NO. 12-484

IN THE
Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived its objection to a mixed-motive jury instruction with regard to respondent's Title VII retaliation claim, and, if not, whether the mixed-motive framework applies to Title VII retaliation claims.

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INTRODUCTION

The question presented in the petition is whether this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2006), which held that the mixed-motive framework does not apply to claims brought under the Age Discrimination in Employment Act (ADEA), bars the use of that framework in Title VII retaliation cases. Before this Court could reach that issue in this case, however, it would first need to decide whether petitioner University of Texas Southwestern Medical Center (UTSW) waived its objection to the mixed-motive jury instruction—a fact-bound question never decided below. If the waiver issue were resolved against UTSW—and the record and opinions below suggest that it would be—this Court would never reach the Title VII issue. Thus, this case is a poor vehicle for addressing the question presented in the petition.

Moreover, the courts of appeals are not divided on whether the mixed-motive framework applies to Title VII retaliation claims. Only two circuits have addressed the question since *Gross*, and both answered in the affirmative. Petitioner claims a circuit split by citing cases from three circuits that interpret other statutes, two of which expressly distinguish Title VII. In any event, because the jury rejected UTSW's claim that it would have taken the same action even without a retaliatory motive, the outcome of this case would almost certainly be the same even if the Title VII issue were decided in UTSW's favor.

STATEMENT OF THE CASE

Factual Background

1. Dr. Naiel Nassar, who is of Middle Eastern descent, was a faculty member at UTSW from 1995 to 1998, and from 2001 to 2006. Pet. App. 2. UTSW is

affiliated with Parkland Hospital, and UTSW faculty make up most of the Hospital's physician staff. *Id.* Nassar worked as the Associate Medical Director of Parkland's Amelia Court Clinic. *Id.*

Until 2004, Nassar worked at Parkland without incident. R. 2360. Nassar's immediate supervisor was Dr. Phillip Keiser, the Clinic's Medical Director. In June 2004, UTSW hired Dr. Beth Levine to be Keiser's supervisor at UTSW. Pet. App. 2-3. Levine was responsible for overseeing the Amelia Clinic, but did not work there on a daily basis. *Id.* at 3.

Even before Levine began working at UTSW, she treated Nassar differently than his colleagues. Before she was hired, she interviewed the faculty who would be under her supervision. R. 2926-28. When Nassar met with Levine, he expected an informal fifteen to twenty minute meeting, as Levine had held with other members of the staff. *Id.* Instead, Levine questioned Nassar for an hour and a half, reviewing every detail of his resume and reading from a long list of pre-written questions that she asked of no one else. *Id.*

Once Levine started at UTSW, she became irrationally convinced that Nassar was not working as hard as the other doctors. Pet. App. 3; R. 2360-62. She expressed concern to Keiser about Nassar's productivity, much more so than she did about any other doctor. Pet. App. 3. When Keiser presented Levine with objective data demonstrating Nassar's high productivity and effectiveness, Levine began criticizing Nassar's billing practices. *Id.* Her criticism did not take into account the fact, of which Levine was aware, that Nassar's salary was funded by a federal grant that precluded billing for most of his services. *Id.* On a number of occasions, Nassar met with Dr.

Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's unwarranted and unusual scrutiny. *Id.* at 4.

In late 2005, when UTSW considered hiring Muhammad Akbar, another doctor of Middle Eastern descent, Levine said in Nassar's presence that "Middle Easterners are lazy." Pet. App. 3. Levine successfully opposed the hiring of Akbar to the UTSW/Parkland staff. *See* R. 2383-2400. After Parkland hired Akbar independently of UTSW, Levine remarked in Keiser's presence that the Hospital had "hired another one." Pet. App. 3. Keiser took "another one" to mean "another person . . . who is Muslim and who is dark-skinned." R. 2400.

