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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 -- 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.

1 JUSTICE GINSBURG: In the -- in the AIDS
2 discrimination context, there wouldn't be a difference
3 between the discrimination claim itself and the
4 retaliation. 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 that
13 in Title VII, where it's very clear what the standard
14 Congress wants to have for the discrimination claim,
15 you're going to have a different standard for
16 retaliation. So, in these statutes, I thought these two
17 traveled together, whatever the standard is for
18 discrimination is the same for retaliation.

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

1 limits --

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

10 Am I wrong about that?

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

18 JUSTICE KAGAN: I'll try again. Is there
19 any other statute in which we have a different standard
20 of causation for a retaliation claim than we do for a
21 substantive discrimination claim?

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

24 JUSTICE KAGAN: Well, is there -- I mean,
25 it's but-for everywhere. Is there even any time at

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

6 MR. JOSEFFER: Not -- I can't point to
7 anything specific because what we had, right, was --
8 there was -- I can't point to anything specific on that.
9 Up until the statute, the whole point of Gross, right,
10 is that the statute carves out a narrow exception from
11 but-for and --

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

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

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

1 statute we're talking about. If we're talking about
2 other aspects of retaliation and other types of
3 discrimination, there are differences in the statutes.

4 JUSTICE ALITO: Did this court ever hold
5 that a Price Waterhouse framework applied to retaliation
6 claims?

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

14 Then, two years later, Congress came in with
15 this amendment to specifically identify what it wanted
16 to do about mixed motive. And Gross says that except
17 for when Congress has specifically called for this mixed
18 motive treatment, it's but-for is the holding of Gross.
19 And when we look to this provision -- I mean, there are
20 different ways of looking at it, but one would be to say
21 that I'm not aware of any statute that has a specific
22 retaliation provision where this Court has construed
23 discrimination based on class generally to encompass
24 retaliation, because that would make the retaliation
25 provision here in 3a absolutely surplusage. It would

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

6 And this basic structure of these provisions
7 of Title VII is that when Congress wants to refer to all
8 Title VII discrimination claims, it will refer as it did
9 in subsection 2n to a claim of employment
10 discrimination, generally; it will refer as it did also
11 in section 2 to an unlawful employment practice, which
12 would cover the waterfront, but when it wants to cover a
13 specific subset, it refers to retaliation as spelled out
14 in 3(a), or to discrimination based on membership in one
15 of the five protected classes.

16 And here --

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

22 MR. JOSEFFER: Well, the reason -- well,
23 what Jackson says of course and Title VII is vastly
24 different. And the --

25 JUSTICE SOTOMAYOR: Well, different because

1 it was the beginning of this sort of endeavor of
2 creating a statute.

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

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

18 JUSTICE SOTOMAYOR: I'm -- I'm not sure what
19 difference it makes.

20 MR. JOSEFFER: Well, because otherwise, you
21 are taking the --

22 JUSTICE SOTOMAYOR: Other than in the
23 outcome you want here.

24 MR. JOSEFFER: As a matter -- well, as a
25 matter of statutory interpretation, right, which then

1 drives the outcome, the difference is that if -- if you
2 treat a specific retaliation reference or provision as
3 being subsumed within a more general one, a
4 discrimination based on race, for example, you are
5 treating the specific retaliation reference to be
6 surplusage, to have no effect and to not need to be
7 there, and you're treating the other statutory
8 cross-references to it as also being surplusages, which
9 is why, when Congress does speaks more directly this
10 Court's never overridden, never said that it will take a
11 specific retaliation provision and treat it like it's
12 not there and toss it and -- based on race, for example.

13 And that's why -- I mean, that's why those
14 general cases they cite, those are our cases, because
15 Jackson specifically says that Title VII is vastly
16 different for this very reason.

17 JUSTICE KAGAN: Well, Mr. Joseffer, I mean,
18 Title VII is written before any of these cases come
19 along. So Title VII is written and it says we have an
20 anti- -- you know, a substantive antidiscrimination
21 provision, and we have a retaliation provision. And
22 then the Court starts issuing cases. And it says, by
23 the way, you actually don't need both. One will do the
24 job for you, because one includes the other.

25 And that's in Sullivan. And that's in

1 Jackson. And that's in Gomez-Perez, and I'm sure I am
2 missing a few. Three, four, five times, the Court says
3 this.

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

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

19 Also, in this very provision, the Civil
20 Rights Act of 1991, Congress specifically
21 cross-referenced both the part of Title VII that
22 contains the general provision and the part of VII,
23 Section 3, that contains retaliation. So it's
24 specifically dealing with these separate provisions,
25 acknowledging that it has in fact presumptively at least

1 has read them and understands the distinction. I mean,
2 I think we presume it anyhow, but we know it from the
3 actual statutory text of the '91 -- 1991 Act. And
4 then --

5 JUSTICE GINSBURG: Well, it seems that the
6 overall purpose of the '91 Act was to overrule decisions
7 of this Court that Congress thought had not interpreted
8 Title VII properly.

9 And am I right that what they put about
10 motivating factor, a motivating factor, that is more
11 plaintiff-friendly than the -- than the standard that
12 the Court declared in -- in Price Waterhouse?

13 MR. JOSEFFER: For -- for those cases
14 that -- that the motivating factor provision governs,
15 it's more plaintiff-friendly, yes.

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

20 MR. JOSEFFER: That was basically the same
21 argument that this Court rejected in Gross, in -- in
22 that Gross involved an absolutely identical statutory
23 provision, that was lifted in fact, deliberately lifted
24 verbatim, from Title VII to be put into the Age Act.
25 And what this Court held, basically, it was that, look:

1 Whatever Congress's overall purpose or general purpose
2 behind the 1991 act as a whole, right, what we have to
3 do is look at what it actually did, what lines it
4 actually drew in any given situation. And here --

5 JUSTICE GINSBURG: Let's look at what they
6 actually did. If we look at this (m) section, it says,
7 "except as otherwise provided in this subchapter." I
8 take it that would include retaliation as well, in the
9 subchapter.

