NO. 12-___

In the
# Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

PETITIONER,

v.

NAIEL NASSAR, M.D.,

RESPONDENT.

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

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 268–69 (1989), a plurality of this Court held that the *discrimination* provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), requires a plaintiff to prove only that discrimination was "a motivating factor" for an adverse employment action. In contrast, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 179–80 (2009), held that the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602, requires proof that age was "the but-for cause" of an adverse employment action, such that a defendant is *not* liable if it would have taken the same action for other, non-discriminatory reasons. The courts of appeals have since divided 3-2 on whether *Gross* or *Price Waterhouse* establishes the general rule for other federal employment statutes, such as Title VII's *retaliation* provision, that do not specifically authorize mixed-motive claims.

The question presented is:

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

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## PETITION FOR A WRIT OF CERTIORARI

This case presents an important and frequently recurring question of federal employment law over which the courts of appeals have divided. The First, Sixth, and Seventh Circuits have construed this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S 168, 174 (2009), to mean that, unless Congress has specified otherwise, the federal employment statutes require a plaintiff to prove "but-for" causation—*i.e.,* that an employer would not have taken an adverse employment action but for an improper motive. In contrast, the Fifth and Eleventh Circuits have limited *Gross* to the ADEA. They have held that other statutes using similar or even identical language to the ADEA, such as Title VII's retaliation provision, require a plaintiff to prove only that an improper motive was one of multiple reasons for an adverse employment action. Numerous judges and commentators have acknowledged this circuit split and called for its resolution.

Because "[t]he specification of the standard of causation under [the federal employment statutes] is a decision about the kind of conduct that violates" those statutes, this is a fundamental question in civil rights law. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (plurality opinion). The question also has great practical importance, in part because mixed motives are easy to allege and difficult to disprove. If a plaintiff need only allege that retaliation provided an additional motivation for an adverse employment action, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and

non-discriminatory policies (as happened in this case).

The issue's importance is confirmed by the numerous decisions of this and other courts addressing the question, as well as the emergence of a 3-2 circuit split within just three years of *Gross*. Only this Court can settle the deepening controversy over whether its decision in *Gross* establishes a general rule or is limited to the ADEA.

This case provides "a good vehicle" for resolving that question because it illustrates the problems with the mixed-motive approach and the reasons why the legal standard matters. *See* Pet. App. 63 (Smith, J., dissenting). The plaintiff, Dr. Naiel Nassar, contends that the University of Texas Southwestern Medical Center's ("Medical School's") Chair of Internal Medicine, Dr. Gregory Fitz, blocked his attempt to secure a new job in retaliation for Nassar's allegation that another doctor had discriminated against him. The Medical School presented undisputed documentary evidence that Fitz had consistently opposed Nassar's proposed new job *well before* Nassar engaged in any protected activity and therefore *well before* any retaliatory animus could have existed.

Under these circumstances, the mixed-motive approach was likely outcome-determinative. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the new job but for retaliation, considering that Fitz had consistently done exactly that before any basis for retaliation arose. But the Fifth Circuit's mixed-motive approach allowed the jury to hold the Medical

School liable on the theory that retaliation became an additional motive over time.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 674 F.3d 448 and reproduced at Pet. App. 1. The court's order denying rehearing *en banc* is unpublished but available on Westlaw at 2012 WL 2926956 and reproduced at Pet. App. 59. The district court's final judgment is also unpublished and available on Westlaw at 2010 WL 3000877 and reproduced at Pet. App. 16.

## JURISDICTION

The judgment of the court of appeals was entered on March 8, 2012. Pet. App. 1. The court denied rehearing *en banc* on July 19, 2012. *Id.* at 59–60. The Medical School timely filed this petition on October 17, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) are reproduced at Pet. App. 96, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) are reproduced at Pet. App. 68, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (2007) are reproduced at Pet. App. 99.

## STATEMENT OF THE CASE

### A. The Statutory Backdrop

This case concerns Title VII's *retaliation* provision. In *Price Waterhouse*, a plurality of this Court held that, if a plaintiff in a Title VII *discrimination* case proves that discrimination "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [membership in a protected class] into account." 490 U.S. at 258; *see also id.* at 259–60 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.).

