No. 20-939

In the Supreme Court of the United States

COLETTE MARIE WILCOX, PETITIONER

v.

NATHAN H. LYONS ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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In the decision below, the Fourth Circuit held that retaliation against a public employee for complaining about sex discrimination in the workplace does not constitute intentional discrimination in violation of the Equal Protection Clause. That ruling is in acknowledged conflict with the Second Circuit's decision in *Vega* v. *Hempstead Union Free School District*, 801 F.3d 72 (2015), and it cannot be squared with this Court's recognition that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). Respondents' strained efforts to minimize the importance of the question presented and to gin up supposed vehicle defects are unpersuasive. This Court's review is warranted.

A. The Question Presented Warrants Review

1. As the certiorari petition explains (at 6-9), this Court's review is warranted to resolve the conflict

between the decision below and the Second Circuit's decision in *Vega*. In that case, the Second Circuit held that, "[w]hen a supervisor retaliates against an employee because he complained of discrimination, the retaliation constitutes intentional discrimination against him for purposes of the Equal Protection Clause." 801 F.3d at 82. In the decision below, by contrast, the court of appeals held that such a retaliation claim "is not cognizable under the Equal Protection Clause." Pet. App. 15a. The court of appeals adopted that rule despite expressly acknowledging the Second Circuit's "contrary conclusion" in *Vega*. *Id.* at 18a.

Respondents acknowledge the circuit conflict, but they suggest in passing that it is too "lopsided" to warrant this Court's attention. Opp. 3-4. That suggestion is misplaced.

In the first place, respondents' description of a "seven to one split" (Br. in Opp. 4) substantially overstates the support for the rule adopted below. As the petition explains (at 8 n.2), and as respondents do not contest, two of the decisions that respondents invoke did not involve retaliation for complaints about intentional discrimination based on a protected classification and thus do not implicate the question presented here. See *Thompson* v. *City of Starkville*, 901 F.2d 456, 468 (5th Cir. 1990); *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427, 439-440 (6th Cir. 2005).[1] Moreover, as respondents again do not contest,

[1] Respondents cite the Eighth Circuit's decision in *Burton* v. *Arkansas Secretary of State*, 737 F.3d 1219 (2013), but they do not appear to include the Eighth Circuit in their tally of circuits that they contend have resolved the question presented in the same way as the decision below. That exclusion is appropriate,

the other circuits that have held that the Equal Protection Clause does not prohibit retaliation for complaints about discrimination have done so without directly confronting this Court's holdings in *Jackson* and related cases. See Pet. 9 n.3. Thus, although those decisions confirm the importance and recurring nature of the question presented, they provide little precedential support for the rule adopted by the court of appeals below.

In any event, respondents do not explain why the supposedly "lopsided" nature of the circuit conflict would counsel against further review. In particular, respondents provide no reason to think that the circuit conflict will disappear without this Court's intervention. The Second Circuit's decision in *Vega* represents that court's considered judgment on the question presented, which the court reached after careful analysis of its own precedents and those of this Court. See 801 F.3d at 80-82. The Second Circuit has also continued to apply its rule even after the court of appeals's decision in this case. *Gonzalez* v. *City of N.Y.*, No. 20-1126-cv, 2021 WL 438894, at *1 (Feb. 9, 2021). There is accordingly no basis to conclude that the Second Circuit is likely to abandon its position in favor of the unsound rule adopted by the court of appeals below.

2. Review is also warranted because the court of appeals erred in holding that the Equal Protection Clause does not prohibit retaliation against those who complain about invidious discrimination based on a protected classification. Pet. 9-18. Respondents'

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because *Burton* was resolved on qualified immunity grounds and thus did not directly address the question presented here. See *id.* at 1237.

assertion (Br. in Opp. 11) that the decision below is correct is wholly conclusory. Respondents fail to grapple with the petition's showing that the decision below cannot be squared with this Court's repeated holdings that a "broadly written general prohibition on discrimination" encompasses claims for retaliation against those who complain about discrimination. *Jackson*, 544 U.S. at 175; see also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Gomez-Perez* v. *Potter*, 553 U.S. 474, 481 (2008); *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 446 (2008). As this Court has explained, "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *Jackson*, 544 U.S. at 173, and there is no sound basis not to apply that observation to the Equal Protection Clause's prohibition of sex discrimination.