2. Levine's attitude and behavior led Dr. Nassar to look for a way to escape Levine's supervision. Pet. App. 4. Although he wanted to do so while continuing to work at the Amelia Clinic, he testified that the harassment was severe enough that he would have resigned from UTSW even if it meant he had to leave Parkland. *Id*; R. 2962-63. Parkland staff told Nassar that if he resigned from his UTSW position, the Hospital would hire him to continue working at the Clinic. Pet. App. 5. On June 3, 2006, Parkland offered Nassar a job as a staff physician on Parkland's payroll, starting on July 10. *Id*.

Dr. Nassar resigned from UTSW on July 3. *Id.* In his resignation letter to Dr. Fitz and other UTSW faculty, Nassar wrote that "[t]he primary reason of my resignation is the continuing harassment and discrimination against me by . . . Dr. Beth Levine." *Id*. Levine's behavior, he wrote, "stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." *Id*.

Fitz moved to block Parkland from hiring Nassar, asserting that UTSW had a right to staff Parkland with university faculty. *Id*. As a result, Parkland withdrew its offer to Nassar. *Id*. at 5-6. Nassar later accepted a position at a smaller clinic in Fresno, California. *Id*. at 6.

Proceedings Below

1. Dr. Nassar filed a charge with the EEOC, which found "credible, testimonial evidence" that UTSW had retaliated against Nassar for his allegations of discrimination. Pl. Trial Ex. 78. Nassar filed suit, alleging, as relevant here, that UTSW constructively discharged and retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Pet. App. 6.

On May 3, 2010, UTSW submitted proposed jury instructions that included a mixed-motive charge on Nassar's retaliation claim. *Id*. at 103-04. In a footnote, UTSW incorrectly stated that Fifth Circuit law on the causation standard was "unsettled," citing two unpublished decisions. *Id*. at 104 n.8. The footnote failed to cite the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), decided more than a month earlier, which held that a mixed-motive instruction was appropriate in Title VII retaliation cases. Thus, although UTSW thought that the law was "unsettled," it nonetheless proposed a mixed-motive instruction, which was consistent with *Smith*.

The case was bifurcated into liability and relief phases and tried to a jury. Pet. App. 6. On Friday, May 21, after the close of the evidence in the liability phase, the district court held a charge conference that lasted the entire afternoon. R. 3283-3325. UTSW did not

object to the mixed-motive instruction. At the conclusion of the conference, the court announced the end of the period for objections: "Anything else? I'm telling you now, no new objections." R. 3324; Pet. App. 61 (Elrod, J., concurring in denial of rehearing).

On Monday, May 24, just before the jury was to be charged, UTSW attempted to raise a new objection to the mixed-motive charge, explaining that "we have had a little more time to go and look a little more closely into some case law." Pet. App. 108; *see* R. 3330-52. The district court stated that UTSW "probably ha[d] waived" the objection and that the court found it "a little more than dismaying" and "unprofessional" to raise a new objection after failing to do so during the charge conference. Pet. App. 109-10. The court instructed the jury on a mixed-motive theory on the retaliation claim. *Id*. at 47-48.

The jury returned a verdict for Nassar, finding that Nassar's resignation from UTSW was the result of a constructive discharge and that UTSW blocked Parkland from hiring Nassar in retaliation for Nassar's complaints of discrimination. *Id*. at 6, 47-48; R. 3309.

For the relief phase, the district court instructed the jury on an affirmative defense—that if the evidence showed that UTSW would have stopped Parkland from hiring Nassar even without a retaliatory motive, then UTSW would not be liable for damages. Pet. App. 42. UTSW had claimed at trial that Fitz made his decision to block Parkland from hiring Nassar in April 2006, before Nassar sent his resignation letter. *Id*. at 5, 11. Indeed, in the petition UTSW claims that such evidence was "undisputed." Pet. 2, 26. But Keiser testified to a conversation with Fitz two or three days after Fitz received Nassar's resignation letter. Pet.

