NO. __

In the

Supreme Court of the United States

JOSEPHLOC TIEN NGUYEN,

Petitioner

v.

KIRSTJEN NIELSEN,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1). 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).

2). Is it the duty of the Court or the jury to decide whether undisputed conduct constitutes"protected activity" for reporting " filing employment discrimination complaint, "discrimination harassment," within the meaning of Title VII of the Civil Rights Act of 1964, particularly in light of Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 555 U.S. 271 (2009)?

2) Does Title VII protect employee from employer's discrimination harassment by giving a negative statement (i.e..."words of threat": getting rid of employee ahead of Employment proficiency plan " EPP "is an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964.

3). Whether the continuation of time driven events elapse between the protected activity and the adverse employment action (demotion) disproves the causal connection element of a prima facie case in a retaliation claim under Title VII, 42 U.S.C. 2000e-3(a). (The First Circuit's decision conflicted with the Third, Sixth, and Ninth Circuits' decisions on the same issue).

4). Whether the discovery rule is applicable in Title VII cases.

5). Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision

admittedly harbored no discriminatory motive toward the impacted employee.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE\

SUPREME COURT OF THE UNITE STATES

PETITION FOR WRIT OF CERTIORARI

Pertitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-31a) is unpublished. The order of the United States District Court (App. 32a-76a) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July, 18, 2018. The court of appeals are currently reviewing a timely petition for rehearing en banc on September 25, 2018. Pet. App. 68a-69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

This case, which arises under Title VII of the 1964 Civil Rights Act, stems from one incident to the other involving a Vietnamese Asian American Import Specialist, JosephLoc T. Nguyen, who w as employed at Customs and Border Protection ("CBP"), Long Beach, California, being retaliatory discrimination by CBP management from 2010 until today. Petitioner ("Appellant", "Plaintiff") began working for CBP as an Import Specialist in 2006 at the Los Angeles/Long Beach Seaport. In 2010, Appellant was assigned to Team 737, which handles consumer electronics, lighting, and antiques. On March 25, 2010, he filed the first EEO complaint against the agency ("CBP") regarding unfair treatment, creating a hostile work environment, and retaliation. Agency did not provide adequate training in job performance and having discrimination issues at team 737. After a thorough review and investigation, CBP's Office of Diversity and Civil Rights ("DCR") concluded that Appellant was being discriminated against based on his race/national origin (Vietnamese), retaliation and working under hostile work environment. [(The place where Appellant worked were cubical workstations that were provided for each import specialist team. The cubical workstations located very close by, so they can stop by and visit each team regularly)]. After filing that complaint, CBP Management forcibly placed him on a 90-day Employee Proficiency Plan (the first "EPP") without counseling for revenging against Appellant on the event of prior EEO protected activity with discriminatory intent to fail him on EPP just any reason. After that, they reassigned Appellant to FCL Warehouse in Wilmington, Los Angeles to do administrative duties for over one year. On February 17, 2012, Todd Owen,

former Director of Field Operations for Los Angeles ("DFO"), informed Appellant that he had decided to rescind that EPP because there had been some problems with the EPP. (For example: Job Training Problem...), (But Owen stated on his letter that "Give Plaintiff another opportunity to demonstrate proficiency in the performance of his duties as an Import Specialist..." ???) , and sent him back to Import Specialist Division and assigned him to work at CST 723, which handles shoes and handbags. (CST 737 located next to CST 723, so Appellant witnessed former supervisor Ellen Graham (team 737) stopped by and talked with former supervisor Patti Dondero (team 723) weekly ???). Due to the failure on the first "EPP", on July 12, 2012, after serving a short time on Team 723, Ms. Dondero forcibly put Plaintiff undergo the second EPP without adequate training with the intent to fail Appellant on that just any reason to avenge against Appellant on the event of prior EEO protected activity. During the relevant time, Appellant continuously filed two other complaints (2012 and 2013) regarding CBP Management's unfair treatment and discrimination issues. . As a result, on May 29, 2013, former Director Owen intended to fail Plaintiff on the second "EPP" and demoted him without reasonable cause. Appellant sought review of the decision before the Merit System Protection Board (MSBP) and Equal Employment Opportunity Commission (EEOC), but they dismissed Appellant's claims and concurred with the agency decision. Appellant suffered and disagreed with that decision, on February 25, 2016, Appellant filed the fourth complaint in Federal District Court, in Santa Ana, California regarding discrimination issues. On August 31, 2017, the District Court dismissed Appellant's complaint and ordered granting Appellee ("Respondent")'s motion for summary judgment. Once again, Appellant was so suffering and was so dissatisfied with the

