No. 12-484

IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,
v.
NAIEL NASSAR,
Respondent.

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

BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") and the *amici curiae* joining this brief (incorporated by reference in Appendix A), are civil rights organizations that seek to preserve and defend the rights of those who face discriminatory retaliation in the workplace. The ADC, which was founded by U.S. Senator James Abourezk over 33 years ago in 1980, consists of members from all 50 states, and has multiple chapters nationwide. The ADC is non-sectarian and non-partisan, and is the largest Arab American grassroots civil rights organization in the U.S.[2] In this case, the rights of the ADC's constituents will be fundamentally affected by the Court's determination of which standard of proof is necessary

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Of 3.6 million Arab Americans, over 80% are U.S. citizens, and most are Christian. Arab Americans trace their roots to Arabic-speaking countries, especially Lebanon, Palestine, Syria, Egypt, Morocco, and Iraq. Arab American Institute Foundation, *Demographics* (2012), http://aai.3cdn.net/2b24e6a8711d521148_5ym6iv4b5.pdf. For purposes of this brief, reference to the term "Arab" relates to those protected under the classifications of "race" or "national origin" under Title VII. *See* Rachel Saloom, *I Know You Are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 Hamline J. Pub. L. & Pol'y 55 (2005-2006) (discussion regarding the legal classification of "Arabs"). Of 2.75 million Muslim Americans, over 80% are U.S. citizens, and 41% are of Arab descent. Pew Research Center, *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism* 14 (2011).

to establish a retaliation claim under Title VII of the Civil Rights Act of 1964: (1) the "mixed-motive" causation standard, which would preserve an important avenue of redress for employees who face adverse employment actions for expressing opposition to unlawful discrimination; or, instead, (2) the "but-for" causation standard, which in effect would allow employers to avoid liability easily for retaliating against employees. The ADC respectfully urges the Court to affirm the decision of the Fifth Circuit by holding that the "mixed-motive" standard applies to the anti-retaliation provision of Title VII.

The ADC's interest in this case arises from the Petitioner University of Texas Southwestern Medical Center's ("UTSMC") discriminatory retaliation against Respondent Dr. Naiel Nassar, an Arab and Muslim American of Egyptian descent. In his resignation letter to UTSMC, Dr. Nassar described his supervisor's conduct as "religious, racial, and cultural bias against Arabs and Muslims." *Nassar v. Univ. of Texas Sw. Med. Ctr.*, 674 F.3d 448, 451 (5th Cir. 2012), *cert. granted*, 133 S.Ct. 978 (2013). Thereafter, UTSMC took an adverse employment action against Dr. Nassar by causing its affiliated hospital, Parkland Hospital, to rescind its employment offer to Dr. Nassar. *Id.* at 452. The jury found that this action was based, at least in part, on retaliation against Dr. Nasser for his claim of bias asserted in his resignation letter. *Id.* Dr. Nassar's case is, unfortunately, one of many cases that the ADC is tracking as Arab and Muslim Americans increasingly find themselves subject to employment discrimination and retaliation.

Statistical data gathered by the Equal Employment Opportunity Commission ("EEOC"), which monitors

retaliation charges filed by those who self-identify as Arabs and Muslims, indicate that retaliation against these groups is on the rise.[3] Since the tragic events of September 11, 2001, the number of Arab and Muslim Americans who have complained of being retaliated against has risen sharply. Specifically, in 2012, almost 40% of Arab and 50% of Muslim Americans who filed discrimination charges also filed retaliation charges, whereas in 2000, only approximately 20% of Arab and Muslim Americans who filed discrimination charges also filed retaliation charges. Furthermore, since 9/11, Muslim Americans have filed more charges of retaliation and discrimination than any other religious group monitored by the EEOC.

SUMMARY OF ARGUMENT

Before and especially after 9/11, Arab and Muslim Americans have experienced pervasive discrimination, which has frequently played out in the workplace. *See generally* U.S. Dep't of Justice ("DOJ"), *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later* (October 19, 2011), http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf ("*Confronting Discrimination*"). When Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) *et seq.*, and later revised it under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress intended to eradicate discrimination and

[3] Press Release, ADC, EEOC Statistical Data: Discrimination and Retaliation Charges Filed by Arab and Muslim Americans (Mar. 25, 2013). The EEOC provided the ADC with statistics reflecting the charges that Arabs and Muslims filed with the EEOC from 2000-2012, including charges filed with Fair Employment Practice Agencies ("FEPA"), state and local agencies acting on behalf of the EEOC. *Id.*

retaliation from the workplace for the benefit of groups such as Arab and Muslim Americans. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 240-44 (1989). Applying a "but-for" standard to the anti-retaliation provision of Title VII, however, would thwart congressional intent and allow employer-defendants to avoid liability easily, leaving employee-plaintiffs who should be protected by the provision – such as Dr. Nassar – without an effective avenue for redressing retaliation in the workplace.[4]

