No. 23-10131

24-5491

IN THE

SUPREME COURT OF THE UNITED

STATES

Phile Andra Watson

Petitioner,

v.

Megan J Brennan,

Respondent.

On Petition for a Writ of Certiorari To The

United

States Court of Appeals for the Fifth Circuit

PETITON FOR A WRIT OF CERTIORIA

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June 24,2024

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. Whether the statutory phase discrimination based on age includes retaliation based on the filing of age discrimination complaint

PARTIES:

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Pro Se

Petitioner

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   United States District Court Northern District of Dallas Division

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PETITION FOR WRIT OF CERTIORARI

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

Because "[t]he specification of the standard of causation under [the federal employment statutes] is a decision about the

kind of conduct that violates" those statutes, this is a fundamental question in civil rights law. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 237 (1989) (plurality opinion). The question also has great practical importance, in part because mixed motives are easy to allege and difficult to disprove. If a plaintiff need only allege that retaliation provided an additional motivation for an adverse employment action, employers could be held liable for even routine decisions that individual supervisors took pursuant to straightforward and non-discriminatory policies (as happened in this case).

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

This case provides "a good vehicle" for resolving that question because it illustrates the problems with the mixed-motive approach and the reasons why the legal standard matters. *See* Pet. App. 63 (Smith, J., dissenting). The plaintiff, Dr. *Naiel*

Nassar, contends that the University of Texas Southwestern Medical Center's ("Medical School's") Chair Internal Medicine, Dr. Gregory Fitz, blocked his attempt to secure a new job in retaliation for *Nassar's* allegation that another doctor had discriminated against him. The Medical School presented undisputed documentary evidence that Fitz had consistently opposed *Nassar's* proposed new job *well before Nassar* engaged in any protected activity and herefore *well before* any retaliatory animus could have existed.

Under these circumstances, the mixed-motive approach was likely outcome-determinative. A jury would be hard-pressed to determine that *Nassar* had proven that Fitz would not have opposed the new job but for retaliation, considering that Fitz had consistently done exactly that before any basis for retaliation arose. But the Fifth Circuit's mixed motive approach allowed the jury to hold the Medical School liable on the theory that retaliation became an additional motive over time. Petitioner Phile Andra Watson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered on July 16, 2018 and resolve these disparities

OPINIONS BELOW

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

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit issued its opinion on September 25,2023 under this Court's order Pet. App. 1. The court denied rehearing en banc on November 17,2023. *Id.* at Mandate and a copy of the courts opinion . This Court has jurisdiction under 28U.S.C. ~1254(1).

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

A. The Statutory Backdrop

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

In the Civil Rights Act of 1991, Pub. L. No. 102- 166, 105 Stat. 1071, Congress partially abrogated *Price Waterhouse* by adopting a more nuanced scheme for Title VII discrimination claims. Congress specified that a defendant is liable if "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If a defendant then proves as an affirmative defense that it "would have taken the same action

in the absence of the impermissible motivating factor," the court may award equitable relief (including equitable monetary relief such as front pay) and attorney's fees to the plaintiff, but not damages. *Id.* § 2000e-5(g)(2)(B).

When Congress amended Title VII's discrimination provision, it left Title VII's retaliation provision unchanged. The latter provision continues to prohibit an employer from taking an adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Unlike Title VII's discrimination provision, this retaliation provision does not set forth or cross reference a mixed-motive standard. *See id.* Other employment statutes are similar to Title VII's retaliation provision in this respect. For example, the ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a), or "because" the employee opposed an unlawful

practice or participated in protected activity. *Id.* § 623(d). After the Civil Rights Act of 1991, this Court held that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross,* 557 U.S at 174. Instead, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176. Shortly thereafter, the Fifth Circuit held in *Smith v. Xerox Corp.,* 602 F.3d 320, 330 (5th Cir.2010), that, notwithstanding *Gross,* "we must continue to allow the *Price Waterhouse* burden shifting in [Title VII retaliation] cases unless and until the Supreme Court says otherwise."

