No. 15-868

IN THE
Supreme Court of the United States

CITY OF HOUSTON, TEXAS,
Petitioner,
v.
CHRISTOPHER ZAMORA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently participates in cases involving the impact of federal employment laws on public school districts.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the Nation's local governments and public schools if the Fifth Circuit's erroneous decision below is allowed to stand. Local governments and public schools, collectively, are among the largest employers in the United States, and they utilize rigorous review procedures to investigate employee disputes and grievances in a variety of contexts. Under the Fifth Circuit's rule, these and other employers would be amenable to suit for intentional retaliation under Title VII any time they take an adverse employment action based even in part upon facts or recommendations conveyed by a supervisor whom a factfinder later concludes was secretly harboring retaliatory

animus. That rule exposes *amici*'s members to widespread (and, in practice, unavoidable) liability and undermines review procedures that have been carefully crafted to provide a fair and efficient mechanism for addressing legitimate grievances without resort to costly and unpredictable litigation. Moreover, the Fifth Circuit's decision necessarily assumes that these independent internal processes are not sufficient to ensure fair review of employee grievances and renders them incapable of protecting employers from liability, thereby creating substantial incentives for legislators and employers to reconsider whether offering employees this benefit is worth the effort and cost entailed.

SUMMARY OF ARGUMENT

This Court has only once addressed whether the animus of a supervisor, together with the adverse employment action of a separate, unbiased decisionmaker, may combine to result in liability for the employer—so-called "cat's-paw" liability. In that case, *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the Court based its affirmative answer to that question on the specific standard of causation applicable to that plaintiff's claim: "motivating factor" causation. The Court reasoned that for animus to be a motivating factor in the employment action, it need only be one of many proximate causes of that action. Accordingly, even an unbiased decisionmaker's independent judgment, though also a proximate cause of the employment action, will usually not insulate the employer from liability. In the Title VII retaliation context, however, a plaintiff is required to prove that retaliatory animus is the "but for" cause of the employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). This is a more rigorous

and demanding standard of causation than "motivating factor" causation, one that cannot be satisfied when the employer has a separate, sufficient, and legitimate basis—such as a neutral decisionmaker's independent judgment or the results of an independent investigation—for taking the challenged action. The Fifth Circuit's decision below that an independent, unbiased investigation does not preclude liability for Title VII retaliation therefore fundamentally misunderstands and is contrary to this Court's decisions in *Staub* and *Nassar*.

That legally erroneous holding is also contrary to a core purpose of Title VII: "to promote conciliation rather than litigation in the Title VII context" through "the creation of . . . effective grievance mechanisms." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Local governments, school districts, and many other employers employ rigorous internal review procedures to ensure fairness in disciplinary and other employment-related proceedings. But the Fifth Circuit's decision renders those procedures—no matter how fair and unbiased—incapable of preventing litigation and avoiding liability, because any time an independent decisionmaker relies in good faith on any information provided by a supervisor, the employer runs the unavoidable and unpredictable risk that a jury will later decide that the supervisor's account was the product of retaliatory animus. Even the most careful review cannot effectively mitigate that risk.

The incentives under such a regime are clear: Rational employers and legislators will question the wisdom of devoting limited resources to these hitherto valuable and beneficial internal reviews that, un-

der the Fifth Circuit's approach, cannot reduce the risk of costly litigation. That result is contrary to the text of Title VII, this Court's decisions in *Staub* and *Nassar*, and Congress's intent as recognized in *Ellerth* and *Faragher*. This Court's review is warranted to resolve those conflicts, correct the erroneous rule of law adopted below, and prevent the harmful consequences that will ensue if the decision below is allowed to stand.