In the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress partially abrogated *Price Waterhouse* by adopting a more nuanced scheme for Title VII discrimination claims. Congress specified that a defendant is liable if "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). If a defendant then proves as an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor," the court may award equitable relief (including equitable monetary relief such as front pay) and attorney's fees to the plaintiff, but not damages. *Id.* § 2000e-5(g)(2)(B).

When Congress amended Title VII's discrimination provision, it left Title VII's retaliation

provision unchanged. The latter provision continues to prohibit an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Unlike Title VII's discrimination provision, this retaliation provision does not set forth or cross-reference a mixed-motive standard. *See id.*

Other employment statutes are similar to Title VII's retaliation provision in this respect. For example, the ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a), or "because" the employee opposed an unlawful practice or participated in protected activity. *Id.* § 623(d).

After the Civil Rights Act of 1991, this Court held that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 557 U.S at 174. Instead, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176. Shortly thereafter, the Fifth Circuit held in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010), that, notwithstanding *Gross*, "we must continue to allow the *Price Waterhouse* burden shifting in [Title VII retaliation] cases unless and until the Supreme Court says otherwise."

### B. The Underlying Events

Nassar was an assistant professor at the Medical School from November 2001 until his resignation in July 2006. Pet. App. 2, 5; R. 3033.[1] As a faculty member, he was assigned to the AIDS clinic at Parkland Hospital, with which the Medical School was affiliated. Pet. App. 2.

Nassar felt that his supervisor, Dr. Beth Levine, treated him unfairly because of his Middle Eastern background. Pet. App. 5. After the Medical School promoted Nassar in March 2006, he began discussions with the Hospital about switching his employer. *Id.* at 4. At trial, Nassar testified that he wanted to work at "exactly the same job" at the Hospital but be employed by the Hospital instead of the Medical School, so that Levine would no longer be his supervisor. R. 2960.

The Affiliation Agreement between the Medical School and the Hospital, as well as the Hospital's bylaws, rules, and regulations, required that a physician seeking regular employment within the Hospital's geography (including the AIDS clinic) be employed by the Medical School. Pet. App. 4–6. Beginning in late March 2006, Fitz declined to approve Nassar's request to work full-time for the Hospital in the AIDS Clinic without being a Medical School faculty member. Pet. App. 5. Fitz explained at that time that the Affiliation Agreement precluded such an arrangement. *Id.*

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

Fitz met with Nassar approximately a month later, on April 27, 2006. Recounting their meeting in an e-mail to the responsible hiring official at the Hospital that same day, Fitz wrote that, "[a]s per discussion," Nassar could not be a "Parkland employee" because "it would be against our operating agreement with Parkland to have them employ faculty directly." Defendant's Trial Exhibit, No. 14. Fitz noted that Nassar was "OK with this." *Id.*

Unknown to Fitz, a Hospital employee who lacked hiring authority continued to work behind the scenes to hire Nassar as a Hospital employee. *See* R. 2781–82. By July 3, 2006, those efforts resulted in an unsigned offer letter from the Hospital. Pet. App. 5.

On July 3, 2006, believing he had secured employment with the Hospital, Nassar wrote a letter resigning from the Medical School and accusing Levine of discriminating against him. Pet. App. 5. In that letter, Nassar thanked Fitz "for all [his] support," described his interactions with Fitz as "pleasant and positive," and called Fitz "a very honorable person." Plaintiff's Trial Exhibit 15.

Fitz first learned that Nassar was claiming illegal discrimination when he received Nassar's resignation letter on July 7, 2006. R. 2749, 2827–28, 2829; Pet. App. 5–6. Fitz was "very saddened" and "shocked," as he "had not been aware of this sentiment" by Nassar. R. 2709.

A disaffected former employee of the Medical School, Dr. Phillip Keiser, testified that, after Nassar resigned, Fitz told him that Fitz had put a stop to

Nassar's effort to be employed by the Hospital. Pet. App. 5–6; R. 2414–16. Keiser interpreted Fitz's comments as admitting retaliation. Pet. App. 5–6; R. 2417, 2471, 2538. Fitz testified that he acted based on the Affiliation Agreement, not because of retaliation. R. 2661, 2686–87, 2711, 2716–17; Pet. App. 5.

