No. 12-789

# In the Supreme Court of the United States

MARK S. PALMQUIST, PETITIONER

*v.*

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, provides a defense to liability when the federal government demonstrates that it would have reached the same employment decision even in the absence of any impermissible consideration.

2. Whether petitioner was entitled to judgment as a matter of law on his claim that his supervisor provided a retaliatory job reference.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 689 F.3d 66. The opinion of the district court (Pet. App. 23a-68a) is reported at 808 F. Supp. 2d 322.

## JURISDICTION

The judgment of the court of appeals was entered on August 2, 2012. A petition for rehearing was denied on September 27, 2012 (Pet. App. 69a-70a). The petition for a writ of certiorari was filed on December 26, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, provides that the federal govern-

ment must pursue an affirmative action plan for "the hiring, placement, and advancement of individuals with disabilities." 29 U.S.C. 791(b). Section 501(g) states that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under * * * sections 501 through 504 * * * of the Americans with Disabilities Act of 1990 [(ADA)]." 29 U.S.C. 791(g). Section 503(a) of the ADA in turn provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. 12203(a). Accordingly, Section 501 of the Rehabilitation Act is violated when, *inter alia*, the federal government discriminates against any individual "because" that individual engaged in a specified protected activity.

When such a violation is established, Section 505 of the Rehabilitation Act provides the means of enforcement. See 29 U.S.C. 794a (2006 & Supp. V 2011). For enforcement, unlike for liability, the Rehabilitation Act cross-references Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. In particular, Section 505(a) of the Rehabilitation Act states that "[t]he remedies, procedures, and rights set forth in" 42 U.S.C. 2000e-16 (2006 & Supp. V 2011), "including the application of" 42 U.S.C. 2000e-5(f) through (k), "shall be available." 29 U.S.C. 794a(a). One of Title VII's incorporated provisions, 42 U.S.C. 2000e-5(g), provides for injunctive relief including, *inter alia*, reinstatement and back pay. Section 2000e-5(g)(2)(B), however, limits the

remedies available in cases where the plaintiff "proves a violation under section 2000e-2(m) of [Title 42] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). In such circumstances, the court can grant declaratory relief, certain limited forms of injunctive relief, attorney's fees, and costs, but may not order that the plaintiff be reinstated, hired, or promoted, and may not award back pay or damages. *Ibid.*

As noted, 42 U.S.C. 2000e-5(g)(2)(B) applies only when a plaintiff proves "a violation under section 2000e-2(m)." Section 2000e-2(m) in turn provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). Section 2000e-2(m) does not apply to claims of discrimination based on disability, and this Court recently held that it does not apply to retaliation claims. See *University of Tex. Sw. Med. Ctr.* v. *Nassar*, No. 12-484 (June 24, 2013), slip op. 11-20.

2. In 2004, Sherry Aichner hired petitioner, a disabled veteran, to work in the United States Department of Veterans Affairs (VA) in Michigan. Approximately four months later, petitioner applied for a promotion, but he did not receive an interview. Petitioner believed that the VA had not properly honored his veterans' preference. He told Aichner, who was his supervisor but who was not involved in the selection process for the promotion, that he was going to complain to the VA's equal employment opportunity specialist and to his congressman—which he did. See Pet. App. 2a.

During the next two years, petitioner and Aichner generally maintained a positive relationship. Aichner gave petitioner favorable evaluations in annual performance reviews and in recommendations for two other promotions for which petitioner unsuccessfully applied. In certain respects, however, petitioner's work was deficient. He would sometimes become preoccupied, distract others in his unit, leave during working hours to do errands or socialize, and use his computer for nonwork purposes. See Pet. App. 3a.