B. The Underlying Events

Factual Back ground

Watson began working at United State Postal Service October 21, 2017. (Start of Peak Season), Watson Files unreported grievances prior to Age/ January 18,2018 Sex Discrimination.

January 18, 2018, Probationary period ended.

January 21, 2018, Petitioner's wrongful termination approved.

January 22, 2018, 1 day passed his probation.

After Watson filed Age/ Sex, and 4 days later Watson was wrongfully terminated. (Adverse action).

January 23, 2018 Watson filed Improper termination, *see* Exhibit 12, app'x P, page 74a.

In law, wrongful dismissal, also called wrongful termination or wrongful discharge, is a situation in which an employee's contract of employment has been terminated by the employer, where the termination breaches one or more terms of the contract of employment, or a statute provision or rule in employment law.

First, **EMPLOYER LEVEL DISCLAIMER,**

Exhibit 20, app'x X, page 85a – 87a,

1. **Information current(December 24, 2020)**
2. **Employment Status (Active), Most Recent Start Date (10/21/2017), Total Time With Employer (3 years,2 months), Job title(Rural Carrier Asso. / REG RTE), (Pay Rate 19.06) prove Watson was never terminated.**

Watson has argued Respondent has provided bogus and misleading information to the court from the start and Inaccuracy in their brief. Enclosed are Index, Appendix and Exhibits to prove as follow;

1. Bogus Notice of Separation, bogus 30 day and 60 day evaluations.
2. Currently Watson is still active with USPS until shown otherwise. Updated and Current P S Form 50 and Notice of Separation that the respondent refuse to provide
3. PS form 50 should be current up to today's date. It is of importance that the respondent provides to the court.
4. The Disclaimer Form dose not matches to any of the respondent's Argument. Pretexual and Prima Facie, Retaliation that was exhausted September 26, 2019 right to sue was provided by the EEOC.
5. Watson was placed on and unauthorized leave/ periodic roll. **To avoid adverse action.**
6. Employers cannot legally fire an employee for reasons that violate the law or breach a contract.
7. Wrongful termination- Respondent Claim Watson was on Periodic roll/ Workman's comp. prior to filing and termination. There is no record to support their claim.
8. If the real reason for termination is discrimination, retaliation, whistle-blowing, or other protected activity, the termination is considered wrongful. When the

10. burden was shifted the respondent did not provide any materials to support their defense also HEARSAY was a factor as well and no sworn statements by employees.

C. The District Court Proceedings

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

RENEE HARRIS TOLIVER, UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and Special Order 3, this matter was referred to the United States magistrate judge for case management.

Before the Court is Plaintiff's Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. Doc. 82. For the reasons that follow, Plaintiff's motion should be DENIED.

I. Background

Plaintiff, proceeding pro se, alleged in the operative complaint that Defendant, his former employer, discriminated and retaliated against him based on his sex and age in violation of Title VII and the Age Discrimination in Employment Act. Doc.

34 at 2-4. Plaintiff also asserted a claim for intentional infliction of emotional distress. Doc. 34 at 3. The Court ultimately granted summary judgment to Defendant and dismiss this case with prejudice. Doc. 70; Doc. 73; Doc. 74. Plaintiff timely appealed, and on November 17, 2023, the Court of Appeals for the Fifth Circuit entered judgment affirming this Court's judgment. Doc. 80; Doc. 81. The motion sub justice followed. Doc. 82.