Part I.A of this brief explains that in the case below, the Fifth Circuit correctly held that the "mixed-motive" standard applies to Dr. Nassar's Title VII retaliation case. *Nassar*, 674 F.3d at 454 n. 16 (citing *Smith v. Xerox Corp.,* 602 F.3d 320, 330 (5th Cir. 2010)). In *Smith*, the Fifth Circuit properly distinguished *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), and held that the "but-for" standard is inapplicable to Title VII retaliation cases. The *Smith* court explained that *Gross* expressly recognized that Title VII and the Age Discrimination and Employment Act ("ADEA") were materially different with respect to their causation standards, and that *Gross* only applied the "but-for" causation standard to the ADEA. 602 F.3d at 329 (citing *Gross*, 557 U.S. at 173). The Fifth Circuit's approach in *Smith* honors this Court's repeated insistence that, under the Equal Protection Clause, courts should evaluate laws with race or national origin classif-

[4] The anti-retaliation provision of Title VII prohibits an employer from taking an adverse employment action against an employee who engages in "protected conduct." 42 U.S.C. § 2000e-3(a). Employees engage in "protected conduct" when they oppose an unlawful employment practice, or participate in an investigation, proceeding, or hearing related to Title VII. *Id*.

ications with higher scrutiny than laws with age classifications. Unlike in the ADEA context, the Court and Congress have established a "mixed-motive" standard for Title VII disparate impact cases. By including an anti-retaliation provision under Title VII, Congress intended for employees to have both the right to a discrimination-free work environment and effective procedures for enforcing that right. Imposing the higher standard of "but-for" causation on retaliation claimants would be inconsistent with congressional intent, create undue confusion for triers of fact, and unfairly place retaliation claimants at a judicial disadvantage as compared to discrimination claimants.

Imposing a "but-for" standard without the opportunity for the employee to shift the burden of persuasion to the employer would require the employee to establish the absence of any other independently sufficient reason for the employer's retaliatory action. Part I.B argues that this standard would create a nearly insurmountable burden for plaintiffs because, in the employment context, an employer has many opportunities to create some independently sufficient reason for its adverse action, thereby insulating itself from liability. The ultimate impact of imposing a "but-for" standard would be a widespread chilling effect for those protected under Title VII. As a result, Arab and Muslim Americans would be discouraged from expressing opposition to illegal discrimination in the workplace. Instead, as discussed in Part I.C, a "mixed-motive" standard with burden-shifting would place opposing parties on an equal playing field and more accurately reveal the reason(s) for an employer's adverse decision.

As explained in Part II, and as demonstrated in this case, Arab and Muslim Americans are particularly susceptible to discrimination and retaliatory action from employers. The EEOC's statistical data show a surge in the last decade in the number of discrimination and retaliation charges filed by those who self-identify as Arab and Muslim.

Discrimination and retaliation in the workplace is an outgrowth of overarching prejudice against Arab and Muslim Americans, who are negatively stereotyped and collectively blamed for the wrongful and unjustified acts of a few. Especially in the post-9/11 era, Arab and Muslim Americans (and those perceived as such) have suffered an unprecedented number of hate crimes, and incidents of harassment and violence. These realities provide all the more reason for the Court to establish a "mixed-motive" standard that adequately protects victims of discriminatory retaliation in the employment context.

ARGUMENT

I. THE COURT SHOULD APPLY A "MIXED-MOTIVE" STANDARD TO TITLE VII RETALIATION CASES.

Gross is inapplicable to this case. In *Gross*, the Court held in a 5-4 decision that, under the ADEA, a plaintiff is required to prove "but-for" causation without the opportunity to shift the burden of persuasion to the employer. 557 U.S. at 170. The Court should not extend *Gross* to this case because: (1) ADEA precedent does not apply to Title VII; (2) courts evaluate laws with race or national origin classifications under higher scrutiny than laws with age classifications; (3) a "but-for" standard would create unnecessary confusion for a trier of fact; and

(4) a "but-for" standard would be inconsistent with Congress's intent for Title VII to eradicate discrimination from the workplace. Additionally, imposing a "but-for" standard in retaliation cases would allow defendant-employers to avoid liability easily by providing an independently sufficient reason for their adverse decisions, which would be particularly unfavorable to Arab and Muslim Americans. Instead, a "mixed-motive" causation standard with burden-shifting would place the parties on a fair legal and procedural playing field, and would be a more accurate way to discover the reason(s) for an employer's adverse action.

A. The Court should not extend its holding in *Gross* to this case.

In this case, Dr. Nassar's claim arose under Title VII – albeit in the retaliation context – making the Court's precedent under the ADEA irrelevant. *Gross,* 557 U.S. at 173-75 (expressly limiting the Court's ruling to the ADEA context and emphasizing that Title VII and the ADEA are distinct statutory schemes). Rather, the clear precedent of Title VII is applicable. "Title VII [in contrast to the ADEA] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Price Waterhouse*, 490 U.S. at 241.