### C. The District Court Proceedings

Nassar sued the Medical School for constructive discharge and retaliation. Pet. App. 6. The Medical School asked the district court to instruct the jury that it could find the school liable only if discrimination was the "but-for" cause of Fitz's actions, *i.e.*, only if Fitz would not have taken those actions in the absence of retaliatory animus. *Id.* at 112–15, 119. The district court observed that "[t]he defense has put forth a strong defense with regard to the fact that it [had] some legitimate reason, primarily, at least, it appears, based upon this affiliation agreement." *Id.* at 115.

Pursuant to the Fifth Circuit's decision in *Smith*, however, the district court rejected the Medical School's request and instructed the jury that Nassar needed to prove only that discrimination was one of multiple motives for Fitz's actions. Pet. App. 115, 47. The court noted that "it remains to be seen what the Supreme Court does with this mixed motive issue once they look at it in the context of a Title VII [case], but they haven't." *Id.* at 115.

The jury found the Medical School liable for constructive discharge and retaliation. It awarded approximately $3.5 million in damages. Pet. App. 44;

*id.* at 6–7. The district court reduced the damages award to approximately $735,000 and awarded Nassar roughly $490,000 in attorney's fees. *Id.* at 7.

**D. The Appellate Proceedings**

The court of appeals reversed the constructive discharge verdict because it was unsupported by the evidence, but upheld the jury's finding of retaliation. Pet. App. 8–12. The Medical School had argued on appeal that "[t]he district court reversibly erred in instructing the jury based on a theory of mixed-motive retaliation," but acknowledged that the Fifth Circuit had held otherwise in *Smith*. *Id.* at 63 (quoting Medical School's opening brief in Case No. 11-10338, at 42 (5th Cir. June 13, 2011)). Because the Fifth Circuit panel was bound by *Smith*, it rejected the Medical School's challenge. *Id.* at 12 n.16.

The court of appeals proceeded to uphold the retaliation verdict. It explained that the Medical School had argued "that Fitz thwarted Nassar's prospective employment at Parkland as a routine application of [the Medical School's] rights under the . . . [A]ffiliation [A]greement." Pet. App. 11. But the court found sufficient evidence from which the jury could conclude that Fitz sought "to punish Nassar for his complaints about Levine." *Id.*

After addressing various damages issues, the court of appeals remanded "for reconsideration, consistent with this opinion, of Nassar's monetary recovery and the award of attorney's fees." Pet. App. 15.

The court of appeals denied the Medical School's petition for rehearing *en banc* by a 9-6 vote. Pet. App. 60. Dissenting from the denial of rehearing *en banc*, Judge Smith wrote that *Smith* was wrongly decided, that *Smith* created a circuit split, that the question has "exceptional importance in employment law," and that "[t]his case is a good vehicle for fixing" the court's mistake in *Smith*. *Id.* at 63. Judge Smith concluded that the court's "failure to take the case en banc is a serious error." *Id.* at 67.

One of the 15 judges on the *en banc* court stated, in a concurrence to the denial of rehearing *en banc*, that the Medical School had not properly preserved this issue. Pet. App. 61–62. Judge Smith responded by describing, in a detailed footnote, all the ways in which the Medical School had raised the issue in the district court and again on appeal. *Id.* at 65–66 n.1.

**E. The Remand**

On remand, the district court stayed all proceedings pending this Court's action on this petition. Order Staying Case, Dkt. No. 214 (Sep. 7, 2012).

## REASONS FOR GRANTING THE WRIT

The Court should grant this petition because it presents a question of great practical significance over which the courts of appeals are divided, and provides a good vehicle for addressing the question.

### I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER *GROSS* IS LIMITED TO THE ADEA, OR INSTEAD APPLIES TO OTHER EMPLOYMENT DISCRIMINATION STATUTES THAT USE SIMILAR LANGUAGE.

Although *Gross* appeared to resolve mixed-motive questions under the federal employment discrimination laws, the circuit courts' longstanding divergence on that issue has persisted. The ADEA prohibits an employer from taking an adverse employment action "because of such individual's age" or "because" the employee opposed an unlawful practice or participated in protected activity. 29 U.S.C. § 623(a) and (d). The *Gross* Court held that, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 176. The Court explained that the "ordinary meaning" of the phrase "because of" is that "age was the 'reason' that the employer decided to act"—not merely one of the factors that led to the employer's decision. *Id.* And "nothing in the statute's text indicates that Congress has carved out an exception to that rule." *Id.* at 177.