3. Respondents seek to minimize the importance of the question presented by contending that it does not arise frequently and that, when it does, plaintiffs have other available causes of action to seek redress for retaliation. Both of those contentions are incorrect.

a. Contrary to respondents' suggestion (Br. in Opp. 9-10), the question presented is a significant one, even though some employees who have faced retaliation for complaining about discrimination may also be able to pursue a claim under Title VII. As respondents acknowledge, Title VII does not apply to employers with fewer than fifteen employees. See, *e.g.*, 42 U.S.C § 2000e(b). Many American employees work for small

employers,[2] and as petitioner's case illustrates, a number of them are employed by small governmental agencies that are subject to the Equal Protection Clause but exempt from Title VII. Indeed, public employees may be particularly likely to be excluded from Title VII's protection by the statute's numerosity requirement, because courts are reluctant to aggregate formally distinct state agencies into a single employer for purposes of Title VII's coverage. See, *e.g.*, *Sandoval* v. *City of Boulder*, 388 F.3d 1312, 1323 & n.3 (10th Cir. 2004). And even where Title VII does apply, many plaintiffs must nonetheless rely on the Equal Protection Clause because their Title VII claim has expired, see, *e.g.*, *Vega*, 801 F.3d at 78-79; *Lange* v. *Town of Monroe*, 213 F. Supp. 2d 411, 418 (S.D.N.Y. 2002), or in order to impose individual liability, see, *e.g.*, *DaSilva* v. *Indiana*, No. 1:19-CV-02453-JMS-DLP, 2020 WL 994847, at *8 (S.D. Ind. Mar. 2, 2020); *Naumovski* v. *Binghamton Univ.*, No. 3:11-CV-1097, 2018 WL 9596943, at *13 (N.D.N.Y. Apr. 17, 2018), rev'd on other grounds, *Naumovski* v. *Norris*, 934 F.3d 200 (2d Cir. 2019).

The question whether the Equal Protection Clause prohibits retaliation against a person who has complained about invidious discrimination also arises with frequency. As the petition explains (at 6-8), six courts of appeals have addressed the question presented in published opinions, including the Fourth Circuit's decision in this case. In the Second Circuit, which has held that the Equal Protection Clause

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[2] In 2018, approximately 20 million Americans worked for businesses that employed fewer than 20 people. U.S. Small Business Administration, *2018 Small Business Profile* 1 (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf.

prohibits such retaliation, plaintiffs have invoked that theory repeatedly in recent years.[3] And district court decisions in additional circuits underscore the frequency with which the question presented arises.[4]

b. Respondents likewise err in contending (Br. in Opp. 10-11) that the possibility that public employees may pursue a claim challenging workplace retaliation under the First Amendment undermines the

