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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff establishes a violation of Title VII's retaliation provision when the plaintiff proves that the defendant acted at least in part to retaliate and the defendant fails to prove that it would have taken the same action absent the retaliatory motive.

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INTRODUCTION

Adverse employment actions often have multiple causes, and it is well settled that a plaintiff can establish a violation of Title VII when an unlawful motive is not the sole cause of the defendant's action. The issue in this case is how a plaintiff establishes retaliation in violation of Title VII when the defendant's adverse action has both lawful and unlawful motivations.

For over two decades, nearly every court that addressed the issue has held that when a Title VII plaintiff shows that an unlawful employment practice was a motivating factor for the defendant's action, the burden of proof shifts to the defendant to attempt to prove, as an affirmative defense, that it would have made the same decision even absent the impermissible motive. This burden-shifting framework was articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and under *Price Waterhouse*, a defendant's same-decision showing is a complete defense to liability. In 1991, Congress amended Title VII in part to codify *Price Waterhouse* burden-shifting, but also to provide that a defendant's same-decision showing limits the relief available to the plaintiff but does not prevent a finding of liability. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075-76; 42 U.S.C. §§ 2000e–2(m) & 2000e-5(g)(2)(B).

Petitioner University of Texas Southwestern Medical Center (UTSW) urges this Court to reject burden-shifting for Title VII retaliation claims because the pertinent 1991 amendments do not explicitly refer to retaliation, and because the Court declined to extend the burden-shifting framework to claims brought under the Age Discrimination in Employment Act (ADEA). *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). UTSW fails to

recognize, however, that, if it is correct that the 1991 amendments changed nothing with respect to retaliation claims—a position with which we disagree—*Price Waterhouse* continues to control such cases. Because the jury here found that UTSW had not shown that it would have taken the challenged action absent a retaliatory motive, respondent Dr. Nassar will prevail and be entitled to the same relief regardless of whether the 1991 amendments or *Price Waterhouse* applies.

Moreover, and contrary to UTSW's assertions, UTSW would not be entitled to judgment as a matter of law even if the Court were to adopt the *Gross* standard for Title VII retaliation claims. Under that standard, the burden of proof would be on Dr. Nassar to establish but-for causation, and a jury would have to decide in the first instance whether he met that burden.

The Court should affirm the decision of the Fifth Circuit on either of the alternative bases discussed below.

STATEMENT OF THE CASE

A. Legal Background

Title VII provides that it is an "unlawful employment practice . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). Title VII also provides that it is an "unlawful employment practice to discriminate" against an individual because that individual opposes a practice that violates Title VII. *Id.* § 2000e-3(a).

In *Price Waterhouse v. Hopkins*, the Court held that when a plaintiff in a Title VII 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 without the unlawful motive. 490 U.S. at 258 (plurality); *see id.* at 259–60 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring). The principal debate in *Price Waterhouse* concerned the "allocation of the burden of persuasion on the issue of causation." *Id.* at 263 (O'Connor, J., concurring). The Court rejected the view that a Title VII plaintiff has the burden of proving but-for causation in a mixed-motives case. Instead, the Court held that once the plaintiff shows that discrimination was a motivating factor, the burden shifts to the defendant to negate but-for causation by proving that it would have made the same decision even without the discriminatory motive. Under *Price Waterhouse*, a defendant's same-decision showing is a complete defense to liability. *Id.* at 242 (plurality); *see id.* at 261 (White, J., concurring); *id.* at 261-62 (O'Connor, J., concurring). Nothing in *Price Waterhouse* explicitly or implicitly limits its holding so as to render it inapplicable to claims of retaliation, which under Title VII is a species of unlawfully motivated discrimination.

In 1991, Congress amended Title VII to provide that a plaintiff establishes a violation of the statute by showing that discrimination was a motivating factor for the defendant's adverse employment decision, and that a defendant's same-decision showing limits the relief available but does not provide a complete defense to liability. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Thus, the 1991 amendments partially codified and partially abrogated *Price Waterhouse*. This Court has not decided whether the motivating-factor amendments in the 1991 Civil Rights Act apply to discrimination based on protected

activity (i.e., retaliation), or only to discrimination based on protected characteristics. If the 1991 amendments do not cover retaliation, retaliation claims would continue to be governed by *Price Waterhouse*. *See Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010); *accord Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012).

In *Gross*, the Court rejected the application of burden-shifting to cases brought under the ADEA, explaining 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 175 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). *Gross* did not address retaliation claims under Title VII.

B. Factual Background

Dr. Naiel Nassar, an expert in infectious diseases and a specialist in HIV/AIDS treatment, is of Middle Eastern descent. Pet. App. 2; R. 2324-29[1]. Dr. Nassar 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.* Beginning in 2001, Dr. Nassar worked as the Associate Medical Director of Parkland's Amelia Court Clinic. *Id.*

Until 2004, Dr. Nassar worked at Parkland without incident, under the immediate supervision of Dr. Phillip Keiser, the Clinic's Medical Director. JA 125; R. 2360. In June 2004, UTSW hired Dr. Beth Levine to oversee the Clinic and supervise Dr. Keiser. Pet. App. 2-3.

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[1] R. citations are to the Fifth Circuit Record.

From the start, Levine treated Dr. Nassar differently than she treated his colleagues. Before she was hired, Levine interviewed the faculty who would be under her supervision if she came to UTSW. R. 2926-28. Although she spoke with other staff members for fifteen or twenty minutes each, Levine questioned Dr. 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 no one else. *Id.*

After Levine started at UTSW, she became irrationally convinced that Dr. Nassar was not working as hard as the other doctors. Pet. App. 3; R. 2360-62. She expressed concern to Keiser about Dr. Nassar's productivity, much more so than she did about any other doctor. Pet. App. 3. When Keiser presented Levine with objective data demonstrating Dr. Nassar's high productivity and effectiveness, Levine began criticizing Dr. Nassar for under-billing. *Id.* Her criticism did not take into account the fact, of which Levine was aware, that Dr. Nassar's salary was funded by a federal grant that precluded billing for most of his services. *Id.* On a number of occasions, Dr. 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; JA 191-92, 206-10.