ARGUMENT

I. THE RULE OF LIABILITY ADOPTED BELOW IS CONTRARY TO THIS COURT'S DECISIONS IN *STAUB* AND *NASSAR*.

As a general rule, when a company's decisionmaker takes an adverse employment action against an employee and possesses no discriminatory intent, the company is not liable. *See*, *e.g.*, 42 U.S.C. §§ 2000e-2, 2000e-3 (Title VII); 38 U.S.C. § 4311(c) (Uniformed Services Employment and Reemployment Rights Act). The lower courts, however, carved out an exception to this rule—known as the "cat's-paw" theory of liability—in order to prevent employers from escaping liability by vesting decisionmaking authority in an unbiased company official who then uncritically accepts (*i.e.*, "rubber stamps") whatever information is provided to him by supervisors, including false information stemming from a supervisor's animus. *See*, *e.g.*, *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 742-43 (8th Cir. 2009). The proffered justification for this theory was that the discriminatory intent of a subordinate is "imputed" to the decisionmaker if that decisionmaker failed to exercise independent judgment. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *see also*, *e.g.*, *Hoffman v. MCA, Inc.*, 144 F.3d

1117, 1121-22 (7th Cir. 1998) ("tainted the decision maker's judgment").

In 2010, this Court granted review to determine the viability of this exception. Importantly, the resulting decision, *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), did not adopt the lower courts' textually unmoored theory of "imputing" intent to the decisionmaker. The Court recognized that "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both," *id*. at 418 (citing Restatement (Second) of Agency § 275 (1958)), and that in cat's-paw cases the animus resides only in the supervisor while the decisionmaking authority resides in a separate company official. Accordingly, the Court declined to hold that the *decisionmaker* is tainted by the supervisor's animus, and instead held that the *supervisor* may satisfy both elements "if the adverse action is the intended consequence of that agent's discriminatory act." *Id.* at 419.

The Court specifically predicated this holding—*i.e.*, that both animus and the harmful action may reside in the biased supervisor—on USERRA's statutory text, which provides that the animus must be "a *motivating factor* in the employer's action." 38 U.S.C. § 4311(c) (emphasis added); *see Staub*, 562 U.S. at 417 ("The central difficulty in this case is construing the phrase 'motivating factor in the employer's action.'"). The Court reasoned that the "motivating factor" standard "incorporates the traditional tort-law concept of proximate cause," *id*. at 420, and therefore that whenever a biased supervisor's actions proximately cause the adverse employment action, the statute is satisfied even though the su-

pervisor lacks decisionmaking authority, *id.* at 419-20. The Court thus held that under USERRA, "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id*. at 422 (footnote and emphasis omitted).

The Court further held that even if the decisionmaker exercised independent judgment rather than merely rubber-stamping the biased supervisor's recommendation, liability would still attach under USERRA's causation standard. "Proximate cause . . . excludes only those 'link[s] that are too remote, purely contingent, or indirect.'" *Id.* at 419 (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)). The fact that the decisionmaker's independent exercise of judgment is also a cause of the adverse action does not "automatically render[] the link to the supervisor's bias 'remote' or 'purely' contingent," as "it is common for injuries to have multiple proximate causes." *Id.* at 419-20. Thus, under *Staub*'s application of the "motivating factor" statutory language, an independent investigation does not save the employer from liability unless the "adverse action was, apart from the supervisor's recommendation, entirely justified." *Id.* at 421.

Thus, *Staub*'s holding rests squarely on the "motivating factor" standard of proximate cause articulated in USERRA. This case, by contrast, arises in the Title VII retaliation context, which is subject to a markedly different standard of causation. In *University of Texas Southwestern Medical Center v. Nassar*, this Court held that to make out a Title VII retaliation claim, the employee must establish that animus

is the "but for" cause of the adverse decision, and not simply a "motivating factor." 133 S. Ct. 2517, 2534 (2013). As *Nassar* made abundantly clear, moreover, "but for" causation and "motivating factor" causation are significantly different, and "motivating factor" causation "is a *lessened* causation standard" relative to the "but for" causation required under Title VII. *Id.* at 2526 (emphasis added); *see also id*. at 2553 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test" of motivating factor.); Pet. App. 6 ("In *Nassar*, the Supreme Court clarified that a plaintiff asserting a Title VII retaliation claim must meet a *higher standard of causation*" than the "motivating factor" standard that applies under USERRA. (original emphasis omitted; emphasis added)).

