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IN THE SUPREME COURT OF THE UNITED STATES

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UNIVERSITY OF TEXAS SOUTHWESTERN :

MEDICAL CENTER, :

Petitioner : No. 12-484

v. :

NAIEL NASSAR :

- - - - - x

Washington, D.C.

Wednesday, April 24, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

DARYL L. JOSEFFER, ESQ., Washington, D.C.; on behalf of Petitioner.

BRIAN P. LAUTEN, ESQ., Dallas, Texas; on behalf of Respondent.

MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: Our last case of the year is 12-484, University of Texas Southwestern Medical Center v. Nassar.

Mr. Joseffer?

ORAL ARGUMENT OF DARYL L. JOSEFFER

ON BEHALF OF THE PETITIONER

MR. JOSEFFER: Good morning, and may it please the Court:

This Court's decision in Gross does most of the work in this case, and the plain language of the 1991 amendments to Title VII do the rest.

Under Gross, Nassar must prove that retaliation was the but-for cause of the challenged employment action, unless Congress has specifically relieved him of that burden by authorizing a mixed motive claim.

In the 1991 amendments, however, Congress authorized mixed motive treatment only for Title VII claims that challenge -- that challenge discrimination based on membership in a protected class, not for retaliation claims, and, for that reason, a Title VII retaliation claim must prove but-for causation.

JUSTICE GINSBURG: In the -- in the age

1 discrimination context, there wouldn't be a difference
2 between the discrimination claim itself and the
3 retaliation.

4 They'd both be governed by the same
5 standard, isn't that right, in the age discrimination
6 area, the but-for causation. Or am I wrong about that?

7 MR. JOSEFFER: Yeah. Well, the Age Act does
8 not permit any mixed motive claims.

9 JUSTICE GINSBURG: Yes.

10 MR. JOSEFFER: So, for this purpose in the
11 Age Act, everything is but-for, that's correct.

12 JUSTICE GINSBURG: But your argument is
13 that, in Title VII, where it's very clear what the
14 standard Congress wants to have for the discrimination
15 claim, you're going to have a different standard for
16 retaliation.

17 So, in these statutes, I thought these two
18 traveled together, whatever the standard is for
19 discrimination is the same for retaliation.

20 MR. JOSEFFER: Well, that -- I mean, to some
21 extent, within Title VII, that is the question in the
22 case, but what we have here is an amendment within Title
23 VII. It is first in Title VII, where it's set forth
24 discrimination based on class and discrimination based
25 on retaliation as separate types of discrimination, and

1 this provision treats them differently.

2 It specifically limits the --

3 JUSTICE KAGAN: Well, I guess the question,
4 Mr. Joseffer, is, is there any other discrimination
5 statute in which one can say that there's a different
6 standard for proving retaliation than there is for
7 proving substantive discrimination? Because, as I sort
8 of survey the universe, it seems as though whatever the
9 standard is, the standard is the same for both, and
10 there's no statute in which the two have been divorced.

11 Am I wrong about that?

12 MR. JOSEFFER: Well, I mean -- the reason I
13 answer the question -- I would agree, in the sense that
14 if what we're talking about is but-for versus mixed
15 motive, right? It's -- it's but-for everywhere, except
16 for within the meaning of this one amendment. Congress
17 clearly intended to make an exception here to the normal
18 but-for, so the question is to the scope of it.

19 JUSTICE KAGAN: I'll try again.

20 Is there any other statute in which we have
21 a different standard of causation for a retaliation
22 claim than we do for a substantive discrimination claim?

23 MR. JOSEFFER: No, because it's but-for
24 everywhere, except for this one amendment.

25 JUSTICE KAGAN: Well, is there -- I mean,

1 it's but-for everywhere.

2 Is there even any time at which whatever the
3 standard that applied -- you know, pre-Gross, is there
4 ever a moment and is there ever a statute in the history
5 of antidiscrimination laws, where there has been a
6 divorce -- a different standard for retaliation than for
7 substantive discrimination?

8 MR. JOSEFFER: Not -- I can't point to
9 anything specific because what we had, right,
10 was -- there was -- I can't point to anything specific
11 on that.

12 Up until the statute, the whole point of
13 Gross, right, is that the statute carves out a narrow
14 exception from but-for and --

15 JUSTICE KAGAN: All I'm saying is -- you know,
16 Gross was a couple of years ago. It said but-for covers
17 the -- the ADA and outside Title VII -- you know, we've
18 had a lot of discrimination statutes since 1964. We've
19 had a lot of different standards applying to those
20 discrimination statutes since 1964.

21 And you're coming in here and asking for the
22 first time, in all of those many decades, that we should
23 divorce the retaliation claim from the substantive
24 discrimination claim and make them follow two different
25 standards; is that correct?

1 MR. JOSEFFER: Well, I mean, yes and no, in
2 the sense that, if we're talking about but-for versus
3 mixed, right, yes, that's a creature of this specific
4 statute we're talking about.

5 If we're talking about other aspects of
6 retaliation and other types of discrimination, there are
7 differences in the statutes.

8 JUSTICE ALITO: Did this court ever hold
9 that the Price Waterhouse framework applied to retaliation
10 claims?

11 MR. JOSEFFER: No. And the -- I mean, the
12 backdrop here, which is the whole point of Gross, right,
13 is that, as of Price Waterhouse, we had -- you know, a
14 somewhat confusing and murky alignment of opinions,
15 that -- and I think everyone agrees with
16 this -- interpreted only at Section 2a, the
17 discrimination based on class provision.

18 Then, two years later, Congress came in with
19 this amendment to specifically identify what it wanted
20 to do about mixed motive. And Gross says that, except
21 for when Congress has specifically called for this mixed
22 motive treatment, it's but-for, is the holding of Gross.

23 And when we look to this provision -- I
24 mean, there are different ways of looking at it, but one
25 would be to say that I'm not aware of any statute that

1 has a specific retaliation provision, where this Court
2 has construed discrimination based on class, generally,
3 to encompass retaliation because that would make the
4 retaliation provision here in 3a absolutely surplusage.

5 It would make the other statutory
6 cross-references to 3a surplusage because you'd be
7 taking the specific retaliation provision within Title
8 VII and subsuming it within a general treatment of
9 discrimination based on -- on class, race, and so forth.

10 And this basic structure of these provisions
11 of Title VII is that, when Congress wants to refer to
12 all Title VII discrimination claims, it will refer as it
13 did in subsection 2n to a claim of employment
14 discrimination, generally.

15 It will refer as it did, also, in Section 2,
16 to an unlawful employment practice, which would cover
17 the waterfront, but when it wants to cover a specific
18 subset, it refers to retaliation, as spelled out in
19 3(a), or to discrimination based on membership in one of
20 the five protected classes. And here --

21 JUSTICE SOTOMAYOR: I'm sorry. I somehow
22 lost what you were saying. Isn't the law -- and our
23 presumption in Jackson -- that, when we talk about
24 discrimination on the basis of race, that it includes
25 retaliation, generally?

1 MR. JOSEFFER: Well, the reason -- well,
2 what Jackson says, of course, then is that Title VII is
3 vastly different. And the --

4 JUSTICE SOTOMAYOR: Well, different because
5 it was the beginning of this sort of endeavor on
6 creating a statute.

7 MR. JOSEFFER: Well, the distinction that
8 Jackson draws and, also, that Gomez-Perez draws -- you
9 know, expressly, in distinguishing this type of
10 situation, is if you have a broad general prohibition on
11 discrimination or discrimination based on race, without
12 more -- without more specificity, the Court will presume
13 that that would include retaliation.