In late 2005, when UTSW considered hiring Dr. Muhammad Akbar, another physician of Middle Eastern descent, Levine said in Dr. Nassar's presence that "Middle Easterners are lazy." Pet. App. 3. Levine successfully opposed the hiring of Akbar by UTSW. *See* R. 2383-2400. After Parkland hired Akbar independently of UTSW, JA 38-39, Levine remarked in Keiser's presence that Parkland

had "hired another one," Pet. App. 3. Keiser took "another one" to mean "another person . . . who is Muslim and who is dark-skinned." *Id*; R. 2400.

Because of Levine's racially-motivated harassment, Dr. Nassar looked for a way to continue working at the Clinic without being a UTSW faculty member under Levine's supervision. Pet. App. 4. Specifically, beginning in 2005, Dr. Nassar began exploring the possibility of working directly for Parkland. Dr. Nassar's efforts to switch his employer from UTSW to Parkland were initially unsuccessful because Fitz did not support the change, but both Dr. Nassar and Parkland staff continued to pursue the goal of having Dr. Nassar work at the Clinic as a Parkland employee. JA 67-71, 214-16, 326-30.

Parkland staff told Dr. Nassar that if he resigned from his UTSW position, Parkland would hire him to work directly for the Clinic. Pet. App. 5. On June 3, 2006, Parkland verbally offered Dr. Nassar a job as a staff physician on Parkland's payroll. *Id.*; JA 215-16, 236, 245-50. In July 2006, Parkland employees exchanged emails between themselves and Dr. Nassar detailing the steps Dr. Nassar needed to take to finalize his employment. JA 67-71, 326-27. Parkland negotiated a salary for Dr. Nassar, JA 215-16, completed an internal administrative form designating that salary, JA 328-30, and prepared a formal offer letter, JA 314-15.

Believing that he had a firm job offer from Parkland, Dr. Nassar resigned from UTSW on July 3. Pet. App. 5. In his resignation letter to Fitz and other UTSW faculty, Dr. Nassar wrote that "[t]he primary reason of my resignation is the continuing harassment and discrimination against me by . . . Dr. Beth Levine." *Id.*; JA 311-13, 387. Levine's

behavior, he wrote, "stems from religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment." Pet. App. 5.

Fitz then moved to block Parkland from hiring Dr. Nassar. *Id.*; JA 120-21. Dr. Samuel Ross, Parkland's Chief Medical Officer, met with Fitz after Dr. Nassar's resignation and discussed the allegations of discrimination. JA 298. Soon thereafter, Parkland revoked the employment offer, and Dr. Nassar then accepted a position at a smaller clinic in Fresno, California. Pet. App. 5-6; R. 2963-64. In response to an e-mail from Dr. Nassar about the Fresno position, Ross responded that Nassar should not commit to leaving Parkland "just yet" because "many conversations are going on to try to resolve this issue." JA 387; *see also id.* at 331 (e-mail from one Parkland employee to another saying Dr. Nassar should "sit tight" because the issue is "being addressed").

Fitz admitted to Keiser that he blocked Dr. Nassar's employment at Parkland in retaliation for the resignation letter. Pet. App. 5, 11; JA 39-45. Fitz told Keiser that Levine was "publicly humiliated" by Dr. Nassar's charges and needed to be "publicly exonerated." JA 41. Keiser reported the conversation to Vernon Mullen, UTSW's Equal Opportunity Officer. *Id.* at 45-46. Mullen told Keiser that, "after sending a letter like this, Dr. Nassar could no longer continue to work here." *Id.* at 45.

Parkland corroborated Keiser's account, explaining in its submission to the EEOC that "[Ross] contacted [Fitz] to discuss [Dr. Nassar] and his potential hire by Parkland Health & Hospital System." JA 322-23. Fitz "informed Dr. Ross that [Dr. Nassar] made allegations against Dr.

Levine and asked that Dr. Ross give him an opportunity to look into the matter." *Id.*

C. Proceedings Below

1. Dr. Nassar filed a charge with the EEOC, which found "credible, testimonial evidence" that UTSW had retaliated against Dr. Nassar for his allegations of discrimination. Pl. Trial Ex. 78. Dr. Nassar filed suit, alleging, as relevant here, that UTSW constructively discharged him on account of race or national origin and retaliated against him for his complaints of discrimination 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 the retaliation claim. Pet. App. 103-04. In a footnote, UTSW incorrectly stated that Fifth Circuit law on the causation standard was "unsettled," citing two unpublished decisions, both of which preceded *Gross*. *Id.* at 104 n.8. The footnote failed to cite the Fifth Circuit's decision in *Smith*, 602 F.3d 320, decided more than a month earlier, which held that a mixed-motive instruction was appropriate in a Title VII retaliation case. UTSW nonetheless proposed a mixed-motive instruction, consistent with *Smith*.

On May 21, 2010, the district court held a charge conference that lasted the entire afternoon. R. 3283-3325; JA 262-74. During the conference, UTSW did not object to the mixed-motive instruction. At the conclusion of the conference, the district court stated that no further objections would be entertained. *See* JA 273 ("Anything else? I'm telling you now, no new objections."). On 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 attempt to raise a new objection after the court had concluded the charge conference and the deadline for objections had passed. Pet. App. 109-10.

The district court instructed the jury that Dr. Nassar had the burden to prove that his protected characteristics and protected activities were motivating factors for UTSW's conduct, even though other factors might also have motivated UTSW. The jury returned a verdict for Dr. Nassar, finding that his resignation from UTSW was the result of a racially-motivated constructive discharge and that UTSW blocked Parkland from hiring him in retaliation for his complaints of discrimination. *Id.* at 6, 47-48.