In 2006, petitioner applied for another position with the VA, this one in Tennessee. Pet. App. 3a. Aichner provided a generally favorable recommendation, describing petitioner as energetic and a quick learner, but she also mentioned some of petitioner's shortcomings as noted above. *Id.* at 3a-4a. Aichner also noted petitioner's tendency to "go[] overboard" on behalf of veterans, stating that he "use[s] his service-connected preference and watches carefully to make sure he gets an interview," and "that he had once gone 'to [the] patient [r]epresentative'" when he did not get one. *Id.* at 4a. Aichner thought this information "would show [petitioner's] zeal both for veterans' rights and for his own advancement within the VA." *Ibid.*

Petitioner did not receive the promotion. Because the position petitioner sought involved impartially evaluating applications for veterans' benefits, the evaluating official (Delores Tate) considered petitioner's tendency to "go overboard" in helping veterans to be a negative quality. Tate also considered as unfavorable the work-related shortcomings that Aichner had described. And Tate was troubled by petitioner's attempt to contact her after the interview, despite explicit warnings that he should not engage in any post-interview contact. Tate

did not think that Aichner was trying to discourage her from hiring petitioner, but the unfavorable aspects of Aichner's reference were "one factor" in Tate's ultimate decision not to recommend petitioner for the job. See Pet. App. 3a-5a.

3. Petitioner filed suit in the District of Maine, alleging unlawful retaliation in violation of Section 501 of the Rehabilitation Act. In particular, petitioner alleged that Aichner's job reference and the VA's ultimate denial of the promotion were both adverse employment actions taken in retaliation for petitioner's earlier discrimination complaints. The jury found that retaliation was not the motivation for Aichner's job reference, but that it was a motivating factor for denying petitioner the promotion. The jury also found, however, that the Secretary of Veterans Affairs (Secretary) had demonstrated that the VA would have reached the same decision regardless of that improper consideration. Based on the jury's findings, the district court entered judgment for the Secretary. See Pet. App. 5a-6a.

Petitioner filed a motion to amend the judgment and a renewed motion for judgment as a matter of law. As relevant here, petitioner argued that he was entitled to a remedy based on the jury's finding that retaliation was a motivating factor for denying him the promotion, even though the jury had also found that the Secretary would have reached the same decision regardless of that improper consideration. Petitioner also argued that he was entitled to judgment as a matter of law because the Secretary had failed to articulate a legitimate nondiscriminatory reason for Aichner's job reference. The district court denied both motions. See Pet. App. 23a-68a.

4. The court of appeals affirmed. Pet. App. 1a-22a.

The court of appeals first rejected petitioner's argument that he was entitled to judgment as a matter of law because the Secretary had failed to proffer a legitimate nondiscriminatory reason for Aichner's mention of petitioner's previous complaints in her job reference. Pet. App. 6a-11a. The court explained that the Secretary had "produced a justification for Aichner's comment: evidence that, in her opinion, [petitioner's] pro-veteran leanings, his enthusiasm about veterans' preferences, and his desire for advancement were positive characteristics that would help him in his quest for the" promotion. *Id.* at 9a. The court concluded that there was "a surfeit of proof" supporting the jury's finding that the proffered reason was, in fact, "the true reason for the challenged comment." *Ibid.* The court explained that the "[t]rial testimony indicated that Aichner's reference was generally favorable"; "that she believed that her discourse with Tate would help [petitioner] get the job"; and that she "had given him nothing but favorable reviews until the incident in question." *Ibid.* The court of appeals therefore concluded, "without serious question," that the district court had not erred in submitting the question of retaliation to the jury. *Id.* at 10a-11a.

The court of appeals next considered petitioner's argument that the jury verdict entitled him to declaratory and certain injunctive relief, as well as attorney's fees and costs. Pet. App. 11a-20a. The court rejected petitioner's reliance on a remedial provision in Title VII, 42 U.S.C. 2000e-5(g)(2)(B), finding that provision inapplicable on its own terms. The court explained that Section 2000e-5(g)(2)(B) "nowhere mentions retaliation," and it relied on "[l]ongstanding precedent" holding that such "mixed-motive remedies" are unavailable "in Title VII retaliation cases." Pet. App. 14a (citing *Tanca* v. *Nord-*

*berg*, 98 F.3d 680, 682-683 (1st Cir. 1996), cert. denied, 520 U.S. 1119 (1997)). The court further explained that Section 2000e-5(g)(2)(B) is "inextricably linked" to the Title VII causation standard set forth in Section 2000e-2(m), and it observed that, although the Rehabilitation Act "borrows its remedial scheme from Title VII," the Act "borrows the causation standard from the [ADA]." *Id.* at 14a-15a. Because Section 2000e-5(g)(2)(B)'s remedies are available only to individuals who have proven a "violation[] of section 2000e-2(m)," and because petitioner is not such an individual, the court concluded that those statutory remedies were unavailable. *Ibid.*