The courts of appeals have differed on whether *Gross* established a generally applicable rule or is

limited to the ADEA. In the first major decision interpreting *Gross*, the Seventh Circuit, in an opinion by Judge Easterbrook, determined that "*Gross* . . . holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden *in all suits under federal law*." *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added). For that reason, the Seventh Circuit applied *Gross* to a First Amendment retaliation claim under § 1983. *Id.* at 522, 525–26.

Subsequent Seventh Circuit panels have reiterated that holding in the specific context of the employment discrimination laws, ruling that the ADA does not authorize mixed-motive claims for disparate treatment, *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010), or for retaliation, *Barton v. Zimmer*, 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011). The court explained that, "[l]ike the ADEA, the ADA renders employers liable for employment decisions made 'because of' a person's disability," and nothing else in the statute indicates that Congress meant to permit mixed-motive claims. *Serwatka*, 591 F.3d at 962. The *Serwatka* court also emphasized that its decision was consistent with an earlier Title VII retaliation case, *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706 (7th Cir. 1998), which held that "mixed-motive decisions based on retaliation were not" authorized by the statute. *Serwatka*, 591 F.3d at 962–63; *see also Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001).

In *Smith*, however, a divided panel of the Fifth Circuit split from the Seventh Circuit. The *Smith* majority "recognize[d] that the *Gross* reasoning could be applied in a similar manner to the instant case," which involved Title VII's retaliation provision. *Smith*, 602 F.3d at 328. It held, however, that "*Gross* is an ADEA case, not a Title VII case," and "the *Price Waterhouse* holding remains our guiding light." *Id.* at 329. The Fifth Circuit majority therefore sanctioned mixed-motive Title VII retaliation claims. *Id.* at 330. In doing so, it expressly disagreed with the Seventh Circuit's "broad" holding that *Gross* states the general rule for federal statutes. *Id.* at 329 n.28.

In contrast, the dissenting opinion agreed with the Seventh Circuit's decisions in *Fairley* and *Serwatka*: "As the Seventh Circuit has correctly reasoned, without statutory language indicating otherwise, the mixed-motive analysis is no longer applicable outside of Title VII discrimination, and consequently does not apply to this retaliation case." *Id.* at 336 (Jolly, J., dissenting).

The dissent also criticized the majority for relying on the "lame distinction that, although the language is identical, *Gross* was an age discrimination case under the ADEA and the case today is a retaliation case under Title VII." *Id.* at 337. "Given the uniform principle set out in *Gross*, the majority's distinction is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* The dissenters

from denial of rehearing *en banc* in this case reiterated that "[t]he panel decision in *Smith* . . . created an unnecessary circuit split," making the denial of *en banc* review "confounding." Pet. App. 67.

Three more circuits have now taken sides, deepening this division among the circuits. After observing in a Title VII retaliation case that, "[n]otably, there is a circuit split between the Fifth and Seventh Circuits on this issue," the Eleventh Circuit aligned itself with the Fifth, albeit in an unpublished decision. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012).

Two other circuits have gone the other way. In a deeply divided decision, the *en banc* Sixth Circuit observed that "[t]here are two ways to look at" the issue. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (Sutton, J.). "One is that *Price Waterhouse* established the meaning of 'because of' for Title VII *and* other statutes with comparable causation standards . . . ." *Id.* (emphasis in original). The other is that *Price Waterhouse*'s "motivating factor" test applies only to the extent that Congress has expressly imposed it. *Id.* After concluding that "*Gross* resolves this case" by adopting the second of those views, the majority held that the ADA does not permit mixed-motive claims for the same reasons the ADEA does not. *Id.* at 318–19. The majority emphasized that it had "taken the same path" as the Seventh Circuit. *Id.* at 319.