After the jury returned a verdict for Dr. Nassar on liability, the trial entered the relief stage. The district court instructed the jury on an affirmative defense—that if UTSW proved that it would have stopped Parkland from hiring Dr. Nassar even absent a retaliatory motive, then UTSW would not be liable for damages or backpay. Pet. App. 42. Attempting to make such a showing, UTSW argued to the jury that Fitz made his decision to block Parkland from hiring Dr. Nassar in April 2006, well before Dr. Nassar sent his resignation letter, on the basis of a 1979 agreement between UTSW and Parkland. *Id.* at 5, 11; R. 3664-70. The jury rejected UTSW's affirmative defense and found that UTSW had failed to prove that it would

have blocked Dr. Nassar's hiring at Parkland even if it had not considered Dr. Nassar's protected activity. Pet. App. 43-44.

The jury awarded Dr. Nassar $436,168 in backpay and $3,187,500 in compensatory damages. *Id.* The district court reduced the damages to $300,000 in accordance with Title VII's cap on such damages. *Id.* at 7. UTSW moved for a directed verdict on the affirmative defense, reiterating its argument that it would have made the same decision based on the 1979 agreement. JA 261-62. The district court denied the motion, stating that there was a "great deal of evidence on both sides of the case." *Id.*

2. UTSW appealed, and the Fifth Circuit upheld the verdict in part. The court of appeals reversed the constructive discharge verdict, holding that although "Dr. Nassar proved that Levine racially harassed him," he did not prove an aggravating factor necessary for constructive discharge. Pet. App. 10. The court upheld the retaliation verdict, holding that Dr. Nassar offered sufficient proof that UTSW prevented Parkland from hiring him "to punish Nassar for his complaints about Levine." *Id.* at 11. The court explained that the jury "heard conflicting evidence about the timing and motivation of Fitz's opposition" to Parkland's hiring of Dr. Nassar and "resolved the conflict against UTSW." *Id.* at 5, 11.

In a footnote, the Fifth Circuit acknowledged that "UTSW [] urges error based on the jury having been instructed on a mixed-motive theory of retaliation," but noted that UTSW conceded that the instruction was correct under controlling precedent. *Id.* at 12 n.16 (citing *Smith*, 602 F.3d at 330). The court remanded for a

reduction of the damages in accordance with its decision. *Id.* at 15.

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

Judge Smith dissented, urging the panel, on the motion for panel rehearing, 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.

SUMMARY OF ARGUMENT

The Court should not reach the merits of this case because UTSW forfeited its challenge to the mixed-motive jury instruction. If the Court does reach the merits, either of two alternative holdings should resolve this case in Dr.

Nassar's favor because the jury rejected UTSW's same-decision defense.

The 1991 Civil Rights Act added sections 703(m) and 706(g)(2)(B) to Title VII, codifying a mixed-motive standard paired with a limited-remedy affirmative defense. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Those amendments apply to both discrimination and retaliation claims. The 1991 amendments provide that "an unlawful employment practice is established where the [employee] demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* § 2000e-2(m). Under this Court's precedents, retaliation for opposing discrimination on the basis of a protected characteristic is itself discrimination on that basis. Therefore, an unlawful employment practice is established where the employee demonstrates that retaliation for opposing race, color, religion, sex, or national origin discrimination was a motivating factor for the employer's action. This interpretation not only makes sense, because there is no reason to treat retaliation claims differently from substantive discrimination claims, but also accords with the EEOC's long-held view.

In the alternative, if UTSW is correct that the 1991 amendments apply only to substantive discrimination and not retaliation, then retaliation claims continue to be governed by *Price Waterhouse* burden-shifting. *Price Waterhouse* interpreted the meaning of the words "because of" in the discrimination provision of Title VII, 42 U.S.C. § 2000e-2(a), an interpretation that applies to other uses of that phrase within the same statute. In the two years between the Court's decision and the 1991 amendments, the lower courts recognized that *Price*

Waterhouse applies to retaliation claims. And after the 1991 amendments, most courts held that *Price Waterhouse* continues to apply to retaliation claims.

Contrary to UTSW's assertion, *Gross* did not alter mixed-motive analysis in Title VII cases. *Gross* did not overrule *Price Waterhouse*; rather, *Gross* held that *Price Waterhouse* does not apply to cases under the ADEA, and explained that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174 (quoting *Fed. Express*, 552 U.S. at 393). That principle counsels against applying *Gross* to Title VII cases, given the substantive differences between the ADEA and Title VII. For instance, the ADEA includes a provision addressing mixed-motive cases that immunizes a decision based on age where that decision was also based on "reasonable factors other than age," 29 U.S.C. § 623(f), but Title VII includes no such language. And this Court has recognized that age discrimination is categorically different than discrimination on the basis of the characteristics protected by Title VII and has not always interpreted the ADEA and Title VII uniformly. If anything, *Gross* further decoupled the two statutes.

Finally, if this Court holds that Dr. Nassar has the burden of proving but-for causation, this case should be remanded for a new trial. The trial record belies UTSW's argument that the outcome of this case would necessarily be different if Dr. Nassar had the burden of proving but-for causation. Indeed, given that the jury found that UTSW failed to show that it would have made the same decision absent retaliation, there is every reason to believe that a jury instructed under the *Gross* standard would find

for Dr. Nassar. UTSW's argument for judgment as a matter of law is in essence a renewed challenge to the evidence supporting the verdict—a challenge already rejected by both courts below.

ARGUMENT

I. UTSW Forfeited Its Challenge to the Mixed-Motive Jury Instruction.

To preserve an objection to the jury instruction, UTSW was required to state its objection 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). Because UTSW met neither of these requirements, the writ should be dismissed as improvidently granted. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-60 (1987).

