NO. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER,

Petitioner,

v.

NAIEL NASSAR, M.D.,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND ALLIANCE DEFENDING FREEDOM IN SUPPORT OF RESPONDENT

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774

DAVID J. HACKER
Counsel of Record
ALLIANCE DEFENDING FREEDOM
101 Parkshore Dr, Ste. 100
Folsom, California 95630
(916) 932-2850
dhacker@alliancedefendingfreedom.org

GREG LUKIANOFF
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
601 Walnut Street, Ste. 510
Philadelphia, Pennsylvania 19106
(215) 717-3473

KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
15192 Rosewood St.
Leawood, Kansas 66224
(913) 685-8000

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a non-partisan, non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE believes that the law must remain clearly and vigorously on the side of free speech on campus.

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either party or of neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Many of these cases involve the proper application of the Free Speech Clause in the educational context. Dissenting students and faculty at public schools and universities are often victims of unlawful retaliation due to their protected expression. Recognizing that the Court's decision in this case could have an adverse impact on the ability of those individuals to prosecute First Amendment and Title VII retaliation claims, Alliance Defending Freedom seeks to ensure that the First Amendment's guarantee of religious free speech is safeguarded in the public square and higher education.

SUMMARY OF THE ARGUMENT

Over forty years ago, this Court declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Robust protection of academic freedom and free speech for students and faculty is essential to preservation of the "marketplace of ideas" on campus. *Id.* In fact, those freedoms are "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Despite these proclamations students and faculty are regularly censored on today's public school and university campuses. Administrators empowered by explicit or implicit campus speech codes regularly retaliate against students and faculty who advocate views in conflict with campus

orthodoxy. But savvy administrators often cloak their retaliatory actions in seemingly benign critiques of educational or professional incompetence. Rarely can one say that a decision was motivated by a single factor. As a result, students and faculty who look for justice in the courts often resort to First Amendment or Title VII retaliation claims in which they need show only that their speech was the "substantial" or "motivating" factor for the punishment. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Petitioner here urges that standard be altered to require Title VII plaintiffs to prove that "but-for" the alleged unlawful motive the adverse action would not have been taken.

Amici believe that change in law is ill-advised. But if petitioner's proposal is adopted, and the Court requires a "but-for" standard in Title VII cases, without specific instruction to the contrary from this Court the ruling may lead lower courts to conclude that First Amendment cases also require that standard of proof. Such a result would diminish the ability of student and faculty litigants to effectively challenge unconstitutional censorship. Free speech would suffer in the end.

Whatever its decision in the case at bar, this Court should take care to communicate that its ruling is confined to the statute whose text requires that outcome, and entails no detraction from the authority of the *Mt. Healthy* line of cases that govern claims separately authorized under 42 U.S.C. § 1983.

ARGUMENT

I. A But-For Standard Will Negatively Impact the Academic Freedom and Free Speech of Students and Faculty at Public Schools and Universities.

Students and faculty at public educational institutions depend on protecting their constitutional rights by utilizing the mixed-motive framework for retaliation cases announced in *Mt. Healthy*, 429 U.S. 274. *See*, *e.g.*, *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (college student speech); *Nagle v. Marron*, 663 F.3d 100, 109 (2d Cir. 2011) (teacher speech); *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 560-61 (4th Cir. 2011) (professor speech); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (high school student speech). Allowing plaintiffs to prove unconstitutional retaliation by showing that their protected conduct was a "substantial" or "motivating" factor in an adverse action reflects the reality that all decisions are based on many factors.[2]

Adopting a but-for causation standard for Title VII retaliation claims without carefully circumscribing the reach of that determination may foster confusion in the lower courts and lead to the abandonment of mixed-motive First Amendment retaliation claims as well. Indeed, after this Court's holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which imposed a but-for standard in Age Discrimination in Employment Act cases, the

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[2] The Court uses "substantial" and "motivating" interchangeably. *Mt. Healthy*, 429 U.S. at 287.