14 But, when you have a statute, like this one,
15 that specifically singles that -- specifically
16 describes, in detail, the different types of prohibited
17 discrimination, including, specifically, retaliation,
18 this Court has never overridden that specific statutory
19 text to put one of those specifically broken-out types
20 of discrimination into another more general one, such as
21 discrimination based on race, which is why --

22 JUSTICE SOTOMAYOR: I'm -- I'm not sure what
23 difference it makes.

24 MR. JOSEFFER: Well, because, otherwise, you
25 are taking the --

1 JUSTICE SOTOMAYOR: I mean, other than in
2 the outcome you want here.

3 MR. JOSEFFER: As a matter -- well, I mean,
4 as a matter of statutory interpretation, right, which
5 then drives the outcome, the difference is that if -- if
6 you treat a specific retaliation reference or provision
7 as being subsumed within a more general one, a
8 discrimination based on race, for example, you are
9 treating the specific retaliation reference to be
10 surplusage, to have no effect and to not need to be
11 there.

12 And you're treating the other statutory
13 cross-references to it as also being surplusage, which
14 is why, when Congress does speaks more directly, this
15 Court's never overridden -- never said that it will take
16 a specific retaliation provision and treat it like it's
17 not there and toss it and -- based on race, for example.

18 And that's why -- I mean, that's why those
19 general cases they cite, those are our cases because
20 Jackson specifically says that Title VII is vastly
21 different for this very reason.

22 JUSTICE KAGAN: Well, Mr. Joseffer, I mean,
23 Title VII is written before any of these cases come
24 along. So Title VII is written, and it says we have an
25 anti -- a substantive antidiscrimination provision, and

1 we have a retaliation provision.

2 And then the Court starts issuing cases.
3 And it says, by the way, you actually don't need both.
4 One will do the job for you because one includes the
5 other. And that's in Sullivan, and that's in Jackson,
6 and that's in Gomez-Perez, and I'm sure I am missing a
7 few. Three, four, five times, the Court says this.

8 And so then, in 1991, Congress comes back,
9 and it says, we want to make some amendments, what do we
10 have to do? Do we have to amend both the anti -- the
11 substantive provision and the retaliation provision?
12 Well, no, we have been told five times that, as long as
13 we say one, it means both. And so that's what Congress
14 does in 1991.

15 MR. JOSEFFER: There are a couple -- if you
16 just look at '91, there are a few reasons that we know
17 from the '91 that doesn't work. One is, at almost at
18 the same time in 1991, Congress enacted the Americans
19 With Disabilities Act, where it, again, separately broke
20 out discrimination based on disability and retaliation,
21 treated them separately. So Congress hadn't forgotten
22 that it was treating them differently.

23 Also, in this very provision, the Civil
24 Rights Act of 1991, Congress specifically
25 cross-referenced both the part of Title VII that

1 contains the general provision and the part of VII,
2 Section 3, that contains retaliation. So it's
3 specifically dealing with these separate provisions,
4 acknowledging that it has in fact, presumptively, at
5 least, has read them and understands the distinction.

6 I mean, I think we presume that anyhow, but we
7 know it from the actual statutory text of the '91 -- of
8 the '91 Act. And then --

9 JUSTICE GINSBURG: Well, it seems that the
10 overall purpose of the '91 Act was to overrule decisions
11 of this Court that Congress thought had not interpreted
12 Title VII properly.

13 And am I right that what they put about
14 motivating factor -- a motivating factor, that is more
15 plaintiff-friendly than the -- than the standard that
16 the Court declared in -- in Price Waterhouse?

17 MR. JOSEFFER: For -- for those cases
18 that -- that the motivating factor provision governs,
19 it's more plaintiff-friendly, yes.

20 JUSTICE GINSBURG: So it's -- it's really
21 odd to think that, in wanting to go beyond what we did
22 in Price Waterhouse, the Court meant to set up an
23 entirely different standard for -- for retaliation.

24 MR. JOSEFFER: Well, that was, basically,
25 the same argument that this Court rejected in Gross,

1 in -- in that Gross involved another absolutely
2 identical statutory provision, that was lifted, in fact,
3 deliberately lifted verbatim, from Title VII to be put
4 into the Age Act. And what this Court held, basically,
5 it was that, look, whatever Congress's overall purpose
6 or general purpose behind the 1991 act, as a whole,
7 right, what we have to do is look at what it actually
8 did, what lines it actually drew in any given situation.

9 And here --

10 JUSTICE GINSBURG: Well, even looking --
11 let's look at what they actually did. If we look at
12 this (m) section, it says, "except as otherwise provided
13 in this subchapter." I take it that would include
14 retaliation as well, in the subchapter.

15 MR. JOSEFFER: Yes.

16 JUSTICE GINSBURG: "An unlawful employment
17 practice is established." And then, when we go over to
18 the retaliation provision, it says, "It shall be an
19 unlawful employment practice."

20 So why doesn't that suggest that the -- "an
21 employment practice" under the retaliation provision is
22 the same as "an employment practice" under this --

23 MR. JOSEFFER: Well, the -- under Title VII,
24 there are basically three different ways to establish an
25 unlawful employment practice. One is the general

1 provision for discrimination because of membership in a
2 class. One is because of retaliation. And this is
3 another one.

4 So this defines, basically, a third way of
5 establishing whether an employment practice is unlawful.
6 And what it says is that any employment practice that is
7 motivated by one of the five listed factors is an
8 unlawful employment practice. So this is why it all
9 keeps coming back to do those five factors, those five
10 motivations, do they or do they not include retaliation?
11 We agree with the Government that that's what it all
12 comes down to.

13 And, as to that question, I mean, there was
14 discussion, earlier today, about -- you know, the weight
15 of authority. I mean, nine courts of appeals have
16 squarely addressed this. They've all agreed with us
17 because Title VII's text and structure are so clear,
18 that Title VII -- and that's what -- that was the basis
19 for the distinction of Title VII in Gomez-Perez --
20 Excuse me. Gomez-Perez distinguished the identical
21 provisions of the Age Act, made the same point.

22 Jackson, again, said Title VII was vastly
23 different for this reason --

24 JUSTICE SCALIA: I can't understand you very
25 well. Could you -- maybe you have to lift up your mike,

1 or maybe you have to speak more slowly. But I'm having
2 an awful time following you.

3 MR. JOSEFFER: I apologize, Your Honor.

4 I was just saying the basic point is that,
5 as Jackson and Gomez-Perez indicated, the specific
6 controls the general. And, when Congress breaks out
7 retaliation, that's a different subset of discrimination
8 that's not then subsumed within discrimination based on
9 class.

10 Otherwise, you are reading out the
11 retaliation provisions and making them surplusage, which
12 is why all of the many courts of appeals that have looked
13 at this unanimously agreed with us.

14 JUSTICE GINSBURG: The EEOC didn't.

15 MR. JOSEFFER: Right. Well, the -- this
16 Court has already disagreed with the EEOC. The EEOC has
17 two footnotes and informal guidance that say that, under
18 the 1991 amendments, retaliation claims can be proven
19 under a mixed motive theory for any of the statutes that
20 the EEOC administers, which is clearly contrary to
21 Gross.

22 And that informal guidance does not
23 contain -- what it contains, basically, is -- you know,
24 policy analysis of why they would like that to be the
25 result, but no textual analysis whatsoever. There's --

1 so the guidance in one doesn't get deference because
2 it's contrary to the plain text of the statute, as
3 numerous courts of appeals have recognized.

4 And, two, in terms of its power to persuade,
5 I mean, this Court has already rejected it, and, even as
6 applied to Title VII retaliation -- you know, courts of
7 appeals have unanimously rejected it as well because
8 there is just policy there. There's no actual textual
9 analysis.

10 JUSTICE ALITO: As of 1991 -- well,
11 Gomez-Perez and Jackson came after 1991, right?

12 MR. JOSEFFER: Yes, the others before.

13 JUSTICE ALITO: So, as of 1991, was there
14 any case -- any decision of this Court other than
15 Sullivan, that could have possibly led Congress to a
16 conclusion that the general prohibition against
17 discrimination included a prohibition of retaliation?