App. 5,11. According to Keiser, the letter shocked Fitz, who felt that Levine should be publicly exonerated from the charges, and therefore resolved to stop Parkland from hiring Nassar. *Id*. Nassar also offered evidence that UTSW's interpretation of its agreement with Parkland was implausible and that, in fact, Parkland hired physicians who were not UTSW faculty members. *Id*. at 4-5.

In any event, Nassar's protected activity was not limited to the resignation letter. Fitz had been aware of Nassar's complaints about Levine's harassment because Nassar complained to Fitz about Levine's behavior several times in late 2005 and early 2006. *Id.* at 4. And Nassar offered evidence that Fitz blocked the employment not only because of the resignation letter, but also because of the earlier complaints. *See* R. 3309 (the district court rejecting UTSW's request that the jury instructions limit the protected activity to the resignation letter).

The jury agreed with Nassar and expressly rejected UTSW's affirmative defense. That is, the jury found that UTSW would not have blocked Nassar's hiring at Parkland but for its retaliatory motive. Pet. App. 43-44. The jury awarded Nassar $436,168 in back pay and $3,187,500 in compensatory damages. *Id*. The district court reduced the damages to $300,000 in accordance with Title VII's compensatory damages cap. *Id*. at 7.

2. UTSW appealed, and the Fifth Circuit upheld the verdict in part. The court of appeals reversed the constructive discharge verdict, holding that although "Nassar proved that Levine racially harassed him," he did not prove an aggravating factor necessary for constructive discharge. *Id*. at 10. But the court upheld the retaliation verdict, holding that Nassar offered

sufficient proof that UTSW prevented Parkland from hiring Nassar "to punish Nassar for his complaints about Levine." *Id.* at 11. The court addressed the mixed-motive issue by noting that UTSW conceded that *Smith v. Xerox* was controlling, *id.* at 12 n.16, but the court did not decide whether UTSW waived the issue by failing to make a timely objection to the mixed-motive instruction. *Id.*

3. UTSW petitioned for rehearing en banc, asking the Fifth Circuit to overrule *Smith*. The court denied rehearing. Judge Elrod, a member of the original panel, concurred, noting that she "agree[ed] with the district court" that UTSW had waived its objection to the jury instruction by not submitting an alternate proposed jury instruction and by not raising the objection during the May 21 charge conference. *Id.* at 61-62. Judge Elrod stated that although the question was not necessary to the panel opinion—because UTSW conceded that its objection was foreclosed by *Smith v. Xerox*—it was "dispositive" of her decision to vote against rehearing en banc. *Id.*

Judge Smith dissented, urging the panel to address the waiver issue expressly, rather than passing on it "*sub silentio*," because of the importance of the underlying issue. *Id.* at 63. He stated that UTSW "[a]t least . . . presents a strong argument" that the issue was not waived and that the panel—on a motion for rehearing—could decide "one way or the other." *Id.* at 65 n.1. And he explained that it was necessary for the panel to decide the waiver issue because "UTSW is not entitled to raise a waived claim." *Id.* at 65.

REASONS FOR DENYING THE WRIT

I. This Case is a Poor Vehicle to Address The Title VII Question Because the Court Would First Have to Decide Whether UTSW Waived Its Objection to the Mixed-Motive Jury Instruction.

If the Court granted the petition to decide whether the mixed-motive framework applies to Title VII retaliation claims, it would first need to decide whether UTSW waived its objection to the relevant jury instruction. The waiver question is fact-intensive and was not decided by the panel below. If decided against UTSW, the waiver question would be dispositive of the case and would prevent this Court from reaching the Title VII issue. *See* Pet. App. 64-65 (Smith, J., dissenting from denial of rehearing) (noting the need to decide the waiver question because "UTSW is not entitled to raise a waived claim"). This case is therefore a poor vehicle to address the petitioner's question presented.