Although the Sixth Circuit majority recognized that the *Gross* analysis is generally applicable, it purported to distinguish *Smith* because that case concerned "a different provision of *Title VII*." *Id.* at

321 (emphasis in original). But "*Smith* cannot be dismissed so easily." *Id.* at 328 (Stranch, J., concurring in part and dissenting in part). Just like the ADA and the ADEA, Title VII's retaliation provision prohibits adverse employment actions "because of" an improper purpose, with no indication that Congress intended to authorize mixed-motive claims. 42 U.S.C. § 2000e-3(a). Because the question does not turn on "the title of the statute at issue," the Sixth Circuit majority's distinction of *Smith* is no distinction at all, as the dissenters observed. *Lewis*, 681 F.3d at 328 (Stranch, J., concurring in part and dissenting in part); *see also id.* at 330 n.5 (arguing that *Smith* was correctly decided and *Serwatka* wrongly decided); *id.* at 337 & n.1 (Donald, J., dissenting) (citing *Smith* for the proposition that "the *Price Waterhouse* burden-shifting doctrine remains controlling law outside of the ADEA context").[2]

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[2] After a 2008 amendment, the ADA continues to prohibit *retaliation* "because" an individual has opposed an unlawful employment practice, but now prohibits *discrimination* "on the basis of disability." 42 U.S.C. § 12112(a); *see* ADA Amendments Act of 2008, § 5, 122 Stat. 3553. This amendment to the ADA's discrimination provision, which is only one of the statutes implicated by the circuit split, has no bearing on the court of appeals' division on the question whether *Gross* articulates a generally applicable rule for numerous statutes. Nor does the amendment alter the meaning of the ADA's discrimination provision. As *Gross* observed, "the [statutory] phrase 'based on' indicates a but-for causal relationship" and "has the same meaning as the phrase, 'because of.'" 557 U.S. at 176. The House Report explains that the amendment addresses the different question "whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists," and that

The First Circuit has joined the Sixth and Seventh Circuits. Expressly agreeing with *Serwatka* and *Lewis,* the First Circuit held that materially identical provisions in the Rehabilitation Act require the plaintiff to prove but-for causation. *See Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012). The First Circuit understood that "*Gross* is the beacon by which we must steer, and textual similarity between the Rehabilitation Act and the ADEA compels us to reach the same conclusion here." *Id.* at 74. In drawing that conclusion, the First Circuit (like the Seventh Circuit) relied heavily on circuit precedent concerning Title VII's retaliation provision—the statute at issue in this case. *Id.* at 73–74 (citing *Tanca v. Nordberg*, 98 F.3d 680, 682–83 (1st Cir. 1996)).

Notwithstanding its reliance on Title VII retaliation authority, the First Circuit attempted to distinguish *Smith* on the ground that, "[o]n any reading, *Smith* is a case in which but-for causation is required in order to hold an employer liable." *Id.* at 75. Because *Smith* held exactly the opposite, the First Circuit's attempt to distinguish *Smith* only confirms the circuit split.

District courts in other circuits have acknowledged this circuit split. *See Fordham v. Islip Union Free Sch. Dist.*, No. 08-2310, 2012 WL 3307494, at *6 n.5 (E.D.N.Y. Aug. 13, 2012); *Mingguo Cho v. City of New York*, No. 11-1658, 2012 WL 4376047, at *10 n.21 (S.D.N.Y. July 25, 2012). The

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Congress did not intend to change a plaintiff's burden of proof. H. Rep. 110-730, pt. 2, at 21 (2008); *accord* H. Rep. 110-730, pt. 1, at 16-17 (2008).

district courts have likewise divided on the question. Following *Gross*, some district courts have held that Title VII's retaliation provision does not permit mixed-motive claims. As one of them explained, there is "no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*." *Zhang v. Children's Hosp. of Phila.*, No. 08-5540, 2011 WL 940237, at *2 (E.D. Pa. Mar. 14, 2011); *accord Hayes v. Sebelius*, 762 F. Supp. 2d 90, 110–15 (D.D.C. 2011); *Beckford v. Geithner*, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009). But other district courts have limited *Gross* to its ADEA roots. *See, e.g.*, *Hylind v. Xerox Corp.*, 749 F. Supp. 2d 340, 355–56 (D. Md. 2010), *vacated in part on other grounds*, Nos. 11-1318, 11-1320, 2012 WL 2019827 (4th Cir. June 6, 2012); *cf. Morrow v. Bard Access Sys., Inc.*, 833 F. Supp. 2d 1246, 1248 (D. Or. 2011).