18 MR. JOSEFFER: I think you are right about
19 the timing. And Sullivan was so general that -- I don't
20 know that the law was a whole lot different in 1991 than
21 it had been in '64 on this. But--

22 JUSTICE KAGAN: Well, but, Mr. Joseffer, in
23 CBOCS, we said that, because of Sullivan, alone -- just
24 because of Sullivan, there was no need for Congress to
25 exclude explicit language about retaliation. In other

1 words, we -- we said Sullivan made the point clear.

2 Now, Justice Alito was right. After that,
3 it goes on. We have done it many more times after 1991.
4 But we have said that Sullivan, itself, made the point
5 clear that you did not need explicit language about
6 retaliation.

7 MR. JOSEFFER: Right, but the -- and the
8 main point is the one I was making earlier, that, in
9 1991 itself, Congress was continuing to distinguish
10 between retaliation and discrimination based on class
11 and in provisions of this Act and also in the almost
12 simultaneously enacted Americans With Disabilities Act.

13 But there has been another provision in the
14 Disabilities Act that treats retaliation and
15 discrimination based on -- on disability is
16 significantly different, in terms of the remedies that
17 are available for the two. So, even at the same time,
18 Congress has, elsewhere, also been distinguishing
19 between the two.

20 JUSTICE KAGAN: I mean, here's what
21 you're -- this goes back to Justice Ginsburg's
22 question -- but here's what you're asking us to accept,
23 Mr. Joseffer: Congress comes along, in 1991, in a world
24 in which there has -- there have never been separate
25 standards for retaliation and substantive

1 discrimination.

2 Congress is trying to codify and make even
3 stronger the Price Waterhouse decision, right?

4 They -- you know, they say, basically, we like Price
5 Waterhouse, but it's kind of confused, and the court was
6 kind of fractured, we're going to really put it into
7 place legislatively.

8 They do that, they follow the --
9 essentially, the drafting manuals that we have given
10 them in Sullivan. And you're saying, well, no. What
11 they really meant was that retaliation would have a
12 different standard, and, indeed, that the retaliation
13 would have the standard that the dissenting justices
14 suggested in Price Waterhouse, notwithstanding that what
15 Congress was clearly intending to do was codify the -- the
16 plurality-plus position.

17 MR. JOSEFFER: Well, what -- Gross rejected
18 a fair amount of that reasoning, right? I mean, the
19 point is that Price -- you could say that, until Price
20 Waterhouse, there is no reason to think that there
21 should be mixed motive claims, right?

22 Now, Congress, shortly thereafter, came in
23 with the '91 amendments to say, okay, we'll have mixed
24 motive claims in this one category. Gross says that's a
25 relatively narrow category, we're going to assume

1 Congress does not want them anywhere else, even
2 though -- you know, discrimination under the Age Act or
3 under Title VII, you could ask why should it be
4 different? Well, because Congress decided it would be.

5 Here --

6 JUSTICE KAGAN: Well, Gross is talking about
7 outside of Title VII. And -- and whatever might be said
8 of Gross outside of Title VII, here, where Congress is
9 specifically trying to make Title VII conform with Price
10 Waterhouse, with the backdrop of our legislative
11 drafting instructions and with the backdrop of never
12 distinguishing between retaliation and
13 anti-discrimination -- you know, how do you get to where
14 you want to be?

15 This would be, like -- talk about elephants
16 in mouse holes or talk about -- you know, we can take up
17 all our cliches, the dog that didn't bark -- you know,
18 Congress doesn't do things like this without saying
19 something.

20 MR. JOSEFFER: Well, first off, it did
21 because, in this statute, as in others, it distinguishes
22 between discrimination based on membership in a class
23 and retaliation, but it wants to cover all of it, it
24 uses a more general phrase. When it wants to cover one
25 of them, it says one. Here, it said one.

1 But, beyond that, again, in terms of the
2 backdrop, though -- I mean, the -- the whole point of
3 Gross is that you -- you stick to the plain language of
4 '91, and that's -- that's where mixed motive treatment
5 is permitted, and, also, elsewhere there's a -- there's a
6 negative inference elsewhere that is so strong that, as
7 you said, it applies even in other statutes.

8 Well, if that negative inference applies in
9 other statutes, it would sure apply within the same
10 statute that -- that this provision exists in and is
11 amending. Also, there are significant differences
12 between discrimination based on class and retaliation
13 that Congress could -- didn't have to -- but could
14 certainly, reasonably, choose to follow. One is that
15 retaliation is -- excuse me.

16 The primary evil Congress was after here,
17 right, was discrimination based on race, sex, religion,
18 and so forth. Retaliation is an important derivative
19 prophylactic provision to help enforce the primary
20 right, but Congress could reasonably conclude that the
21 significant cons with mixed motive treatment did not
22 justify extending it to the secondary right.

23 Also --

24 JUSTICE SOTOMAYOR: Where do you see that
25 anywhere in the legislative history?

1 MR. JOSEFFER: The only thing you'll find in
2 the legislative history -- the only thing you'll find
3 that's specific to this, is that Congress was aware of
4 retaliation, including aware of Title VII's retaliation
5 provision, and it amended legislation to incorporate
6 that provision when it wanted to.

7 You're not going to find anything else in
8 there.

9 JUSTICE SOTOMAYOR: Well, but it -- it calls
10 it the same thing it calls the substantive
11 discrimination charge, an -- it's a -- an unfair
12 employment practice. I mean, I don't understand how
13 you -- where you get to your policy point --

14 MR. JOSEFFER: Well, the --

15 JUSTICE SOTOMAYOR: -- from the fact that it
16 calls it the same thing on both substantive.

17 MR. JOSEFFER: No, my -- my point is this:
18 This Court explained, for example, in Burlington
19 Northern, the two -- the two are both prohibited types
20 of discrimination, generally, under but-for standard,
21 but they are different, which is why we have different
22 labels and different names for the two categories.

23 And -- and Congress could reasonably choose
24 to give greater protection to the primary right and not
25 the secondary one, considering the negative.

1 JUSTICE SOTOMAYOR: Calls it both identical
2 things, an unlawful employment practice.

3 MR. JOSEFFER: Yes. And, textually -- but
4 it then describes seven different unlawful employment
5 practices, discrimination based on the five classes and
6 discrimination based on the two types of protected
7 conduct.

8 This provision then applies to the five
9 practices and leaves out the two types of protected
10 conduct, which is why, textually speaking -- and there's
11 no contrary legislative history -- Congress meant to
12 apply this to some, but not all types of unlawful
13 conduct -- of unlawful -- of employment practices.

14 And the reason that that's perfectly
15 rational is three things. First, as I mentioned, this
16 is the secondary of them. Second, it sweeps -- by its
17 nature, retaliation sweeps so much broader, well outside
18 of the traditional workplace, that while Congress was
19 thinking about jettisoning traditional burdens of proof
20 and relieving a plaintiff of the -- of the traditional
21 burden of proving its own case, they could certainly
22 balk at doing that in a much broader setting.

23 And, third, the potential for meritless and
24 abusive suits is particularly pronounced in a
25 retaliation context because any employee, at all, can

1 opt into a retaliation claim by making a charge of -- a
2 relevant charge, knowing that -- you know, potentially
3 knowing that, yeah, the writing's on the wall, that,
4 I probably am going to be fired.

5 And if you then flip the burden, so the
6 plaintiff doesn't have prove its own claim, the
7 plaintiff can point to the timing of his own complaint,
8 the inevitable employment action that would have happened
9 anyway, and the proximity of them is probably going to
10 get the plaintiff past summary judgment.

11 Now, when you're then looking at an
12 expensive and unpredictable trial, most defendants will
13 be forced to settle even meritless claims. And the
14 EEOC's own statistics show that, one, retaliation claims
15 have become all the rage.

16 They are the -- the leading type of claims
17 being raised these days. And, two, the EEOC's
18 reasonable cause determination show that only 5 percent
19 of them have even reasonable cause to support them,
20 which is not an especially high standard.