10 MR. JOSEFFER: Yes.

11 JUSTICE GINSBURG: -- "an unlawful
12 employment practice is established." And then when we
13 go over to the retaliation provision, it says, "it shall
14 be an unlawful employment practice."

15 So why doesn't that suggest that the -- "an
16 employment practice" under the retaliation provision is
17 the same as "an employment practice" under this --

18 MR. JOSEFFER: Well, the -- under Title VII,
19 there are basically three different ways to establish an
20 unlawful employment practice.

21 One is the general provision for
22 discrimination because of membership in a class. One is
23 because of retaliation. And this is another one. So
24 this defines basically a third way of establishing
25 whether an employment practice is unlawful. And what it

1 says is that any employment practice that is motivated
2 by one of the five listed factors is an unlawful
3 employment practice. So this is why it all keeps coming
4 back to do those five factors, those five motivations,
5 do they or do they not include retaliation? We agree
6 with the Government that that's what it all comes down
7 to.

8 And as to that question, I mean, there was
9 discussion earlier today about the weight of authority.
10 I mean, nine courts of appeals have squarely addressed
11 this. They've all agreed with us because Title VII's
12 text and structure are so clear, that Title VII -- and
13 that was the basis for the distinction of Title VII in
14 Gomez-Perez. Excuse me. Gomez-Perez distinguished the
15 identical provisions of the Age Act, made the same
16 point. Jackson again was vastly different for this
17 reason --

18 JUSTICE SCALIA: I can't understand you very
19 well. Could you -- maybe you have to lift up your mike,
20 or maybe you have to speak more slowly. But I'm having
21 an awful time following you.

22 MR. JOSEFFER: I apologize, Your Honor.

23 I was just saying the basic point is that,
24 as Jackson and Gomez-Perez indicated, the specific
25 controls the general. And when Congress breaks out

1 retaliation, that's a different subset of discrimination
2 that's not been subsumed within discrimination based on
3 class.

4 Otherwise, you are reading out the
5 retaliation provisions and making them surplusage, which
6 is why all of the many courts of appeals that looked at
7 this unanimously agreed with us.

8 JUSTICE GINSBURG: The EEOC didn't.

9 MR. JOSEFFER: Right. Well, this Court has
10 already disagreed with the EEOC. The EEOC has two
11 footnotes and informal guidance that say that under the
12 1991 amendments retaliation claims can be proven under a
13 mixed motive theory for any of the statutes that the
14 EEOC administers, which is clearly contrary to Gross.

15 And that informal guidance does not
16 contain -- what it contains basically is, you know,
17 policy analysis of why they would like that to be the
18 result, but no textual analysis whatsoever. There's --
19 so the guidance in one doesn't get deference because
20 it's contrary to the plain text of the statute, as
21 numerous courts of appeals have recognized.

22 And two, in terms of its power to persuade,
23 I mean, this Court has already rejected it and even as
24 applied to Title VII retaliation, you know, courts of
25 appeals have unanimously rejected it as well because

1 there is just policy there, there's no textual analysis.

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

4 MR. JOSEFFER: Yes, the other's before.

5 JUSTICE ALITO: So as of 1991, was there any
6 case, any decision of this Court other than Sullivan,
7 that could have possibly led Congress to a conclusion
8 that the general prohibition against discrimination
9 included a prohibition of retaliation?

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

14 JUSTICE KAGAN: Well, but, Mr. Joseffer, in
15 CBOCS, we said that because of Sullivan alone, just
16 because of Sullivan, there was no need for Congress to
17 exclude explicit language about retaliation. In other
18 words, we -- we said Sullivan made the point clear.

19 Now, Justice Alito was right. After that,
20 it goes on. We have done it many more times after 1991.
21 But we have said that Sullivan itself made the point
22 clear that you did not need explicit language about
23 retaliation.

24 MR. JOSEFFER: Right. But the -- and the
25 main point is the one I was making earlier, that in 1991

1 itself, Congress was continuing to distinguish between
2 retaliation and discrimination based on class, and in
3 provisions of this Act and also in the almost
4 simultaneously enacted Americans With Disabilities Act.

5 But there has been another provision in the
6 Disabilities Act that treats retaliation and
7 discrimination based on -- on disability is
8 significantly different in terms of the remedies that
9 are available for the two. So even at the same time,
10 Congress has elsewhere also been distinguishing between
11 the two.

12 JUSTICE KAGAN: I mean, here's what you're
13 ask -- this goes back to Justice Ginsburg's question --
14 but here's what you're asking us to accept,
15 Mr. Joseffer. Congress comes along in 1991 in a world
16 in which there has -- there have never been separate
17 standards for retaliation and substantive
18 discrimination.

19 Congress is trying to codify and make even
20 stronger the Price Waterhouse decision, right? They --
21 you know, they say, basically, we like Price Waterhouse,
22 but it's kind of confused and the court was kind of
23 fractured. We're going to really put it into place
24 legislatively.

25 They do that, they follow the -- essentially

1 the drafting manuals that we have given them in
2 Sullivan. And you're saying, well, no. What they
3 really meant was that retaliation would have a different
4 standard and, indeed, retaliation would have a standard
5 that the dissenting justices suggested in Price
6 Waterhouse, notwithstanding what Congress was clearly
7 intending to do was codify the majority -- the
8 plurality-plus position.

9 MR. JOSEFFER: Well, what -- Gross rejected
10 a fair amount of that reasoning, right? I mean, the
11 point is that Price Waterhouse -- you could say that in
12 Price Waterhouse, there is no reason to think that there
13 should be mixed-motive claims, right?

