NO. 12-484

In the
Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR,
Respondent.

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

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND SIX OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONER

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March 11, 2013

AMICI ON THIS BRIEF

American Council on Education

American Association of Community Colleges

American Association of State Colleges and Universities

Association of American Medical Colleges

Association of American Universities

Association of Public and Land-grant Universities

National Association of Independent Colleges and Universities

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STATEMENT OF INTEREST[1]

The American Council on Education, American Association of Community Colleges, American Association of State Colleges and Universities, Association of American Medical Colleges, Association of American Universities, Association of Public and Land-grant Universities, and National Association of Independent Colleges and Universities submit this brief as *amici curiae* in support of petitioner. *Amici* and their member institutions have a substantial interest in the impact this case will have on the academic freedom and employment practices of the nation's academic institutions.

The American Council on Education ("ACE") is a non-profit organization that was founded in 1918, whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. ACE represents all sectors of American higher education—public and private, large and small, and denominational and nondenominational. ACE strives to enhance the vitality and well-being of the nation's higher education institutions through advocacy, research, leadership, and program initiatives. ACE regularly submits amicus briefs in

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

cases that raise legal issues important to higher education.

The American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's community colleges. AACC represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities ("AASCU") is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

The Association of American Medical Colleges ("AAMC") is a not-for-profit association representing all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. The AAMC supports the entire spectrum of education, research, and patient care activities conducted by its member institutions. Of particular concern to the AAMC in this case is the need to protect the ability of medical schools to exercise educational judgments in relation to their faculty employees.

The Association of American Universities ("AAU") an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today

focuses on issues that are important to research intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

The Association of Public and Land-grant Universities ("APLU") is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.

The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Congress has expressly permitted plaintiffs to prove discrimination claims under this provision by demonstrating that unlawful discrimination was a "motivating factor" in the challenged employment decision. 42 U.S.C. § 2000e-2(m). As a prophylactic measure to safeguard the Act's core protection against discrimination, the statute also prohibits employers from retaliating 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). Congress has not authorized plaintiffs to satisfy Title VII's retaliation provision through the "mixed-motive" standard of proof permitted under the discrimination provision.

I. Title VII's retaliation provision requires plaintiffs to prove but-for causation. That congressional choice is sound policy. Compared to a straightforward but-for standard, the mixed-motive burden-shifting regime employed below is difficult to apply. Moreover, the very nature of competing evidentiary showings makes such claims especially difficult to resolve at summary judgment. Consequently, a mixed-motive framework would place undue pressure on defendants to settle in order to avoid the high costs and uncertainty of protracted litigation. Congress has decided that these practical difficulties are tolerable to deter

infringement of Title VII's core protections against discrimination. But it has not made the same choice for retaliation claims. Neither should this Court.

These practical concerns pose an acute threat to the academic freedom of *amici*'s member institutions, which employ millions of Americans across the country. This Court has long held that the academic freedom of colleges and universities is entitled to robust constitutional protection. And the freedom to set a school's academic mission necessarily entails the freedom to determine *who* will further those academic goals. Adopting a mixed-motive, burden-shifting framework for Title VII retaliation claims would encourage judicial intrusion into sensitive matters of academic freedom and empower disgruntled employees to bring academic fights into the courts. This is especially troubling given that most colleges and universities provide extensive internal grievance procedures to report discriminatory behavior and to resolve disputes. Under a mixed-motive regime, plaintiffs might strategically invoke those commonly-used procedures to manufacture an appearance of retaliation. The but-for standard urged by petitioner would lessen these concerns by correctly keeping the burden on plaintiffs to prove that non-academic, retaliatory motives actually caused an employment decision. This Court should adopt that more workable standard.

II. This result is compelled by Title VII's clear text and the logic of this Court's precedents. The retaliation provision's use of "because" requires but-for causation. This Court held as much in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). The

Court's earlier decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is inapposite and obsolete. The plurality and concurring opinions in that case adopted a mixed-motive, burden-shifting framework for discrimination claims under Title VII based on the purpose behind Title VII's core protection against unconstitutional discrimination. But the decision did not address Title VII's prophylactic retaliation provision. Moreover, experience has proven that the framework endorsed by *Price Waterhouse* is unworkable and undesirable. To the extent the decision would apply here, it should be overruled.

The clear indication from Congress is that this is the correct result. Following the *Price Waterhouse* decision, Congress amended Title VII's statutory text to expressly adopt a "mixed-motive" standard for discrimination claims, by clarifying that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). But Congress left the neighboring retaliation provision untouched. When Congress amends one provision but not another, the presumption must be that this distinction is intentional and meaningful.