UTSW's proposed instructions included a mixed-motive charge—the charge it now seeks to contest. Pet. App. 103-04. UTSW's footnote, far from "including a detailed presentation on the conflicting state of the law," as UTSW describes it, Pet. 25, included irrelevant caselaw and omitted *Smith v. Xerox*, controlling authority decided more than one month earlier. Pet. App. 104 n.8. The failure to submit a written alternative instruction constitutes forfeiture. *See Kanida*, 363 F.3d at 580 ("Failure to present a specific written instruction to the trial court bars a[] subsequent complaint on appeal that the instruction was not given.").

Moreover, UTSW did not raise an objection during the charge conference. Rather, UTSW asked the district court for an instruction on the same-decision defense under the

mixed-motive framework. *See* JA 262 ("I think we are entitled to an affirmative defense on this retaliation theory."); *id.* at 263 ("I think if an affirmative defense is pled for retaliation, I think we are just entitled to it."). At the end of the conference, when UTSW re-listed all of its objections for the record, UTSW's *only* reference to the mixed-motive charge was this: "We also object to the charge because it lacks the affirmative defense." *Id.* at 271. Throughout the charge conference, UTSW was *requesting* a mixed-motive charge, not objecting to it. And the district court unequivocally set the end of the charge conference as the deadline for entering objections. *Id.* at 273 ("Anything else? I'm telling you now, no new objections."); Pet App. 61 (Elrod, J., concurring in denial of rehearing).[2]

As Judge Boyle, Pet. App. 109-10, and Judge Elrod, *id.* at 61, recognized, UTSW forfeited its objection to the jury instructions. This Court should therefore dismiss the writ as improvidently granted.

II. The 1991 Amendments on Motivating Factor Burden-Shifting Apply to Both Discrimination and Retaliation Claims.

In 1991, Congress amended Title VII to add 42 U.S.C. § 2000e-2(m), providing that

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[2] Because UTSW did not submit a written alternate instruction and did not object before the deadline that coincided with the end of the charge conference, its actions on the morning of May 24, 2010, are irrelevant. But it is worth noting that, despite its weekend research "into some case law," Pet. App. 108, UTSW did not mention *Gross* and did not bring *Smith*, the controlling authority in the Fifth Circuit, to the court's attention. Rather, the district court raised *Smith* on its own. *Id.* at 114 ("I haven't heard anyone cite yet [*Smith*].").

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

The best interpretation of this text is that it applies to Title VII's retaliation provision because retaliation is "an unlawful employment practice," 42 U.S.C. § 2000e-3(a), that can be "established" when the plaintiff proves that retaliation for complaining of discrimination based on "race, color, religion, sex, or national origin" was a "motivating factor for any employment practice," *id.* § 2000e-2(m). UTSW's arguments that § 2000e-2(m) does not apply to retaliation claims are not persuasive.

A. Retaliation Is an "Unlawful Employment Practice" Motivated by "Race, Color, Religion, Sex, or National Origin."

UTSW argues that § 2000e-2(m) includes a list of protected characteristics—-race, color, religion, sex, or national origin—that does not include retaliation. But this Court has long made clear that statutes prohibiting discrimination also prohibit retaliation for complaining about that discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that 42 U.S.C. § 1981, which provides that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibits retaliation); *Gomez-Perez v. Potter*, 553 U.S. 474, 479-82 (2008) (holding that the federal-sector provision of the ADEA, which prohibits "discrimination based on age," also prohibits

retaliation); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (holding that Title IX, which provides that no person "shall, on the basis of sex, . . . be subjected to discrimination under any education program," prohibits retaliation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that 42 U.S.C. § 1982, which provides that all persons "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," prohibits retaliation). In short, "[r]etaliation against a person because that person has complained of . . . discrimination is another form of intentional . . . discrimination" based on the characteristics protected by an antidiscrimination statute. *Jackson*, 544 U.S. at 173-74.

Two other provisions of the 1991 Civil Rights Act show that Congress shared this Court's view that retaliation is a form of discrimination based on protected characteristics and so Congress did not intend, by referencing those characteristics specifically, to exclude retaliation. First, § 302 of the 1991 Civil Rights Act barred unlawful discrimination against employees of the Senate, providing that "[a]ll personnel actions affecting employees of the Senate shall be made free from any discrimination based on [] race, color, religion, sex or national origin, within the meaning of section 717 of [Title VII]." 105 Stat. at 1088. Although § 302's list of prohibited bases for personnel actions did not expressly include retaliation, it was well accepted at the time that § 717 (Title VII's federal-section provision) prohibited retaliation. *See, e.g.*, *Gulley v. Orr*, 905 F.2d 1383, 1384 (10th Cir. 1990); *Hampton v. IRS.*, 913 F.2d 180, 182 (5th Cir. 1990); *Barnes v. Small*, 840 F.2d 972, 974 (D.C. Cir. 1988); *Jordan v. Clark*, 847 F.2d 1368, 1371 (9th Cir. 1988); *Harris v. Brock*, 835 F.2d 1190, 1191

(7th Cir. 1987). Thus, the list of protected characteristics—to be applied "within the meaning of section 717"—protected against retaliation, without explicitly specifying so.