14 Now, Congress shortly thereafter came in
15 with the '91 amendments to say, okay. We'll have mixed
16 motive claims in this one category. Gross says that's a
17 relatively narrow category. We're going to assume
18 Congress does not want them anywhere else, even though,
19 you know, discrimination under the Age Act or under
20 Title VII, you could ask why should it be different.
21 Well, because Congress decided it would be.

22 Here --

23 JUSTICE KAGAN: Well, Gross is talking about
24 outside of Title VII. And -- and whatever might be said
25 of Gross outside of Title VII, here, where Congress is

1 specifically trying to make Title VII conform with Price
2 Waterhouse, with the backdrop of our legislative
3 drafting instructions, and with the backdrop of never
4 distinguishing between retaliation and
5 antidiscrimination, you know, how do you get to where
6 you want to be? This would be, like -- talk about
7 elephants in mouse holes or talk about -- you know, we
8 can take up all our cliches, the dog that didn't bark.
9 You know, Congress doesn't do things like this without
10 saying something.

11 MR. JOSEFFER: Well, first off, it did.
12 Because in this statute, as in others, it distinguishes
13 between discrimination based on membership in a class
14 and retaliation, but it wants to cover all of it, it
15 uses a more general phrase. When it wants to cover one
16 of them, it says one. Here it said one.

17 But beyond that, again, in terms of the
18 backdrop though -- I mean, the -- the whole point of
19 Gross is that you -- you stick to the plain language of
20 '91, and that's -- that's where mixed motive treatment
21 is permitted, and also where there's a -- there's a
22 negative inference elsewhere that is so strong that as
23 you said, it applies even in other statutes. Well, if
24 that negative inference applies in other statutes, it
25 would sure apply within the same statute that -- that

1 this provision exists in and is amending.

2 Also, there are significant differences
3 between discrimination based on class and retaliation
4 that Congress could -- didn't have to -- but could
5 certainly reasonably choose to follow. One is that
6 retaliation is -- well, excuse me.

7 The primary evil Congress was after here,
8 right, was discrimination based on race, sex, religion,
9 and so forth. Retaliation is an important derivative
10 prophylactic provision to help enforce the primary
11 right, but Congress could reasonably conclude that the
12 significant cons with mixed motive treatment did not
13 justify extending it to the secondary right. Also --

14 JUSTICE SOTOMAYOR: Where do you see that
15 anywhere in the legislative history?

16 MR. JOSEFFER: The only thing you'll find in
17 the legislative history, the only thing you'll find
18 that's specific to this, is that Congress was aware of
19 retaliation, including aware of Title VII's retaliation
20 provision, and it amended legislation to incorporate
21 that provision when it wanted to.

22 You're not going to find anything else in
23 there.

24 JUSTICE SOTOMAYOR: Well, but it -- it calls
25 it the same thing it calls the substantive

1 discrimination charge, an un -- it's a -- an unfair
2 employment practice. I mean, I don't understand how
3 you -- where you get to your policy point --

4 MR. JOSEFFER: Well, the --

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

7 MR. JOSEFFER: No, my -- my point is this.
8 This Court explained, for example, in Burlington
9 Northern, the two -- the two are both prohibited types
10 of discrimination, generally, under but-for standard,
11 but they are different, which is why we have different
12 labels and different names for the two categories.
13 And -- and Congress could reasonably choose to give
14 greater protection to the primary right and not the
15 secondary one considering the negative.

16 JUSTICE SOTOMAYOR: Calls it both identical
17 things, an unlawful employment practice.

18 MR. JOSEFFER: Yes. And textually, but it
19 then describes seven different unlawful employment
20 practices. Discrimination based on the five classes and
21 discrimination based on the two types of protected
22 conduct. This provision then applies to the five
23 practices and leaves out the two types of protected
24 conduct, which is why, textually speaking, and there's
25 no contrary legislative history, Congress meant to apply

1 this to some, but not all types of unlawful conduct --
2 of unlawful -- of employment practices.

3 And the reason that that's perfectly
4 rational is three things. First, as I mentioned, this
5 is the secondary of them. Second, it sweeps -- by its
6 nature, retaliation sweeps so much broader, well outside
7 of the traditional workplace. While Congress was
8 thinking about jettisoning traditional burdens of proof
9 and relieving a plaintiff of the -- of the traditional
10 burden of proving its own case, they could certainly
11 balk at doing that in a much broader setting.

12 And third, the potential for meritless and
13 abusive suits is particularly pronounced in a
14 retaliation context, because any employee at all can opt
15 into a retaliation claim by making a -- a charge of -- a
16 relevant charge, knowing that -- you know, potentially
17 knowing that, yeah, the writing's on the wall, probably
18 I'm going to get fired. And if you then flip the burden
19 so the plaintiff doesn't have prove its own claim, the
20 plaintiff can point to the timing of his own complaint,
21 the inevitable employment action would have happened
22 anyway, and the proximity, then, is probably going to
23 get the plaintiff past summary judgment.

24 Now, what you're then looking at is an
25 expensive and unpredictable trial, most defendants will

1 be forced to settle even meritless claims.

2 And the EEOC's own statistics show that,
3 one, retaliation claims have become all the rage. They
4 are the -- the leading type of claims being raised these
5 days. And, two, the EEOC's reasonable cause
6 determination show that only 5 percent of them have even
7 reasonable cause to support them, which is not an
8 especially high standard.

9 So when we're talking about a potential
10 massive amount and growing amount of mostly meritless
11 but expensive litigation to defend, it's perfectly
12 reasonable for Congress to decide, well, within the
13 scope of what Price Waterhouse was exactly dealing
14 with -- to get back -- to get back to Justice Kagan's
15 point -- we'll have -- we'll allow some mixed motive
16 treatment there, but that'll be it now, because --
17 because there are other issues with retaliation that
18 caused -- caused Congress to reasonably do exactly what
19 it so clearly did in statutory text.