21 So, when we're talking about a potential
22 massive amount and growing amount of mostly meritless,
23 but expensive litigation to defend, it's perfectly
24 reasonable for Congress to decide, well, within the
25 scope of what Price Waterhouse was exactly dealing

1 with -- to get back -- to get back to Justice Kagan's
2 point -- we'll have -- we'll allow some mixed motive
3 treatment there, but that'll be it now,
4 because -- because there are other issues with
5 retaliation that caused -- caused Congress to reasonably
6 do exactly what it so clearly did in statutory text.

7 JUSTICE SOTOMAYOR: But that policy argument
8 just says Jackson's wrong.

9 MR. JOSEFFER: No, not at all.

10 JUSTICE SOTOMAYOR: It just doesn't make
11 any -- much sense to me that, in 1991, when they were
12 thinking about Price Waterhouse burdens, that, somehow,
13 they thought that it should now apply that burden
14 differently to retaliation.

15 MR. JOSEFFER: It -- it was -- the same
16 argument was rejected in Gross, right? Because, in
17 Gross, you had another absolutely identical provision
18 to -- to the -- to the two Title VII provisions at issue
19 here.

20 And this Court held that, no, what Congress
21 was doing, in 1991, was specifically authorizing mixed
22 motive treatment when it wanted and otherwise casting
23 what this Court called the strongest possible inference,
24 that there would be no other mixed motive treatment.

25 JUSTICE BREYER: Is -- is this a violation

1 of Title VII? I don't know the answer. Smith works for
2 Jones. Jones' whole job is to supervise Smith and be
3 certain that Smith, a well-known racist, has kept his
4 racism under control. He didn't.

5 Smith -- they fired someone -- Smith
6 did -- did some terrible thing and got rid of somebody
7 for racist reasons. He tells his boss. His boss knows
8 it. His boss does nothing about it. All right?

9 Is the boss violating Section VII? He -- he
10 had no reason for doing nothing about it. He, himself,
11 wasn't a racist. It was just his job. But he didn't.
12 Is he -- is he violating Section VII?

13 MR. JOSEFFER: If I understand the hypo
14 right, there's no question that the immediate supervisor
15 and the employer --

16 JUSTICE BREYER: The immediate supervisor
17 does --

18 MR. JOSEFFER: But-for -- but-for causation.

19 JUSTICE BREYER: All right. Now --

20 MR. JOSEFFER: So it's just a supervisory
21 hypo question?

22 JUSTICE BREYER: Yes, yes, yes. Okay. So,
23 there, what we have is somebody is guilty under
24 Section VII, even though that individual did not,
25 himself, discriminate on the basis of race, it was

1 circumstances where the subordinate discriminated on the
2 basis of race. All right?

3 And, yet, the -- there's no doubt that (m)
4 applies to that. (M) applies to that, I imagine, unless
5 you're going to start distinguishing, within Title VII,
6 are you going to say (m) doesn't apply to that?

7 My question's going to be, if (m) applies to
8 that, then why doesn't it also apply here? Because you
9 see, here, what you have is -- it's at one removed. It
10 is the individual who is retaliating -- been retaliated
11 against. That individual did not discriminate on the
12 basis of race, nor did the individual in Farr read into
13 it, but the whole thing is based on race.

14 And if, sometimes, under Section VII,
15 simpliciter, people are guilty, although the race
16 motive -- the race involvement is one level down, why
17 wouldn't you -- that, perhaps, is too complicated a
18 question, and if -- you only have five minutes left, so
19 I will take your answer as being, Judge, you better
20 think this out on your own.

21 (Laughter.)

22 MR. JOSEFFER: No, no, no. No, no.
23 I -- hopefully, I'm keeping up with you. If not, please
24 tell me.

25 It seems to me that there were, basically,

1 two different parts to that. One is, in terms of your
2 main hypo -- your first hypo, I don't know that 2(m)
3 even comes into play because it sounds to me like
4 the -- the intermediate supervisor is clearly liable
5 under 2(a), under a but-for theory, and then you just
6 get into a vicarious liability question.

7 I -- I don't think 2(m) gets into that.

8 JUSTICE BREYER: Obviously, you are better
9 off keeping your time.

10 MR. JOSEFFER: I was going to say, under
11 2(m), though, I think the overriding point here is that,
12 if I have two thoughts in my head, a bad one, but then I
13 go ahead and treat the person the same way I would have
14 anyhow, then I have done what, under Title VII,
15 generally understood, I am supposed to do, which is I
16 treat everyone equally, regardless of the bad thought in
17 my head.

18 And, at that point -- and that's why mixed
19 motive claims really threaten to take the statute from
20 one that ensures equal treatment to one that goes
21 into -- you know, thought control.

22 Beyond that, I will take the advice and save
23 my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Lauten.

1 ORAL ARGUMENT OF BRIAN P. LAUTEN

2 ON BEHALF OF THE RESPONDENT

3 MR. LAUTEN: Mr. Chief Justice, may it
4 please the Court:

5 It does not make any sense at all for
6 Congress to have created two causation standards under
7 the same statute in 1991 without saying anything about
8 it at all. There are three good reasons why Congress
9 had not to amend e-3(a) in 1991.

10 The first is, in 1964, that is when e-3(a)
11 was originally drafted. It was part of the original
12 bill. 5 years later, in 1969, in Sullivan v. Little
13 Hunting Park, this Court held that 42 U.S.C. 1982
14 included retaliation. So, in 1991, Congress knew that
15 retaliation was encompassed within discrimination.

16 Point number 2 --

17 JUSTICE SCALIA: Why did they -- why did
18 they include it in a separate section? If they knew
19 that, why did they have a separate section on
20 retaliation?

21 MR. LAUTEN: Well, when Congress added e-2
22 in, Justice Scalia, it supplemented the Act. It created
23 a new provision altogether.

24 JUSTICE SCALIA: I understand that. Why did
25 they do it, if they knew it was already included?

1 MR. LAUTEN: Well, they didn't have to amend
2 e-3(a) because there were policy -- the Burlington
3 Northern case, for example, where this Court held that
4 retaliation is considerably broader, that provision,
5 where -- where the Court held that retaliation in
6 Burlington actually went beyond conditions in the
7 workplace, that was the second reason.

8 And the third reason is imagine if they had
9 amended e-3(a) or if they had deleted or repealed it.
10 We would be here saying, well, why did they do that, if
11 they had already knew in Sullivan, since 1964, why would
12 they amend the Act?

13 E-2(m), on its text, applies to e-3(a).
14 Congress could have very well put an e-2(m) under this
15 section. It could have very well put an e-2(m), an
16 individual's race, color, religion, sex, national
17 origin, but what it did was it said a complaining party
18 must demonstrate -- and then it lists those things. And
19 then it says, "for any employment practice."

20 E-3(a) specifically defines retaliation as
21 an unlawful employment practice. So the text of e-2(m),
22 which, again, was a new provision altogether -- Congress
23 did not go in and amend e-2(a) through e-2(d), as it
24 easily could have done, but it created a new provision.

25 The motivating factor --

1 JUSTICE ALITO: I take -- I take you back to
2 your opening statement, that there is no reason why
3 Congress might have wanted to have a different standard
4 for substantive discrimination and retaliation.

5 Would you disagree with the proposition that
6 the motivating factor analysis creates special problems
7 in the retaliation -- in the retaliation context?

8 MR. LAUTEN: Not at all, Your Honor, and
9 this is the reason -- and this Court needs to keep this
10 in mind. Motivating factor causation is not going away
11 no matter what this Court holds today. It's in e-2(m),
12 it is going to apply to substantive discrimination.
13 With respect to how it's submitted --

14 JUSTICE ALITO: Well, I know it's not going
15 to go away. Let me give you this example -- this
16 hypothetical. An employee thinks that he is about to be
17 fired. And let's -- let's suppose that the employer
18 really has a good, nondiscriminatory reason for firing
19 the employee. On the eve of that, the employee makes a
20 spurious charge of discrimination and does it in a way
21 to maximize the embarrassment to the employer.