The court of appeals did not need to decide whether UTSW forfeited the issue because the panel decision was controlled by circuit precedent. Pet. App. 61 (Elrod, J., concurring in denial of rehearing). This Court, in contrast, would only reach the Title VII question if it decided the waiver issue in UTSW's favor. *See Adams v. Robertson*, 520 U.S. 83, 83 (1997) (dismissing as improvidently granted where issue was not properly presented to state court below)*; Morrison v. Olson*, 487 U.S. 654, 669-70 (1988) (declining to consider issue that was forfeited in the district court and viewed as waived in the court of appeals); 9B Charles Alan Wright, et al., *Federal Practice and Procedure Civil* § 2472 (3d ed. 1998 & Supp. 2012)

(forfeiture rule is "not a mere technical formality and is essential to the orderly administration of civil justice.").

To preserve an objection, UTSW was required to state its objection distinctly on the record at the time established by the district court for such objections, and to submit in writing a proposed alternate instruction. *See* Fed. R. Civ. P. 51; *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 580 (5th Cir. 2004) ("Failure to present a specific written instruction to the trial court bars a[] subsequent complaint on appeal that the instruction was not given."). UTSW met neither of these requirements.

UTSW paints a picture of perfect diligence, arguing that it submitted a proposed alternate instruction and raised its objection during the May 21 charge conference. Pet. 24-25. Neither assertion is accurate. UTSW's proposed instruction, submitted weeks before the charge conference, included a mixed-motive charge—the charge that it now seeks to contest. Pet. App. 103-04. Its footnote, far from "including a detailed presentation on the conflicting state of the law," as the petition describes it, Pet. 25, failed to even mention *Smith v. Xerox*, controlling authority decided over a month earlier. Pet. App. 104 n.8.

And UTSW did not raise its objection during the May 21 charge conference, as required by Federal Rule of Civil Procedure 51. The petition cherry-picks words from the transcript to make it appear that UTSW objected to the mixed-motive standard. *See* Pet. 24. In fact, the transcript shows that UTSW asked the district court for an instruction on an affirmative defense under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that would prevent a finding of liability if

UTSW could prove it would have blocked Parkland's hiring of Nassar even without a retaliatory motive. *See* Pet. App. 118 ("I think we are entitled to an affirmative defense on this retaliation theory."); *id.* ("I think if an affirmative defense is pled for retaliation, I think we are just entitled to it."); *id.* at 119 ("I think in the absence of an affirmative defense . . .").[1]

At the end of the charge conference, in a portion of the transcript that UTSW does not reproduce in the petition appendix, counsel for UTSW stated that he "would like to just make some objections that we made previously just so they are on the record as to this jury charge." R. 3320. In the subsequent list of objections, UTSW's *only* reference to the retaliation mixed-motive charge was this: "We also object to the charge because it lacks the affirmative defense." *Id.* at 3322. Throughout the May 21 charge conference, UTSW was *requesting* a *Price Waterhouse* charge, not objecting to it.

Indeed, UTSW's depiction is belied by its later actions. If, as the petition argues, UTSW properly presented its objection in its proposed instructions and again at the Friday Rule 51 charge conference, then it would have not needed to object the following Monday morning, *after* the charge conference. *See* Pet. App. 111 (the district court making the same point). And it makes no sense for counsel to explain to the court that "we have had a little more time to go and look a little more closely into some caselaw" if he had previously raised the objection. *Id.* at 108. The only reasonable explanation is that UTSW raised a new issue, not one

[1] For the full exchange, see R. 3310-25.

preserved in its proposed instructions and charge conference objections.

Thus, it is no surprise that, of the four judges to decide this case on the merits, at least two think that UTSW's objection is waived, *see id.* at 61 (Judge Elrod) & 109-10 (Judge Boyle), and the other two have never addressed the issue.