ARGUMENT

I. The Mixed-Motive, Burden-Shifting Regime Employed By The Decision Below Poses Practical Problems That Threaten Academic Freedom.

As petitioner aptly demonstrates (at 14–24), and as *amici* explain below, the plain text of Title VII's retaliation provision requires proof of but-for causation. The text alone should be dispositive in this case. Yet, the illogic of the lower court's decision to the contrary is further confirmed by the practical difficulties that follow from it. The mixed-motive, burden-shifting regime contemplated in *Price Waterhouse* and adopted by the court below is difficult to apply. Indeed, defendants often cannot be sure whether they are defending against a mixed-motive allegation or not until after discovery. Even then, the framework makes it extremely difficult for defendants to secure summary judgment against meritless claims. These practical problems pose a particularly serious threat to the academic freedom of *amici*'s member institutions. The but-for standard adopted in *Gross* avoids these problems by keeping the burden of proof where it normally rests in civil litigation—on the plaintiff.

1. As this Court recognized in *Gross*, the mixed-motive "burden-shifting framework is difficult to apply." 557 U.S. at 179. Specifically, "in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework." *Id.* And jury confusion in this area has predictably resulted in a high rate of reversible error in mixed-motive cases. *See Visser v. Packer Eng'g*

Assocs., Inc., 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting). Thus, as Justice Kennedy predicted in *Price Waterhouse*, application of the framework has led to "disarray in an area of the law already difficult for the bench and bar." 490 U.S. at 279 (Kennedy, J., dissenting); *see also* Br. for Pet'r 25–28.

The Fifth Circuit's jurisprudence is illustrative. In *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the case that controlled the analysis of the panel below, the court of appeals struggled to determine whether the case presented to it was a mixed-motive case or a pretext case, *compare id.* at 333–34 (majority), *with id.* at 339–40 (Jolly, J., dissenting)—a distinction that is dispositive for the burden of proof. *See id.* at 333 ("[T]he reality is that the defendant will always prefer a pretext submission that requires the plaintiff to prove that there was no legitimate motivation (but-for) while the plaintiff will always prefer a mixed-motive submission with the burden on the defendant."). Even the *Smith* majority, which felt constrained to apply a mixed-motive framework, acknowledged that allowing a plaintiff to change the burden based on how he pleads his case is "[i]llogical." *Id.*

Moreover, it is especially difficult to defeat mixed-motive claims at summary judgment. By its very nature, the mixed-motive framework requires competing evidence. The plaintiff alleges that retaliation was a substantial factor in the challenged employment decision, the employer attempts to rebut that allegation with evidence that either there was no retaliatory motive or that it would have taken the

employment action even in the absence of the retaliatory motive, and the plaintiff presents additional evidence to defeat the employer's defense. Except in frivolous cases, this evidentiary battle will almost always result in a "genuine dispute as to [a] material fact" that will prevent the defendant from obtaining summary judgment. Fed. R. Civ. P. 56(a).

As a result, the mixed-motive standard adopted by the court below places undue pressure on defendants to settle claims. When faced with a retaliation claim, employers cannot even be sure at first which framework of proof will apply—under the Fifth Circuit's view, the plaintiff need not decide whether he is bringing a pretext claim or a mixed-motive claim until after discovery. *See Xerox*, 602 F.3d at 333. But what the employer can be sure of is a costly and invasive discovery process, followed by a full trial, in which it bears the burden to disprove the plaintiff's allegation, unless it settles the claim. Most employers will choose not to bear those costs, and consequently most plaintiffs will receive relief even for meritless claims. And as the cost of providing higher education continues to rise, *amici*'s member institutions will feel even greater pressure to settle claims to avoid the risks of litigation.

A but-for standard would avoid these practical problems. Adopting "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims," *Schaffer v. Weast*, 546 U.S. 49, 56 (2005), would honor the simple, administrable system of proof that the statute contemplates: The plaintiff would carry his burden only when he can prove that he suffered an adverse employment action "*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) (emphases added); *see also Meachem v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92 (2008) ("Absent some reason to believe that Congress intended otherwise, … we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." (internal quotation marks omitted)). And when the plaintiff fails to meet his burden, summary judgment would be available to the defendant, as it is in other circumstances.