22 Then the employer formally makes the
23 decision to terminate the employee. And what the
24 employer says at that time is, we were going to fire
25 so-and-so anyway for all these other reasons, but, now,

1 because he has done this and really embarrassed us
2 publicly, we are really happy that we are going to fire
3 him.

4 Now, how does that work out under the
5 motivating factor analysis?

6 MR. LAUTEN: Very easily because, in that
7 situation, the employer wouldn't even have to prove the
8 affirmative defense because the employee wouldn't be
9 able to prove a violation of the Act because it was a
10 spurious claim. That's point number 1. But point
11 number --

12 JUSTICE ALITO: Is that correct? Can't
13 you -- can't you succeed on a retaliation claim if your
14 underlying substantive claim is invalid?

15 MR. LAUTEN: You cannot prevail on a
16 retaliation claim under e-2(m) without proving, first, a
17 violation of the Act, and that is the distinction
18 Congress made in e-2(m) for Price Waterhouse, whereas
19 Price Waterhouse held there was no violation, as long as
20 the affirmative defense was proven.

21 What Congress did in 1991 was say, once you
22 prove a motivating factor and a violation of the Act,
23 only then do you get to the affirmative defense.

24 JUSTICE SCALIA: No, I really don't
25 understand -- I didn't understand the law to be that.

1 You mean if -- if an employee files a discrimination
2 claim, and then is fired -- let's assume there is no
3 other reason, except retaliation; he's fired for filing
4 that claim -- he has to prove not only that he was fired
5 in retaliation for filing, but also that his claim was
6 valid?

7 Is that what you are saying the law is?

8 MR. LAUTEN: No, no, no, I'm not saying
9 that. I'm not saying that.

10 JUSTICE SCALIA: I thought that's what you
11 were saying. I thought that's what Justice Alito's
12 question asked.

13 MR. LAUTEN: No. What I'm saying is that
14 that -- and you can look at the jury instructions in
15 this case -- you would have to prove that the employer
16 acted in part to retaliate and -- for the protected
17 activity.

18 JUSTICE SCALIA: In his hypothetical, he
19 did. Justifiable retaliation, as far as I am concerned.
20 I mean, the employer files a frivolous claim to
21 embarrass the employer. He can't erase that from his
22 mind. That's one of the reasons he fired this guy. And
23 you say, oh, if that's one of the reasons, no matter how
24 frivolous or anything else, he's liable under the law.

25 MR. LAUTEN: Well, here's -- here's our

1 position, Justice Scalia, our position, number one, is
2 the Court doesn't even get to that issue because the
3 statute applies. If e-2(m) applies, then motivating
4 factor causation applies. If it doesn't apply, if the
5 Court rejects our statutory argument, then, by default,
6 we are under the Price Waterhouse framework, and
7 motivating factor causation should apply.

8 But to the policy question, Justice Alito --

9 JUSTICE SCALIA: I don't understand that.

10 Do you understand that?

11 MR. LAUTEN: Substantive discrimination, the
12 teeth of the Act, relies on employees being able to
13 cooperate and be witnesses, that they have the guts to
14 come forward. If you take that protection away, you are
15 taking the teeth out of Title VII.

16 JUSTICE ALITO: Well, no, I understand that,
17 and it's not a policy question. It's a question of
18 interpreting the statute. But I understood your lead
19 argument in favor of a particular interpretation of the
20 statute to be it can't mean what the Petitioner wants it
21 to mean, what the Petitioner says it means because that
22 would make no sense.

23 And the point of my question was to explore
24 the possibility that there might be a very good reason
25 why Congress would want a different causation standard

1 for substantive discrimination and -- and retaliation.

2 MR. LAUTEN: There is nothing in the
3 legislative history in 1991 that supports that. In
4 fact, I would argue the contrary. When Congress passed
5 Section 101 in 1991, which is 42 U.S.C. 1981, in that
6 provision where it overruled *Patterson v. McLean* and the
7 Court held that retaliation was encompassed within the
8 substantive discrimination provision, which is what the
9 Court held in *CBOCS v. Humphries*, in the House bill that
10 accompanied the Act, it said that Congress intended for
11 retaliation to apply to Section 101, but it's not in the
12 section at all that became 101 that was in *CBOCS*.

13 In *Gomez-Perez v. Potter*, as you well know,
14 this Court held the absence of retaliation provision
15 under the Federal sector provision did not undermine the
16 argument that retaliation was included, even though
17 Congress had a separate anti-retaliation provision in
18 the private sector.

19 And there was a very good argument from the
20 court of appeals, as you well know, that, hey, if
21 Congress wanted an anti-retaliation provision, why
22 wouldn't they have done so, they did it on the private
23 part?

24 And there were arguments the other way, that
25 there was already a civil service remedy in place. And

1 this Court rejected that argument, relied on Sullivan,
2 Jackson v. Birmingham, and those trilogy of cases --

3 CHIEF JUSTICE ROBERTS: Over -- over a
4 powerful dissent.

5 (Laughter.)

6 JUSTICE BREYER: I would just like to get to
7 what I think is one of their arguments, and I'm having
8 some -- the argument is purely linguistic, all right?
9 And they say, read (m). (M) says race is a motivating
10 factor in an unfair employment situation.

11 Now, we look to what the unfair employment
12 situation is, at the beginning, unfair employment
13 practice. It is to dismiss a person because of race,
14 all right? So, obviously, it applies. Now, we look to
15 the definition that we're at issue in here. It
16 says it's an unfair labor practice to dismiss a person
17 because of retaliation. Now, retaliation for what? For
18 race, that's true.

19 But we're -- we couldn't care less about
20 whether that race is part or a little bit or it's
21 all -- it could even be totally unjustified. What we're
22 interested in is the retaliation. So they say, you see,
23 the words of (m) do not speak about race. They speak
24 about retaliation. They speak about race.

25 So whatever the policy reasons are, you

1 can't do it any more than if you have a statute that
2 refers to carrots and you try to put in a beet. You
3 just can't do it. Now, that's the answer -- I -- I
4 would like to hear an answer.

5 MR. LAUTEN: Yes, sir, Your Honor. I think
6 the point is that complaining about race is race
7 discrimination. The Court held that in Sullivan.
8 Complaining about gender discrimination is -- it's
9 gender discrimination, Jackson v. Birmingham.

10 Complaining about --

11 JUSTICE BREYER: So you have to say
12 retribution for race is race? Yes.

13 MR. LAUTEN: Yes. What I'm saying --

14 JUSTICE BREYER: Now -- now, what I was
15 looking for, perhaps without success, is some other
16 example that has nothing to do with retribution, but
17 where that's clearly so, that's why the example came
18 into my mind that it is possible that you could, under
19 the basic unfair employment section, find a person
20 liable of race discrimination, even though that person
21 himself was not motivated by race, but perhaps had an
22 obligation to report a race discrimination, which he
23 failed to do because he wanted to go to the racetrack.
24 You see?

25 I'm looking for some other -- is there any

1 other example in the history of these statutes where
2 we've said, you, Mr. Jones or Ms. Smith, you are guilty
3 of race discrimination, even though that's because of
4 your responsibilities because of what you did or didn't
5 do, it's not because you, yourself, held the motive, but
6 you -- you'd attribute the motive to them for reasons to
7 do with the statute.

8 Is there -- does that ring any bell at all?

9 MR. LAUTEN: If -- if I understand your
10 question, what I would default to are the three or four
11 cases that I mentioned: Sullivan,
12 Jackson v. Birmingham, CBOCS v. Humphries,
13 Gomez-Perez v. Potter, where this Court has consistently
14 held that complaining about discrimination is
15 intentional discrimination.