1. ADEA precedent does not apply to Title VII.

In *Price Waterhouse*, the Court interpreted the phrase "because of" in Title VII to mean that if the claimant could show that his or her protected status (race, color, sex, national origin, or religion) played a "motivating part" in the adverse employment

decision, then the burden of persuasion would shift to the defendant – thus requiring only proof of "mixed-motive" to shift the burden. *Id.* at 248-50. The *Price Waterhouse* Court determined that a defendant could meet its burden and avoid liability altogether by proving that it would have made the same decision even if it had not considered the prohibited factor ("same-decision defense"). *Id.* at 242. Two years after *Price Waterhouse*, in amending Title VII, Congress (a) rejected the same-decision defense by changing it from a complete bar to recovery to a limitation on the damages that plaintiffs could recover,[5] and (b) approved the "mixed-motive" standard by writing it into the anti-discrimination provision of Title VII. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(B). Significantly, Congress disapproved of the same-decision defense because to do otherwise would send "a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action." H.R. Rep. No. 102-40, pt. 1, at 47 (1991). This principle should apply with equal force to retaliation cases – it is inappropriate for an employer to partially base its decision-making on consideration of an employee's protected conduct.

In 2009, *Gross* held that although, like Title VII, the ADEA uses the phrase "because of" to prohibit age discrimination, a "mixed-motive" framework is never applicable in ADEA disparate treatment cases.

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[5] The remedies excluded by a successful same-decision defense are "damages" or "admission, reinstatement, hiring, promotion, or payment" of back wages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The relief that may be granted regardless of any successful same-decision defense include "declaratory relief, injunctive relief [that is not otherwise excluded], and attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B)(i).

557 U.S. at 175. The Court reasoned that when Congress amended Title VII in 1991, codifying the *Price Waterhouse* "mixed-motive" definition of "because of," Congress did not amend the ADEA in the same way, thereby intentionally omitting "mixed-motive" causation in age discrimination cases. *Id*. at 174-75. The holding in *Gross* has led to divergent views among circuit courts of appeals regarding the breadth of its applicability.[6]

The Fifth Circuit correctly held in *Smith* that *Gross* did not apply to Title VII, and as such, the district court's mixed-motive jury instruction was proper in a Title VII retaliation case. 602 F.3d at 330. The *Smith* court explained that the *Gross* Court's reasoning was based on the text of the ADEA and a comparison of Congress's approach to Title VII and the ADEA. *Id*. at 328. *Smith* expressly relied on the *Gross* Court's conclusion that Congress did not authorize "mixed-motive" claims under the ADEA. *Id*. The *Smith* court cogently explained, however, that the application of *Gross* to Title VII retaliation cases would be an "incorrect," "simplified application of *Gross*." *Id*. *Gross* expressly recognized that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion," and as such, Title VII precedent did not control cases under ADEA. *Id*. at 329-30 (citing *Gross*, 557 U.S. at 173).

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[6] *Compare Smith*, 602 F.3d at 329-30 (holding that *Gross* does not apply to Title VII retaliation cases because *Gross* expressly recognized that Title VII and the ADEA are materially different with respect to their burden of causation), *with Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir. 2010) (finding that *Gross* mandates that unless an anti-discrimination statute has language that expressly recognizes mixed-motive claims, the words "because of" demand proof that a forbidden consideration was the "but for" cause of the adverse action).

By the same token, it follows that the Court's interpretation of Title VII in this case should not be governed by ADEA precedent.

2. Courts evaluate laws with race or national origin classifications under higher scrutiny than laws with age classifications.

It is a well-established principle of Constitutional law that, under the Equal Protection Clause, laws with race and national origin classifications are subjected to stricter scrutiny than laws with age classifications. *Compare Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications are "subjected to the most rigid scrutiny") (internal quotation omitted); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin classifications are subject to strict scrutiny) *with Vance v. Bradley*, 440 U.S. 93, 97 (1979) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (courts evaluate laws with age classifications by determining whether they are "rationally related to furthering a legitimate state interest."). The Court has explained that plaintiffs who face racial or national origin discrimination are entitled to more protection due to the historical discriminatory treatment they have endured – and as explained in Part II, Arab and Muslim Americans are the quintessential example of such a group. In *Massachusetts Bd. of Retirement v. Murgia*, the Court explained that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics

not truly indicative of their abilities." 427 U.S. at 313. Unlike one's race or national origin, old age "does not define a discrete and insular minority." *Id*. at 313-314. *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (citing *Cleburne v. Cleburne Living Center*, *Inc*., 473 U.S. 432, 440, (1985)). So, here, applying a "mixed-motive" causation standard that is more protective of a plaintiff's ability to seek redress for race-based and national origin-based discrimination than the "but-for" standard is fully consistent with the greater protection provided in the Equal Protection context.

3. A "but-for" standard would create unnecessary confusion for a trier of fact.

Imposing a "but-for" standard to the anti-retaliation provision of Title VII would create undue confusion for a trier of fact because of the interconnectedness of the anti-retaliation and anti-discrimination provisions of Title VII. Both Congress and the Court have set forth a "mixed-motive" standard under the anti-discrimination provision of Title VII. *Price Waterhouse*, 490 U.S. at 251-52; Civil Rights Act of 1964, § 701 *et seq*., *as amended*, 42 U.S.C. § 2000e *et seq*. By including an anti-retaliation provision under Title VII, Congress intended employees to have both the right to a discrimination-free work environment and effective procedures for the enforcement of that right. Requiring a different standard of proof for the anti-discrimination provision of Title VII and the statutory mechanism intended to protect it would create excessive confusion. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) (noting that "[t]he 1991 Act eliminated any confusion about burden-shifting and the proof

necessary for a Title VII violation); *see also Price Waterhouse*, 490 at 287 (Kennedy, J., dissenting) (highlighting the disadvantageous "risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision."). Indeed, the Court has recognized that the purpose of the anti-retaliation provision in Title VII is to allow "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Company,* 519 U.S. 337, 346 (1997). Therefore, this Court should not require a higher burden for a Title VII retaliation claim than a Title VII discrimination claim when the two types of claims "do not pose different consideration[s] for causation." Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 Buff. L. Rev. 69, 137 (2010).