2. While the ill effects of a mixed-motive retaliation regime would be detrimental to all employers, they would prove especially harmful to the academic freedom of *amici*'s member institutions. The mixed-motive framework adopted by the lower court and urged by respondent would trench on the constitutional right of colleges and universities to pursue their academic mission through employment decisions. Because mixed-motive allegations are difficult to disprove, and especially difficult to defeat at summary judgment, academic institutions facing such claims would face undue pressure to settle against their academic interests. Requiring but-for causation in Title VII retaliation claims would safeguard academic freedom by ensuring that colleges and universities will face liability only when plaintiffs can show that employment decisions resulted from unlawful retaliation, rather than constitutionally protected academic motives.

This Court has "long recognized that … universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967)); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Academic freedom "long has been viewed as a special concern of the First Amendment."). "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603. Academic freedom means "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312. And the federal courts have a "responsibility to safeguard th[is] academic freedom." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

Faculty employment decisions are critical to academic freedom. For an educational institution to retain "the freedom to make decisions about *how* and *what* to teach," *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in the judgment) (emphases added), it must possess the freedom "to determine for itself on academic grounds *who* may teach." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (internal quotation marks omitted) (emphasis added). "Academic freedom thrives … on autonomous decisionmaking by the academy itself." *Ewing*, 474 U.S. at 226 n.12. Thus, just as a school must be

afforded considerable leeway in "the selection of its student body," *Bakke*, 438 U.S. at 312, it must have autonomy over the selection of its faculty. And "good faith on the part of a university" should be "presumed absent a showing to the contrary." *Grutter*, 539 U.S. at 329 (internal quotation marks omitted).

Requiring proof of but-for causation in Title VII retaliation claims would properly protect these constitutional principles. A but-for standard would properly place the burden on plaintiffs to demonstrate that unlawful retaliation—not constitutionally protected academic choices or other factors—caused the employment actions they challenge. And it would enable employers to obtain summary judgment when the plaintiffs cannot meet their burden. This would provide colleges and universities the assurance that employment decisions made on academic grounds would not, outside of the circumstances contemplated by Congress, be subjected as a matter of course to full-blown litigation in which minimal evidence could shift the burden to the institutions to justify the legitimacy of their academic choices.

Allowing proof of mixed-motive causation in Title VII retaliation claims, by contrast, would trench on academic freedom. As explained above, the mixed-motive framework would enable plaintiffs to re-grind academic axes through costly litigation that will pressure higher education institutions to settle. Moreover, because the mixed-motive framework invites allegations of multiple contributing causes, plaintiffs will be able to present minimal evidence—

here, a third-party's subjective impression of a an administrator's statement, *see* Br. for Pet'r 10—to cast doubt on legitimate academic decisions in order to shift the burden of proof to the defendant. At that point, academic institutions will be forced to disclose and submit to judicial scrutiny sensitive academic matters the First Amendment protects. Judges and juries would be put in a position to second-guess academic decisions including tenure, administrative appointments, and research funding. Meanwhile, the risk that a jury will reject the legitimate (and actual) academic motives in favor of the plaintiff's minimal evidence is significant, as this case itself demonstrates. Thus, the intrusion into protected matters would be inevitable and potentially wide-ranging.

These concerns are heightened with respect to retaliation claims, given the internal grievance procedures adopted by most colleges and universities. Many academic institutions already have well-established internal procedures to handle faculty grievances, many of which are modeled on guidelines published by the American Association of University Professors ("AAUP"). The AAUP is an association of 48,000 professors and academics across 450 campuses that issues policy documents and reports. It endeavors to develop standards for sound academic practices and works for acceptance of the standards by the higher education community. *See* AAUP, About: Mission & Description, http://www.aaup.org/about/mission-description. The AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* provide a model procedure for faculty grievances. *See* AAUP, *Recommended*

Institutional Regulations on Academic Freedom and Tenure (2009), http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf. The procedures allow faculty members to petition a grievance committee to complain of perceived discrimination based on race, sex, religion, national origin, and other protected characteristics. *See id.* ¶ 10. Moreover, those committees are often composed entirely of peer faculty members. *See id.* ¶ 16.

Such internal processes are an effective and efficient means of remedying and deterring discriminatory conduct within the academy. At the same time, the widespread adoption and proactive use of these procedures increases the likelihood that disgruntled employees will invoke them to create the appearance of retaliation—as respondent appears to have done in this case. *See* Br. for Pet'r 9–10. Indeed, here, it is "uncontroverted that Fitz did not learn that Nassar had claimed illegal discrimination until he received Nassar's resignation letter." *Id.* at 36. And Fitz had rejected respondent's transfer request *before* receiving the resignation letter. *See id.* at 35–36. Yet, the medical school faces retaliation liability under the mixed-motive framework employed by the Fifth Circuit. Thus, this very case illustrates how procedures designed for the valuable purpose of preventing and punishing discrimination might perversely be used to accuse colleges and universities of retaliatory conduct. In a mixed-motive regime, the invocation of such procedures prior to an adverse employment action could be proof enough to shift the burden to the college or university to justify its actions and thus compel a trial. Under a but-for, non-shifting standard a plaintiff could not

use a university's procedures against it to get past summary judgment and force a settlement.