Commentators have also noticed "the resulting circuit split," which "positions the issue for the Supreme Court to address." Kimberly Cheeseman, *Recent Development*, Smith v. Xerox Corp.: *The Fifth Circuit Maintains Mixed-Motive Applicability in Title VII Retaliation Claims*, 85 TUL. L. REV. 1395, 1406 (2011); *accord* Andrew Kenny, Comment, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1032 (2011); James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. C.L. & C.R. 43, 85 (2011); *see also* Kourtni Mason, Article, *Totally Mixed*

*Up!: An Expansive View of* Smith v. Xerox *and Why Mixed-Motive Jury Instructions Should Not Be Applied in Title VII Retaliation Cases*, 38 S.U. L. REV. 345, 352–33 (2011).

## II. THE COURT OF APPEALS' DECISION IS IRRECONCILABLE WITH THIS COURT'S DECISON IN *GROSS*.

The Fifth Circuit's decision cannot be squared with *Gross*. *See Smith*, 602 F.3d at 338 (Jolly, J., dissenting). Just like the ADEA, the Title VII retaliation provision "does not provide that a plaintiff may establish discrimination by showing that [retaliation] was simply a motivating factor." *Gross*, 557 U.S. at 174. Both statutes prohibit adverse employment actions against employees "because" of improper reasons. 42 U.S.C. § 2000e-3(a). Under the "ordinary meaning of [that] requirement," "a plaintiff must prove that [the improper factor] was the 'but-for' cause of the employer's adverse action." *Gross*, 557 U.S. at 176.

As with the ADEA, moreover, Congress did not add a motivating-factor provision to Title VII's *retaliation* provision when it added such provisions to Title VII's *discrimination* provision. *Compare* 42 U.S.C. § 2000e-3 (retaliation), *with id.* § 2000e-2(m) (prohibiting mixed-motive discriminatory employment practices), *and id.* § 2000e-5(g)(2)(B) (providing remedies for violations of § 2000e-2(m). *See also Gross*, 557 U.S. at 174; *Smith*, 602 F.3d at 337–38 (Jolly, J., dissenting). That "careful tailoring" of the 1991 amendments to Title VII "should be read as limiting the mixed-motive analysis to the

statutory provision under which it was codified—Title VII discrimination only, which excludes retaliation, the claim here." *Smith*, 602 F.3d at 338 (Jolly, J., dissenting) (quoting *Gross*, 557 U.S. at 178 n.5).

## III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This question has "exceptional importance in employment law" and beyond. *See* Pet. App. 63 (Smith, J., dissenting). That importance is reflected in the issue's regular recurrence over the past quarter century, both before and after *Gross*, which makes the question more than ripe for this Court's resolution.

1. Under the court of appeals' holding, a plaintiff may establish liability by showing that retaliation provided an additional motivation for an adverse employment action. *Smith*, 602 F.3d at 329–30. The burden of proof then shifts to the defendant to try to prove, as an affirmative defense, that it would have taken the same action for other reasons. *Id.* at 330. That "pro-employee" framework puts an employer at a decided disadvantage because mixed motives are easy to allege and difficult to disprove. *See* Kenny, 78 U. CHI. L. REV. at 1032. As in this case, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and non-discriminatory policies. *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193–94 (2011).

Even if an employer carries its burden of proof on that affirmative defense, it faces significant

liability. Under the court of appeals' view, the employer is liable and subject to equitable relief and an award of attorney's fees. *See* 42 U.S.C. § 2000e-5(g)(1); *Smith*, 602 F.3d at 333. It is exonerated only from damages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

As a result, even defendants that prevail on the affirmative defense face grave consequences. The reputational consequences alone of being held liable for a federal civil rights violation can be substantial, including for the individuals accused of perpetrating the violation.