While Plaintiff initially claimed discrimination based on his RACE and QUID PRO QUO as well, he abandoned that claim in his response to Defendant's summary judgment motion. *See* Doc. 65 at 17-19

D. The Appellate Proceedings

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and Special Order 3, this matter was referred to the United States magistrate judge for case management. Before the Court is Plaintiff's Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. Doc. 82. For the reasons that follow, Plaintiff's motion should be

DENIED

I. Background

Petitioner's, proceeding pro se, alleged in the operative complaint that Defendant, his former employer, discriminated and retaliated against him based on his sex and age in violation of Title VII and the Age Discrimination in Employment Act. Doc. 34 at 2-4. Plaintiff also asserted a claim for intentional infliction of emotional distress. Doc. 34 at 3. The Court ultimately granted summary judgment to Defendant and dismissed this case with prejudice. Doc. 70; Doc. 73; Doc. 74. Plaintiff timely appealed, and on November 17, 2023, the Court of Appeals for the Fifth Circuit entered judgment affirming this Court's judgment. Doc. 80; Doc. 81. The motion sub justice followed. Doc. 82. While Plaintiff initially claimed discrimination based on his race as well, he abandoned that claim in his response to Defendant's summary judgment motion. See Doc. 65 at 17-19 ("Race and Quid Pro Quo Discrimination was amended and no longer a part of this Lawsuit.").

REASONS FOR GRANTING THE WRIT

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

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

Although *Gross* appeared to resolve mixed motive questions under the federal employment discrimination laws, the circuit courts' longstanding divergence on that issue has persisted. The ADEA prohibits an employer from taking an adverse employment action "because of such individual's age" or "because" the employee opposed an unlawful practice or participated in protected activity. 29 U.S.C. § 623(a) and (d). The *Gross* Court held that, "under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross,* 557 U.S. at

176. The Court explained that the "ordinary meaning" of the phrase "because of" is that "age was the 'reason' that the employer decided to act"—not merely one of the factors that led to the employer's decision. *Id.* And "nothing in the statute's text indicates that Congress has carved out an exception to that rule." *Id.* at 177. The courts of appeals have differed on whether *Gross* established a generally applicable rule or is limited to the ADEA. In the first major decision interpreting *Gross,* the Seventh Circuit, in an opinion by Judge Easterbrook, determined that "*Gross* . . .holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but for causation is part of the plaintiff's burden in all suits under federal law." *Fairley v. Andrews,* 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added). For that reason, the Seventh Circuit applied *Gross to* a First Amendment retaliation claim under § 1983. *Id.* at 522, 525–26. Subsequent Seventh Circuit panels have reiterated that holding in the specific context of the employment discrimination laws, ruling that the ADA does not authorize mixed-motive claims for disparate treatment, *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62

(7th Cir. 2010), or for retaliation, *Barton v. Zimmer,* 662 F.3d 448, 455–56 & n.3 (7th Cir. 2011). The court explained that, "[l]ike the ADEA, the ADA renders employers liable for employment decisions made 'because of' a person's disability," and nothing else in the statute indicates that Congress meant to permit mixed-motive claims. *Serwatka,* 591 F.3d at 962. The *Serwatka* court also emphasized that its decision was consistent with an earlier Title VII retaliation case, *McNutt v. Board of Trustees of the University of Illinois,* 141 F.3d 706 (7th Cir. 1998), which held that "mixed-motive decisions based on retaliation were not" authorized by the statute. Serwatka, 591 F.3d at 962–63; see also *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001). In Smith, however, a divided panel of the Fifth Circuit split from the Seventh Circuit. The Smith majority "recognize[d] that the Gross reasoning could be applied in a similar manner to the instant case," which involved Title VII's retaliation provision. Smith, 602 F.3d at 328. It held, however, that "*Gross* is an ADEA case, not a Title VII case," and "the *Price Waterhouse h*olding remains our guiding light." *Id.* at 329. The Fifth Circuit majority therefore sanctioned mixed-motive Title VII retaliation claims. *Id.* at

330. In doing so, it expressly disagreed with the Seventh Circuit's "broad" holding that *Gross* states the general rule for federal statutes. *Id.* at 329 n.28. In contrast, the dissenting opinion agreed with the Seventh Circuit's decisions in Fairley and *Serwatka*: "As the Seventh Circuit has correctly reasoned, without statutory language indicating otherwise, the mixed-motive analysis is no longer applicable outside of Title VII discrimination, and consequently does not apply to this retaliation case." *Id.* at 336 (Jolly, J., dissenting).