Seventh Circuit succumbed to that temptation and extended *Gross* to First Amendment retaliation claims, *see Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (imposing but-for causation on § 1983 retaliation claims in light of *Gross*), even though in *Gross*, 557 U.S. at 179 n.6, this Court said that constitutional cases like *Mt. Healthy* are not governed by statutory text and have "no bearing" on the correct causation standard. Although a later panel of that circuit retreated from that sweeping change, *see Greene v. Doruff*, 660 F.3d 975, 977-78 (7th Cir. 2011) (rejecting but-for causation in First Amendment retaliation cases, but not overruling *Fairley*), district courts in that circuit continue to apply but-for causation to First Amendment retaliation claims, *see Jenkins v. E. St. Louis Hous. Auth.*, 863 F. Supp. 2d 785, 789 (S.D. Ill. 2012) ("the Supreme Court of the United States clarified recently that, unless a federal statute provides otherwise, a plaintiff bears the burden of demonstrating but-for causation in suits brought under federal law.").[3]

The difference between the statutory sources governing these separate causes of action militates against an identity in standards of proof. But the similarity in substantive relief and policy between these legal remedies may understandably (though

[3] One scholar explained why courts are tempted in this way: "Numerous other federal statutes, including . . . § 1983 . . . do not use the words 'because of' in their operative language but likewise prohibit discrimination against an individual, in what could colloquially be referred to as 'because of' certain factors or conduct." Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 909-10 (2012).

mistakenly) motivate judicial interest in imposing a proof standard common to both. For this reason *amici* urge this Court to admonish lower courts against the unwarranted transfer of its ruling beyond the boundaries of this case to retaliation claims under § 1983.

Imposition of a but-for standard on First Amendment retaliation claims would place the students and faculty who suffer retaliation for voicing their opinions on campus in the difficult position of having to prove the retaliation is motivated solely by their speech. Yet in many cases, savvy school administrators when penalizing faculty or students for their speech claim benign, non-discriminatory reasons. A but-for analysis enables the defeat of the plaintiff's claims even when viewpoint discrimination motivated the challenged retaliation. A mixed-motive standard provides greater protection to civil liberties at public schools and universities.

A. A But-For Proof Requirement for Civil Rights Retaliation Will Inhibit Robust Protection of Free Speech and Academic Freedom on Campus.

"[F]ree speech is of critical importance" on public university and college campuses throughout this country "because it is the lifeblood of academic freedom." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). Without free speech on campus for students and faculty, the "marketplace of ideas" as we know it would cease to exist. *Keyishian*, 385 U.S. at 603. Indeed, the core principles of the First Amendment "acquire a special significance in the

university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing *Keyishian*, 385 U.S. at 603).

In the educational community, many players lay claim to "academic freedom," an idea with varying definitions. *See* Br. for *Amici Curiae* American Council on Education, et al. ("ACE") 11-12. Academic institutions assert the academic freedom to set curriculum, make employment decisions, and proscribe academic standards, but teachers assert it to protect their ability to pursue scholarship without interference. *Sweezy v. State of N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 629 (7th Cir. 1985) (Posner, J.) ("'academic freedom' . . .is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict."). The institutional rights must be balanced against the rights of faculty and students to speak freely on and off campus. *Sweezy*, 354 U.S. at 250; *see also Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) ("Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues.") (internal citations omitted).

At its core, academic freedom is rooted in the Free Speech Clause of the First Amendment. And "[i]t has long been recognized that the purpose of

academic freedom is to preserve the 'free marketplace of ideas'" against "arbitrary interference of university officials." *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989) (citing *Keyishian*, 385 U.S. at 603). Indeed, this Court has always strived to protect faculty and student speech, whenever possible. *See*, *e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (leaving open protection of faculty teaching and scholarship from restrictions on employment-related speech); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999) (protecting ability of students to speak freely and making schools liable for student-on-student harassment only when it is severe, pervasive, and objectively offensive); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670-71 (1973) (protecting offensive student speech in higher education); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (protecting student speech that is not materially or substantially disruptive).

These broad protections for student and faculty speech are supported by the mixed-motive framework established in *Mt. Healthy,* which uncovers retaliatory conduct threatening to fundamental rights. Often, the evidence surrounding punishment of a student on campus or a faculty member in the workplace contains several justifications for the adverse action. In the case of a professor, a college may deny her tenure because of a less than preferred number of publications and the viewpoints she expresses in existing publications. Rarely is any decision made for one reason alone. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it

be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."). As Senator Case famously stated during the debates on the Civil Rights Act of 1964: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." Senator Case, 110 Cong. Rec. 13,837-38 (1964) (Debates on the Civil Rights Act of 1964).