In addition, academic institutions operate under the oversight of accrediting bodies that set and enforce standards relevant to academic programs. In the case of medical schools, the Liaison Committee on Medical Education accredits programs leading to the M.D. degree in the United States. Among the Committee's accreditation standards are faculty requirements that constrain the medical schools' personnel decisions. *See generally* Liaison Comm. on Med. Educ., *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* (2012), http://www.lcme.org/functions.pdf. One of those standards provides context and support to petitioner's decision not to transfer supervision of respondent from the medical school to the hospital. *See id.* ¶ ER-10 ("In the relationship between a medical education program and its clinical affiliates, the educational program for medical students must remain under the control of the program's faculty at each instructional site."); *see also* Br. for Pet'r 7–8. Yet, the decision below imposes liability on petitioner for adherence to that standard (and petitioner's agreement with its affiliated hospital). Thus, this very case demonstrates how the mixed-motive, burden-shifting regime urged by respondent and adopted by the decision below would permit plaintiffs, like respondent, to second-guess academic decisions premised on accreditation standards—and other appropriate academic factors—with greater frequency and damaging consequence.

These academic concerns affect a large group of employers. Across the country, roughly 3.6 million faculty and staff members are employed at private and public universities, colleges, community colleges and professional schools. *See* Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2011, http://www.bls.gov/oes/tables.htm.[2] Together, these academic institutions employ nearly 3% of the US labor force as educators, researchers, administrators, and other staff. *Id.*[3] Meanwhile, "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 283 (2009) (Alito, J., concurring in the judgment); *see also* U.S. EEOC, Charge Statistics: FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charg

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[2] To compute this approximate total, *amici* utilized the Bureau of Labor Statistics' May 2011 OES data. According to that data, the total number of personnel employed by community colleges (including private, state, and local government schools) is 777,880, and the total number of personnel employed by colleges, universities, and professional schools (including private, state, and local government schools) is 2,857,640. These totals can be found within the May 2011 "All Data" spreadsheet, respectively, at row 63322, column J, and row 64210, column J.

[3] *Amici* computed this approximate percentage from the Bureau of Labor Statistics' 2011 OES data as well. As explained above, private and public universities, colleges, community colleges and professional schools employ 3,635,520 personnel, which amounts to 2.8% of the 128,278,550 total personnel employed in the United States. Total U.S. employment data can be found at row 2, column J of the May 2011 "All Data" spreadsheet.

es.cfm (last visited Mar. 5, 2013) (showing that the number of Title VII retaliation charges has nearly doubled in the past fifteen years). Adopting a mixed-motive framework for retaliation claims "would likely cause this trend to accelerate." *Crawford*, 555 U.S. at 283. Thus, such a standard's threat to academic freedom is no negligible harm. It cuts deeply to the core of academic institutions' constitutional freedoms and broadly across this large sector of the workforce.

To be clear, *amici* do not contend that the Constitution's protection of their academic freedom should immunize colleges and universities from meritorious Title VII retaliation claims. On the contrary, *amici*'s concern is that a mixed-motive, burden-shifting regime will enable plaintiffs to advance *meritless* retaliation claims in a manner that will endanger academic freedom. The framework adopted by the Fifth Circuit would empower a plaintiff to shift the burden of proof to an educational institution to justify its academic decisions, without first requiring the plaintiff to prove the merits of his claim. Thus, in many cases, it would force such institutions to disclose and explain the constitutionally protected reasons for their actions based on minimal evidence that is insufficient to prove that the institutions acted unlawfully. Not only is this system constitutionally offensive; it is patently inconsistent with Title VII's plain text and this Court's interpretation of identical statutory terms. Given the strong statutory evidence that Congress never intended this impracticable regime, there is no compelling reason to adopt it.