The dissent also criticized the majority for relying on the "lame distinction that, although the language is identical, *Gross* was an age discrimination case under the ADEA and the case today is a retaliation case under Title VII." *Id.* At 337. "Given the uniform principle set out in *Gross,* the majority's distinction is the equivalent of saying that a principle of negligence law developed in the wreck of a green car does apply to a subsequent case because the subsequent car is red—a meaningless distinction indeed." *Id.* The dissenters from denial of rehearing en banc in this case reiterated that "[t]he panel decision in Smith . . .created an unnecessary circuit split," making the denial of *en banc review* "confounding." Pet.

App. 67. Three more circuits have now taken sides, deepening this division among the circuits. After observing in a Title VII retaliation case that, "[n]otably, there is a circuit split between the Fifth and Seventh Circuits on this issue," the Eleventh Circuit aligned itself with the Fifth, albeit in an unpublished decision. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012). Two other circuits have gone the other way. In a deeply divided decision, the en banc Sixth Circuit observed that "[t]here are two ways to look at" the issue. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (Sutton, J.). "One is that *Price Waterhouse* established the meaning of 'because of' for Title VII and other statutes with comparable causation standards . . . ." *Id.* (emphasis in original). The other is that *Price Waterhouse's* "motivating factor" test applies only to the extent that Congress has expressly imposed it. *Id.* After concluding that *"Gross* resolves this case" by adopting the second of those views, the majority held that the ADA does not permit mixed-motive claims for the same reasons the ADEA does not. *Id.* at 318–19. The majority

emphasized that it had "taken the same path" as the Seventh Circuit. *Id.* at 319. Although the Sixth Circuit majority recognized that the Gross analysis is generally applicable, it purported to distinguish Smith because that case concerned "a different provision of Title VII." *Id.* At 321 (emphasis in original). But "Smith cannot be dismissed so easily." *Id.* at 328 (Stranch, J., concurring in part and dissenting in part). Just like the ADA and the ADEA, Title VII's retaliation provision prohibits adverse employment actions "because of" an improper purpose, with no indication that Congress intended to authorize mixed-motive claims. 42 U.S.C. § 2000e-3(a). Because the question does not turn on "the title of the statute at issue," the Sixth Circuit majority's distinction of Smith is no distinction at all, as the dissenters observed. Lewis, 681 F.3d at 328 (Stranch, J., concurring in part and dissenting in part); see also id. at 330 n.5 (arguing that Smith was correctly decided and *Serwatka* wrongly decided); *id.* at 337 & n.1 (Donald, J., dissenting) (citing Smith for the proposition that "the *Price Waterhouse* burden-shifting doctrine remains controlling law outside of the ADEA context").22 After a 2008 amendment, the ADA continues to prohibit retaliation "because" an individual

has opposed an unlawful employment practice, but now prohibits discrimination "on the basis of disability." 42 U.S.C. § 12112(a); see ADA Amendments Act of 2008, § 5, 122 Stat. 3553. This amendment to the ADA's discrimination provision, which is only one of the statutes implicated by the circuit split, has no bearing on the court of appeals' division on the question whether *Gross* articulates a generally applicable rule for numerous statutes. Nor does the amendment alter the meaning of the ADA's discrimination provision. As Gross observed, "the [statutory] phrase 'based on' indicates a but-for causal relationship" and "has the same meaning as the phrase, '*because of*.'" 557 U.S. at 176. The House Report explains that the amendment addresses the different question "whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists," and that The First Circuit has joined the Sixth and Seventh Circuits. Expressly agreeing with *Serwatka* and *Lewis*, the First Circuit held that materially identical provisions in the Rehabilitation Act require the plaintiff to prove but-for causation. See *Palmquist v. Shinseki*, 689 F.3d 66