For nearly four decades, the mixed-motive standard has proved a vital doctrine to protect constitutional and civil rights. By asking this Court to abrogate *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), petitioner's request might be perceived also as a challenge to *Mt. Healthy*, which notably, informed the analysis contributing to *Price Waterhouse*'s mixed-motive standard. *See Price Waterhouse*, 490 U.S. at 248-49 (referencing *Mt. Healthy*); *see also Desert Palace v. Costa*, 539 U.S. 90, 93 (2003) (discussing the six justices who approved of the mixed-motive standard in *Price Waterhouse*).

B. The Mixed-Motive Standard Announced in *Mt. Healthy* Protects Fundamental Rights.

In *Mt. Healthy*, a public school declined to rehire a teacher after he told a disc jockey about a new school dress code. 429 U.S. at 282. The teacher previously had argued with co-workers, profanely described certain students, and made an obscene gesture at the school. The school justified its rehire denial by citing the teacher's "notable lack of tact in handling professional matters," particularly, the

radio station incident and the obscene gestures. *Id.* at 282-83. This Court held that "the burden was properly placed upon [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the [school's] decision not to rehire him." *Id.* at 287. The Court balanced the interests of employees and employers by adding that once an employee has shown the constitutionally protected conduct was a motivating factor, the defendant may show that "it would have reached the same decision" anyway. *Id.*

In *Price Waterhouse*, six justices adopted the mixed-motive framework in a sex discrimination suit under 42 U.S.C. § 2000e *et seq*. *See* 490 U.S. at 248-49 (Brennan, J., plurality) (discussing *Mt. Healthy*); *id.* at 258-59 (White, J., concurring) (same); *id.* at 263-69 (O'Connor, J., concurring) (discussing the *Arlington Heights* mixed-motive framework). This Court said: "To construe the words 'because of' [in Title VII] as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them." *Id.* at 240. After all, "Title VII [is] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241. Thus, the Court held that "once a plaintiff . . . shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45. The Court acknowledged that it had reached "a similar conclusion" in *Mt. Healthy*. *Id.* at 248.

The mixed-motive framework "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287.

C. The But-For Standard Is Not Rooted in Reality and Gives Defendants a Litigation Advantage.

Under a but-for standard, First Amendment retaliation litigants would be handicapped in attempts to vindicate their constitutional rights. The requirement that they prove that discrimination was the sole cause of an adverse educational or employment action would dramatically enhance the difficulty of their cases, and thus diminish the availability of remedies. Conversely, this altered standard would relieve government officials of the salutary incentives to fairness that viable retaliation claims bring.

When debating the Civil Rights Act of 1964, "Congress expressly rejected the notion that Title VII liability attached only when discrimination was the sole cause of the employment action." *Griffith v. City of Des Moines*, 387 F.3d 733, 740 (8th Cir. 2004) (Magnuson, J., concurring). Congress rejected but-for causation because it is more difficult to prove and not rooted in reality. As one commentator noted, "[b]y requiring conclusive proof of actual causation, but-for causation is undoubtedly more difficult to prove than mixed-motive causation which requires proof that an illicit motive was part of the consideration." Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the*

but-for Requirement, 43 SUFFOLK U. L. REV. 921, 929 (2010). Another commentator finds three problems with but-for causation: "(1) It is difficult to prove this type of causation; (2) this standard allows some employers to engage in discrimination with impunity; and (3) this standard will yield a windfall to defendants in certain cases." Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515 (2006).

The but-for standard is not rooted in reality, as it "requires the mental construction of a non-existent world – one in which the defendant's action did not occur." *Id.* As this Court noted in *Price Waterhouse*:

> Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it [under a but-for scheme], neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

490 U.S. at 241. Justice O'Connor's concurring opinion expressed similar skepticism about the but-for standard:

> "[T]he [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable

> state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy."

Id. at 264 (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956)).

The but-for test also inhibits a civil rights plaintiff from successfully prosecuting his claims because often times defendants control the evidence that a plaintiff needs to prove his case. Katz, *supra*, at 515. Thus, "there is something unfair about requiring plaintiffs to prove 'but for' causation." *Id.* at 516; *see also Price Waterhouse*, 490 U.S. at 263 (O'Connor, J., concurring) ("[T]he law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care."); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) (stating that it would be "destructive of the purposes of Title VII to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor").