Because deciding this case would require the Court to resolve a predicate issue of fact that was not decided below, and because resolution of that issue would likely prevent this Court from reaching the merits of the Title VII question, the petition should be denied.

II. There Is No Circuit Split Regarding Whether Title VII Retaliation Claims Can Be Tried Under a Mixed-Motive Theory.

Only two circuits—the Fifth and the Eleventh—have considered whether Title VII retaliation claims may proceed under a mixed-motive theory after *Gross*. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926 (11th Cir. 2012); *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010). Both have answered in the affirmative.

In *Smith*, the Fifth Circuit held that, in light of *Gross*'s admonition that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination," 557 U.S. at 174 (citation omitted), and the Court's conclusion that Title VII decisions did not control interpretation of the ADEA, *id.* at 173-74, *Price Waterhouse* remained applicable to Title VII retaliation claims. *Smith*, 602 F.3d at 329. In the only other court of appeals decision on the issue, the Eleventh Circuit,

in an unpublished opinion, agreed with the Fifth Circuit. *Saridakis*, 468 F. App'x at 931.

In arguing that the circuits are split, UTSW relies exclusively on decisions interpreting *other* statutory schemes. *See Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (Americans with Disabilities Act); *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012) (Rehabilitation Act); *Barton v. Zimmer*, 662 F.3d 448 (7th Cir. 2011) (ADEA); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (Americans with Disabilities Act)*; Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009) (Section 1983).

These decisions do not conflict with the decision below. Indeed, the Sixth and First Circuits recognized that Title VII retaliation claims, arising under the same statutory scheme as *Price Waterhouse,* are different than claims arising under other statutes. The Sixth Circuit distinguished *Smith* as concerning "the use of a 'motivating factor' test in a different provision of *Title VII*." *Lewis*, 681 F.3d at 321 (emphasis in original). The First Circuit recognized similarly that "*Smith* dealt with a problem altogether different from the one that confronts us here"—whether to apply Title VII rules to the Rehabilitation Act. *Palmquist*, 689 F.3d at 75.

Perhaps anticipating this flaw in its argument, UTSW argues that the First and Seventh Circuits relied on earlier decisions interpreting Title VII. Pet. 12 (citing *McNutt v. Bd. of Trustees of the Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998), and *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001)); *id.* at 16 (citing *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996)). For example, the petition describes *McNutt* as holding that

Title VII retaliation cases could not be brought as mixed-motive claims. Pet. 12.

UTSW has it backwards. *McNutt*, 141 F.3d at 706, *Speedy*, 243 F.3d at 401-02, and *Tanca*, 98 F.3d at 682-83, each held that *Price Waterhou*se applies to Title VII retaliation claims. The courts all held that the mixed-motive discrimination *remedies* created by the 1991 Civil Rights Act were unavailable to Title VII retaliation plaintiffs. Once the employer carried its burden of showing that retaliation was not the but-for cause of the adverse action—*i.e.*, that the retaliation truly was mixed-motive—plaintiffs could not take advantage of the 1991 amendments that allowed for injunctive relief and attorney's fees in such circumstances. Instead, their claims were governed by *Price Waterhouse*'s rule that defendants were not liable at all. The three decisions are based on circumstances that arose after the plaintiff proved a *Price Waterhouse* motivating factor that shifted the burden to the employer to show that it would have taken the same action even without the retaliatory motive. As the Seventh Circuit noted, the application of *Price Waterhouse* to the retaliation claims in *McNutt* was "consistent with the Supreme Court's . . . decision in *Gross*." *Serwatka*, 591 F.3d at 963.

McNutt, *Speedy*, and *Tanca* thus do not conflict with *Smith* and *Saridakis*. Because both courts of appeals that have addressed the question presented in this case reached the same answer, this Court should deny review.

III. A Different Causation Standard Would Not Change the Outcome of This Case.

The Court normally denies review "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court[.]" Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). Because the outcome of this case almost certainly does not turn on the question presented in the petition, certiorari should be denied. *See The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (Court decides cases "in the context of meaningful litigation" because its function is "judicial, not simply administrative or managerial.").

