-discrimination statutes that also prohibit actions "because of" or "on the basis of" an illegal motive. Pet. Br. at 28-29. In particular, Petitioner proposes that the Court should take note that the "solely because of" standard set forth in the Rehabilitation Act of 1973 "is at least as strict" as "but-for" cause, even though, as noted, no other federal antidiscrimination statute contains the word "solely." Pet. Br. at 29. Not only does Petitioner's argument wholly ignore the Court's reasoning in *Gross* that "but-for" or "because of" does not require "sole cause," but Petitioner also boldly invites this Court to apply the "solely" language from one particular subsection of the Rehabilitation Act (Section 504) to several statutes that specifically and purposefully do not contain it. Especially in the case of Title VII's antiretaliation provision, such an application would go directly against established precedent and legislative intent.

The overreaching nature of Petitioner's argument on this point is vividly demonstrated where Petitioner argues that *Gross*' "but-for" causation standard applies to the Americans with Disabilities Act (ADA), which prohibits discrimination "on the basis of disability." 42 U.S.C. §§ 12112(a), (b) (2006); Pet. Br. at 29. Yet Congress has rejected that very contention. Congress incorporated the "powers, remedies, and procedures set forth" in certain provisions from Title VII into Title I of the ADA. 42 U.S.C. § 12117(a). Among the Title VII provisions incorporated into the ADA is Section 2000e-5, which authorizes relief where a

plaintiff proves that race, color, religion, sex, or national origin was a "motivating factor" for an employment practice, even if other factors also motivated the practice. 42 U.S.C. §§ 2000e-5(g)(1), (g)(2)(B) (2006).

Petitioner suggests that the ADA's incorporation of Section 2000e-5's powers, remedies and procedures remains forever frozen in 1990, when the ADA was enacted, rather than reflecting subsequent amendments to Section 2000e-5. History tells otherwise. Indeed, Congress considered and rejected an amendment to the ADA that would have done precisely what Petitioner contends Congress did. During consideration of the ADA:

> An amendment was offered . . . that would have removed the cross-reference to title VII and would have substituted the actual words of the cross-referenced sections. This amendment was an attempt to freeze the current title VII remedies . . . in the ADA. This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.

H.R. REP. NO. 101-485 (III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471.

In fact, at the time that this amendment was considered, H.R. 4000, later enacted as the Civil Rights Act of 1991, was pending before Congress and proposed, among other things, to amend Section 2000e-5 to permit motivating factor claims.

Congress understood that "[b]ecause of the cross-reference to Title VII in Section 107, *any amendments to title VII that may be made in H.R. 4000 or in any other bill would be fully applicable to the ADA*." *Id.* (emphasis added). And Congress chose to keep it that way: "[b]y retaining the cross-reference to title VII, the Committee's intent is that the remedies of title VII, currently *and as amended in the future*, will be applicable to persons with disabilities." *Id.* (emphasis added).[8]

Given the Court's explicit warning in *Gross* against transporting rules from one statute to another statute, the Court should reject Petitioner and its supporting *Amici's* argument that *Gross* is applicable to Title VII, as well as all other similarly worded employment statutes.

V. Recognizing The Same Causation Standards Under Title VII's Substantive And Antiretaliation Provision Is A Commonsense And Functional Approach Which Eliminates Jury Confusion

The Seventh Circuit recently acknowledged that "vague judicial terminology, such as 'motivating factor' and 'proximate cause' . . . confuses judges, jurors, and lawyers alike; and [that] philosophical conundra such as 'causation' present unnecessary

---

[8] *See also* H.R. REP. NO. 101-485 (III), at 48, *reprinted in* 1990 U.S.C.C.A.N. 445, 471 ("The Committee intends that the powers, remedies and procedures available to persons discriminated against based on disability shall be the same as, and parallel to, the powers, remedies and procedures available to persons discriminated against based on race, color, religion, sex or national origin. Thus, if the powers, remedies and procedures change in title VII . . . , they will change identically under the ADA for persons with disabilities.").

challenges to understanding." *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012). Jury instructions reflecting these differing standards frequently cause confusion, and the likelihood of confusion correlates with the complexity of the instructions. Petitioner asks the Court to further confuse matters by applying one standard to Section 703 discrimination claims and another to Section 704 retaliation claims. Petitioner contends that applying multiple standards to all claims of intentional discrimination under a single statute somehow would be less confusing to jurors. This argument defies common sense.