Moreover, equitable relief and attorney's fees can be far *more* burdensome than a damages award. Equitable relief may include the intrusive remedy of ordering the defendant to reinstate a former employee or to promote or transfer a current employee. *Id.* § 2000e-5(g)(1). It may also include an award of front pay, which can total far more than the maximum $300,000 compensatory-damages award allowed by statute. *See* Pet. App. 14; *see also* 42 U.S.C. § 1981a(b)(2). Indeed, Nassar sought $4.2 million in front pay. Plaintiff's Application for Court Award of Front Pay, Dkt. No. 147, at 5 (June 11, 2010). Attorney's fees awards can likewise exceed compensatory damages. Here, the district court awarded Nassar's counsel almost half a million dollars in fees. Pet. App. 7.

An empirical study has confirmed the obvious: plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences*

*Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 944 (2010). Numerous other commentators have recognized the "extremely important practical issues" at stake. Michael Fox, *5th Circuit En Banc Request on* Smith v. Xerox, *Please!* (Mar. 25, 2010), http://employerslawyer.blogspot.com/2010/03/5th-circuit-en-banc-request-on-smith-v.html; *accord* Kenny, 78 U. CHI. L. REV. at 1032. That commentary has generally been highly critical of the Fifth Circuit's "mixed-up" and "unexpected" departure from *Gross* and *Serwatka*. *See* Mason, 38 S.U. L. REV. at 362; Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 440–46 (2010).

Moreover, the issue's importance extends well beyond the employment discrimination context. Causation is an element of almost all causes of action. As noted, the Seventh Circuit construes *Gross* to hold that, unless a statute "provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law," including § 1983 actions. *Fairley*, 578 F.3d at 525–26 (emphasis added).

2. The practical importance of this question is confirmed by the frequency with which it recurs. Before this Court decided *Price Waterhouse* in 1989, "[t]his question ha[d], to say the least, left the Circuits in disarray," at least with respect to Title VII's discrimination provision. *Price Waterhouse*, 490 U.S. at 238 n.2 (citing numerous cases). After Congress partially abrogated *Price Waterhouse* with respect to Title VII discrimination claims, courts remained unclear on the treatment of other claims,

including Title VII retaliation claims. *Compare Vialpando v. Johanns*, 619 F. Supp. 2d 1107, 1119 (D. Colo. 2008) (applying but-for test to Title VII retaliation claims), *with Porter v. U.S. Agency For Int'l Development*, 240 F. Supp. 2d 5, 7 (D.D.C. 2002) (applying motivating-factor test to such claims).

Now, in the three years since *Gross*, five circuits have divided 3-2, one of them has granted *en banc* review, another has narrowly denied *en banc* review, three of the appellate decisions have drawn vigorous dissents, and numerous district courts have also weighed in. *See* pp. 11–17, *supra.* Those decisions demonstrate that, in addition to recurring frequently, the issue has percolated thoroughly. Indeed, the five circuits that have addressed the question account for 43% of the federal courts' civil-rights caseload, including 15,070 civil rights actions in fiscal year 2011 alone. *See* Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts: Fiscal Year 2011, table C-3, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C03Sep11.pdf.

3. Over the past decade, this Court has recognized the importance of causation issues under federal employment statutes of all types. *See, e.g.*, *Gross*, 557 U.S. 167; *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (burden of proof for the ADEA's "reasonable factors other than age" defense); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (causation standard under Federal Employers' Liability Act); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (evidentiary standard for obtaining a

mixed-motive jury instruction under Title VII); *Price Waterhouse*, 490 U.S. at 258.

The question presented here is at least as important as the questions presented in those cases, because the meaning of *Gross* is fundamental to the interpretation of *all* employment statutes. Especially since the current division among the lower courts turns on the meaning of this Court's decision in *Gross*, as well as its earlier plurality decision in *Price Waterhouse*, lower courts and litigants need this Court's guidance on the meaning of the Court's own precedents.

## IV. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case provides an especially "good vehicle" for considering the question presented. Pet. App. 63 (Smith, J., dissenting). There is no procedural obstacle to the Court's review, and this case's fact pattern illustrates the practical importance of the issue.

1. Although respondent argued below that the Medical School had waived its objection, there is no such impediment to this Court's review. The Court reviews questions that were pressed *or* passed upon below. *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992). The question presented is properly before this Court for *both* of those reasons.