4. A "but-for" standard would be inconsistent with Congress's intent for Title VII to eradicate discrimination from the workplace.

There is a fundamental disconnect in the concept that Congress would have intended an employee to defend his right to be free from discriminatory retaliation under a more stringent standard than the right to be free from discrimination itself. Indeed, in passing the Civil Rights Act of 1991, Congress reiterated the idea that Title VII seeks to prohibit "mixed-motive" discrimination. *See* H.R. Rep. No. 102-40, pt. 1, at 48 (1991) (explaining that the standard is whether the protected status category "actually contributed or was otherwise a factor in an employment decision."); *id.* pt. 2, at 18 ("[T]he complaining party must demonstrate that discrim-

ination was a contributing factor in the employment decision—i.e., that discrimination actually contributed to the employer's decision with respect to the complaining party."). The legislative history of the initial enactment of Title VII in 1964 underscores how incongruous it would be to require "but-for" causation under any provision of Title VII. In response to Senator McClellan's proposal to define Title VII violations as occurring only when a prohibited factor was the sole motivation for an adverse employment action, Senator Case stated: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13837-38 (1964); *see also* 110 Cong. Rec. 7218 (1964) (statement by Senator Clark that "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision.").

B. Imposing a "but-for" standard in retaliation cases would allow defendant-employers to avoid liability easily.

A "but-for" standard without burden-shifting would allow employers to avoid liability, so long as the plaintiff could not disprove that the defendant had some independently sufficient alternative reason for its decision – even if the employer admits that it also considered the employee's protected conduct. In the employment context, however, an employer typically has multiple reasons for making an adverse decision. *See Price Waterhouse*, 490 U.S. at 268-69 (O'Connor, J., concurring). Also, very few (if any) employees have unblemished employment records. *See id.* at 273-74. As a result, employers would effectively have permission to consider an employee's protected conduct in their decision-making with impunity, so long

as the employee could not disprove an independently sufficient reason for the employer's adverse action.

Escalating the plaintiff's burden to a "but-for" standard in retaliation cases would create a chilling effect. Claimants such as Arab and Muslim Americans would face prohibitive difficulty in proving their claims. Their unlikelihood of success on a retaliation claim would create an additional incentive to acquiesce to discrimination in the workplace, silencing vulnerable groups of employees from seeking redress for workplace discrimination.

Hocine Omari, an Arab and Muslim of Algerian descent who alleged Title VII retaliation against his employer, provides a clear example of a potential plaintiff whose valid retaliation claim could fail under a "but-for" standard. *Omari v. Waste Gas Fabricating Co. Inc.*, No. Civ.A. 04-796, 2005 WL 545294, at *15 (E.D. Pa. Mar. 4, 2005) (finding that retaliatory animus was a "substantial motivating factor" for the adverse employment action). Omari testified that after 9/11, his co-workers began harassing him by nicknaming him "Osama," calling him a terrorist, hijacker, cave-dweller, camel driver, and wetback, and frequently cursing at him. *Id.* at *1. Omari's co-workers told him he was probably making a bomb, and asked if Omari knew how to fly a plane into a building. *Id.* at *1-2. On multiple occasions, Omari engaged in protected conduct under the anti-retaliation provision of Title VII by reporting his co-workers' behavior to his supervisors, who told Omari the harassment would stop. *Id.* at *4, *13. The harassment did not stop, however, and Omari learned that his supervisors did not inform higher management of his claims. *Id*. Omari filed a complaint with the EEOC. When Omari's supervisor

learned about the complaint, he said that Omari was "making a problem" and that Omari would be fired the next time he made a mistake. *Id.* at *6. Subsequently, Omari made a mistake on his timecard. *Id.* at *8. Seizing the opportunity, Omari's employer fired him for "timecard fraud." *Id.* Under a "but-for" standard without burden-shifting, Omari's employer could have completely avoided liability if Omari could not disprove that "time-card fraud" was an independently sufficient reason for its decision. Despite the overt retaliatory action of his employer, Omari's retaliation claim would likely not have survived. However, under the "mixed-motive" standard that the district court applied, the employer was unable to avoid liability because Omari could show that his protected conduct played a motivating part in his employer's adverse decision.