Petitioner further contended that he was entitled to a remedy because Section 505(a) of the Rehabilitation Act incorporates the "remedies, procedures, and rights" set forth in Title VII's federal-sector provision, 42 U.S.C. 2000e-16 (2006 & Supp. V 2011), and one subsection of Title VII's federal-sector provision declares that "[a]ll personnel actions * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e-16(a). Based on a D.C. Circuit decision interpreting a different statute (the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*), petitioner argued that whenever retaliation plays any role in the employment decision, the decision is not "made free from any discrimination." Pet. App. 20a-21a (quoting *Ford* v. *Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010)). The court of appeals rejected that argument, without determining whether *Ford* had been "correctly decided." *Id.* at 21a. The court again explained that Section 501 of the Rehabilitation Act "expressly incorporates a liability standard drawn from the ADA," whereas Section 505 incorporates Title VII's federal-sector provision only for the purpose of provid-

ing "remedies, procedures, and rights." *Ibid.* Concluding that "Congress acted with evident purpose in using one source for the liability standard and a different source for the remedial scheme," the court declined to render "the selective incorporation of the ADA provisions * * * nugatory" by concluding that Title VII controls "both the liability standard and the remedy." *Id.* at 21a-22a.

As for the applicable liability standard under the ADA's retaliation provision, the court of appeals noted that the provision barred retaliation against an individual "because" that individual had engaged in protected activity. Pet. App. 15a (quoting 42 U.S.C. 12203(a)). The court concluded that the provision "thus requires retaliation to be the but-for cause of an adverse employment action in order for the plaintiff to obtain a remedy." *Id.* at 16a, 22a n.3. The court explained that, in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), this Court had placed the burden of proving but-for causation "on employees under the ADEA," whereas in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the Court had "plac[ed] this burden on employers under Title VII." Pet. App. 16a. Because the district court in this case had "assigned the burden of proving the absence of but-for causation to the employer" (*i.e.*, it had given a *Price Waterhouse* jury instruction), and because the Secretary had not "challenged that decision," the court declined to decide "whether the employee or the employer bears the burden of showing or negating but-for causation in a Rehabilitation Act case." *Id.* at 22a n.3.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The

decisions of other circuits on which petitioner relies predate relevant guidance from this Court. Further review is not warranted.

1. The jury found both that retaliation was a motivating factor for denying petitioner a promotion, and that the VA would have reached the same decision regardless of that improper consideration. Pet. App. 6a. The district court "assigned the burden of proving the absence of but-for causation" to the government, and the jury found that the government had satisfied its burden. *Id.* at 22a n.3. This case therefore does not present the question "whether the employee or the employer bears the burden of showing or negating but-for causation in a Rehabilitation Act case," and the court of appeals did not decide that issue. *Ibid.*

Based on the jury's finding that retaliation was a motivating factor in the promotion decision, petitioner contends that he is potentially entitled to limited relief such as a declaratory judgment and attorney's fees. The court of appeals correctly rejected petitioner's arguments and held that the jury verdict mandated a judgment in favor of the Secretary.

a. Petitioner contends (Pet. 7-14) that the ADA incorporates the remedies available under Title VII.[1] In petitioner's view, those remedies include the relief described in 42 U.S.C. 2000e-5(g)(2)(B). When the plaintiff in a Title VII suit establishes that an impermissible consideration was a motivating factor for the defendant

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[1] Although this is a Rehabilitation Act case, petitioner frames his argument in terms of the ADA. Because the Rehabilitation Act incorporates the ADA's liability standards, 29 U.S.C. 791(g), and because (like the ADA) it incorporates the remedies available under Title VII, 29 U.S.C. 794a(a), the analysis is substantially the same under both statutes.

employer's decision, Section 2000e-5(g)(2)(B) allows a court to award declaratory relief, certain injunctive relief, and attorney's fees and costs, even if the defendant "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). Petitioner argues that he is entitled to those same "mixed-motive remedies."