In the relief phase of the trial, the district court instructed the jury that if UTSW showed that it would have prevented Parkland from hiring Nassar even without a retaliatory motive, UTSW would not be liable for damages. Pet. App. 42. The jury rejected the defense, finding that retaliation was the but-for cause of UTSW's actions. *Id.* at 43-44.

To be sure, if a mixed-motive theory did not apply, the burden of persuasion on the but-for question would shift to Nassar. But that distinction is of limited import, because it only matters where the evidence is balanced. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 n.4 (2011); *accord* 21B Charles Alan Wright, et al., *Federal Practice and Procedure Evidence* § 5122 (2d ed. 2005 & Supp. 2012) (preponderance standard "applies only when the jury cannot make up its mind."). In this case, where the jury "heard conflicting evidence about the timing and motivation of Fitz's opposition" to Parkland's hiring of Nassar, Pet. App. 5, and "resolved the conflict against UTSW," *id.* at

11, shifting the burden of persuasion would not change the outcome.

The petition's assertion that its evidence on but-for causation was "undisputed," Pet. 2, 6-7, 26, is belied by the Fifth Circuit's opinion and the district court record, including, most importantly, the jury's express finding that unlawful retaliation was the but-for motivation for UTSW's adverse action.

IV. The Fifth Circuit's Interpretation of Title VII Is Correct.

Gross rested on the principle that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." 557 U.S. at 167 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). Because this Court was interpreting the ADEA, not Title VII, it stated that decisions such as *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), and *Price Waterhouse* were inapplicable. *Id.* at 175 & n.2.

As a result, the question facing the lower courts is not whether *Gross* controls the interpretation of Title VII of its own force. It clearly does not. *See Palmquist*, 689 F.3d at 74 (*Gross* "[o]bviously" does not control interpretation of the Rehabilitation Act); *Lewis*, 681 F.3d at 321 (whether a mixed-motive theory may be brought in "a different provision of *Title VII*" is a different question). Rather, an interpreting court must account for Title VII's structure, context, and history. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

When Congress set out to amend Title VII in 1991, it was aware of the Court's relevant decisions—indeed, the Act was "in large part . . . a response" to cases interpreting the 1964 Civil Rights Act. *Desert Palace*, 539 U.S. at 94 (citation omitted). And Congress knew that, without amendment, Title VII's retaliation provision would continue to be governed by the burden-shifting procedure outlined in *Price Waterhouse*, a decision interpreting identical language in the same statutory scheme. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008) (Congress is "presumably familiar" with the Court's precedents and has "reason to expect" interpretation "in conformity" with them) (citation omitted). It follows that, by leaving the retaliation provision unamended, Congress intended to continue to permit mixed-motive claims. *See McNutt*, 141 F.3d at 709 ("Congress clearly stated its decision to overrule *Price Waterhouse* only with respect to [discrimination claims] and did not make a similar provision for retaliation claims[.]"); H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S. Code Cong. & Admin. News 694, 709-10 ("Section 5 overturns one aspect of the Supreme Court's decision in *Price Waterhouse v. Hopkins*[.]").

Moreover, the discrimination and retaliation provisions—enacted by the same Congress in the same statute and using identical causation language—are inherently interrelated. *See Gomez-Perez*, 553 U.S. at 481 (rejecting the argument that "a claim of retaliation is conceptually different from a claim of discrimination"); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination."). Applying the mixed-motive

framework to Title VII retaliation claims not only accords with precedent, but also, by retaining a uniform standard for Title VII claims, "ensure[s] that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

Thus, although this case would not be an appropriate one in which to consider the issue, Title VII's text, history and context confirm that the Fifth Circuit was correct to hold that mixed-motive theories remain available for Title VII retaliation claims after *Gross*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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