(1st Cir. 2012). The First Circuit understood that "*Gross* is the beacon by which we must steer, and textual similarity between the Rehabilitation Act and the ADEA compels us to reach the same conclusion here." *Id.* at 74. In drawing that conclusion, the First Circuit (like the Seventh Circuit) relied heavily on circuit precedent concerning Title VII's retaliation provision—the statute at issue in this case. *Id.* At 73–74 (*citing Tanca v. Nordberg,* 98 F.3d 680, 682–83 (1st Cir. 1996)). Notwithstanding its reliance on Title VII retaliation authority, the First Circuit attempted to distinguish Smith on the ground that, "[o]n any reading, Smith is a case in which but-for causation is required in order to hold an employer liable." *Id.* At75. 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 Fifth Circuit's decision cannot be squared with *Gross. See Smith,* 602 F.3d at 338 (Jolly, J., dissenting). Just like the ADEA, the Title VII retaliation provision "does not provide that a plaintiff may establish discrimination by showing that [retaliation] was simply a motivating factor." *Gross*, 557 U.S. at 174. Both statutes prohibit adverse employment actions against employees "because" of improper reasons. 42 U.S.C. § 2000e-3(a). Under the "ordinary meaning of [that] requirement," "a plaintiff must prove that [the improper factor] was the 'but for' cause of the employer's adverse action." *Gross*,

557 U.S. at 176. As with the ADEA, moreover, Congress did not add a motivating-factor provision to Title VII's retaliation provision when it added such provisions to Title VII's discrimination provision. Compare 42 U.S.C. § 2000e-3 (retaliation), with id. § 2000e-2(m) (prohibiting mixed-motive discriminatory employment practices), and id. § 2000e 5(g)(2)(B) (providing remedies for violations of § 2000e-2(m). See also *Gross,* 557 U.S. at 174; *Smith,* 602 F.3d at 337–38 (Jolly, J., dissenting). That "careful tailoring" of the 1991 amendments to Title VII "should be read as limiting the mixed-motive analysis to the statutory provision under which it was codified— Title VII discrimination only, which excludes retaliation, the claim here." *Smith,* 602 F.3d at 338 (Jolly, *J., dissenting) (quoting Gross,* 557 U.S. at 178 n.5).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

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

1. Under the court of appeals' holding, a plaintiff may establish liability by showing that retaliation provided an additional motivation for an adverse employment action. *Smith*, 602 F.3d at 329–30. The burden of proof then shifts to the defendant to try to prove, as an affirmative defense, that it would have taken the same action for other reasons. *Id.* at 330. That "pro-employee" framework puts an employer at a decided disadvantage because mixed motives are easy to allege and difficult to disprove. See Kenny, 78 U. CHI. L. REV. at 1032. As in this case, employer should be held liable for even routine decisions that individual supervisors took
2. 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

3. 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
4. ordering the defendant to reinstate a former employee or to promote or transfer a current employee. *Id.* § 2000e-5(g)(1). It may also include an award of front pay, which can total far more than the maximum $300,000 compensatory-damages award allowed by statute. *See* Pet. App. 14; see also 42 U.S.C. § 1981a(b)(2). Indeed, *Nassar* sought $4.2 million in front pay. Plaintiff's Application for Court Award of Front Pay, Dkt. No. 147, at 5 (June 11, 2010). Attorney's fees awards can likewise exceed compensatory damages. Here, the district court awarded *Nassar's* counsel almost half a million dollars in fees. Pet. App. 7. An empirical study has confirmed the obvious: plaintiffs recover "significantly more often" when courts give a "so-called motivating factor instruction" to the jury. David Sherwyn & Michael Heise, The *Gross* Beast of Burden of Proof: Experimental Evidence

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

3. 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 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.

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*,

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

This case provides an especially "good vehicle" for considering the question presented. Pet. App. 63 (Smith, J., dissenting). There is no procedural obstacle to the Court's review, and this case's fact pattern illustrates the practical importance of the issue. Although respondent argued of the entirety of case that proved to have presented misleading. Knowing that Watson still an employee until outcome of the allegation so adverse action and retaliation can be ended.