Petitioner ignores critical language in Section 2000e-5(g)(2)(B). That provision makes certain remedies available only if the plaintiff "*proves a violation under section 2000e-2(m) of this title*." 42 U.S.C. 2000e-5(g)(2)(B) (emphasis added). Section 2000e-2(m) in turn provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). Section 2000e-5(g)(2)(B) thus applies when, and only when, one of the prohibited criteria enumerated in Section 2000e-2(m) is shown to have been "a motivating factor for [an] employment practice."

In asserting a retaliation claim under the Rehabilitation Act, petitioner did not allege or prove that "race, color, religion, sex, or national origin was a motivating factor" in the decision not to promote him. 42 U.S.C. 2000e-2(m). Section 2000e-2(m) does not mention "disability," and it has not been incorporated into the Rehabilitation Act. As the court of appeals explained, although "[t]he Rehabilitation Act borrows its remedial scheme from Title VII," its liability standards (including the causation standard) are derived from the ADA. Pet. App. 14a-15a. Because Section 2000e-5(g)(2)(B) is "inextricably linked to violations of section 2000e-2(m)," and

because petitioner did not prove a violation of Section 2000e-2(m), he is not entitled to the limited remedies available under that particular subparagraph.

This Court's recent decision in *University of Texas Southwestern Medical Center* v. *Nassar*, No. 12-484 (June 24, 2013), slip op. 11-20, provides another reason why petitioner could not prove a violation of Section 2000e-2(m): that provision does not apply to retaliation claims. The plaintiff in *Nassar*, supported by the United States as amicus curiae, argued that a mixed-motive standard was available under 42 U.S.C. 2000e-2(m)'s "motivating factor" provision for Title VII retaliation claims. See Resp. Br. at 15-20 & U.S. Amicus Br. at 11-23, *Nassar*, *supra*. The Court rejected that contention, holding that "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [Section] 2000e-2(m)." *Nassar*, slip op. 20. If Section 2000e-2(m) does not cover claims of retaliation for complaining about discrimination on the basis of one of the listed factors, *i.e.*, "race, color, religion, sex, or national origin," there is no tenable ground for concluding that it covers retaliation for complaining about discrimination on the basis of disability (a non-listed factor).[2]

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[2] There is some discussion in the legislative history suggesting an intent to apply a "motivating factor" standard to the ADA. See H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 4 (1991). The statutory text ultimately enacted, however, does not adopt that approach. See *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 185-186 & n.6 (2009) (Stevens, J., dissenting) (noting that "[b]ecause the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motive claims, the Court reasonably declines to apply the amended provisions to the ADEA," despite legislative history that might suggest a contrary result).

b. Petitioner also contends (Pet. 17) that the jury's verdict entitles him to certain remedies because the Rehabilitation Act incorporates Title VII's federal-sector provision, because the language of Title VII's federal-sector provision is materially identical to the ADEA's federal-sector provision, and because the D.C. Circuit has interpreted the ADEA's federal-sector provision as affording certain "mixed-motive remedies." The court of appeals correctly rejected that argument as well. Pet. App. 20a.

Petitioner's argument fails at the first step. The Rehabilitation Act does not incorporate the liability standards set forth in Title VII's federal-sector provision. Section 501(g) of the Rehabilitation Act states that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied" under the ADA. 29 U.S.C. 791(g). Section 505(a), on which petitioner relies, simply sets forth the "remedies, procedures, and rights" that apply *after* the plaintiff has established a violation under the ADA's standards. 29 U.S.C. 794a(a). Those "remedies, procedures, and rights" are found in Title VII's federal-sector provision, but petitioner first must establish a violation—and for purposes of that requirement, the ADA's causation standard controls.