While juries are generally thorough and thoughtful when properly instructed, numerous commentators and judges have expressed concern about jurors' ability to resolve complex civil litigation. *See generally* Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 733 (1991) (citing Chief Justice Warren Burger). Jury instructions involving multiple standards and difficult legal concepts only increase this complexity.

By accepting Petitioner's argument that jurors should employ two different causation standards in cases involving a claim of discrimination based upon the protected classification and a retaliation claim, the Court would require jurors with limited legal exposure to the law to resolve an issue with which many courts continue to struggle. There is no reason to further this confusion by setting separate causation standards for two forms of intentional discrimination under the same statute.

This is not simply an academic concern but also a very practical problem. According to the Equal Employment Opportunity Commission's (EEOC) fiscal year 2012 enforcement and litigation statistics, retaliation is the most frequently filed charge with the EEOC. Beginning in 2009 and continuing presently, the total number of retaliation charges surpassed race discrimination, becoming the most frequently alleged claim.[9] Cases in which there are multiple claims under Title VII, involving both a claim of discrimination based upon a protected classification and a retaliation claim, are common. This present case is such an example where the employee alleged both discrimination and retaliation under Title VII, as was *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), which the Fifth Circuit relied upon below when deciding "motivating factor" analysis applied to Title VII retaliation claims. Despite Petitioner and its supporting *Amici's* contention that retaliation claims are frivolous, retaliation is a very real problem suffered by many employees.

As discussed in Section II, the courts have applied "motivating factor" analysis for decades and its application has not led to a flood of cases or misuse by employees. However, Petitioner and its supporting *Amici* attempt to craft a policy argument that employees will try to game the system in order

---

[9] The EEOC's final compilation of the fiscal 2012 enforcement and litigation statistics revealed that the EEOC received 37,836 private sector retaliation charges, in addition to 33,512 race discrimination charges, and 30,356 sex discrimination charges. CHARGE STATISTICS FY 1997-FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 8, 2013).

to obtain a "motivating factor" instruction for a jury.[10] As this case illustrates, and as the courts have noted, the intricacies of these causation standards can be confusing to judges and attorneys. It truly strains credulity to suggest that employees will intentionally engage in protected activity under Title VII merely to gain the advantage of a "motivating factor" instruction. While any person may file a discrimination charge with the EEOC based upon race, color, religion, sex, or national origin, retaliation requires opposing discrimination or participating in a protected activity. Further, a plaintiff must demonstrate that the challenged conduct would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations omitted).

Requiring the same causation standards under Title VII's provisions prohibiting discrimination based upon a protected classification and the antiretaliation provision avoids the confusing inconsistencies that would result if a jury could be charged with "motivating factor" under one section of Title VII and "but-for" cause under another. The standard Petitioner wishes to impose on the antiretaliation provision should be rejected

---

[10] *See*, *e.g.*, Br. of *Amicus Curiae* Nat'l School Bds. Ass'n at 7-8 ("[*A*]*ny* employee can engage *strategically* in protected activity in anticipation of an adverse employment decision. Consequently, the mixed-motive standard effectively opens the door to larger numbers of meritless administrative complaints and lawsuits alleging retaliation.").

because it is out-of-step with legislative intent, Supreme Court precedent, and public policy.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's decision that "motivating factor" analysis is available in Title VII retaliation claims.