Second, § 101 of the 1991 Civil Rights Act overruled *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), by amending 42 U.S.C. § 1981 to clarify that the right to "make and enforce contracts" extends to the period after the contractual relation is established. 105 Stat. at 1071-72. The House Report explained that the purpose of this provision was "to bar all racial discrimination in contracts . . . includ[ing] . . . retaliation." H.R. Rep. No. 102-40 (II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N 694, 730-31. In discussing retaliation in reference to § 101 (that applies only to 42 U.S.C. § 1981, which does not expressly include retaliation, *see CBOCS*, 553 U.S. at 445), the legislative history confirms that Congress did not see discrimination and retaliation as distinct. The list of protected characteristics in § 2000e-2(m) does not, therefore, demonstrate that Congress meant to take retaliation outside the scope of conduct covered by the section.[3]

UTSW's argument that the 1991 amendments' mixed-motive provision does not apply to retaliation turns largely on the fact that § 2000e-2(m) is located in a section of Title VII titled "Unlawful Employment Practices," 42 U.S.C. § 2000e-2, which contains the prohibition on

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[3] It is true that another provision of Title VII, 42 U.S. C. § 2000e-5(g)(2)(A), includes retaliation in a list of forbidden reasons for an employment action. But that provision was not enacted as part of the 1991 Civil Rights Act. *See Gomez-Perez*, 553 U.S. at 486 (refusing to draw a negative implication where two provision were not enacted at the same time).

discrimination because of protected characteristics, and not in the section titled "Other Unlawful Employment Practices," 42 U.S.C. § 2000e-3, which contains the prohibition on discrimination because of protected activities. UTSW's argument relies too heavily on the placement of § 2000e-2(m) and fails to explain why Congress would have different standards of causation for discrimination and retaliation claims under Title VII, when Congress recognized retaliation as a form of discrimination and especially given that Title VII plaintiffs often allege both types of unlawful employment practice in the same case. *Cf. Burlington N. & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 74-75 (2006) (Alito, J., concurring) (suggesting that discrimination and retaliation provisions, which are "complementary and closely related," should be read together).

UTSW argues that the burden-shifting regime of § 2000e-2(m) creates confusion when a plaintiff alleges discrimination under Title VII and under a statute that employs a different causation standard, such as the ADEA. Pet. Br. 29 n.1. In fact, however, such confusion will more frequently arise if different causation standards apply to Title VII discrimination and retaliation claims. Thus, the confusion that UTSW identifies provides an additional indication that Congress intended the 1991 motivating-factor amendments to apply to both discrimination and retaliation claims.

B. Interpreting § 2000e-2(m) to Apply to Retaliation Accords with the EEOC's Longstanding Position.

Shortly after the 1991 amendments became law, the EEOC amended its Compliance Manual to interpret

§ 2000e-2(m) to apply to both discrimination and retaliation claims. *See* Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Directives Transmittal No. 915.022 (July 14, 1992), *available at* http://www.eeoc.gov/policy/docs/disparat.html. The EEOC explained that it "has a unique interest in protecting the integrity of its investigative process, and if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination." *Id.* n.14; *see also* EEOC Compliance Manual 8-16 & n.45, *available at* http://www.eeoc.gov/policy/docs/retal.html (stating that to interpret otherwise "undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism").

The EEOC's views are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (citing *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000)); *but see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring in the judgment) (arguing that EEOC interpretations are entitled to *Chevron* deference). Deference is particularly appropriate where, as here, the interpretation was "contemporaneous with [the statute's] enactment [and] consistent since the statute came into law," *Arabian Am. Oil Co.*, 499 U.S. at 257, and the interpretation is the result of a centralized, formal process and designed to apply to all cases, *cf. United States v. Mead Corp.*, 533 U.S. 218, 233-34 (2001).

III. If the 1991 Motivating-Factor Amendments to Title VII Do Not Apply to Retaliation Claims, *Price Waterhouse* Burden-Shifting Governs Those Claims.

If the 1991 amendments do not apply to Title VII retaliation claims, *Price Waterhouse* continues to control the order of proof in such cases. Under *Price Waterhouse*, once the plaintiff shows that the defendant acted at least in part to retaliate, the burden of proof shifts to the defendant to attempt to prove, as an affirmative defense, that it would have made the same decision absent the retaliatory motive. If the defendant fails to make that showing, it is presumed that retaliation was the but-for cause of the challenged action. If the defendant proves the same-decision defense, the employer has not violated Title VII and has no liability.

A. UTSW Ignores the Continuing Vitality of *Price Waterhouse* Burden-Shifting for Title VII Retaliation Claims.

UTSW argues that the 1991 amendments left Title VII's retaliation provision "unchanged." Pet. Br. 6. If UTSW is correct, the burden-shifting framework of *Price Waterhouse* continues to control Title VII retaliation claims.

UTSW begins by arguing that the words "because of" in § 2000e-3(a) show that the plaintiff bears the burden of proof at all times. But UTSW's conclusion contradicts the decision in *Price Waterhouse*, in which this Court held that, notwithstanding the similar use of "because of" in Title VII, the burden of proof shifts to the defendant to prove, as an affirmative defense, that it would have made

the same decision even without the unlawful motive. The same reading applies here. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning . . . ." (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007))).

The substantive provision at issue in *Price Waterhouse* was 42 U.S.C. § 2000e-2(a), which, like § 2000e-3(a), outlaws discrimination "because of" prohibited factors. In the brief time between *Price Waterhouse* and the 1991 amendments, courts routinely applied the burden-shifting framework to retaliation claims. *See Johnson v. Sullivan*, 945 F.2d 976, 980 n.6 (7th Cir. 1991); *Vislisel v. Turnage*, 930 F.2d 9, 9 (8th Cir. 1991); *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1068 (6th Cir. 1990) (Nelson, J., concurring); *Carter v. S. Cent. Bell*, 912 F.2d 832, 843 (5th Cir. 1990)*, abrogated on other grounds*, *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003)*; Williams v. Mallinckrodt, Inc.*, 892 F.2d 75, 75 (4th Cir. 1989).[4]