20 JUSTICE SOTOMAYOR: But that policy argument
21 just says Jackson's wrong.

22 MR. JOSEFFER: No, not at all.

23 JUSTICE SOTOMAYOR: It just doesn't make
24 any -- much sense to me that in 1991, when they were
25 thinking about Price Waterhouse burdens, that somehow

1 they thought that it should now apply that burden
2 differently to retaliation.

3 MR. JOSEFFER: It -- it was -- the same
4 argument was rejected in Gross, right? Because in
5 Gross, you had another absolutely identical provision
6 to -- to the -- to the two Title VII provisions at issue
7 here. And this Court held that, no, what Congress was
8 doing in 1991 was specifically authorizing mixed motive
9 treatment when it wanted and otherwise casting what this
10 Court called the strongest possible inference that there
11 would be no other mixed motive treatment.

12 JUSTICE BREYER: Is -- is this a violation
13 of Title VII? I don't know the answer. Smith works for
14 Jones. Jones' whole job is to supervise Smith and be
15 certain that Smith, a well-known racist, has kept his
16 racism under control. He didn't. Smith -- they fired
17 someone -- Smith did -- did some terrible thing and got
18 rid of somebody for racist reasons. He tells his boss.
19 His boss knows it. His boss does nothing about it. All
20 right?

21 Is the boss violating Section VII? He -- he
22 had no reason for doing nothing about it. He himself
23 wasn't a racist. It was just his job. But he didn't.
24 Is he -- is he violated Section VII?

25 MR. JOSEFFER: If I understand the hypo

1 right, there's no question that the immediate supervisor
2 and the employer --

3 JUSTICE BREYER: The immediate supervisor
4 does.

5 MR. JOSEFFER: But-for, but-for causation.

6 JUSTICE BREYER: All right. Now --

7 MR. JOSEFFER: So it's just a supervisory
8 hypo question?

9 JUSTICE BREYER: Yes, yes, yes. Okay. So
10 there what we have is somebody is guilty under
11 Section VII. Even though that individual did not
12 himself discriminate on the basis of race, it was
13 circumstances where the subordinate discriminated on the
14 basis of race. All right? And yet the -- there's no
15 doubt that m applies to that. M applies to that, I
16 imagine, unless you're going to start distinguishing
17 within Title VII, are you going to say m doesn't apply
18 to that.

19 My question's going to be, if m applies to
20 that, then why doesn't it also apply here? Because you
21 see here, what you have is -- it's at one removed. It
22 is the individual who is retaliating been retaliated
23 against. That individual did not discriminate on the
24 basis of race, nor did the individual in Farr read into
25 it, but the whole thing is based on race.

1 And if sometimes under Section VII
2 simpliciter, people are guilty although the race
3 motive -- the race involvement is one level down. Why
4 wouldn't you -- that perhaps is too complicated a
5 question, and if you only have five minutes left, so I
6 will take your answer as being, "Judge, you better think
7 this out on your own."

8 (Laughter.)

9 MR. JOSEFFER: No, no, no. No, no.
10 Hopefully, I'm keeping up with you. If not, just tell
11 me.

12 It seems to me that there were basically two
13 different parts to that. One is, in terms of your main
14 hypo, your first hypo, I don't know that 2(m) even comes
15 into play because it sounds to me like the intermediate
16 supervisor is clearly liable under 2(a) under a but-for
17 theory. And then you just get into a vicarious
18 liability question. I don't think 2(a) gets into that.

19 JUSTICE BREYER: I would say you are better
20 off keeping your time.

21 MR. JOSEFFER: I was going to say under 2(m)
22 though, I think the overriding point here is that if I
23 have two thoughts in my head, a bad one, but then I go
24 ahead and treat the person the same way I would have
25 anyhow, then I have done what under Title VII, generally

1 understood, I am supposed to do, which is I treat
2 everyone equally regardless of the bad thought in my
3 head.

4 And at that point -- and that's why mixed
5 motive claims really threaten to take the statute from
6 one that ensures equal treatment to one that goes into,
7 you know, thought control.

8 Beyond that, I will take the advice and save
9 my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Lauten.

12 ORAL ARGUMENT OF BRIAN P. LAUTEN

13 ON BEHALF OF THE RESPONDENT

14 MR. LAUTEN: Mr. Chief Justice, may it
15 please the Court:

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

21 The first is in 1964, that is when e-3(a)
22 was originally drafted. It was part of the original
23 bill. 5 years later, in 1969 in Sullivan v. Little
24 Hunting Park, this Court held that 42 U.S.C. 1982
25 included retaliation. So in 1981, Congress knew that

1 retaliation was encompassed within discrimination.

2 Point number 2 --

3 JUSTICE SCALIA: Why did they -- why did
4 they include it in a separate section? If they knew
5 that, why did they have a separate section on
6 retaliation?

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

10 JUSTICE SCALIA: I understand that. Why did
11 they do it if they knew it was already included?

12 MR. LAUTEN: Well, they didn't have to amend
13 e-3(a) because there were policy -- the Burlington
14 Northern case, for example, where this Court held that
15 retaliation is considerably broader, that provision,
16 where the Court held that retaliation in Burlington
17 actually went beyond conditions in the workplace. That
18 was the second reason.

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

24 E-2(m) on its text applies to e-3(a).
25 Congress could have very well put an e-2(m) under this

1 section. It could have very well put an e-2(m), an
2 individual's race, color, religion, sex, national
3 origin. But what it did is it said a complaining party
4 must demonstrate, and then it lists those things. And
5 then it says "for any employment practice."