Respectfully submitted on April 10, 2013.

Michael L. Foreman, *Counsel of Record*
PENNSYLVANIA STATE UNIVERSITY
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Park, Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@law.psu.edu

Rebecca Hamburg Cappy
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery St., 4th Flr.
San Francisco, CA 94104
(415) 296-7629
rcappy@nelahq.org

Lisa M. Bornstein
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
1629 K St., NW, 10th Flr.
Washington, DC 20006
(202) 466-3311
bornstein@civilrights.org

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **National Employment Lawyers Association** (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 circuit, state, and local Affiliates have more than 3,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the workplace rights of individuals.

The **Leadership Conference on Civil and Human Rights** is the nation's oldest and largest civil and human rights coalition, consisting of more than 210 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish

Community Relations Advisory Council. The Leadership Conference works to build an America that is inclusive and as good as its ideals and towards this end, urges the court to find that the "motivating factor" standard of Title VII is the appropriate causation standard to apply in both Title VII discrimination and retaliation claims. The Leadership Conference believes that holding workplace retaliation claims brought under Title VII to a different, higher standard than workplace discrimination claims contravenes the intended goals of the statute and fails to protect all workers from discrimination.

9to5 is a national membership-based organization of women in low-wage jobs working to end discrimination and achieve economic justice. 9to5's members and constituents are directly affected by sex and other forms of workplace discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. 9to5 has worked for four decades at the federal level and in the states to strengthen protections against workplace discrimination and harassment. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.

AARP is a nonpartisan, nonprofit organization with a membership. AARP strives to enable people age 50+ to secure independence, choice and control

in ways beneficial and affordable to them and to society as a whole. In a variety of ways, including legal advocacy as an *amicus curiae*, AARP supports the rights of all Americans, and in particular older workers, to workplaces free of discrimination. To this end, AARP has been vigilant in advocating for vigorous and full enforcement of federal civil rights laws including the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, and Title VII of the Civil Rights Act of 1964.

The **American Association for Justice** (AAJ) is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury actions, employment discrimination cases, and civil rights suits. AAJ believes that legal redress should be freely available under federal anti-discrimination statutes, not only to achieve equality in the workplace but also to allow America to benefit fully from its qualified workers. The **Anti-Defamation League** (ADL) was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and race, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment and hate. As part of its commitment to protecting the civil rights of all persons, ADL has supported the passage of federal and state antidiscrimination laws. Recognizing the importance of being able to effectively enforce these laws, ADL has also filed *amicus* briefs in cases such

as this one, which raise important constitutional and legal issues regarding how such laws are interpreted.

The **Asian American Justice Center** (AAJC), a member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of civil rights issues, including fairness and non-discrimination in the workplace. Individuals from minority, immigrant, and other underserved communities such as those for whom AAJC advocates are particularly vulnerable to unfair employment practices. AAJC's interest in the effective vindication of these employees' rights has resulted in the organization's participation in numerous *amicus curiae* briefs supporting vigorous enforcement of Title VII and other employment laws.

The **Asian Law Caucus** (ALC) was founded in 1972 as the nation's first Asian American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC's regular caseload includes employment discrimination and retaliation cases on behalf of Asian and other immigrant workers

The **Asian Pacific American Legal Center** of Southern California (APALC), a member of the Asian American Center for Advancing Justice, is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and employment discrimination.

The **Bazelon Center For Mental Health Law** is a national nonprofit organization that advocates for the rights of individuals with mental disabilities. The Center, founded in 1972 as the Mental Health Law Project, engages in litigation, policy advocacy, and public education to promote equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, family and community living. Enforcement of the Americans with Disabilities Act (ADA) is central to the Center's efforts to remedy disability-based discrimination.

