1	IN THE SUPREME COURT OF THE UNITED STATES		
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3	UNIVERSITY OF TEXAS SOUTHWESTERN :		
4	MEDICAL CENTER, :		
5	Petitioner : No. 12-484		
6	v. :		
7	NAIEL NASSAR :		
8	x		
9	Washington, D.C.		
10	Wednesday, April 24, 2013		
11			
12	The above-entitled matter came on for oral		
13	argument before the Supreme Court of the United States		
14	at 11:02 a.m.		
15	APPEARANCES:		
16	DARYL L. JOSEFFER, ESQ., Washington, D.C.; on behalf of		
17	Petitioner.		
18	BRIAN P. LAUTEN, ESQ., Dallas, Texas; on behalf of		
19	Respondent.		
20	MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor		
21	General, Department of Justice, Washington, D.C.; for		
22	United States, as amicus curiae, supporting		
23	Respondent.		
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1	PROCEEDINGS
2	(11:02 a.m.)
3	CHIEF JUSTICE ROBERTS: Our last case of the
4	year is 12-484, University of Texas Southwestern Medical
5	Center v. Nassar.
6	Mr. Joseffer?
7	ORAL ARGUMENT OF DARYL L. JOSEFFER
8	ON BEHALF OF THE PETITIONER
9	MR. JOSEFFER: Good morning, and may it
10	please the Court:
11	This Court's decision in Gross does most of
12	the work in this case and the plain language of the 1991
13	amendments to Title VII do the rest.
14	Under Gross, Nassar must prove that
15	retaliation was the but-for cause of the challenged
16	employment action unless Congress has specifically
17	relieved him of that burden by authorizing a mixed
18	motive claim.
19	In in the 1991 amendments, however,
20	Congress authorized mixed motive treatment only for
21	Title VII claims that challenge that challenge
22	discrimination based on membership in a protected class,
23	not for retaliation claims. And for that reason, a
24	Title VII retaliation claim must prove but-for
25	gaugation

1 JUSTICE GINSBUR	3: In the	in the AIDS
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- 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.
- JUSTICE GINSBURG: Yes.
- 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
- 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
- on retaliation as separate types of discrimination, and
- 25 this provision treats them differently. It specifically

- 1 limits --
- 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?
- 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?
- MR. JOSEFFER: No, because it's but-for
- 23 everywhere except for this one amendment.
- 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.
- 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
- 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
- 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?
- 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
- 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 --
- JUSTICE SOTOMAYOR: I'm -- I'm not sure what
- 19 difference it makes.
- MR. JOSEFFER: Well, because otherwise, you
- 21 are taking the --
- JUSTICE SOTOMAYOR: Other than in the
- 23 outcome you want here.
- 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.
- 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
- 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?
- MR. JOSEFFER: For -- for those cases
- 14 that -- that the motivating factor provision governs,
- 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.
- MR. JOSEFFER: Yes.
- 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."
- 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.
- 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.
- MR. JOSEFFER: I apologize, Your Honor.
- 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 quidance 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 quidance 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.
- 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.
- 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.
- 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
- 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.
- 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?
- 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.
- 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 --
- JUSTICE SOTOMAYOR: Where do you see that
- 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.
- You're not going to find anything else in
- 23 there.
- 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.
- 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.
- JUSTICE SOTOMAYOR: But that policy argument
- 21 just says Jackson's wrong.
- 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
- 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 --
- 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?
- 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
- 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
- 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?
- 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
- they had already knew in Sullivan since 1964, why would
- 23 they amend the Act?
- 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
- 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 --
- 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.
- 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.
- 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.
- 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 --
- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- MR. LAUTEN: Retribution?
- JUSTICE BREYER: Yes.
- MR. LAUTEN: Yes.
- 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
- 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
- of race discrimination, even though that's because of
- 12 your responsibilities, because of what you did or didn't
- 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 --
- 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(q)(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
- 5(g)(2)(A) from 1964, when it already knew.
- 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.
- 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(q)(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).
- 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.
- 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?
- 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?
- 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
- 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.
- 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.
- My -- my belief is that e-2(m) and
- 17 5(q)(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.
- So that that is the distinction with e-2(m).
- 5(q)(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
- 5(q)(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.
- 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.
- JUSTICE SCALIA: Excuse me. I don't
- 19 understand. Say again?
- MS. ARBUS SHERRY: In circumstances where
- 21 the employer would have made the same decision --
- JUSTICE SCALIA: Right.
- 23 MS. ARBUS SHERRY: -- even without the
- 24 improper motive --
- JUSTICE SCALIA: Yes.

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- 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 --
- 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.
- 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?
- 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.
- 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
- 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.
- 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	οf	deleting	language	that	had	been	there	for
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- 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

Τ	know, retallation 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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