Awad v. National City Bank, No. 1:09-CV-00261, 2010 WL 1524411, at *16-18 (N.D. Oh. Apr. 15, 2010) (denying the defendant's motion for summary judgment on Awad's retaliation claim) provides another compelling example. Rami Awad engaged in protected conduct by filing a complaint with the EEOC stating that his employer, a bank, would not promote him because he was a Muslim and Arab of Palestinian descent. *Id.* at *1. Before a scheduled mediation, Awad's supervisor threatened to fire Awad if he did not drop the EEOC charge. In response, Awad settled the EEOC charge. However, when Awad refused to drop the case entirely, his supervisor subjected Awad to significant harassment and frequently yelled at him. *Id.* at *3-4. Ultimately, the bank fired Awad, claiming that it was for "performance reasons" (mistakes in loan applications). *Id*. That the rationale employed in the Awad case could defeat a retaliation claim under a "but-for" analysis under-

scores the real world consequences for Arab and Muslim Americans and other groups protected by Title VII. Under a "but-for" standard, if a claimant is unable to disprove that "performance reasons" were independently sufficient for an employer's decision, then almost no employee would stand a chance in proving a retaliation claim. As Justice O'Connor explained in *Price Waterhouse*, Title VII would be incapable of eliminating discrimination if plaintiffs must "pinpoint discrimination as the precise cause of [their] injury, despite having shown that it played a significant role in the decisional process." *See* 490 U.S. at 273 (O'Connor, J., concurring). A "mixed-motive" standard, by contrast, does not unfairly prejudice those who have faced adverse employment actions due in part to expressing opposition to discriminatory conduct.

The policy goals of Title VII include "deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." H.R. Rep. No. 102-40, pt. 2, at 13. Title VII also was designed to punish employers who participate in illegal retaliation or discrimination. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("[T]here is no doubt that Congress considered reliance on gender [national origin, religion,] or race in making employment decisions an evil in itself."). Imposing a "but-for" causation requirement for retaliation claims would jeopardize these goals and create a standard that allows discriminators to avoid liability easily. If employers who consider protected conduct as a factor in their decision-making can easily avoid liability, employers will not be deterred from the very conduct that Congress enacted Title VII to prevent.

C. Burden-shifting in retaliation cases allows the fact-finder to fairly and accurately discover the reason(s) for an employer's adverse decision.

A "but-for" standard of causation in retaliation cases with no possibility of burden-shifting places a daunting one-sided burden on the claimant to prove a negative: the absence of any other independently sufficient cause for an adverse employment decision. *See* Martin J. Katz, *Gross Disunity,* 114 Penn St. L. Rev. 857, 882 (2010); 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, 937 (2010). This requirement fails to recognize something obvious – the most relevant information and evidence tends to be under the employer's control. Furthermore, the employer is the alleged wrongdoer, and as such, should bear the burden of untangling its permissible from its impermissible motives. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983) (concluding that as the alleged wrongdoer, the employer should bear the risk that it will be unable to untangle its permissible from its impermissible motives).

A "mixed-motive," burden-shifting standard allows the fact finder to uncover and assess the factual heart of the parties' allegations and defenses. *See Price Waterhouse*, 490 U.S. at 261-62 (1989) (O'Connor, J., concurring) (explaining that burden-shifting is apt "in cases . . . where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."). The burden does not fall on the employer until the claimant proves that his or her protected conduct played a

motivating part in the employer's decision-making. If the claimant is able to shift the burden, the employer, which controls the evidence about potential non-discriminatory justifications, may dispel the plaintiff's allegation by providing evidence of some other reason for its action. *Id*. at 277 ("This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination.").

As illustrated in *Arafi v. Mandarin Oriental,* burden-shifting is a fair and accurate process for determining the root cause(s) of an employer's potentially retaliatory decision. 867 F.Supp. 2d 66 (D.D.C. 2012) (denying the defendant's motion to dismiss Arafi's retaliation claim). Mohamed Arafi, a Muslim and Arab of Moroccan descent who worked for the defendant hotel, engaged in protected conduct under the anti-retaliation provision when he complained twice to his supervisor after he was prohibited from working near an Israeli delegation. *Id*. at 66. His direct manager responded, "You know how the Israelis are with Arabs and Muslims." *Id*. at 68. Another supervisor told Arafi to be "cognizant of the hostility that Israelis have towards Arabs and Muslims." *Id*. at 76. Subsequently, Arafi's schedule was significantly reduced from five to seven days per week to one day per month. *Id*. at 75. The employer's purported reason was that the Department of State conducted a background check of employees in anticipation of the arrival of the delegation that returned "irregularities" with regard to Arafi. *Id*. at 69. On these facts, without burden-shifting, Arafi would have the sole burden of demonstrating a lack of "irregularities," and the employer would never have the burden of persuasion to justify its adverse decision to restrict Arafi's work schedule.

Such a process would improperly burden the claimant because the employer took the adverse action, and would be best suited to provide precise information and evidence about its decision. In fact, because the district court permitted Arafi to shift the burden to his employer, the fact finder was able to consider the fact that Arafi's employer did not know and could not explain what the "irregularities" entailed. *Id*. Without burden-shifting, Arafi's ability to disprove alleged "irregularities" about his background would be difficult, inefficient, and provide less accuracy than a framework that allowed for burden-shifting. *See Price Waterhouse*, 490 U.S. at 253; Harper, *supra*, at 140-44; Katz, *supra*, at 655-58.