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

11 The motivating factor --

12 JUSTICE ALITO: I take you back to your
13 opening statement that there is no reason why Congress
14 might have wanted to have a different standard for
15 substantive discrimination and retaliation.

16 Would you disagree with the proposition that
17 the motivating factor analysis creates special problems
18 in the retaliation -- in the retaliation context?

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

25 JUSTICE ALITO: Well, I know it's not going

1 to go away. Let me give you this example, this
2 hypothetical. An employee thinks that he is about to be
3 fired. And let's -- let's suppose that the employer
4 really has a good, nondiscriminatory reason for firing
5 the employee. On the eve of that the employee makes a
6 spurious charge of discrimination and does it in a way
7 to maximize the embarrassment to the employer.

8 Then the employer formally makes the
9 decision to terminate the employee. And what the
10 employer says at that time is, we were going to fire so
11 and so anyway for all these other reasons, but now
12 because he has done this and really embarrassed us
13 publicly, we are really happy that we are going to fire
14 him. Now, how does that work out under the motivating
15 factor analysis?

16 MR. LAUTEN: Very easily, because in that
17 situation the employer wouldn't even have to prove the
18 affirmative defense because the employee wouldn't be
19 able to prove a violation of the Act because it was a
20 spurious claim. That's point number 1. Point number --

21 JUSTICE ALITO: Is that correct? Can't
22 you -- can't you succeed on a retaliation claim if your
23 underlying substantive claim is invalid.

24 MR. LAUTEN: You cannot prevail on a
25 retaliation claim under e-2(m) without proving first a

1 violation of the Act, and that is the distinction
2 Congress made in e-2(m) for Price Waterhouse, whereas
3 Price Waterhouse held there was no violation as long as
4 the affirmative defense was proven. What Congress did
5 in 1991 was say once you prove a motivating factor and a
6 violation of the Act, only then do you get to the
7 affirmative defense.

8 JUSTICE SCALIA: No, I really don't
9 understand -- I didn't understand the law to be that.
10 You mean if an employee files a discrimination claim,
11 and then is fired -- let's assume there is no other
12 reason except retaliation; he's fired for filing that
13 claim -- he has to prove not only that he was fired in
14 retaliation for filing, but also that his claim was
15 valid? Is that what you are saying the law is?

16 MR. LAUTEN: No, no, no, I'm not saying
17 that. I'm not saying that.

18 JUSTICE SCALIA: I thought that's what you
19 were saying. I thought that's what Justice Alito's
20 question asked.

21 MR. LAUTEN: No. What I'm saying is that
22 that -- and you can look at the jury instructions in
23 this case -- you would have to prove that the employer
24 acted in part to retaliate, and -- for the protected
25 activity.

1 JUSTICE SCALIA: In his hypothetical, he
2 did. Justifiable retaliation, as far as I am concerned.
3 I mean, the employer files a frivolous claim to
4 embarrass the employer. He can't erase that from his
5 mind. That's one of the reasons he fired this guy. And
6 you say: Ooh, if that's one of the reasons, no matter
7 how frivolous or anything else, he's liable under the
8 law.

9 MR. LAUTEN: Well, here's -- here's our
10 position, Justice Scalia. Our position, number one, is
11 the Court doesn't even get to that issue because the
12 statute applies. If e-2(m) applies, then motivating
13 factor causation applies. If it doesn't apply, if the
14 Court rejects our statutory argument, then by default we
15 are under the Price Waterhouse framework and motivating
16 factor causation should apply.

17 But to the policy question, Justice Alito --

18 JUSTICE SCALIA: I don't understand that.
19 Do you understand that?

20 MR. LAUTEN: Substantive discrimination, the
21 teeth of the Act, relies on employees being able to
22 cooperate and be witnesses, that they have the guts to
23 come forward. If you take that protection away, you are
24 taking the teeth out of Title VII.

25 JUSTICE ALITO: Well, no, I understand that.

1 And it's not a policy question. It's a question of
2 interpreting the statute. But I understood your lead
3 argument in favor of a particular interpretation of the
4 statute to be it can't mean what the Petitioner wants it
5 to mean, what the Petitioner says it means, because that
6 would make no sense.

7 And the point of my question was to explore
8 the possibility that there might be a very good reason
9 why Congress would want a different causation standard
10 for substantive discrimination and retaliation.

11 MR. LAUTEN: There is nothing in the
12 legislative history in 1991 that supports that. In
13 fact, I would argue the contrary. When Congress passed
14 Section 101 in 1991, which is 42 U.S.C. 1981, in that
15 provision where it overruled *Patterson v. McLean* and the
16 Court held that retaliation was encompassed within the
17 substantive discrimination provision, which is what the
18 Court held in *CBOCS v. Humphries*, in the House bill that
19 accompanied the Act it said that Congress intended for
20 retaliation to apply to Section 101, but it's not in the
21 section at all that became 101 that was in CBOCS.

22 In *Gomez-Perez v. Potter*, as you well know,
23 this Court held the absence of retaliation provision
24 under the Federal sector provision did not undermine the
25 argument that retaliation was included, even though

1 Congress had a separate anti-retaliation provision in
2 the private sector. And there was a very good argument
3 in the court of appeals, as you well know, that, hey, if
4 Congress wanted an anti-retaliation provision, why
5 wouldn't they have done so, they did it on the private
6 part.

7 And there were arguments the other way, that
8 there was already a civil service remedy in place. And
9 this Court rejected that argument, relied on Sullivan,
10 Jackson v. Birmingham, and those trilogy of cases --

11 CHIEF JUSTICE ROBERTS: Over a powerful
12 dissent.

13 JUSTICE BREYER: I would just like to get to
14 what I think is one of their arguments and I'm having
15 some -- the argument is purely linguistic, all right?
16 And they say, read m. M says race is a motivating
17 factor in an unfair employment situation.