Second, the district court failed to permit the Petitioner to prove discrimination and retaliation claims under the "motivating-factor" test under *Quigg v. Thomas Cnty. Sch. Dist.,* 814 F.3d 1227 (11th Cir. 2016); 42 U.S.C. § 2000e-2(m); 29 U.S.C. § 633a or 42 U.S.C. § 2000e-16.

Third, the district court erred because the evidence was sufficient to raise a jury question of whether discrimination, retaliation, or both was a "motivating factor" for these actions.

Fourth, the district court erred in dismissing the hostile work environment claim. With respect to the issues presented by this petition, the panel for the

Fifth Circuit Court of Appeals felt that it was bound by a decision of a different panel who heard the Truitt and Trask case. App 18a (citing Trask, 822 F.3d at 1191). In that case, the retaliation claim arose after the gender-plus-age discrimination had already resulted in substantially all career affecting adverse employment actions, and that case did not address the textual differences between the private- and federal-sector statutory provisions of either the ADEA or Title VII. Nevertheless, despite never having directly addressed the issue, the panel held that they were bound by precedent to apply a "because of" or "but for" standard to federal-sector employees' ADEA and Title VII retaliation claims. The Fifth Circuit denied petitioners' timely petition for panel rehearing or rehearing en banc

REASONS FOR GRANTING THE WRIT

At the current time, Federal employees filing retaliation claims under Title VII and ADEA face differing standards of proof. The only federal court to consider and resolve the textual differences under provisions of the ADEA recognized that "free from" language requires only that discrimination be "a factor" to be an actionable claim. In Petitioner's case, the panel of the Fifth Circuit Court of Appeals recognized that it was not considering the textual differences between the private- and federal-sector provisions when making its decision. App. 18a Nevertheless, the panel determined that it was bound by a prior panel decision applying *a McDonnell Douglas* test and a "but-for" causation standard to a federal-sector retaliation case that also did not considered said textual differences. *Id.* The same precedent setting panel decision will require all federal employees to forego the benefits of the words Congress made applicable to them. They not only have a more difficult burden of proof, their employer does not have to prove a same decision defense and the employees

have lost potential injunctive rights and attorneys' fees that would tend to lessen future retaliation.

Several other Circuits have had the issue presented to them by federal employees but have avoided resolving the textual difference. As such, they have, at best, left the issue open. As a result, some federal employees are being treated differently than others. Many do not know what their burden of proof will be. To add to this disparate treatment of federal sector employees, administrative agencies that oversee discrimination and retaliation claims have followed the D.C. Circuit in *Ford* and the practice of this Court of reading the language of a statute and concluded that federal employee's burden of proof should be "a factor" or "a motivating factor" in Title VII retaliation and ADEA discrimination cases. Similar to the statutory language regarding federal-sector ADEA claims, the statutory language prescribing the standard of causation applicable to federal employees in retaliation cases is different from the language applicable to private-sector employees. In *Nassar*, this Court extended the rationale of

Gross to private-sector retaliation claims under 42 U.S.C. § 2000e-3(a) of Title VII, primarily due to the "because of" language in that section. 570 U.S. at 352 (extending the rationale of *Gross*, "[g]iven the lack of any meaningful textual difference between § 2000e3 (a) and § 623(a)(1)"); *see* also 42 U.S.C. § 2000e-3(a). However, "EEO retaliation claims in the federal sector do not implicate the statute at issue in *Nassar*." *Savage, 122* M.S.P.R. at 633; see also discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

Given this sweeping language, both the EEOC and MSPB have determined a federal employee should be able to establish a retaliation claim under 42 U.S.C §2000e-16 where a prohibited consideration was a motivating factor in the contested personnel action, even if it was not the only reason. *See Savage, 122* M.S.P.R. at 634; *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140014, 2015 WL 5042782, at *5-6 (Aug. 19, 2015) (retaliation under Title VII or ADEA); *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140037, 2015 WL 3542586, at *4-5 (May 29, 2015) (retaliation under Title VII).