The mixed-motives standard protects civil liberties by affording civil rights plaintiffs the viable opportunity to challenge unconstitutional conduct

that may be masked by other educational or employment considerations. Under a but-for standard, university employers like petitioner may proffer, at or before trial, alternative justifications for the adverse employment or educational actions and thereby gain litigation advantage. That strategic litigation advantage (to prevail at summary judgment) is one understandably attractive to and sought by higher educational organizations, ACE Br. 8-9, but it bodes ill for academic freedom and free speech of their students and faculty members. With the but-for trump card in hand, a university may thwart a student or faculty member's protest of unlawful retaliation.

D. *Amici* Are Aware of Many Cases Where Students, Faculty, and Staff Could Have Had Their Claims Affected Adversely by a But-For Standard.

Academic freedom and campus free speech depend on opportunities for students and faculty to challenge the entrenched orthodoxy. Too often public schools and universities censor and retaliate against dissenters for their speech, but cloak those adverse actions in seemingly benign justifications. A but-for standard facilitates such punishment of disfavored speakers and thus imperils the marketplace of ideas.

Untenured faculty would be left particularly vulnerable upon an elimination of the mixed-motive standard in both Title VII and First Amendment claims. "In all but the clearest cases, the decision to terminate a probationary teacher's employment entails the complicated weighing of many factors,

almost all of which are subjective. An essential element of the probationary process is periodic assessment of the teacher's performance, including the person's ability and willingness to work effectively with his colleagues." *Mabey v. Reagan*, 537 F.2d 1036, 1044 (9th Cir. 1976). An untenured professor may receive an annual review from several peers, some of whom may consider the viewpoints expressed in the professor's writings or communications with peers. A court's

> close examination is particularly appropriate [in these cases] where . . . a complex of reasons may as well mask an unlawful motive as legitimately motivate a refusal to rehire, and where all of those in the group are subject to the threat of loss of their jobs for identical ill-defined reasons.

Id. at 1045. Under a but-for standard, an employer met with a charge of retaliation for protected activity could simply posit an alternate ground for termination. This leaves untenured faculty who deviate from the carefully guarded boundaries of fashionable opinion in a dubious legal position should they face retaliation for their nonconformity.

In *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), a public school fired a teacher who decided to teach students about uses of industrial hemp. The school's termination notice detailed several performance deficiencies and instances of misconduct, but the teacher asserted the school fired her for inviting the actor Woody Harrelson to speak about industrial hemp. *Id.* at

1045. The Sixth Circuit held that the teacher's introduction of industrial hemp was protected expression. *Id*. at 1050. It then applied *Mt. Healthy*'s mixed-motive standard and concluded that the teacher presented sufficient evidence that a reasonable jury could find her termination was motivated, at least in part, by her protected speech. *Id*. at 1056. Had the Sixth Circuit applied a but-for standard, the teacher's case may not have reached a jury because the school proffered several justifications for terminating her employment.

In California, a public college terminated the employment of an adjunct professor who answered a student's question about the biological basis for homosexuality in a human heredity class. *Sheldon v. Dhillon*, No. C-08-03438-RMW, 2009 WL 4282086, at *1 (N.D. Cal. 2009). The college claimed the professor taught misinformation as science, which justified dismissal. The professor asserted, however, that she merely provided information from the approved course textbook and that she was terminated because a student was offended by her answer. The professor filed a First Amendment retaliation claim. *Mt. Healthy*'s mixed-motive framework allowed the professor's case to survive a motion to dismiss because the evidence showed two reasons for the college's action. Under a but-for standard, however, the professor's case may have never survived a motion to dismiss, let alone reach a jury. The professor would have been obliged to prove that the college terminated her employment solely because a student deemed it "offensive." But because the college offered a competing justification – that it terminated her employment for teaching

misinformation – the professor would not have satisfied a but-for standard.