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[3] See*, e.g.*, *Gunning* v. *New York State Justice Ctr. for Prot. of People With Special Needs*, No. 1:19-CV-1446 (GLS/CFH), 2020 WL 5203673, at *6 (N.D.N.Y. Sept. 1, 2020); *Parks* v. *Buffalo City Sch. Dist.*, No. 17-CV-631S, 2020 WL 2079320, at *8 (W.D.N.Y. Apr. 30, 2020); *Oliver* v. *New York State Police*, No. 1:15-CV-00444 (BKS/DJS), 2020 WL 1989180, at *48 (N.D.N.Y. Apr. 27, 2020); *Cusher* v. *Mallick*, No. 1:16-CV-01273 (BKS/DJS), 2020 WL 109510, at *33 (N.D.N.Y. Jan. 9, 2020); *Concha* v. *Purchase Coll. State Univ. of New York*, No. 17 CIV. 8501 (JCM), 2019 WL 3219386, at *10 (S.D.N.Y. July 17, 2019); *Swain* v. *Town of Wappinger*, No. 17 CIV. 5420 (JCM), 2019 WL 2994501, at *10 (S.D.N.Y. July 9, 2019), appeal dismissed, 805 Fed. Appx. 61 (2d Cir. 2020); *Warburton* v. *John Jay Coll. of Criminal Justice of the City Univ. of New York*, No. 14-CV-9170 (JPO), 2016 WL 3748485, at *3 (S.D.N.Y. July 7, 2016), aff'd *sub nom. Warburton* v. *Hoffman*, 677 Fed. Appx. 9 (2d Cir. 2017) (qualified immunity); *Bamba* v. *Fenton*, No. 15-CV-1340(JS)(AKT), 2017 WL 3446806, at *11 (E.D.N.Y. Aug. 10, 2017), aff'd, 758 Fed. Appx. 8 (2d Cir. 2018); *Jackson* v. *Rooney*, No. 13-CV-1706 (VAB), 2016 WL 4769717, at *9 (D. Conn. Sept. 13, 2016); *Brooking* v. *New York State Dep't of Taxation & Fin.*, No. 1:15-CV-0510 (GTS/CFH), 2016 WL 3661409, at *11 (N.D.N.Y. July 5, 2016); *Edwards* v. *Khalil*, No. 12 CIV. 8442 (JCM), 2016 WL 1312149, at *28 (S.D.N.Y. Mar. 31, 2016); *Voccola* v. *Rooney*, 136 F. Supp. 3d 197, 205 (D. Conn. 2015); *Diaz* v. *Arnone*, No. 3:14-CV-323 (JAM), 2015 WL 8375001, at *3 (D. Conn. Dec. 8, 2015).

[4] See, *e.g.*, *Dunn* v. *Tunica Cty.*, No. 3:18-CV-200-RP, 2021 WL 40266, at *7 (N.D. Miss. 2021); *Muslow* v. *Board of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, No. CV 19-11793, 2020 WL 1864876, at *21 (E.D. La. Apr. 14, 2020), on reconsideration in part, , 2020 WL 4471519 (E.D. La. Aug. 4, 2020).

importance of the question presented here. A public employee's First Amendment retaliation claim is more limited than respondents suggest—and in ways that would not apply to a claim under the Equal Protection Clause. The question whether a plaintiff may assert a retaliation claim based on the Equal Protection Clause thus has important practical implications.

First, the First Amendment protects a public employee from retaliation only when her speech involves a "matter of public concern." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Lower courts have emphasized that "a complaint about sexual harassment or discrimination is not *always* a matter of public concern." *Campbell* v. *Galloway*, 483 F.3d 258, 268 (4th Cir. 2007); see also *Azzaro* v. *County of Allegheny*, 110 F.3d 968, 979-980 (3d Cir. 1997) (en banc). The Second Circuit, for example, has held that an employee's sexual harassment complaints were not matters of public concern where they "were personal in nature and generally related to her own situation," rather than alleging "pervasive or systemic misconduct by a public agency or public officials." *Saulpaugh* v. *Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (1993) (internal quotation marks omitted). The Tenth Circuit has reached the same conclusion where an employee's allegations of sexual harassment "focus[ed] on the conditions of her own employment." *David* v. *City of Denver*, 101 F.3d 1344, 1356 (1996).[5] Indeed, a district court in the Fourth Circuit has concluded that an employee's sex-discrimination complaint can fail to qualify as a matter of public concern even when the complaint alleged a "sustained

[5] See also, *e.g.*, *Morgan* v. *Ford*, 6 F.3d 750, 755 (11th Cir. 1993) (per curiam); *Gray* v. *Lacke*, 885 F.2d 399, 411 (7th Cir. 1989).

pattern of [sex] discrimination," if she was "was not speaking of a pattern of *systemic* discrimination." *Whitehurst* v. *Bedford Cty. Sch. Bd.*, No. 6:19-cv-00010, 2020 WL 3643132, at *11 (W.D. Va. July 6, 2020) (emphasis added).