District Court's decision, on September 28, 2017, he finally filed Notice of Appeal to the Ninth Circuit. Briefly, this is a discrimination lawsuit brought by Appellant against the Appellee, and specifically its CBP's Import Specialist Division. Despite Appellant's 7 years in exemplary service as an Import Specialist, he has been unable to obtain a promotion from Import Specialist position. Appellant's career advancement has been ruined by, among other things: (1) a refusal to provide him adequate training so that he could perform his job duty consistently as required to apply for promotion, (2) the use by the CBP Management of a flawed employment proficiency plan review ("EPP") process which is just a means to get rid of Appellant and favors CBP Management, and (3) unlawful discrimination issue, specifically (1) race discrimination under Title VII; (2) age discrimination under the Age Discrimination in Employment Act (ADEA); (3) retaliation; (4) disability discrimination under the Rehabilitation Act of 1973; (5) hostile work environment; and (6) sex discrimination under Title VII in violation of Title VII and 42 U.S.C. §§ 2000e-2, as demonstrated best by explanation below.

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. 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 and other courts 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. 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. In addition to that, the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a find of a cause connection because the plaintiff's harasser (discriminator) did not have the opportunity to retaliate until he was assigned to work at CST 723 for former supervisor Patti, Dondero (subordinate) to forcibly placed plaintiff undergo "EPP", discriminated against plaintiff by failing on EPP (without adequate training) and recommended to DFO Owen made personnel decision to demote plaintiff, Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007), Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002) (the time interval between the protected activity and the adverseemployment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different

supervisor during this period); Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997). In other words, the time over two-year gap proves the causation element of the prima facie case and the employer's adverse employment action was continuously until the complaint was appealed to the Ninth Circuit.

B. The Underlying Events

Petitioner initiated the EEO process by filing four complaints in 2010, late 2012, early 2013 and continuously until 2016 and on and such so on to the Supreme Court to petition for a writ of certiorari regarding Appellee's discrimination and retaliation issues. Especially, on February 25, 2016, Appellant finally filed his fourth Complaint in this matter. He believes that Appellee discriminated against him based on his race (Asian), sex (male), age (over 50), subjected him to a hostile work environment, denied him a reasonable accommodation for his disability and retaliated against him for his prior EEO complaint. During the relevant time, when Appellee assigned him to work at CST 723 as an Import Specialist position, CBP Management did not provide a fair process for reviewing the job performance. This includes training, guidance, and a reasonable time to adapt to the new working environment. They did this by requiring Plaintiff to undergo an employee performance plan with the intent to fail him. The Agency failed to review two complaints filed during the review process. This is disparate treatment. Consequently, they demoted him by failing him on Job Performance in order to revenge against him due to his prior EEO complaint causing him suffering on financially, family and health issues. Actually, it came to light that it was just based on discrimination and retaliation matter. However, Appellant expressed his concerns by failing to commit suicide twice to protest that because of demotion issue. In fact, an illegal

motive was the basis for his demotion, Appellant was subjected to a hostile environment, discriminated against based on a disability and retaliated against because of his age. Furthermore, Appellant did not abandon his disability, age claims and non-selection issue as well. Appellant presented triable issues of material fact regarding his discrimination claims; however, the District Court improperly entered summary judgment to the Appellee. The Ninth Circuit concurred with the District Court's summary judgment. Therefore, Appellant respectfully requests the Supreme Court reverses the Ninth Circuit's memorandum and grants Appellant's Motion for Summary Judgement : " **Allow Appellant returning back to Import Specialist position as GS 11-3.** "