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[4] *See also Barnes v. City of New Orleans*, 1991 WL 220380, at *6 (E.D. La. 1991); *Garvey v. Dickinson Coll.*, 775 F. Supp. 788, 796 n.4 (M.D. Pa. 1991); *Jones v. City of Elizabeth City*, 840 F. Supp. 398, 403 (E.D.N.C. 1991), *aff'd*, 2 F.3d 1149 (4th Cir. 1993); *Milligan-Jensen v. Mich. Technological Univ.*, 767 F. Supp. 1403, 1411 n.2 (W.D. Mich. 1991), *rev'd on other grounds*, 975 F.2d 302 (6th Cir. 1992); *Purrington v. Univ. of Utah*, 1993 WL 259457, at *8-*9 (D. Utah 1991), *aff'd*, 996 F.2d 1025 (10th Cir. 1993); *Daines v. City of Mankato*, 754 F. Supp. 681, 699 (D. Minn. 1990); *Ellerby v. Ill., Circuit Court Fifteenth Judicial Circuit*, 1990 WL 41122, at *3 (N.D. Ill. 1990); *Jordan v. Wilson*, 755 F. Supp. 993, 998 n.5 (M.D. Ala. 1990); *Melius v. Waukegan Pub. Sch. Dist. No. 60*, 1990 WL 36822, at *8 (N.D. Ill. 1990); *Dunning v. Nat'l Indus., Inc.*, 720 F. Supp. 924, 929 n.6 (M.D.

(continued...)

After the 1991 amendments, most courts continued to apply *Price Waterhouse* to such claims. *See, e.g.*, *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 401-02 (7th Cir. 2001); *Matima v. Cellie*, 228 F.3d 68, 81 (2d Cir. 2000); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir. 1996). Because burden-shifting has been a part of Title VII mixed-motive retaliation cases for more than two decades, considerations of stability, predictability, and respect for longstanding consensus among the courts counsel strongly against the Court now reinterpreting the requirements of Title VII. In retaliation cases, "[c]ountless judges have instructed countless juries in language drawn from" *Price Waterhouse*. *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011).

UTSW argues that if Congress wanted to shift the burden of persuasion to defendants to negate but-for causation through a same-decision defense in Title VII retaliation cases, Congress would have done so expressly when it amended Title VII in 1991. Pet. Br. 16. But to the extent that UTSW is correct that Congress tailored the 1991 changes to cover discrimination but not retaliation, Congress had no reason to amend the retaliation provision to provide for *Price Waterhouse* burden-shifting because *Price Waterhouse* was already the law. That is, if the 1991

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[4](...continued)
Ala. 1989); *Globus v. Skinner*, 721 F. Supp. 329, 335 (D.D.C. 1989), *aff'd*, 1990 WL 123927 (D.C. Cir. 1990); *United States v. City of Montgomery*, 744 F. Supp. 1074, 1079 (M.D. Ala. 1989), *aff'd*, 911 F.2d 741 (11th Cir. 1990).

amendments that altered the result in *Price Waterhouse* for some claims do not apply to retaliation claims, *Price Waterhouse* continues to govern litigation of retaliation claims.

UTSW's argument would require this Court to conclude that the 1991 amendments *sub silentio* overruled *Price Waterhouse*'s application to § 2000e-3(a), although the amendments were, in UTSW's view, otherwise inapplicable to retaliation claims. But the best interpretation of the congressional silence as to retaliation claims posited by UTSW is that, except insofar as Congress altered *Price Waterhouse*'s application to the claims § 2000e-2(m) covers, it left the law undisturbed. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (stating that the Court does not conclude that Congress intended to abrogate a prior interpretation absent a "clear expression"). Not only is it "always appropriate to assume that our elected representatives . . . know the law," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979), it is especially clear that Congress was legislating with knowledge of *Price Waterhouse* because the 1991 Civil Right Act was "in large part" a response to that and other decisions. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (citation omitted). Thus, it is "not only appropriate but also realistic to presume that Congress was thoroughly familiar with" *Price Waterhouse*'s application to Title VII retaliation and that, to the extent that Congress did not change the law with respect to retaliation, it expected that application to remain undisturbed. *See Cannon*, 441 U.S. at 699; *see also id.* at 702-03 (noting that "the very persistence" of an assumption provides "further evidence that Congress at least acquiesces in, and apparently affirms, that assumption").

UTSW attempts to avoid this result by asserting that if *Price Waterhouse* burden-shifting remains viable for mixed-motive retaliation claims, then "§ 2000e-2(m)'s specific motivating-factor provision would be surplusage, and its exclusion of retaliation would be inexplicable." Pet. Br. 18-19. But under *Price Waterhouse*, a plaintiff who shows that an unlawful practice was a motivating factor for an employer's action does not establish a violation of Title VII, but shifts the burden to the defendant to disprove but-for causation by showing that it would have made the same decision even absent the unlawful motive. The 1991 amendments, in contrast, provide that a plaintiff establishes a violation by showing that discrimination was a motivating factor for the defendant's action, but enable the defendant to limit relief by offering proof that it would have made the same decision in the absence of the improper motive. The two schemes are distinct, and the continuing viability of *Price Waterhouse* for retaliation claims would not render the 1991 amendments surplusage.

B. *Gross* Did Not Overrule *Price Waterhouse* Burden-Shifting in Title VII Retaliation Cases.

UTSW argues that the plaintiff should at all times bear the burden of proof in Title VII retaliation cases because, in *Gross*, the Court rejected the application of *Price Waterhouse* burden-shifting to cases brought under the ADEA.[5] *Gross* does not control this Title VII case, as *Gross* explicitly rejected the argument that decisions under

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[5] UTSW relies on *Gross* to support its argument that the phrase "because of" means "but-for." But under *Price Waterhouse*, the issue is not whether but-for causation is required, but who bears the risk of non-persuasion on the issue.

one antidiscrimination statute on matters such as *Price Waterhouse* burden-shifting are controlling under other statutes. *Gross* rules out UTSW's argument that this Court's decisions (including *Gross* itself) can be transported wholesale from statute to statute.