16 And I want to bring up --

17 JUSTICE BREYER: Now, I have looked --

18 JUSTICE SCALIA: But -- but not under this
19 statute. What I'm concerned about is the text of this
20 statute, which simply destroys your argument that
21 there's no difference between retaliation and race
22 discrimination.

23 Section 2000e-5(g)(2)(A) limits remedies
24 where a defendant acted -- and this is a quote from the
25 statute -- "for any reason other than discrimination on

1 account of race, color, religion, sex, or national
2 origin, or in violation of Section 2000e-3(a) of this
3 title."

4 It -- it separates out 2000e-3(a),
5 retaliation, from the other aspects of race, color,
6 religion, sex, or national origin discrimination.

7 MR. LAUTEN: Justice Scalia, that's
8 incorrect, and this is why -- this is -- this is exactly
9 my point. 5(g)(2)(A), the text of that, that was
10 drafted by the 1964 Congress. That was a part of the
11 original bill. 5 years after that text came through,
12 this Court held, in Sullivan v. Little Hunting Park,
13 that retaliation encompasses discrimination.

14 So why, in 1991, would Congress go amend
15 5(g)(2)(A) from 1964, when it already knew? When it --

16 JUSTICE SCALIA: Sir, the statute says what
17 it says. It doesn't matter when Congress put it in
18 there. The statute has to be read as a whole. And, if
19 you read it as a whole, this provision clearly separates
20 out retaliation from race discrimination.

21 MR. LAUTEN: That -- that --

22 JUSTICE SCALIA: Period. I mean, it
23 doesn't -- I don't have to psychoanalyze Congress and
24 say did they really mean it, blah, blah, blah. It's
25 there in the statute. They didn't take it out. The

1 statute still makes a clear distinction between the two.

2 MR. LAUTEN: Justice Scalia, respectfully,
3 that argument is directly contrary to
4 CBOCS v. Humphries, and it's directly contrary to
5 Gomez-Perez, where this Court held that Congress is
6 charged with knowing what this Court is deciding prior
7 to acting.

8 CHIEF JUSTICE ROBERTS: But it would have
9 been so easy. There -- it's -- it's a set, race, color,
10 religion, sex or national origin. And why would they
11 leave it out?

12 MR. LAUTEN: Why would they leave 5(g)(2)(A)
13 out?

14 CHIEF JUSTICE ROBERTS: Why would they leave
15 "or in violation of Section 2000e-3(a)"?

16 MR. LAUTEN: Well, here's my response to
17 that --

18 CHIEF JUSTICE ROBERTS: I know your argument
19 is, well, look, the Court's already said, well,
20 that's -- that's included, but they've got two
21 provisions fairly close to each other, and I don't know,
22 if they're running through the usual list, why they
23 wouldn't have just run through a list as it appeared in
24 (g)(2)(A).

25 MR. LAUTEN: Well, this is really important.

1 The word "retaliation" is nowhere in Title VII at all.
2 That's point number 1. Point number 2 is,
3 if -- Congress could have specifically put in there an
4 individual's race, color, religion, sex, or national
5 origin, and, clearly, that would have been anchored to
6 e-2(a) to e-2(d).

7 Instead, it created a different provision
8 altogether, e-2(m), and specifically said a complaining
9 party demonstrates, and it didn't say under this
10 section, and it defines any unlawful employment
11 practice. Any.

12 And then, if you look at e-3(a), it
13 specifically defines what we refer to as retaliation,
14 albeit Title VII doesn't use that word, as an unlawful
15 employment practice.

16 Now, I want to make this really clear
17 because the Government is not making this -- this
18 argument. If you reject our statutory argument -- if
19 you reject that argument and you find that e-2(m) does
20 not govern e-3(a), although we strongly urge the Court
21 to -- to embrace that argument, as the Solicitor General
22 has done as well, but, if you reject that argument, by
23 default, we're under Price Waterhouse -- juries have
24 been instructed since jury trials started in 1991, under
25 a Price Waterhouse framework in retaliation cases.

1 And this argument about unwarranted
2 retaliation claims, this is the way we've been doing it
3 since 1991. This isn't something new. Juries have been
4 instructed this way since '91. So this idea about
5 creating new jurisprudence, this is a huge step
6 backwards from the framework we've been working under.

7 JUSTICE GINSBURG: But your alternate
8 argument would -- would involve two standards, the one
9 that Congress provided for substantive discrimination,
10 the -- the improvement on -- on Price Waterhouse and
11 then for retaliation, Price Waterhouse.

12 MR. LAUTEN: Just --

13 JUSTICE GINSBURG: And I started
14 this -- this argument by asking, is there -- in the
15 realm of anti-discrimination law, is there any example
16 where you have the -- the substantive charge governed by
17 one standard and retaliation by another?

18 MR. LAUTEN: No, ma'am. And -- and you
19 brought up a great point. I am aware -- true to Justice
20 Kagan's point, earlier -- I am aware of nowhere in
21 American history of Congress ever creating two causation
22 standards for retaliation and discrimination, especially
23 under the same statute.

24 JUSTICE SCALIA: It might be a good idea,
25 though, and -- and, if so, Congress can do it, right?

1 MR. LAUTEN: Well, that's --

2 JUSTICE SCALIA: I mean, the issue is
3 whether this statute does it or not. The fact that
4 nobody has ever done it before, what difference does
5 that make?

6 MR. LAUTEN: Well, I think the Court has to
7 interpret the Act, but going back to Judge Ginsburg's --

8 JUSTICE KENNEDY: Do -- do you agree with
9 the government's position that the limited affirmative
10 defense provisions Congress enacted, that is to say,
11 limited damages when there's multiple or mixed motives,
12 would also apply to retaliation cases?

13 MR. LAUTEN: Absolutely. If this Court
14 embraces our argument, 5(g)(2)(B) would apply to
15 retaliation. But I want to -- this is really important.
16 Judge Ginsburg brought up a great point -- Justice
17 Ginsburg. If you do the fallback to Price Waterhouse,
18 it doesn't create two causation standards. The juries
19 are going to be instructed the same way.

20 The only thing that's going to happen is, if
21 they prove the affirmative defense, it's a complete bar.
22 Whereas, if you're under the e-2(m) amendment, it goes
23 to the remedy, but that is an issue at the time of
24 judgment.

25 So, no, there -- there won't be two

1 causation standards under Title VII.

2 JUSTICE ALITO: Well, Price Waterhouse is a
3 little different from subsection (m) though, isn't it?
4 You have to have proof of -- you have to have direct
5 evidence of a substantial -- direct and substantial
6 evidence before you get into Price Waterhouse, right?
7 You don't need that under subsection (m).

8 MR. LAUTEN: I don't have -- I don't have an
9 answer for that. The answer is I do not know.

10 My -- my belief is that e-2(m) and
11 5(g)(2)(B) -- the distinction e-2(m) makes is that it
12 makes it a violation of the Act to prove an illegal
13 motive, whereas, in Price Waterhouse, you haven't
14 violated the Act at all until the affirmative defense is
15 disproved, so that that is the distinction with e-2(m).

16 5(g)(2)(B) just goes to the remedy, whereas
17 the affirmative defense of Price Waterhouse was a
18 complete bar. So my point is, is that, even if the
19 Court, by default, finds that e-2(m) does not apply, you
20 are not exchanging or creating two standards.

21 All that is going to happen is that, if the
22 affirmative defense is prevailed upon under the default
23 Price Waterhouse standard, it's a complete bar, whereas
24 5(g)(2)(B) limits the remedies. That's the
25 only distinction.

1 JUSTICE ALITO: Isn't that the -- isn't it
2 the case that Justice O'Connor's opinion in Price
3 Waterhouse required direct evidence and substantial
4 evidence before there was a shift in the burden of
5 proof.

6 MR. LAUTEN: I think judge -- I think
7 Justice O'Connor, in her concurrence, did say direct
8 evidence under Price Waterhouse, albeit six judges
9 agreed, in 1989, that motivating factor causation
10 applies.