Student free speech retaliation claims will suffer under a but-for standard as well. Recently, a public university dismissed a counseling student after she referred a client to another counselor in a practicum program because the client wanted counseling on a same-sex relationship. The student's religious beliefs prevented her from offering the counseling requested. *Ward*, 667 F.3d at 731-32. The evidence presented mixed motives for the dismissal. The university asserted that it expelled the student because she violated counseling ethics, but the Sixth Circuit held a reasonable jury could also find that the university dismissed the student because of her religious views and speech. *Id*. at 735. The defendants' statements indicated that the student's "religious beliefs *motivated* their actions." *Id*. at 738 (emphasis added). Under a but-for standard, the student may never have survived summary judgment because the university could have argued that she had not proved that her speech was the but-for cause of its discipline.

In another instance, a resident assistant at the University of Wisconsin–Eau Claire received a disciplinary letter prohibiting him from holding Bible studies in his dorm room.[4] It is rare that a university will actually admit in writing that the

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[4] Raquel Rutledge, *Bible study policy raises ire UW-Eau Claire resident assistant can't lead group*, Milwaukee J. Sentinel, Nov. 4, 2005, at A; *see also University of Wisconsin at Eau Claire: Ban on RAs' Leading Bible Studies*, Foundation for Individual Rights in Education, http://thefire.org/case/689 (last visited Apr. 9, 2013).

student is being punished for his or her expression. More commonly, if the university had disciplined the student because of the Bible studies *and* his failure to perform proper room-checks, then the student's case would have fallen into a mixed-motive scenario. The student would not be able to prove that but for the Bible study, he would not have been punished, because the university could assert that he was punished for failure to perform room-checks. In contrast, under *Mt. Healthy*'s mixed-motive framework, the student could show that the presence of an unlawful motive – his protected speech during Bible studies – played a role in the university's disciplinary actions.

The risk the but-for standard presents to student and faculty speech claims is identified in the inherently provincial and multivariable justifications readily available in the academic context. For this reason the preservation of the mixed-motive standard is vital to maintaining the utility of § 1983 litigation in preserving and protecting constitutional liberties on campus.

The ACE *amici* raise a couple of issues worth addressing. First, they assert that the but-for standard will "safeguard [their own institutional] academic freedom," ACE Br. 10, but fail to mention that this comes at the expense of the free speech rights of their students and faculty. Second, the ACE *amici* suggest that internal grievance procedures protect academic freedom and free speech, but what they really mean is their *institutional* academic freedom. ACE Br. 13-14. Professor Sheldon, Julea Ward, and others filed internal grievances. These processes provided

neither disinterested adjudicators nor regard for their First Amendment rights. Contrary to the assertions of the ACE *amici*, *see* ACE Br. 7, academic freedom does not suffer under a mixed-motive framework, it thrives. It will suffer if the litigants are subject to a but-for standard of proof for their claims of retaliation.

II. The Court Should Leave § 1983 Retaliation Untouched by the Outcome of This Case.

Finally, if this Court were to adopt the but-for standard in Title VII retaliation claims, it should specifically cabin its holding to Title VII alone. Unlike Title VII, First Amendment retaliation claims under 42 U.S.C. § 1983 are not governed by the specific statutory language at issue here, 42 U.S.C. § 2000e-3. The anti-retaliation provision in § 1983 is implied in the statute. As such, "the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA [or Title VII retaliation] claims, which are governed by statutory text." *Gross*, 557 U.S. at 179 n.6. But courts, however, improperly may still import standards governing one claim into another. *See Fairley*, 578 F.3d at 525-26 (adopting but-for in § 1983 retaliation cases). This Court has admonished lower courts against that mistake. *See Gross*, 557 U.S. at 174 (reminding courts to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"); *cf. Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010) (declining to adopt *Gross*' ADEA reasoning to a Title VII claim because that would violate the Court's "admonition against intermingling interpretations of two statutory

schemes"). However the Court rules in the case at bar, it should explicitly limit the scope of its holding and preserve *Mt. Healthy*'s mixed-motive standard.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

DAVID J. HACKER
Counsel of Record
ALLIANCE DEFENDING FREEDOM
101 Parkshore Drive, Ste. 100
Folsom, California 95630
(916) 932-2850
dhacker@alliancedefendingfreedom.org

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774

KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
15192 Rosewood St.
Leawood, Kansas 66224
(913) 685-8000

GREG LUKIANOFF
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
601 Walnut Street, Ste. 510
Philadelphia, Pennsylvania 19106
(215) 717-3473

Counsel for Amici Curiae

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