The Medical School squarely raised this issue before the court of appeals panel. Pet. App. 63 (quoting Medical School's brief). The court of appeals then reached and addressed this issue on its merits—

without even intimating there had been any waiver. *See id.* at 12 n.16. That is all this Court's pressed-or-passed-upon standard requires.

The Medical School also took pains to preserve the issue in the district court, as detailed by Judge Smith. *See* Pet. App. 65–66 n.1. A party preserves an objection to a jury instruction by raising it on the record, before closing arguments, and before instructions are read to the jury. Fed. R. Civ. P. 51(b) & (c). The Medical School "did so." Pet. App. 65–66 n.1 (Smith, J., dissenting).

In the initial charge conference, the Medical School argued that Nassar's burden was to "show that [retaliation] is the sole motive of the defendant" using "but for language," which the School described as "something more stringent than motivating factor." Pet. App. 119. The district court rejected that objection on the ground that "this case is a mixed motive retaliation case, which calls for . . . a motivating factor; that the discriminatory intent is a motivating factor, it doesn't have to be the sole motivating factor." *Id.* at 121.

Shortly before closing arguments, the Medical School pressed its but-for argument a *second* time. Pet. App. 112–15. After expressing some frustration with the Medical School's second objection, *id.* at 114, the court again denied the objection on its merits, not based on a finding of waiver. The court stated "that the mixed motive analysis still applies in a Title VII retaliation case," expressly relying on *Smith*. *Id.*

One judge on the *en banc* court nonetheless concluded that the Medical School had failed to

preserve the objection because its "own proposed jury instruction included the motivating factor instruction language used by the district court." Pet. App. 61 (Elrod, J., concurring). That is incorrect. As discussed above, the Medical School squarely objected to a mixed-motive approach twice. Judge Smith correctly explained that, "[h]aving lodged that objection, [the Medical School's] attorneys, as officers of the court, also complied with *Smith* by tendering a jury instruction that treated but-for causation as an affirmative defense." *Id.* at 66 n.1; *see id.* at 104. Even then, to make absolutely sure there would be no doubt about its position, the Medical School, "along with its proposed instruction, . . . emphasized its objection to a mixed-motive instruction by including a detailed presentation on the conflicting state of the law, citing authority supporting a but-for causation standard." *Id.* at 66 n.1; *see id.* at 104 n.8.

The Medical School is aware of *no* authority indicating that its preservation of the issue was anything short of exemplary, especially since *Smith* made the School's objection futile in the lower courts.

2. Far from presenting an obstacle to review, the facts of this case provide a great vehicle for considering the question presented. Whether Nassar was entitled to a mixed-motive instruction, or whether he had to prove that retaliation was the but-for cause of the adverse employment action, was likely outcome-determinative.

Nassar's retaliation claim is a narrow one: he contends that Fitz blocked his attempt to get a job at the Hospital's AIDS clinic in retaliation for Nassar's discrimination claim. Pet. App. 11. In response, the

Medical School presented undisputed documentary evidence that Fitz consistently opposed Nassar's proposed employment at the Hospital's AIDS clinic—based on an Affiliation Agreement between the Medical School and the Hospital—beginning well before Nassar engaged in any protected activity and therefore well before any retaliatory animus could have existed. *See* pp. 6–8, *supra*.

The jury's evaluation of these facts was significantly different under a mixed-motive instruction than it would have been under a but-for standard. A jury would be hard-pressed to determine that Nassar had proven that Fitz would not have opposed the hospital job but for retaliation, considering that Fitz consistently did exactly that before learning of any protected activity by Nassar. Indeed, the district court observed before trial that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." Pet. App. 115. But the mixed-motive instruction allowed Nassar to recover if retaliation was only an additional subjective motivation for Fitz's consistent application of the Affiliation Agreement.

The only question the jury asked the district court during its deliberations confirms the importance of the mixed-motive standard. The jury asked to see "an email from Dr. Nassar to Dr. Fitz when he first complained about discrimination or being treated differently." Pet. App. 123. That question is relevant only to *when* Fitz allegedly acquired a retaliatory animus, *i.e.*, to whether Fitz settled on his course of conduct before or after any cause for retaliation arose. The facts of this case put

the practical significance of the mixed-motive instruction in stark relief.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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