11 The -- I guess the last point that I want to
12 make is this Court really needs to consider this record
13 on its face. Dr. Nassar, after going through months of
14 discrimination, finally reports that he's leaving.

15 In this record, Dr. Fitz admitted to
16 Dr. Keiser -- Dr. Keiser, a white Baptist supervisor to
17 Dr. Nassar, goes and -- and reports it --

18 CHIEF JUSTICE ROBERTS: All right. Thank
19 you, counsel.

20 MR. LAUTEN: Sorry. Thank you for your
21 time.

22 CHIEF JUSTICE ROBERTS: Ms. Sherry.

23 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE RESPONDENT

1 MS. ARBUS SHERRY: Mr. Chief Justice, and
2 may it please the Court:

3 I want to start, Justice Alito, with your
4 question as to why it would make sense or why it might
5 make sense for Congress to adopt a different causation
6 standard with respect to substantive discrimination on
7 the one hand and retaliation on the other.

8 And what that question reveals is what,
9 Justice Kagan, you had mentioned. There is not a single
10 statute that Petitioner can point to and not a single
11 statute that I am aware of, where Congress has ever
12 expressly adopted two different causation standards,
13 with respect to intentional discrimination under the
14 same statute.

15 JUSTICE KENNEDY: But I thought -- I thought
16 the thrust of Justice Alito's question was that
17 retaliation claims are -- are now quite common, and they
18 can almost be used as a defensive -- as a defense when
19 you know you are about to be hired. And, if that's
20 true, shouldn't we be very careful about the causation
21 standard?

22 MS. ARBUS SHERRY: And on that --

23 JUSTICE KENNEDY: And so -- so that -- that
24 was the thrust of -- of his question.

25 MS. ARBUS SHERRY: And -- and I want to

1 address that because I don't think that's quite right.
2 You can't just scream "discrimination" when
3 you're -- you know, when the writing is on the wall and
4 you know you're going to get fired.

5 As this Court recognized in Clark County,
6 the courts of appeals have uniformly, in opposition
7 cases, required there to be a reasonable good-faith
8 belief that the discrimination actually occurred. So,
9 if we are talking about truly frivolous claims, I know I
10 am going to get fired -- you know, I might as well say
11 my boss is -- you know, sexually harassing me, that's
12 not going to happen; those cases are going to be weeded
13 out.

14 The other point I would make --

15 CHIEF JUSTICE ROBERTS: Where are they --
16 where are they going to be weeded out? On summary
17 judgment or on -- after trial?

18 MS. ARBUS SHERRY: At summary judgment. And
19 they are weeded out at summary judgment. In
20 cases -- there needs to be a protected activity, and it
21 is not a protected activity if your claim of
22 discrimination -- you don't have a reasonable belief in
23 that claim.

24 Again, you can't just scream
25 "discrimination," as they are kicking you out the door.

1 The other point I would --

2 JUSTICE ALITO: That's -- that's a fair
3 point, but it's, like, if we change it a little bit so
4 that it's -- it's not frivolous, but it is clearly
5 groundless, once its examined, then you still have the
6 problem.

7 MS. ARBUS SHERRY: And then I don't think
8 it's as severe of a problem as Your Honor is suggesting,
9 for a couple of different reasons.

10 Number one, if you are positing a situation
11 where there is clear evidence that the employer would
12 have made the same decision, regardless, that is a
13 defense that is available to the employer, and there is
14 no reason they couldn't seek partial summary judgment
15 with respect to that. That severely limits the remedies
16 that are available --

17 JUSTICE SCALIA: Excuse me. I don't
18 understand. Say it again?

19 MS. ARBUS SHERRY: In circumstances where
20 the employer would have made the same decision --

21 JUSTICE SCALIA: Right.

22 MS. ARBUS SHERRY: -- even without the
23 improper motive --

24 JUSTICE SCALIA: Yes.

25 MS. ARBUS SHERRY: -- that is a defense

1 under (g)(2)(B), and it's something that the employer
2 could certainly raise on partial summary judgment that
3 would severely limit the remedies available.

4 The other point I would make is it does
5 still needs to be a motivating factor. It needs to
6 actually play a role in the employment decision, and so
7 that is the standard. And it's a standard that -- you
8 know, that Congress has adopted, clearly, with respect
9 to substantive discrimination claims.

10 And if I could turn, now, to the language of
11 the statute because that is our primary argument, if you
12 look at the language --

13 CHIEF JUSTICE ROBERTS: Just before you do
14 that --

15 MS. ARBUS SHERRY: Sure.

16 CHIEF JUSTICE ROBERTS: -- because I
17 understood we are talking about what possible reason
18 there could be for drawing this distinction. It seems
19 to me that the protection against discrimination --
20 race, color, religion, sex -- that sets forth the basic
21 principle of -- of fair and equal treatment.

22 The anti-retaliation provision is more
23 functional. The way you protect against that
24 discrimination is you make sure people don't retaliate
25 when they complain about it. Now, that seems, to me, to

1 be an order of -- of hierarchy removed from the basic
2 principle. So, perhaps, you would have a different
3 standard of causation when you deal with that.

4 MS. ARBUS SHERRY: And I don't think it is,
5 for the reasons that this Court talked about in
6 Burlington Northern and in Thompson and in Crawford, and
7 what the Court said in those cases is that the two are
8 linked together. You do need to have robust retaliation
9 protections, in order to ensure that that primary
10 purpose, that discrimination, is outside of the
11 workplace.

12 And so, if employees are worried or afraid
13 to come forward and report discrimination, the
14 discrimination is going to persist. It's not going to
15 be remedied. And so the two are linked together, and it
16 makes sense to have the same --

17 CHIEF JUSTICE ROBERTS: Well, that -- I
18 think that was my point, that they are linked together
19 but they are at different levels. I mean, the -- you
20 protect against retaliation, so that the protection
21 against race, color, national origin can be vindicated.

22 MS. ARBUS SHERRY: And I -- I agree with
23 Your Honor. I think you -- that is the reason you
24 protect against retaliation. And, in order to have
25 sufficient protections so that interest can be

1 vindicated, individual employees need to feel
2 comfortable coming forward.

3 JUSTICE ALITO: The problem is --

4 MS. ARBUS SHERRY: And you have a --

5 JUSTICE ALITO: The problem is this: It's
6 one thing to say -- and it's a good thing to say to
7 employers, when you are making employment decisions, you
8 take race out of your mind, take gender out of your
9 mind, take national origin out of your mind. It's not
10 something you can even think about.

11 But, when you are talking about retaliation,
12 when you are talking about an employer who has been,
13 perhaps publicly, charged with discrimination and the
14 employer knows that the charge is not a good charge,
15 it's pretty -- it's very, very difficult to say to that
16 employer and very difficult for the employer to say, I'm
17 going to take this completely out of my mind, I'm not
18 even going to think about the fact that I am -- have
19 been wrongfully charged with discrimination.

20 Isn't that a real difference?

21 MS. ARBUS SHERRY: I don't think it is, and
22 I think it's significant, if we are talking about
23 distinguishing between retaliation -- it's significant
24 that Congress, in a number of whistleblower statutes, so
25 specifically retaliation statutes, has adopted a

1 contributing factor, a motivating factor standard, and,
2 in fact, has adopted a same-decision defense where you
3 need clear and convincing evidence.

4 So I think Congress's judgment is that that
5 distinction is not one that should be made, that it
6 is --

7 JUSTICE SCALIA: You -- you talk about
8 Congress as though it's a continuing body out there, the
9 same people, and would the same people that did this do
10 that. They are not the same people. I don't know what
11 Congress it was that passed this particular act versus
12 other anti-discrimination acts. Some of them may have
13 been Democratic Congresses, and others may have been
14 Republican Congresses.