A single "mixed-motive" standard that allows for burden-shifting for all Title VII claims would help instill public confidence in anti-discrimination laws. Because the goal of employment discrimination law is to put people similarly situated on an equal playing field, then the public may not understand why one provision under Title VII should have a more favorable proof structure than another provision. Mark R. Deethardt, *Life after Gross: Creating a New Center for Disparate Treatment Proof Structures,* 72 La. L. Rev. 178, 219-20 (2011). One "mixed-motive" structure for both disparate impact and retaliation claims under Title VII would make the law easier to understand for employers, employees, lawyers, judges, and juries. William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. Pa. J. Bus. L. 683, 691 (2010).

II. A "BUT-FOR" STANDARD WOULD DISPROPORTIONATELY AFFECT ARAB AND MUSLIM AMERICANS WHO FACE HIGH LEVELS OF DISCRIMINATION AND RETALIATION INSIDE AND OUTSIDE OF THE WORKPLACE.

Since 9/11, Arab and Muslim Americans have been subjected to unparalleled workplace discrimination and retaliation. Muslims have filed more charges alleging religious retaliation and discrimination than any other religious group that the EEOC monitors – including Catholics, Jews, Protestants, Sikhs, and Seventh Day Adventists. Press Release, ADC, EEOC Statistical Data. Additionally, it is particularly important to erect effective remedies for workplace retaliation because of the discrimination that Arab and Muslim Americans face at large.

A. In the workplace, Arab and Muslim Americans have faced a surge in discrimination in the form of retaliation.

"Harmful racial stereotyping of Arabs and Muslims in the media and popular culture . . . contributes to tangible discrimination in the workplace." Sahar Aziz, *Arab and Muslim American Civil Rights and Identity: A Selection of Scholarly Writings from the Decade after 9/11* 52 (2011). Arab and Muslim Americans have suffered discrimination at work for decades. For example, in 1993, an Arab American Muslim New York transit police officer committed suicide after enduring continuous taunting by his coworkers. Jack G. Shaheen, *Arab and Muslim Stereotyping in American Popular Culture* 33 (1997). After 9/11, employment retaliation and discrimination

against Arab and Muslim Americans increased.[7] *See, e.g., El-Din v. New York City Admin*., 2012 U.S. Dist. LEXIS 126136, at *1 (S.D.N.Y. Sept. 5, 2012) (before 9/11, the Egyptian Muslim plaintiff was called a "terrorist," and post-9/11 was constantly labeled a "Muslim terrorist"). On September 14, 2001, the EEOC issued a Special Alert urging employers to be particularly attentive to "instances of harassment or intimidation against Arab-American and Muslim employees." Press Release, EEOC, EEOC Chair Urges Workplace Tolerance in Wake of Terrorist Attack (Sept. 14, 2001). By 2010, 25% of the complaints that the ADC received related to employment discrimination. ADC, *The 2010 ADC Legal Report: Legal Advocacy and Policy Review* 2 (2011); *see also Report on Hate Crimes and Discrimination Against Arab-Americans 2003-2007* 34 (Hussein Ibish, ed.) (2008) (from 2003-2007, the ADC received approximately ten reports per week of employment discrimination of one kind or another).

Statistical data reveal a troubling trend of retaliation and discrimination against Arab and Muslim Americans in the workplace. Press Release, ADC, EEOC Statistical Data. According to EEOC statistics, the amount of Title VII retaliation and discrimination charges spiked after 9/11 for those who self-

[7] For example, a 2003 survey conducted by the New York City Commission on Human Rights regarding post-9/11 discrimination revealed that 26% of the incidents reported by respondents were related to employment discrimination. New York City Commission on Human Rights, *Discrimination Against Muslims, Arabs and South Asians in New York City Since 9/11* (2003). 81% percent of respondents were Muslim and 47% were Arab. *Id.*

identify as (1) "Arab, Afghani, or Middle Eastern" and (2) "Muslim." *Id*.

With regard to the first category, from 2000-2001, the EEOC received only 13 charges of retaliation, and 34 charges of discrimination. *Id*. After 9/11, however, the "Arab, Afghani, or Middle Eastern" group reported record levels of retaliation and discrimination.[8] In 2002 alone, this group filed 208 retaliation and 950 discrimination charges. This represents a nearly 16 fold increase in retaliation and a 28 fold increase in discrimination charges from the years before. While these numbers decreased slightly from 2003-2006,[9] they surged again from 2007-2011.[10] In 2012, the EEOC received 298 retaliation and 787 discrimination charges from this group. *Id*.

For Muslims, there was a similar spike in post-9/11 charges of retaliation and discrimination. *Id*. In 2000 and 2001, those who self-identified as "Muslim" filed 65 retaliation and 284 discrimination charges, and 91 retaliation and 329 discrimination charges,

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[8] Recognizing post-9/11 intolerance of Arab, Afghani, Middle Eastern, Muslim and South Asian Americans, the EEOC began to monitor 9/11 backlash discrimination, terming it "Process Type Z." According to the EEOC, between September 11, 2001 and December 11, 2002, at least 705 charges were filed against employers under Process Type Z. Press Release, EEOC, EEOC Sees Rise in Discrimination Against Arab-Americans and Muslims (Jan. 22, 2003).

[9] 2003: 223 retaliation/890 discrimination; 2004: 209 retaliation/745 discrimination; 2005: 195 retaliation/717 discrimination; 2006: 182 retaliation/636 discrimination. Press Release, ADC, EEOC Statistical Data.