Petitioner could not establish a violation of Title VII's federal-sector provision because he did not allege or prove discrimination based on any of the prohibited criteria identified in that statute. Section 2000e-16 requires that federal personnel decisions "be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Section 2000e-16 does not require that federal personnel deci-

sions "be made free from any discrimination based on" disability, much less that they be made free from any retaliation for disability-related complaints.[3]

2. Petitioner asserts (Pet. 7-14) that the courts of appeals are in conflict regarding the appropriate causation standard under Section 503(a) of the ADA. But no court of appeals has considered that issue in the wake of this Court's decision in *Nassar*. Only two courts of appeals have considered the issue after the Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2007), moreover, and both of those decisions are consistent with the decision below. See *Lewis* v. *Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (en banc); *Serwatka* v. *Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

The decisions on the other side of the asserted conflict, in contrast, were all issued many years before *Nassar* and *Gross*. See Pet. App. 17a (citing cases). In *Serwatka*, the Seventh Circuit reconsidered (and repudiated) prior circuit precedent in light of *Gross*, see *Serwatka*, 591 F.3d at 963, and the other courts on whose decisions petitioner relies may do the same—particularly in light of *Nassar*. See *Pulczinski* v. *Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) (noting "doubts" about continuing validity of pre-*Gross* precedent); *Blind Indus. & Servs.* v. *Route 40 Paintball Park*, No. 11-3562, 2012 WL 6087489, at *3 n.2 (D. Md. Dec. 5, 2012) (predicting that "when directly

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[3] Petitioner's argument also relies on an interpretation of Title VII's federal-sector provision that no court has adopted. Petitioner cites the D.C. Circuit's decision in *Ford* v. *Mabus*, 629 F.3d 198 (2010) (Pet. 17), but that was an ADEA case. In any event, the United States disagrees with the D.C. Circuit's interpretation of the ADEA's federal-sector provision, and no other court has adopted it.

presented with the issue, the Fourth Circuit will follow its sister circuits").[4] Unless and until some court of appeals concludes post-*Nassar* that Section 2000e-5(g)(2)(B)'s mixed-motive remedies apply to claims of disability-related retaliation, this Court's review is unnecessary.

3. Petitioner also argues (Pet. 18-21) that he was entitled to judgment as a matter of law on his job-reference claim because the Secretary had failed to offer a legitimate nondiscriminatory explanation for Aichner's reference to petitioner's protected activity. The court of appeals correctly rejected that case- and fact-specific contention, which raises no issue of continuing importance that might warrant this Court's review.[5]

As the court of appeals explained, the Secretary "produced a justification for Aichner's comment: evidence that, in her opinion, [petitioner's] pro-veteran leanings, his enthusiasm about veterans' preferences, and his desire for advancement were positive characteristics that would help him in his quest for the" promotion. Pet. App. 9a. The court found "a surfeit of proof" supporting the jury's finding that the proffered reason was "the true reason for the challenged conduct." *Ibid.* The court explained that the "[t]rial testimony indicated

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[4] Petitioner suggests (Pet. 1, 14) that the Fourth Circuit "reiterated its view" in *Halpern* v. *Wake Forest University Health Sciences*, 669 F.3d 454, 461-462 (2012). As petitioner acknowledges (Pet. 1), the language in *Halpern* was pure dicta. Citing a pre-*Gross* decision, the court simply restated the elements of the cause of action without any discussion of the appropriate causation standard. The court in *Halpern* ultimately concluded that the plaintiff was unqualified under the ADA for the relevant program. *Id.* at 464.

[5] Petitioner suggests (Pet. 2, 6, 18-19) that the court of appeals' decision is inconsistent with decisions of other circuits, but he does not explain the conflict.

that Aichner's reference was generally favorable"; "that [Aichner] believed that her discourse with Tate would help [petitioner] get the job"; and that Aichner "had given [petitioner] nothing but favorable reviews until the incident in question." *Ibid.* Other evidence, moreover, "showed that Aichner was not in any way involved in or negatively impacted by [petitioner's] protected conduct." *Ibid.* Based on the record evidence, the court correctly concluded, "without serious question," that the district court had not erred in submitting the question of retaliation to the jury. *Id.* at 10a-11a.[6]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner relies (Pet. 20) on certain statements made by government counsel in closing argument. As the court of appeals explained, petitioner's "selective quotation from the transcript unfairly twists what [government counsel] actually said." Pet. App. 10a. Petitioner's "distortion" of counsel's actual remarks "fails on a simple reading of the record." *Ibid.*