In *Gross*, the Court acknowledged that *Price Waterhouse* had established burden-shifting for mixed-motive cases under Title VII, 557 U.S. at 171, but held that the burden of showing the absence of causation does not shift to the defendant in cases brought under the ADEA, *id.* at 173. Just as the Court ruled that its construction of Title VII in *Price Waterhouse* does not control in the ADEA context, the Court's construction of the ADEA in *Gross* does not control in this case. *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 174 (quoting *Fed. Express*, 552 U.S. at 393). Absent this principle, *Gross* would have had to either overrule *Price Waterhouse* or follow it, neither of which it did. Nothing in *Gross* suggests that *Price Waterhouse* is not entitled to *stare decisis*. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (stating that *stare decisis* has "special force" in statutory construction, "for Congress remains free to alter" the statute (citation omitted)).

In fact, ADEA claims and Title VII retaliation claims are substantively different. The ADEA provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the anti-discrimination provisions of the ADEA] where . . . the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f). This provision makes clear that an adverse action that is in part

the result of a discriminatory motive is "nevertheless lawful so long as it is 'based on' a reasonable factor other than age." *Smith v. City of Jackson*, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring in the judgment). Title VII contains no similar provision, in either its discrimination or retaliation sections. Because the ADEA's text addresses mixed-motive cases in a way different from Title VII, *Price Waterhouse* does not apply in ADEA cases.

More generally, the Court has recognized that the ADEA was written with the view that "age discrimination was a serious problem, but one different in kind from discrimination on account of race." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). As a result, the "Court's approach to interpreting the ADEA in light of Title VII has not been uniform." *Gross*, 557 U.S. at 175 n.2. As this Court has observed, there are "legitimate reasons as well as invidious ones for making employment decisions based on age." *Cline*, 540 U.S. at 587. And where an employer takes an action because of a factor strongly and obviously correlated with age, such as pension status, *see Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), or physical ability, plaintiffs may find it too easy to show that age was one "motivating factor" for the decision, because the actual decision maker probably at least noted—and so, in a sense, considered—the plaintiff's age.

In short, given the substantive differences between ADEA claims and Title VII claims, mixed-motive burden-shifting that is inappropriate in ADEA cases may nevertheless be appropriate in the Title VII context. *Gross* thus does not dictate the result here.

C. *Price Waterhouse* Burden-Shifting Is Consistent with This Court's Precedents.

Under the *Price Waterhouse* framework, even where a plaintiff shows that an unlawful consideration played a motivating part in the defendant's decision, the defendant can avoid liability by proving, as an affirmative defense, that it would have made the same decision absent the unlawful motive. 490 U.S. at 244-45. As the plurality in *Price Waterhouse* observed, the burden-shifting framework is consistent with this Court's decisions in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402 (1983), and strikes a reasonable balance between employee rights and employer prerogatives where retaliation is one of multiple causes for a defendant's action.

In *Mt. Healthy*, the plaintiff alleged that he had not been rehired in retaliation for exercising his First Amendment rights. The Court held that the plaintiff carried the initial burden "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the [defendant's] decision not to rehire him." 429 U.S. at 287. Once the plaintiff carried that burden, the defendant could avoid liability by proving that "it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct." *Id.* The Court explained that the availability of the same-decision affirmative defense would avoid the possibility of placing the plaintiff "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at

285. Otherwise, a plaintiff might be reinstated "in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred." *Id.*

Similarly, in *Transportation Management*, the Court upheld an NLRB decision holding that an unfair labor practice is established if "the employee's protected conduct was a substantial or motivating factor in the adverse action," but permitting an employer to avoid liability by showing, as an affirmative defense, that it would have taken the same action "regardless of [its] forbidden motivation." 462 U.S. at 401. The Court found that shifting to the employer the burden of establishing the same-decision affirmative defense was reasonable, explaining:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Id. at 403.

UTSW's argument that burden-shifting invites abuse by employees and is unfair to employers runs counter to this Court's decisions in both *Mt. Healthy* and *Transportation Management*, as well as *Price Waterhouse*. First, under the *Price Waterhouse* framework, an employee cannot use opposition to an unlawful employment practice as a shield to avoid an

adverse employment action that is justified by lawful considerations, because an employer's same-decision defense is a complete defense to liability. As this Court explained in *Mt. Healthy*, the affirmative defense is designed to prevent an employee who engages in protected activity from being put in a better position than if he had done nothing.

Second, UTSW's claim that it is unfair for an employer to bear the burden of proof on the same-decision defense ignores the fact that the burden shifts to the employer only after the plaintiff has shown that an unlawful practice tainted the decision-making process. *See Transp. Mgmt.*, 462 U.S. at 403. Where a plaintiff lacks evidence that retaliation played a part in the defendant's decision, the case will not survive summary judgment. And where an employer proves that it would have taken the same employment action without a retaliatory motive, the plaintiff is not entitled to any relief, although the employer's motivation was, in part, unlawful.

Finally, the Court should reject UTSW's assertion that opposing unlawful practices is a choice and thus is less deserving of protection. Pet. Br. 33 ("While an employee's membership in a protected class is generally outside of his or her control, the decision to engage in protected activity is not."). UTSW's position is contrary to this Court's decisions recognizing that enforcement of the civil rights statutes depends on protecting those who report discrimination from retaliation. *See, e.g.*, *Burlington N.*, 548 U.S. at 67 (explaining the different purposes of Title VII's antidiscrimination and antiretaliation provisions and stating that Title VII provides broader protection for victims of retaliation than victims of discrimination because

"Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("[A] primary purpose of antiretaliation provisions" is to "[m]aintain[] unfettered access to statutory remedial mechanisms.").