[10] 2007: 222 retaliation/715 discrimination; 2008: 268 retaliation/783 discrimination; 2009: 378 retaliation/978 discrimination; 2010: 339 retaliation/862 discrimination; and 2011: 390 retaliation/915 discrimination. *Id*.

respectively. *Id*. Then, in 2002, this group filed 273 retaliation and 1,160 discrimination charges – over three times the number of retaliation and discrimination charges from the previous year. *Id*. From 2003-2008, the EEOC received slightly fewer retaliation and discrimination charges,[11] but the number rose again from 2009-2011.[12] In 2012, the EEOC received 390 retaliation and 780 discrimination charges from this group. *Id*.

The Court should consider the upward trend in the proportion and raw number of retaliation charges that Arab and Muslim Americans have filed with the EEOC. The anti-retaliation provision of Title VII provides redress for those who have been punished for expressing dissent to discriminatory conduct. Imposing a "but-for" standard would weaken this provision, and effectively eliminate a restraint on employers' ability to discriminate.

B. Retaliation in the workplace is an outgrowth of broad discrimination against Arab and Muslim Americans.

Dr. Nassar's case provides an illustration of general discrimination against Arab and Muslim Americans in society percolating into the workplace. Dr. Nassar's supervisor, for example, made the stereotypical and insulting statement that "Middle

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[11] 2003: 234 retaliation/949 discrimination; 2004: 214 retaliation/799 discrimination; 2005: 233 retaliation/767 discrimination; 2006: 234 retaliation/825 discrimination; 2007: 228 retaliation/601 discrimination; and 2008: 217 retaliation/666 discrimination. *Id*.

[12] 2009: 340 retaliation/803 discrimination; 2010: 380 retaliation/792 discrimination; and 2011: 433 retaliation/879 discrimination. *Id*.

Easterners are lazy." *Nassar*, 674 F.3d at 450. Negative stereotypes of Arabs and Muslims have pervaded American society, and, especially after 9/11, the number of Arab and Muslim Americans at the receiving end of hate crimes, harassment, and violence has been on the rise. *See*, *e.g.*, *Confronting Discrimination*, at 2-3.

Stereotypes of Arabs and Muslims are almost exclusively negative.[13] *See* Edward W. Said, *Orientalism* 31-49 (1979) (explaining the historic understanding of Arabs to be racially inferior and culturally backwards). Most American schools either omit any study about Arabs and Muslims or include information that serves only to perpetuate existing negative stereotypes. ADC Education Dep't, *Reaching the Teachers Campaign*, http://www.adc.org/education/reaching-the-teachers-campaign. Mainstream media outlets tend to attribute the wrongful acts of some Arabs and Muslims to all of them. For example, the media prematurely blamed the 1996 crash of TWA Flight 800 on Arabs, Iranians, Muslims, and Middle Easterners. Shaheen, at 44. [14]

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[13] According to the Pew Research Center, "[a] significant minority (21%) of Muslim Americans say there is a great deal (6%) or a fair amount (15%) of support for extremism in the Muslim American community. That is far below the proportion of the general public that sees at least a fair amount of support for extremism among U.S. Muslims (40%). And while about a quarter of the public (24%) thinks that Muslim support for extremism is increasing, just 4% of Muslims agree." Pew Research Center, *supra* fn. 2.

[14] The National Transportation Safety Board eventually concluded that the probable cause of the accident was an equipment malfunction, Nat'l Transp. Safety Bd., In-flight Breakup over the Atlantic Ocean Trans World Airlines Flight 800, NTSB/AAR-00/03 (2000).

Arab and Muslim Americans are often the target of hateful public rhetoric. For example, on July 13, 2012, Congresswoman Michele Bachmann and four other members of the House of Representatives falsely and baselessly accused State Department Deputy Chief of Staff Huma Abedin, who is Arab American, of having links to the Muslim Brotherhood. In June 2011, congressional candidate Gabriela Saucedo Mercer claimed that Middle Easterners' "only goal is to cast harm to the United States." On December 7, 2011, Newt Gingrich, during his failed bid for the presidency, claimed that Palestinians were "an invented people." *Time Change – Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights on the Judiciary of the S. Comm on the Judiciary*, 112th Cong. 4 (2012) (statement of the ADC). Negative portrayals of Arab and Muslim Americans send a powerful message: Arab and Muslim Americans are not to be trusted.

In the last decade, Arab and Muslim Americans (and those perceived as such) have been subjected to hate crimes, harassment, and violence. In the days following 9/11, the upsurge of violent attacks against them raised a national concern. *See, e.g., Texas Man Executed for Race-Related Killings*, N.Y. Times, July 20, 2011, at A17 (on September 14, 2001 three Muslim Pakistani-American convenience store employees in Texas were shot, one of whom died). In a Federal Bureau of Investigation ("FBI") report released in the aftermath of the 9/11 attacks, the FBI reported that hate crimes against Muslim Americans soared from 28 incidents in 2000 to 481 incidents in 2001, the most drastic climb among any group the