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that there are two reasons why this Court should grant its petition for writ of certiorari and review the Ninth Circuit's decision. First, as the Ninth Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to the proper standard for applying subordinate bias liability, or the so-called "cat's paw" theory of liability, under Title VII. Second, the Ninth Circuit's ruling hinges upon an important question of federal employment law that has not been, but should be, settled by the Supreme Court: namely, under what circumstances may an employer be held liable for intentional discrimination when the person who made the adverse employment decision admittedly harbored no discriminatory bias toward the impacted employee. In other words, 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. . And "nothing in the statute's text indicates that Congress has carved out an exception to that rule." 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. The Fifth Circuit majority therefore sanctioned mixed-motive Title VII retaliation claims. In doing so, it expressly disagreed with the Seventh Circuit's "broad" holding that Gross states the general rule for federal statutes. 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. (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." "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. 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 . . . ." (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. 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. 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"). 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. 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. 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 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 other Circuit's decisions 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. (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. 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 also 42 U.S.C. § 1981a(b)(2). Indeed, Petitioner seeks the court granting him returning back to previous position (Import Specialist) and damages mill. Plaintiff's Application for Court to grant petition for rehearing en banc is now pending for a decision. Here, the district

court awarded defendant for a summary judgment.

2. 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 Influence 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,Plea se!(Mar 25, 2010), http://employerslawyer. blogspot.com/2010/03/5th-circuit-en-banc-request-onsmith- 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 Anti-retaliation 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/201 1/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. (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 employer 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 employer squarely raised this issue before the court of appeals panel. (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. That is all this Court's pressed-or passed- upon standard requires. The employer also took pains to preserve the issue in the district court, as detailed by Judge Smith. 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 employ "did so." Pet. App. 65–66 n.1 (Smith, J., dissenting). In the initial charge conference, the employer argued that Nguyen's 's burden was to "show that [retaliation] is the sole motive of the defendant" using "but for language," which

the defendant described as "something more stringent than motivating factor. 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." . Shortly before closing arguments, the employer pressed its but-for argument a second time.. After expressing some frustration with the employer 's second objection, 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 employer had failed to preserve the objection because its "own proposed jury instruction included the motivating factor instruction language used by the district court." (Elrod, J., concurring). That is incorrect. As discussed above, the employer squarely objected to a mixed-motive approach twice. Judge Smith correctly explained that, "[h]aving lodged that objection, [the defendant'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. Even then, to make absolutely sure there would be no doubt about its position, the employer, "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." The employer is aware of no authority indicating that its preservation of the issue was anything short of exemplary, especially since Smith made the employer'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 Nguyen 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. Nguyen 's retaliation claim is a narrow one: he contends that former supervisor discriminated against him ("Wanting to get rid of him..", but the CBP superior "DFO" Owen denied its discrimination motive against petitioner. CBP management blocked and interfered petitioner 's job applications in retaliation for Nguyen's discrimination claim. In response, the employer presented undisputed documentary evidence that CBP consistently opposed Nguyen's job employment application at CBP Long Beach / Seaport

— based on an Affiliation Agreement between the CBP and union —beginning well before Nguyen engaged in any protected activity and therefore well before any retaliatory animus could have existed. 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 Nguyen had proven that CBP would not have opposed petitioner on job application issue but for retaliation, considering that CBP consistently did exactly that before learning of any protected activity by Nguyen. Indeed, the district court observed before trial that "[t]he defense has put forth a strong defense . . . based upon this [A]ffiliation [A]greement." But the mixed-motive instruction allowed Nguyen to recover if retaliation was only an additional subjective motivation for CBP's consistent discriminating against plaintiff on job application issue.The only question the jury or the court should as the district court during its deliberations confirms the importance of the mixed-motive standard. The jury should ask to see discriminatory retaliation's evidence from Nguyen to CBP when he first complained about discrimination or being treated differently." That question is relevant only to when CBP

allegedly acquired a retaliatory animus, i.e., to whether Ms. Dondero or "DFO" Owen settled on their 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. In addition, the ultimate question in any employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination. Reeves, 530 U.S. at 153. This ultimate question is at the heart of the matter that was presented to the Tenth Circuit in this case: Based on the undisputed facts, could a reasonable trier of fact conclude that Mr. Nguyen was subjected to intentional discrimination on the basis of his race? It is clear that the answer to this question would have been different if the matter had arisen in the Fourth Circuit. Indeed, the case might have turned out very differently even under the supposedly "lenient" standard applied in the Fifth Circuit, where in Russell, the Fifth Circuit found that a theory of subordinate bias liability was applicable in a case where the influence exercised by the subordinate over the decision making process far exceeded the supposed "influence" exerted by Mr. Grado over Ms. Edgar. See Russell, 235 F.3d at 228 (observing that the allegedly biased subordinate exerted so much influence over the decision maker that she "essentially regarded her decision to terminate [the employee] as ordained by other forces"). In fact, the case might have turned out differently in any circuit, even the Tenth Circuit, depending upon the predilections of the panel regarding which of the various available standards to apply. Such indirection and ambiguity in the law severely undermine the best efforts of multijurisdictional employers such as BCI to comply with Title VII and other anti-discrimination laws. In the realities of today's workplace, ultimate decisions are frequently made by decisionmakers who are at some level