15 To -- to assume that there is one Congress
16 out there that -- that has to operate logically in all
17 these areas, it seems, to me, unrealistic. And -- and
18 the best thing we can be guided by is, simply, the text
19 that Congress adopted, however the makeup of that
20 Congress happened to be.

21 MS. ARBUS SHERRY: And thank you,
22 Justice Scalia. I am actually happy to turn to the
23 text. I think it's important to look at the language of
24 Subsection (m) and it's on page 15a of our brief. And,
25 if you follow that language, it starts off very plainly

1 saying as, "Except as otherwise provided in Subchapter
2 (m), unlawful employment practice is established." This
3 is a means of proving an unlawful employment practice.

4 And we know, when you look at 3(a), which is
5 on page 17a of our brief, that retaliation is an
6 unlawful employment practice. Congress used that phrase
7 "unlawful employment practice" in Subsection (m). It's
8 an unadorned phrase. It didn't limit it. It didn't say
9 "under this section." It didn't say "under Section
10 2000e-2(a). It said "an unlawful employment practice."

11 And if you continue on, "when the
12 complaining party demonstrates that race, color,
13 religion, sex or national origin was a motivating
14 factor." And we know, under this Court's cases under
15 Gomez-Perez, under CBOCS, under Jackson and Sullivan,
16 that race is a motivating factor in an employment
17 decision that is based on retaliation when you've
18 complained about race discrimination.

19 And so the language of (m), the plain
20 language, clearly encompasses the retaliation claims in
21 Title VII. And so the only argument, I believe, that
22 Petitioner is making is that there are things elsewhere
23 in the statute that might make you think otherwise here.

24 And we would argue that none of them --

25 JUSTICE KENNEDY: Well, but under -- under

1 that analysis, you don't need the final clause on page
2 17a of your brief of 3, "because he has opposed." Race
3 is enough.

4 MS. ARBUS SHERRY: I think that defines what
5 the protected activity is. I don't think it is any
6 different than in Jackson or Gomez-Perez. In those
7 cases, it was a general discrimination provision, but,
8 once retaliation claims are recognized, there -- there
9 still actually needs to be protected activity. There
10 has to be opposition. There has to be participation of
11 some sort. And so I don't think it's any different in
12 that respect.

13 Justice Scalia, you were talking about
14 g-2(a), and, if I could just take a moment on that,
15 because that is one of the arguments that Petitioner is
16 making, my colleague made the point that it was adopted
17 by the 1964 Congress. It was adopted before Sullivan.
18 And so if I could focus on the 1991 Congress
19 that -- that enacted both subsection (m) and subsection
20 g-2(b), that Congress was acting in light of Sullivan.

21 And we know it was legislating with full
22 knowledge of Sullivan, because that's exactly what this
23 Court said in CBOCS. CBOCS involved Section 101,
24 rather, of the 1991 Act; this involves Section 107 of
25 the 1991 Act.

1 So we know that, when Congress was writing
2 (m) and when it was writing g-2(b), it knew, because of
3 Sullivan, that it didn't need extra words. It didn't
4 need redundant words. It didn't have to say, "under
5 Section 2000e-2 and Section 2000e-3." It could simply
6 say exactly what it said in (m), and that would do the
7 trick.

8 And it's a common rule of statutory
9 interpretation that you don't add extra words if you
10 don't need them. And so what Congress did in (m) is it
11 adopted exactly what words it needed to effectuate its
12 purpose, which is to have one causation standard, a
13 motivating factor standard available, with respect to
14 all intentional discrimination claims under the statute.

15 JUSTICE SCALIA: But the maxim that you
16 don't add words where you don't need them doesn't --
17 doesn't help your case. It hurts your case because, in
18 the other provision that was carried over from the prior
19 law, you -- you were making a nullity of the -- the
20 addition after referring to discrimination on the basis
21 of race, of -- you know, retaliation.

22 MS. ARBUS SHERRY: Your Honor, may I?

23 To answer that question, it's important --
24 what happened in 1991, Congress didn't add that
25 language, it didn't amend that language. It simply

1 didn't delete it.

2 And I think it's completely reasonable, when
3 Congress is faced with a choice of deleting language
4 that had been there for 25 years, that wasn't a problem,
5 it's just, at worst, was redundant, chose to leave it in
6 place, lest any negative inference arise from the
7 deletion, and simply legislate, perspective, in
8 subsection (m), in g-2(b), based on the new
9 understanding that the Court adopted in Sullivan.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Joseffer, you have three minutes
12 remaining.

13 REBUTTAL ARGUMENT OF DARYL L. JOSEFFER

14 ON BEHALF OF THE PETITIONER

15 MR. JOSEFFER: Thank you.

16 This case seems to boil down to two very
17 simple legislative drafting rules or interpretive
18 principles. The first is, in -- from Gross, we know
19 that Congress doesn't relieve the plaintiff of the
20 traditional burden of proof, unless it specifically
21 indicates so. And so then we talk to subsection (m),
22 where the relevant bases are the litany of race, color,
23 sex, religion, and national origin.

24 So the second interpretive principle is,
25 then, does that litany here encompass -- you know,

1 complaining about unlawful conduct and participating in
2 an investigation, which are the protected conduct for
3 purposes of retaliation. That principle comes straight
4 out of Jackson and Gomez-Perez, that, when Congress
5 broadly refers to discrimination on the basis of race in
6 the statute, without greater specificity, the Court will
7 read retaliation in.

8 When Congress breaks it out, the surplusage
9 canon -- and I agree with Justice Scalia, I really
10 didn't understand why they were talking about that --
11 and, also, the general canon is the same canon, which
12 is, put differently, is that specific provisions -- you
13 know, control over general ones; they're not subsumed
14 within them.

15 That tells us that, when Congress is
16 speaking more specifically, it's speaking more
17 specifically. Here, that tells Congress, very clearly,
18 how to amend these statutes when it wishes to, which it
19 does all the time, and how the courts -- and how lower
20 courts should construe them.

21 In addition, Title VII, as a whole, is
22 especially clear because the same subsection 2 within
23 Title VII, when it wants to refer to all types of
24 employment discrimination, it will say, "a claim of
25 employment discrimination." And, by the way, the 1991

1 Congress put that provision in there.

2 So this Congress knew how to say, "any claim
3 of employment discrimination," as it did so in
4 subsection (n), which comes right after this one.
5 Congress will also say, "an unlawful employment
6 practice," when it's referring to all of them, but, when
7 it wants to specifically refer to one subset or another,
8 it does so. That's a clear, logical, coherent reading
9 of the statute as a whole that every court of appeals to
10 consider the question has adopted.

11 They're asking you to read various statutory
12 provisions to be surplusage, and there's simply no
13 reason to do so, especially because -- looking just at
14 1991, Congress, at that point, was not saying, oh, in
15 light of Jackson, we can now just speak more generally,
16 because it, specifically, in 1991, cross-referenced the
17 anti-retaliation provision of Title VII when it wanted
18 to, and it specifically used broader phrases like "a
19 claim of employment discrimination," when it wanted to.

20 And especially since the whole point of
21 Gross -- or much of the point of Gross was to replace a
22 totally unworkable and confusing regime with something
23 that is clear and straightforward, you've done that.
24 And the question, now, is whether to retreat back into a
25 jurisprudential morass where, within the very same

1 statute, the drafting rules this Court has otherwise
2 articulated, no longer apply.

3 The final point I'd make is that, yeah,
4 there's this question about are -- are we treating --
5 you know, retaliation and -- and substantive
6 discrimination differently within one statute, and the
7 answer is, well, yes, as Congress did. The other way of
8 looking at it is they want to treat retaliation
9 differently in this statute than it's treated in every
10 other statute.

11 You can -- you can point to similar
12 anomalies across the board, the reason being that
13 Congress has chosen to have two different sections
14 within this area. And --

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:04 p.m., the case in the
18 above-entitled matter was submitted.)

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