18 Now, we look to what the unfair employment
19 situation is at the beginning unfair employment
20 practice. It is to dismiss a person because of race,
21 all right? So obviously, it applies. Now we look to
22 the definition that we're at issue in here. It
23 says it's an unfair labor practice to dismiss a person
24 because of retaliation. Now, retaliation for what? For
25 race, that's true. But we're -- we couldn't care less

1 about whether that race is part or a little bit or it's
2 all -- it could even be totally unjustified. What we're
3 interested in is the retaliation. So they say, you see,
4 the words of (m) do not speak about race. They speak
5 about retaliation. They speak about race. So, whatever
6 the policy reasons are, you can't do it any more than if
7 you have a statute that refers to carrots and you try to
8 put in a beet. You just can't do it.

9 Now, that's the answer -- I -- I would like
10 to hear an answer.

11 MR. LAUTEN: Yes, sir, Your Honor. I think
12 the point is that -- that complaining about race is race
13 discrimination. The Court held that in Sullivan.
14 Complaining about gender discrimination is -- it's
15 gender discrimination, Jackson v. Birmingham.
16 Complaining about --

17 JUSTICE BREYER: So you have to say
18 retribution for race is race.

19 MR. LAUTEN: Retribution?

20 JUSTICE BREYER: Yes.

21 MR. LAUTEN: Yes.

22 JUSTICE BREYER: Now -- now, what I was
23 looking for, perhaps without success, is some other
24 example that has nothing to do with retribution, but
25 where that's clearly so. That's why the example came

1 into my mind that it is possible that you could, under
2 the basic unfair employment section, find a person
3 liable of race discrimination even though that person
4 himself was not motivated by race, but perhaps had an
5 obligation to report a race discrimination, which he
6 failed to do because he wanted to go to the racetrack.
7 You see?

8 I'm looking for some other -- is there any
9 other example in the history of these statutes where
10 we've said, you, Mr. Jones or Ms. Smith, you are guilty
11 of race discrimination, even though that's because of
12 your responsibilities, because of what you did or didn't
13 do, it's not because you yourself held the motive, but
14 you -- you'd attribute the motive to them for reasons to
15 do with the statute.

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

17 MR. LAUTEN: If -- if I understand your
18 question, what I would default to are the three or four
19 cases that I mentioned: Sullivan,
20 Jackson v. Birmingham, CBOCS v. Humphries,
21 Gomez-Perez v. Potter, where this Court has consistently
22 held that complaining about discrimination is
23 intentional discrimination. And I want to bring up --

24 JUSTICE BREYER: Now, I have looked --

25 JUSTICE SCALIA: But -- but not under this

1 statute. What I'm concerned about is the text of this
2 statute, which simply destroys your argument that
3 there's no difference between retaliation and race
4 discrimination.

5 Section 2000e-5(g)(2)(A) limits remedies
6 where a defendant acted -- and this is a quote from the
7 statute -- "for any reason other than discrimination
8 on -- on account of race, color, religion, sex, or
9 national origin, or in violation of Section 2000e-3(a)
10 of this title."

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

14 MR. LAUTEN: Justice Scalia, that's
15 incorrect, and this is why. This is -- this is exactly
16 my point. 5(g)(2)(A), the text of that, that was
17 drafted by the 1964 Congress. That was a part of the
18 original bill. 5 years after that text came through,
19 this Court held in Sullivan v. Little Hunting Park that
20 retaliation encompasses discrimination.

21 So why in 1991 would Congress go amend
22 5(g)(2)(A) from 1964, when it already knew.

23 JUSTICE SCALIA: Sir, the statute says what
24 it says. It doesn't matter when Congress put it in
25 there. The statute has to be read as a whole. And if

1 you read it as a whole, this provision clearly separates
2 out retaliation from race discrimination.

3 MR. LAUTEN: That -- that --

4 JUSTICE SCALIA: Period. I mean, it
5 doesn't -- I don't have to psychoanalyze Congress and
6 say did they really mean it, blah, blah, blah. It's
7 there in the statute. They didn't take it out. The
8 statute still makes a clear distinction between the two.

9 MR. LAUTEN: Justice Scalia, respectfully,
10 that argument is directly contrary to
11 CBOCS v. Humphries, and it's directly contrary to
12 Gomez-Perez, where this Court held that Congress is
13 charged with knowing what this Court is deciding prior
14 to acting.

15 CHIEF JUSTICE ROBERTS: But it would have
16 been so easy. There -- it's -- it's a set, race, color,
17 religion, sex or national origin.

18 And why would they leave it out?

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

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

23 MR. LAUTEN: Well, here's my response to
24 that.

25 CHIEF JUSTICE ROBERTS: I know your argument

1 is well, look, the Court's already said well, that's --
2 that's included, but they've got two provisions fairly
3 close to each other, and I don't know, if they're
4 running through the usual list, why they wouldn't have
5 just run through a list as it appeared in (g)(2)(A).

6 MR. LAUTEN: Well, this is really important.
7 The word "retaliation" is nowhere in Title VII at all.
8 That's point number 1. Point number 2 is, if --
9 Congress could have specifically put in there an
10 individual's race, color, religion, sex or national
11 origin, and clearly, that would have been anchored to
12 e-2(a) to e-2(d).

13 Instead, it created a different provision
14 altogether, e-2(m), and specifically said a complaining
15 party demonstrates, and it didn't say under this
16 section, and it defines any unlawful employment
17 practice. Any.

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

22 Now, I want to make this really clear,
23 because the Government is not making this -- this
24 argument. If you reject our statutory argument, if you
25 reject that argument, and you find that e-2(m) does not

1 govern e-3(a), although we strongly urge the Court to --
2 to embrace that argument, as the Solicitor General has
3 done as well, but if you reject that argument by
4 default, we're under Price Waterhouse -- juries have
5 been instructed since jury trials started in 1991 under
6 a Price Waterhouse framework in retaliation cases.