The statutory-language difference is a problem critical to resolve. The provisions discussed above are applicable to a large segment of the workforce all over the country. As shown by various courts' willingness to sidestep the issue, as discussed below, this is a problem that will never be addressed if this Court waits for the Circuits to resolve the issue. All of the entities entrusted by Congress to address discrimination and retaliation at the administrative stage have disagreed with the Fifth Circuit's conclusion

1 **claims. . The decision of the Fifth Circuit conflicts with the only other Circuit to directly address the meaning of "free from any" language as well as the decisions of the EEOC, and MSPB when deciding federal** "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs.*, 541 U.S. at 252 (internal quotation marks omitted), accord *Gross*, 557 U.S. at 175. The pertinent section of the ADEA applicable to federal-sector employees' discrimination claims, 29 U.S.C. § 633a(a),

provides that "[a] personnel actions . .. shall be made free from any discrimination based on age." The phrase "because of" does not appear in that section. *See id.* In fact, the language implies that the federal government is held to higher standard. As recognized by the D.C. Circuit, the more sweeping language of § 633a requires a different interpretation than § 623 —a federal-employee plaintiff's burden is to show that age was a factor in the challenged personnel action. *See Ford*, 629 F.3d at 206-07 (discussing the language and § 633a(a) of the ADEA and case law interpretations of similar language along with the fact that Congress deliberately prescribed a distinct statutory scheme applicable only to Federal employees using "sweeping language"). The EEOC and the MSPB have come to the same conclusion as the D. C. Circuit. *See Petitioner v. Dep't of Interior,* EEOC DOC 0320110050, 2014 WL 3788011, at *10 n.6 (July 16, 2014) (holding that the "but for" standard does not apply in federal sector Title VII or ADEA cases); *Wingate v. U.S. Postal Serv.*, 118 M.S.P.R. 566 (Sept. 27, 2012) (concluding that a Federal employee may prove age

discrimination by showing that age was "a factor" in the personnel action, even if it was not the "but for" cause).In *Nassar,* this Court extended the rationale of Gross to private-sector retaliation claims under 42 U.S.C. § 2000e-3(a) of Title VII, primarily due to the "because" language in that section. 570 U.S. at 379-83(extending the rationale of Gross, "[g]iven the lack of any meaningful textual difference between § 2000e3(a) and § 623(a)(1)").Like the statutory language regarding federal sector ADEA claims, the statutory language prescribing the standard of causation applicable to federal employees in retaliation cases is different from the language applicable to private-sector employees. Section 2000e-3(a) of Title VII does not apply to federal employees; Section 2000e-16(a) applies. 42 U.S.C. § 2000e-16(a), applicable to Federal employees, contains different language: "All personnel actions affecting employees or applicants for employment . . .in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added).

As noted by this Court, federal-sector retaliation claims under Title VII was unaddressed in GómezPérez. 553 U.S. at 488, n.4. In that case, this Court found retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, the rationale of *Gómez-Pérez* requires that where, as in 42 U.S.C. § 2000e-16(a), When Congress uses the same broad, general language applicable to the federal-sector as in 29 U.S.C. § 633a(a), it bars retaliation in addition to status-based discrimination. *Id.;* see also *Nassar,* 570 U.S. at 356 (citing *Gómez-Pérez* for the proposition that, "when construing the broadly worded federalsector provision of the ADEA, Court refused to draw inferences from Congress' amendments to the detailed private-sector provisions"). Other Circuits recognizing the statutory differences have largely chosen to side-step the issue. *See, e.g., Logan v. Sessions, 690 Fed.* App'x 176, 179-80 (5th Cir. 2017); *Reynolds v. Tangherlini*, 737 F.3d 1093, (7th Cir. 2013); *Leal v. McHugh*, 731 F.3d 405,(5th Cir. 2013); *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011).

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify on that Sept 3, 2024 the forgoing document was forward via U.S. mail on today's date to following parties/ counsel:

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