The **Equal Justice Center** (EJC) is a nonprofit employment law firm with offices in Austin, San Antonio, and Dallas, Texas. The EJC provides legal representation and counsel to low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people on discrimination, wage-hour, and other employment-related matters

throughout Texas and across the United States. EJC has a vital interest in preserving civil rights in the workplace by preventing the erosion of Title VII's fundamental protections against employment discrimination.

Equal Rights Advocates (ERA) is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment in the workplace, and that this unfair treatment often is reinforced and/or perpetuated by retaliation against those who speak out against it. Based on its nearly four decades of experience litigating employment discrimination cases and hearing from thousands of women workers each year, ERA believes that applying one standard of causation to claims of discrimination based on an employee's membership in a protected class (including her sex), and a different standard to claims of discrimination based on the same employee's exercise of protected rights would frustrate the central purpose of our anti-discrimination laws and leave more women vulnerable to the unfair practices and policies they were designed to eliminate.

Friends of Farmworkers (FOF) is a nonprofit legal services organization based in Philadelphia, Pennsylvania. Since 1975, FOF has worked to improve the living and working conditions of migrant farmworkers and other vulnerable, low wage, and immigrant workers in Pennsylvania. FOF provides free legal services to individuals on employment-

related matters; engages in community education; and, advocates on local, state, and national levels on issues of concern to FOF's client population. The outcome of this matter will have a direct impact on FOF's client population. FOF frequently represents workers who face unlawful discrimination and retaliation in the workplace due to the worker's sex, race, or national origin. In order for the antidiscrimination provisions of Title VII to effectively protect workers, including the especially vulnerable workers FOF represents, the anti-retaliation provision of Title VII must be broadly interpreted, as intended by Congress.

Gender Justice is a nonprofit advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its impact litigation program, Gender Justice represents individual citizens and provides legal advocacy as *amicus curiae* in cases involving the proper interpretation of the Civil Rights Act of 1964 and other federal or state-level civil rights laws. Gender Justice has an interest in preserving employees' right to bring workplace discrimination claims, free from retaliation.

The **Legal Aid Society – Employment Law Center** (LAS-ELC) is a nonprofit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants,

individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC's interest in preserving the protections afforded employees by federal antidiscrimination laws is longstanding. The LAS-ELC has successfully litigated several cases against major metropolitan fire departments to provide increased opportunity for people of color and appeared before this Court on numerous occasions as counsel for plaintiffs as well as in an *amicus curiae* capacity.

The **National Employment Law Project** (NELP) is a nonprofit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws. NELP has litigated and participated as *amicus* in hundreds of cases addressing the rights of low-wage workers under federal and state labor and employment laws, and knows firsthand the barriers faced by workers seeking to enforce their rights, and the importance of strong anti-retaliation protections for those workers brave enough to stand up for or inquire about their workplace rights.

The **National Partnership for Women & Families** is a nonprofit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has

filed numerous *amicus curiae* briefs in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The **National Women's Law Center** (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity and protection for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination, but also access to effective means of enforcing that right and remedying such conduct. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court in employment cases.

The **North Carolina Justice Center** (NCJC) is a nonprofit legal advocacy organization that seeks to secure economic justice for disadvantaged persons and communities throughout North Carolina. The NCJC regularly represents low-wage workers whose rights have been violated by their employers through discriminatory treatment, underpayment or nonpayment of wages and retaliation. The NCJC has a focus on the employment rights of migrant and seasonal workers, a particularly vulnerable group of workers whose ability to demand their employment rights be respected is directly affected by the issue before this Court.

The **Public Justice Center** (PJC) is a nonprofit civil rights and anti-poverty legal services organization. PJC's Appellate Advocacy Project seeks to expand and improve the representation of

indigent and disadvantaged persons and their interests before state and federal appellate courts. PJC has submitted numerous *amicus* briefs defending workers' civil rights under federal, state and local anti-discrimination laws. PJC has an interest in the present case because a reasonable and workable standard for proving retaliation for opposing discrimination in employment is a vital component of access to justice for American workers.