7 And this argument about unwarranted
8 retaliation claims, this is the way we've been doing it
9 since 1991. This isn't something new. Juries have been
10 instructed this way since '91. So this idea about
11 creating new jurisprudence, this is a huge step
12 backwards from the framework we've been working under.

13 JUSTICE GINSBURG: But your alternate
14 argument would -- would involve two standards, the one
15 that Congress provided for substantive discrimination,
16 the -- the improvement on -- on Price Waterhouse, and
17 then for retaliation, Price Waterhouse.

18 MR. LAUTEN: Just --

19 JUSTICE GINSBURG: And I started this --
20 this argument by asking, is there -- in the realm of
21 anti-discrimination law, is there any example where you
22 have the -- the substantive charge governed by one
23 standard and retaliation by another?

24 MR. LAUTEN: No, ma'am. And -- and you
25 brought up a great point. I am aware -- true to Justice

1 Kagan's point earlier -- I am aware of nowhere in
2 American history of Congress ever creating two causation
3 standards for retaliation and discrimination, especially
4 under the same statute.

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

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

8 JUSTICE SCALIA: I mean, the issue is
9 whether this statute does it or not. The fact that
10 nobody has ever done it before, what difference does
11 that make?

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

14 JUSTICE KENNEDY: Do -- do you agree with
15 the Government's position that the limited affirmative
16 defense provisions Congress enacted, that is to say,
17 limited damages when there's multiple or mixed motives
18 would also apply to retaliation cases?

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

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

6 So no, there -- there won't be two causation
7 standards under Title VII.

8 JUSTICE ALITO: Price Waterhouse is a little
9 different from subsection (m) though, isn't it? You
10 have to have proof of -- you have to have direct
11 evidence of a substantial -- direct and substantial
12 evidence before you get into Price Waterhouse, right?
13 You don't need that under subsection (m).

14 MR. LAUTEN: I don't have -- I don't have an
15 answer for that. The answer is, I do not know.

16 My -- my belief is that e-2(m) and
17 5(g)(2)(B) -- the distinction e-2(m) makes is that it
18 makes it a violation of the Act to prove an illegal
19 motive, whereas in Price Waterhouse, you haven't
20 violated the Act at all until the affirmative defense is
21 disproved.

22 So that that is the distinction with e-2(m).
23 5(g)(2)(B) just goes to the remedy, whereas the
24 affirmative defense of Price Waterhouse was a complete
25 bar. So my point is, is that even if the Court by

1 default finds that e-2(m) does not apply, you are not
2 exchanging or creating two standards.

3 All that is going to happen is that if the
4 affirmative defense is prevailed upon under the default
5 Price Waterhouse standard, it's a complete bar, whereas
6 5(g)(2)(B) limits the remedies. That's the
7 only distinction.

8 JUSTICE ALITO: Isn't it the case that
9 Justice O'Connor's opinion in Price Waterhouse required
10 direct evidence and substantial evidence before there
11 was a shift in the burden of proof.

12 MR. LAUTEN: I think judge -- I think
13 Justice O'Connor in her concurrence did say direct
14 evidence under Price Waterhouse, albeit six judges
15 agreed in 1989 that motivating factor causation applies.

16 The -- I guess the last point that I want to
17 make is this Court really needs to consider this record
18 on its face. Dr. Nassar, after going through months of
19 discrimination, finally reports that he's leaving. In
20 this record, Dr. Fitz admitted to Dr. Keiser.
21 Dr. Keiser, a white Baptist supervisor to Dr. Nassar,
22 goes and -- and reports it.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. LAUTEN: Sorry. Thank you for your
25 time.

1 CHIEF JUSTICE ROBERTS: Ms. Sherry.

2 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,

3 FOR UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE RESPONDENT

5 MS. ARBUS SHERRY: Mr. Chief Justice, and

6 may it please the Court:

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

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

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

1 MS. ARBUS SHERRY: And on that --

2 JUSTICE KENNEDY: And so -- so that -- that
3 was the thrust of -- of his question.

4 MS. ARBUS SHERRY: And -- and I want to
5 address that because I don't think that's quite right.
6 You can't just scream "Discrimination" when you're, you
7 know, when the writing is on the wall and you know
8 you're going to get fired.

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

17 The other point I would make --

18 CHIEF JUSTICE ROBERTS: Where are they --
19 where are they going to be weeded out? On summary
20 judgment or on -- after trial?

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

1 Again, you can't just scream "Discrimination" as they
2 are kicking you out the door.

3 The other point I would --

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

9 MS. ARBUS SHERRY: And then I don't think
10 it's as severe of a problem as Your Honor is suggesting,
11 for a couple of different reasons. Number one, if you
12 are positing a situation where there is clear evidence
13 that the employer would have made the same decision
14 regardless, that is a defense that is available to the
15 employer and there is no reason they couldn't seek
16 partial summary judgment with respect to that. That
17 severely limits the remedies that are available.

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

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

22 JUSTICE SCALIA: Right.

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

25 JUSTICE SCALIA: Yes.

1 MS. ARBUS SHERRY: -- that is a defense
2 under (g)(2)(B), and it's something that the employer
3 could certainly raise under partial summary judgment
4 that would severely limit the remedies available.

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

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

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

16 MS. ARBUS SHERRY: Sure.

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

23 The anti-retaliation provision is more
24 functional. The way you protect against that
25 discrimination is you make sure people don't retaliate

1 when they complain about it. Now that seems to me to be
2 an order of -- of hierarchy, removed from the basic
3 principle. So perhaps you would have a different
4 standard of causation when you deal with that.