D. *Price Waterhouse* Burden-Shifting Is Distinct from *McDonnell Douglas* Burden-Shifting.

In arguing against *Price Waterhouse* burden-shifting, UTSW cites decisions of this Court explaining, in a different Title VII context, that Title VII plaintiffs at all times bear the ultimate burden of persuasion. Pet. Br. 16 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *Patterson*, 491 U.S. 187). The cases cited by UTSW refer to the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and refined in *Burdine*, 450 U.S. at 253, which is distinct from *Price Waterhouse* burden-shifting. Indeed, *Price Waterhouse* repeatedly cites *McDonnell Douglas* and *Burdine* and rejects the notion that the two frameworks are in conflict. *See Price Waterhouse*, 490 U.S. at 245 (plurality); *id.* at 260 (White, J., concurring); *id.* at 261-62 (O'Connor, J., concurring). UTSW's reliance on the *McDonnell Douglas* line of cases is, therefore, misplaced.

Recognizing that direct proof of discriminatory intent is seldom available, *McDonnell Douglas* provides an evidentiary framework at summary judgment to assist the court in determining the existence of an illegal motive. Under the framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption

of unlawful discrimination, and the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged act. If the defendant fails to carry its burden, the plaintiff is entitled to judgment as a matter of law. If the defendant meets its burden of production, the plaintiff must show that the reasons proffered by the defendant are a pretext for discrimination. The burden of persuasion remains at all times with the plaintiff. The *McDonnell Douglas* framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). And it is generally recognized that the shifting burdens established in *McDonnell Douglas* are not an appropriate jury instruction. *See U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983).

In contrast, under the *Price Waterhouse* framework, once a plaintiff carries his burden of showing that an unlawful employment practice was a motivating factor for the defendant's adverse action, the burden shifts to the defendant to attempt to prove, as an affirmative defense, that it would have taken the same action even without the unlawful motive.

Thus, while *McDonnell Douglas* shifts the burden of production to the defendant on the issue of intent once the plaintiff establishes a prima facie case, while leaving the ultimate burden of persuasion on that issue on the plaintiff, *Price Waterhouse* shifts the burden of persuasion to the defendant on the issue of causation once an unlawful motive has been proved. UTSW fails to apprehend the distinction between the two frameworks, and its argument

based on the *McDonnell Douglas* line of cases is inapposite.

IV. Even If the Burden of Proving But-For Causation Remains at All Times with the Plaintiff, UTSW Is Not Entitled to Judgment.

UTSW, having failed to persuade the jury, the district court, and the court of appeals that it would have taken the same action against Dr. Nassar regardless of any retaliatory motive, now seeks to relitigate that factual dispute before this Court. Thus, UTSW asks the Court to grant it judgment as a matter of law, arguing that no properly instructed jury could find for Dr. Nassar. Pet. Br. 35-38. Even if this aspect of the case had been properly presented to the Court and even if such fact-based decision making were appropriate here, the Court must reject UTSW's request.[6]

UTSW's claim that Dr. Nassar cannot prove that retaliation was the but-for cause of UTSW's decision to block Dr. Nassar's employment with Parkland depends on UTSW's theory that the decision was made before Dr. Nassar complained of discrimination. But the jury rejected UTSW's theory and, as both lower courts concluded, the record contains ample evidence to create a triable issue on the point. *See* Pet. App. 10-12 (court of appeals); JA 261-62 (district court).

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[6] The question presented in the petition for certiorari did not include whether the jury's finding on retaliation was supported by sufficient evidence nor whether placing the burden of proof on Dr. Nassar to prove but-for causation would have required judgment as a matter of law for UTSW.

For example, at trial UTSW could not explain why, if Fitz resolved the issue in April, Parkland continued to believe that Dr. Nassar could still become a Parkland employee. *See* Pet. App. 5; JA 56-65, 69-71, 214-16. Indeed, Parkland made a verbal offer of employment, negotiated a salary, and prepared a formal offer letter, all after the matter was, according to UTSW's brief (at 8), "settled." Pet. App. 5; JA 215-16, 236, 245-50, 314-15, 325. Further, throughout the process, Parkland's staff exchanged internal communications and administrative forms detailing its progress toward hiring Dr. Nassar. JA 67-71, 326-30. UTSW also could not explain why Ross, the person to whom Fitz allegedly communicated his objection in April 2006, met with Fitz after Dr. Nassar's resignation to discuss the allegations of discrimination, after which Ross told Dr. Nassar not to commit to another job "just yet" because "many conversations are going on to try to resolve this issue." JA 387.

Most importantly, Fitz admitted to Keiser that his purpose was retaliatory, evidence corroborated by Parkland's EEOC submission. Pet. App. 5, 11; JA 39-45, 322-23. And Fitz's own testimony was not credible. Fitz at first denied and later grudgingly agreed that his conversations with Ross extended beyond April until after Dr. Nassar submitted his resignation letter. JA 96-99, 133-34. And he implausibly testified that he had no knowledge of Levine's behavior until he read Dr. Nassar's resignation letter, *id.* at 122-24, 129, although Dr. Nassar had complained several times before, Pet. App. 4; JA 191-92, 206-10. And in his affidavit to the EEOC, where Fitz identified the portions of the 1979 agreement on which he purportedly relied in April, he included a portion that was not negotiated until June 2006 and only took effect in

September 2006. JA 111-13; *see id.* 359-83. Moreover, it was simply unbelievable that Fitz, without apparent reflection, believed that the agreement required Parkland to lose a physician who was extraordinarily difficult to replace, threatening Parkland's mission. Patient safety was endangered because Dr. Nassar's position was left unfilled for six months and then filled by a doctor who needed five or six additional months of training before she could assume Dr. Nassar's duties. *Id.* 65-66; R. 2459-64. UTSW could not explain why that replacement doctor was employed directly by Parkland and not by UTSW. JA 232-41, 250-51.

In sum, the evidence shows that the decision not to allow Dr. Nassar to work directly for Parkland was not final until after his resignation. Thus, even if UTSW were correct that the burden of proof should remain at all times with Dr. Nassar, a jury so instructed could find for Dr. Nassar on his claim of retaliation. Therefore, if the Court holds that the burden of proof should not have shifted to UTSW to disprove but-for causation, this case should be remanded for a new trial under the new standard.

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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