FBI has witnessed.[15] Within a year after 9/11, the ADC and the Coalition on American-Islamic Relations ("CAIR") recorded more than 200 incidents of physical violence, threats, and harassment against Arab and Muslim American students. *Report on Hate Crimes and Discrimination Against Arab-Americans: The Post September 11 Backlash* 7 (Hussein Ibish, ed.) (2003). In the first few years following 9/11, the DOJ investigated more than 800 incidents, including arson, physical threats and assaults, and murder against Arab and Muslim Americans. *Confronting Discrimination.*

Reports suggest that these incidents have intensified.[16] These stories paint a disturbing picture of the

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[15] In 2001, there were 481 incidents made up of 546 offenses having 554 victims of crimes motivated by bias against Muslims. FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2001*, 9 (2002), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001/hatecrime01.pdf. Of all religious bias incidents reported to the FBI in 2011, 13.3% pertained to anti-Islamic incidents. FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2011*, 2 (Dec. 2012), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidentsandoffenses_final.pdf. While this figure represents a slight increase from 2010, it is a marked increase from the 2% reported in 2000. *Compare* FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2010*, 2 (Nov. 2011), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf, *with* FBI Uniform Crime Reporting (UCR) Program, *Hate Crime Statistics 2000*, 7 (2001), (http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2000/hatecrime00.pdf.

[16] The DOJ recently reported that hate crimes motivated by religious bias more than doubled between 2003-2006 and 2007-2011, increasing from 10% to 21%. Lynn Langton, Michael Planty, & Nathan Sandholtz, *Hate Crime Victimization, 2003-2011*, DOJ Bureau of Justice Statistics, 1 (Mar. 21, 2013). As a

harassment and danger that Arab and Muslim Americans endure daily. For example, on August 31, 2009, two men in California repeatedly hit a taxi driver in the back of the head while calling him a "terrorist" and "Taliban" member. *CAIR Seeks Hate Crime Charges in Assault on Calif. Taxi Driver*, CAIR California (Sept. 1, 2009), http://ca.cair.com/sfba/news/cair_seeks_hate_crime_charges_in_assault_on_calif._taxi_driver. On August 10, 2011, a Somali man was assaulted while his assailant yelled racially derogatory profanities. Press Release, DOJ, Former TSA Employee Pleads Guilty to Federal Hate Crime for Assaulting Elderly Somali Man (Aug. 10, 2011).

The undue discrimination that Arab and Muslim Americans face overall, as discussed in Part II.A, is not disconnected from retaliation and discrimination in the workplace. Rather, the evidence suggests that such attitudes permeate the workplace and make Arab and Muslim Americans particularly susceptible to discrimination and retaliation. A "mixed-motive" standard would give force to the anti-retaliation provision of Title VII, and would recognize both the post-9/11 backlash faced by Arab and Muslim Americans and the unfortunate possibility that the unpredictable future may find other communities in a similar situation.

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percentage of total violent crime, violent hate crime was also greater in 2007-2011 than in 2003-2006. *Id*. at 3.

CONCLUSION

For the foregoing reasons, the ADC respectfully urges the Court to AFFIRM the decision of the Fifth Circuit.

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APPENDIX

APPENDIX

List and description of *amici curiae*:

Arab American Institute. The Arab American Institute ("AAI") is a non-profit, non-partisan national leadership organization founded in 1985. AAI was created to nurture and encourage the direct participation of Americans of Arab descent in the political and civil life of the United States. AAI's domestic policy priorities include the protection of civil rights, the preservation of civil liberties, and the termination of discrimination and profiling based on race, ethnicity, or religion. The question before the Court is directly related to AAI's mission and work in representing the interests of Arab Americans and its ongoing efforts to combat discrimination.

Asian American Legal Defense and Education Fund. The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF seeks sufficient protection for retaliation claimants.

Center for Constitutional Rights. The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. The issues addressed in this case are directly related to CCR's work in the areas of employment discrimination generally and the discriminatory treatment of Arab and Muslim Americans, specifically. CCR has historically represented workers

in major employment discrimination cases based on religion, including the Sikh Metropolitan Transit Authority employees. CCR currently represents the Vulcans Society, a membership organization of African American firefighters, as well as African American and Latino New York City teachers in Title VII litigation. In addition, CCR has represented numerous Arabs and Muslims facing discrimination in the post 9/11 era.

Council on American-Islamic Relations. The Council on American-Islamic Relations ("CAIR") is a national organization working to combat discrimination and promote inclusion, particularly on behalf of Muslim Americans. The issues in this case are directly related to CAIR's work combating employment discrimination and retaliation.

Muslim Advocates. Muslim Advocates is a national legal advocacy and community education organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates' work in fighting discrimination.

Sikh Coalition. The Sikh Coalition is a national community-based civil rights organization that works to combat discrimination, including workplace discrimination, against Sikh-Americans. Since 9/11, Sikhs have been subjected to increasing forms of violence and discrimination because of their actual or perceived race, ethnicity, national origin, and religion. Devout Sikhs, the majority of whom are from the Punjab region of South Asia, are distinguished by visible religious articles, including turbans and unshorn hair, and continue to experience harassment, discrimination, segregation, and retaliation in

the workplace. The issues in this case are directly related to the Sikh Coalition's work to combat discrimination against Sikhs, promote inclusion, and strengthen employment discrimination laws to better protect workers nationwide.