removed from employees and who must rely to varying The following cases state that courts may not act as a "super personnel departments" that second guess employers' business judgments: Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1197 (10th Cir. 2006) (quoting Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Serv., 165 F.3d 1321, 1330 (10th Cir. 1999)); Argo v. Blue Cross & Blue Shield of Kansas, Inc., 452 F.3d 1193, 1203 (10th Cir. 2006); Bender v. Hecht's Dep't Stores, 455 F.3d 612, 628 (6th Cir. 2006); Stallings v. Hussmann Corp., 447 F.3d 1041, 1052 (8th Cir. 2006); Millbrook v. IBP, Inc., 280 F.3d 1169, 1181 (7th Cir. 2002), cert. denied, 537 U.S. 884 (2002); Holcomb v. Powell, 433 F.3d 889, 897 (D.C. Cir. 2006). degrees on information received from subordinates. Indeed, the practice utilized by BCI in this case, of elevating the decision at issue to trained Human Resources personnel, is inarguably a deterrent against discrimination, as it provides for consistent application of policies and neutrality in decision making. Are employers such as BCI best advised to eschew such centralized decision making, either entirely, or in certain areas, depending upon the prevailing judicial views in its various operational divisions? As the Tenth Circuit suggests, is someone in Ms. Edgar's position required to have direct contact with the employee at issue in every instance, in order to avoid a claim based upon subordinate bias liability? And if that is the case, does that mean it is now appropriate, in contradiction to the overwhelming weight of prior authority, for courts to act as "super personnel department(s)" dictating in minute detail the practices of employers? All of these extremely important and timely questions underlie the issue presented for review, and make this case an excellent vehicle for the Court to provide much needed guidance to employers, employees, the EEOC, and all interested

parties, regarding these matters. This Court's review of this issue will also have an impact on state anti-discrimination laws, as state courts frequently look to federal law for guidance when applying their own state anti-discrimination statutes. See, e.g., Ocana v. American Furniture Co., 91 P.3d 58, 68 (N.M. 2004) (applying New Mexico law); Christian, 252 F.3d at 880 (applying Ohio law); Beason v. United Tech. Corp., 337 F.3d 271, 276 (2d Cir. 2003) (applying Connecticut law); La Bove v. Raftery, 802 So. 2d 566, 573 (La. 2001) (applying Louisiana law). The EEOC has gone on record opining about the importance of the issue of subordinate bias liability, filing an amicus brief with the Fourth Circuit in the Hill case.

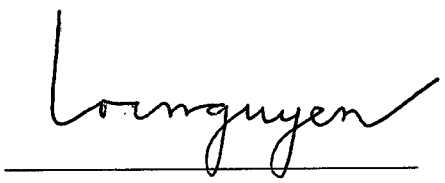
THE NINE CIRCUIT REVIEWS REQUEST FOR REHEARING EN BANC

The Ninth Circuit is currently viewing petitioner's petition for rehearing and suggestions for rehearing en banc.

CONCLUSION

The petitioner for a writ of certiorari should be granted.

Respectfully submitted,



JOSEPHLOC TIEN NGUYEN

Date: October 5th, 2018

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JOSEPHLOC TIEN NGUYEN — PETITIONER
(Your Name)

VS.

KIRSTJEN NIELSEN — RESPONDENT(S)

PROOF OF SERVICE

I, NGUYEN TIEN MINH, do swear or declare that on this date, October 5th, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

ATTORNEY KEVIN B. FINN, Assistant United States Attorney
Federal Building, Suite 7516, 300 North Los Angeles Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 5th, 2018

(Signature)
Nguyen Tien Minh

INDEX TO APPENDICES

Appendix A