Second, even when a plaintiff can show that her sex-discrimination complaint satisfies the "public concern" element, she must further show that her interest in commenting on the matter outweighs the employer's interest in "promoting the efficiency of the public services it performs." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). The court of appeals was thus wrong to posit that "existing legal avenues for challenging public employer retaliation" under the First Amendment would necessarily "remain open to employees" in petitioner's position. Pet. App. 16a.[6]

By contrast, those limitations are inapplicable to a claim brought under the Equal Protection Clause challenging retaliation for complaints about sex-discrimination. That claim proceeds from the core premise that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." *Jackson*, 544 U.S. at 173. In light of that principle, retaliation for reporting sex discrimination (and other forms of invidious discrimination prohibited by the Equal Protection Clause) differs in kind from other forms of retaliation against public employees, and it is actionable under the Equal Protection Clause without any of the additional elements required to establish

[6] Even if a court does classify a sexual harassment or discrimination complaint as a matter of public concern, moreover, the absence of a consistent definition of "public concern" in the lower courts may permit a defendant to successfully assert qualified immunity. See, *e.g.*, *Campbell*, 483 F.3d at 271-272.

liability for retaliation under the First Amendment. The Fourth Circuit's erroneous conclusion that a claim under the Equal Protection Clause is categorically unavailable to challenge retaliation thus has important practical consequences.

B. Respondents' Vehicle Concerns Lack Merit

Respondents contend (Br. in Opp. 4-8) that their disagreement with the holding below that petitioner stated a prima facie retaliation claim makes this case a poor vehicle for resolving the question presented. Not so.

Respondents urge this Court to deny review of the question presented (which is indisputably cert-worthy, for all of the reasons explained above) because of the possibility that resolving this case would require the Court to address a factbound question about the adequacy of petitioner's allegations of retaliation. But granting review in this case would not require this Court to revisit whether petitioner pleaded a sufficient inference that her report of sex discrimination caused her termination. This Court plainly has discretion not to address a respondent's alternative argument that "failed below" and does not present any issue that would independently warrant the Court's review. *Los Angeles Cty. Flood Control Dist.* v. *Natural Resources Def. Council, Inc.*, 568 U.S. 78, 84 (2013).

In any event, the court of appeals correctly rejected respondents' alternative argument. Respondents now contend (Br. in Opp. 6-7) that an inference that petitioner's protected activity caused respondents' adverse employment action cannot be based *solely* on those events' "temporal proximity" where two-and-a-half months transpired between them. The court of appeals correctly held, however, that petitioner's

allegations are *not* based on temporal proximity alone. Pet. App. 7a. Rather, the court of appeals concluded that petitioner's allegations about respondent Lyons's decision to immediately fire petitioner for a "minor workplace infraction" presented the type of suspicious "overreaction" that "suggests pretext" and thus states a prima facie retaliation claim. *Ibid.* That is plainly correct. There is no legal support for respondents' view (Br. in Opp. 7) that a plaintiff who sufficiently alleges pretext must also allege "ongoing antagonism or retaliatory animus" during any intervening period between the protected activity and adverse employment action.

Finally, there is no merit to respondents' contention (Br. in Opp. 8) that principles of "judicial restraint" and "constitutional avoidance" should insulate the decision below from review. Those prudential considerations do not require this Court to exhaust every conceivable nonconstitutional ground for decision before resolving an important and recurring issue of constitutional law that has divided the courts of appeals and urgently calls for clarification by this Court. This case squarely presents just such an issue, and this Court's review is warranted.[7]

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[7] In a footnote (Br. in Opp. 9 n.6), respondents contend that this case is a poor vehicle to address the question presented because they would ultimately prevail on a qualified immunity defense. That is incorrect. As respondents concede (*ibid.*), they have yet even to assert such a defense in this case. This Court routinely reviews cases in which other defenses may be available to respondents on remand, including qualified immunity. See, *e.g.*, *Torres* v. *Madrid*, 141 S. Ct. 989, 1003 (2021) (deciding a Fourth Amendment question while "leav[ing] open on remand * * * the officers' entitlement to qualified immunity"). Moreover,

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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even if respondents could establish qualified immunity from liability for damages in their individual capacities, they are not immune from a judgment providing declaratory, injunctive, or equitable relief. *Hall* v. *Tollett*, 128 F.3d 418, 430 (6th Cir. 1997); *Cannon* v. *City & Cty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993).