II. The Plain Text Of Title VII's Retaliation Provision Requires Plaintiffs To Prove But-For Causation.

Congress wisely avoided the practical problems of a mixed-motive framework for retaliation claims under Title VII. Title VII's plain text prohibits decisions made "because" an employee opposed a discriminatory employment practice or participated in procedures related to a discrimination charge. Congress has not authorized a mixed-motive, burden-shifting framework under this provision, as it has under Title VII's discrimination provision. And this Court has interpreted materially indistinguishable language in another employment discrimination statute to require proof of but-for causation. The same reasoning clearly applies here.

1. The logic of this Court's decision in *Gross* squarely controls this case. In *Gross*, this Court interpreted statutory language in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634, that "makes it unlawful for an employer to take adverse action against an employee '*because of* such individual's age.'" *Gross*, 557 U.S. at 170 (quoting 29 U.S.C. § 623(a)) (emphasis added). The Court held that "the ordinary meaning of the ADEA's requirement" requires that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176.

This Court rejected the argument that the ADEA's statutory text should be interpreted to allow the mixed-motive proof permitted under Title VII's discrimination provision. Unlike the ADEA, Title VII's anti-discrimination protections "explicitly

authoriz[e] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision." *Gross*, 557 U.S. at 174 (quoting 42 U.S.C. § 2000e-2(m)).[4] Thus, "Congress neglected to add" a mixed-motive "provision to the ADEA when it amended Title VII …, even though it contemporaneously amended the ADEA in several ways." *Id.*

The statutory text at issue in *Gross* is materially indistinguishable from the text of Title VII's retaliation provision. In both statutes the crucial term is "because," and absent a clear congressional indication to the contrary, the same word used in multiple statutes must be given its same ordinary meaning. *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2471–72 (2010). If anything, Congress has clearly indicated its intent *not* to permit mixed-motive retaliation claims under Title VII. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079, amended Title VII's discrimination provision to authorize mixed-motive claims, but Congress declined to add language permitting such claims under Title VII's neighboring retaliation provision. "Where Congress includes particular language in one section of a statute but omits it in

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[4] The full text of Section 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added). *See also* 42 U.S.C. § 2000e-5(g)(2)(B) (restricting the remedies available under Section 2000e-2(m)).

another section of the *same* Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation and alteration marks omitted) (emphasis added); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–63 (2006) (holding that the retaliation prohibited by Title VII is not limited to the terms, conditions, or status of employment because Title VII's retaliation provision does not contain the same limiting language as the statute's discrimination provision).

2. This Court's decision in *Price Waterhouse* is inapposite and outdated. *Price Waterhouse* adopted a mixed-motive, burden-shifting framework under Title VII's discrimination provision, holding that after a "plaintiff in a Title VII case proves that [protected status] 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 protected status] into account." 490 U.S. at 258 (emphasis added). The Civil Rights Act of 1991, adopted the *Price Waterhouse* interpretation in part, rejected it in part, and declined to apply the mixed-motive regime outside Title VII discrimination actions. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003).

Price Waterhouse did not address Title VII's retaliation provision. Nor does its logic apply to Title VII's retaliation provision. Both the plurality opinion and Justice O'Connor's concurring opinion focused on the specific intent behind the Act's discrimination

provision to justify their conclusions. *See* 490 U.S. at 243–45 (plurality opinion); *id.* at 262–63 (O'Connor, J., concurring in the judgment). The Court thus adopted the burden-shifting framework to facilitate the remedial goals of Title VII's core protection against discrimination. *See id.* at 239 (plurality); *id.* at 265 (O'Connor, J., concurring in the judgment). But the justifications for such a regime do not equally apply to Title VII's retaliation provision, which is "a prophylactic measure to guard the primary right" against discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 189 (2005) (Thomas, J., dissenting); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (Title VII's retaliation provision is aimed at "[m]aintaining unfettered access to statutory remedial mechanisms."). Indeed, this appears to be the policy judgment Congress made when it declined to extend the mixed-motive framework to retaliation claims.

To the extent *Price Waterhouse* would apply here, it should be overruled. *Gross* indicated that "it is far from clear that the Court would have the same approach were it to consider the question [in *Price Waterhouse*] today in the first instance." 557 U.S. at 178–79. And for good reason. *Price Waterhouse* either ignores or distorts the plain meaning of "because" to permit proof other than but-for causation. *See* 490 U.S. at 281 (Kennedy, J. dissenting). Indeed, "[t]he most confusing aspect of the [*Price Waterhouse*] plurality's analysis of causation and liability is its internal inconsistency." *Id.* at 285. And as *amici* explained above, it leads to grave practical problems. This Court's decision in *Gross* has clarified the confusion; that more recent

and more accurate understanding should apply with equal force here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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