5 MS. ARBUS SHERRY: And I don't think it is,
6 for the reasons that this Court talked about in
7 Burlington Northern and in Thompson and in Crawford.
8 And what the Court said in those cases is that the two
9 are linked together. You do need to have robust
10 retaliation protections in order to ensure that that
11 primary purpose, that discrimination, is outside of the
12 workplace. And so if employees are worried or afraid to
13 come forward and report discrimination, the
14 discrimination is going to persist. It's not going to
15 be remedied.

16 And so the two are linked together and it
17 makes sense to have the same --

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

23 MS. ARBUS SHERRY: And I -- I agree with
24 Your Honor. I think you -- that is the reason you
25 protect against retaliation. And in order to have

1 sufficient protections so that interest can be
2 vindicated, individual employees need to feel
3 comfortable coming forward.

4 JUSTICE ALITO: The problem is --

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

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

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

19 I'm not even going to think about the fact
20 that I am -- have been wrongfully charged with
21 discrimination. Isn't that a real difference?

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

1 specifically retaliation statutes, has adopted a
2 contributing factor, a motivating factor standard, and
3 in fact has adopted a same-decision defense where you
4 need clear and convincing evidence. So I think
5 Congress's judgment is that that distinction is not one
6 that should be made, that it 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 antidiscrimination 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 the
18 best thing we can be guided by is simply the text that
19 Congress adopted, however the makeup of that Congress
20 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 3a, which is on
5 page 17a of our brief, that retaliation is an unlawful
6 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 "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."

15 And we know under this Court's cases under
16 Gomez-Perez, under CBOCS, under Jackson and Sullivan
17 that race is a motivating factor in an employment
18 decision that is based on retaliation when you've
19 complained about race discrimination.

20 And so the language of (m), the plain
21 language, clearly encompasses the retaliation claims in
22 Title VII. And so the only argument, I believe, that
23 Petitioner is making is that there are things elsewhere
24 in the statute that might make you think otherwise here.
25 And we would argue that none of them --

1 JUSTICE KENNEDY: Well, but under -- under
2 that analysis, you don't need the final clause on page
3 17a of your brief of 3, "because he has opposed." Race
4 is enough.

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

14 Justice Scalia, you were talking about
15 g-2(a), and if I could just take a moment on that,
16 because that is one of the arguments that Petitioner is
17 making. My colleague made the point that it was adopted
18 by the 1964 Congress; it was adopted before Sullivan.
19 And so if I could focus on the 1991 Congress that
20 enacted both subsection (m) and subsection g-2(b), that
21 Congress was acting in light of Sullivan. And we know
22 it was legislating with full knowledge of Sullivan,
23 because that's exactly what this Court said in CBOCS.
24 CBOCS involved Section 101, rather, of the
25 1991 Act; this involves Section 107 of 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 say
6 exactly what it said in (m), and that would do the
7 trick. And it's a common rule of statutory
8 interpretation that you don't add extra words if you
9 don't need them. And so what Congress did in (m) is it
10 adopted exactly what words it needed to effectuate its
11 purpose, which is to have one causation standard, a
12 motivating factor standard available with respect to all
13 intentional discrimination claims --

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

21 MS. ARBUS SHERRY: Your Honor, may I? To
22 answer that question, it's important -- what happened in
23 1991, Congress didn't add that language, it didn't amend
24 that language; it simply didn't delete it. And I think
25 it's completely reasonable when Congress is faced with a

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

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Joseffer, you have three minutes
9 remaining.

10 REBUTTAL ARGUMENT OF DARYL L. JOSEFFER
11 ON BEHALF OF THE PETITIONER

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

20 So the second interpretive principle is,
21 then, does that litany here encompass, you know,
22 complaining about unlawful conduct and participating in
23 an investigation, which are the protected conduct for
24 purposes of retaliation. That principle comes straight
25 out of Jackson and Gomez-Perez, that when Congress

1 broadly refers to discrimination on the basis of race in
2 the statute without greater specificity, the Court will
3 read retaliation in.

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

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

17 In addition, Title VII, as a whole, is
18 especially clear, because the same subsection 2 within
19 Title VII, when it wants to refer to all types of
20 employment discrimination, it will say "a claim of
21 employment discrimination." And by the way, the 1991
22 Congress put that provision in there. So this Congress
23 knew how to say "any claim of employment
24 discrimination," as it did so in subsection (n), which
25 comes right after this one.

1 Congress will also say "an unlawful
2 employment practice" when it's referring to all of them,
3 but when it wants to specifically refer to one subset or
4 another, it does so. That's a clear, logical, coherent
5 reading of the statute as a whole that every court of
6 appeals to consider the question has adopted.

7 They're asking you to read various statutory
8 provisions to be surplusage, and there's simply no
9 reason to do so, especially because, looking just at
10 1991, Congress at that point was not saying, oh, in
11 light of Jackson, we can now just speak more generally.
12 Because it, specifically in 1991, cross-referenced the
13 anti-retaliation provision of Title VII when it wanted
14 to, and it specifically used broader phrases like "a
15 claim of employment discrimination" when it wanted to.

16 And especially since the whole point of
17 Gross, or much of the point of Gross was to replace a --
18 a totally unworkable and confusing regime with something
19 that is clear and straightforward, you've done that.
20 And the question now is whether to retreat back into a
21 jurisprudential morass where, within the very same
22 statute, the drafting rules this Court has otherwise
23 articulated, no longer apply.

24 The final point I'd make is that, yeah,
25 there's this question about are -- are we treating, you

1 know, retaliation and -- and substantive discrimination
2 differently within one statute, and the answer is, well,
3 yes, as Congress did. The other way of looking at it is
4 they want to treat retaliation differently in this
5 statute than it's treated in every other statute. You
6 can -- you can point to similar anomalies across the
7 board, the reason being that Congress has chosen to have
8 two different sections within this area. And --

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

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

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