Whereas the "motivating factor" standard is satisfied when "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives," the "but for" standard requires "the causal link between injury and wrong [to be] so close that the injury would not have occurred but for the act." *Nassar*, 133 S. Ct. at 2520, 2522-23; *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (animus must have "a determinative influence on the outcome" (emphasis omitted)). This juxtaposition demonstrates that the critical difference between the standards is that where an employer makes a decision based on "other, lawful motives," animus can be a "motivating factor" but not a "but for" cause. Put differently, whenever an employer establishes a legitimate reason that was a sufficient basis for an employment action, animus *cannot* be a "but for" cause of that action. *See Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting) ("[A] Ti-

tle VII plaintiff alleging retaliation *cannot* establish liability [on a "but for" causation standard] if her firing was prompted by both legitimate and illegitimate factors.").

Accordingly, even assuming that it is appropriate simply to replace *Staub*'s "proximate cause" inquiry with a "but for" inquiry in cases involving Title VII retaliation (*see* Pet. App. 8), that standard will only (if ever) be satisfied in the rare case where the decisionmaker fails to exercise any independent judgment and instead simply rubber stamps the supervisor's proposed action. Where the ultimate decisionmaker exercises independent judgment (and particularly where, as here, that judgment is the product of a thorough review process) and concludes in good faith that the adverse employment action is justified, that good-faith determination is the *only* "but for" cause of the employment action.

That is so even where a decisionmaker's legitimate reason rests upon her judgment to credit a statement or recommendation from a supervisor whom a factfinder later concludes was harboring retaliatory animus. Whether an employer had a legitimate reason to take an adverse employment action is a question about the decisionmaker's "good faith" belief given what she knew at the time, not "whether the employer's stated reasons . . . later prove to be untrue." *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006); *see also Elam v. Regions Fin. Corp.*, 601 F.3d 873, 880 (8th Cir. 2010) (it is plaintiff's burden to prove "the employer acted based on an intent to discriminate rather than on a good-faith belief that the employee committed misconduct justifying termination"); *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (concluding relevant

issue was whether employer honestly believed in the reasons it offered for denying promotion and not the correctness of those reasons). Thus, an independent decisionmaker's good-faith findings and conclusions are the "but for" cause of the employment action, even if a later factfinder determines that those findings and conclusions were incorrect. *See Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 517 (10th Cir. 2015) (holding in Title VII retaliation case that "independent termination review process broke the causal chain between [supervisor's] purported retaliatory animus and [plaintiff's] termination"); *Bishop v. Ohio Dep't of Rehab. & Corr.*, 529 F. App'x 685, 700 (6th Cir. 2013) (McKeague, J., dissenting) (supervisor's wrongful actions "were not the but-for cause of plaintiff's termination; instead, the Warden's independent investigation was").

* * *

Although *Staub* approved of liability in a cat's-paw case, it did not adopt the lower courts' textually unmoored "imputation" approach, under which differing causation standards may have been irrelevant to the question whether the employer could be held responsible for a nondecisionmaker's animus. *Staub* instead rooted its narrow approval of cat's-paw liability in the statutory text as "an application of the 'motivating factor'" standard of causation, *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 629 (7th Cir. 2012)—a standard of causation that *Nassar* made clear is less onerous than the "but for" causation standard that permits liability only where there is no legitimate basis for the adverse employment action. Thus, when examining whether *Staub* applies to a Title VII retaliation claim requiring "but for" causation, it is no surprise that certain of its conclusions no longer

hold. Relevant here, whereas an independent investigation does not necessarily absolve an employer from liability under the "motivating factor" causation standard, an employer's independent investigation—and certainly a thorough review process like that employed by petitioner here—precludes liability in a "but for" causation regime.

The Fifth Circuit below missed this critical difference because it failed to heed the narrowness of *Staub*'s ruling and the definition of "but for" causation as set forth in *Nassar*. Its decision is contrary to this Court's precedents, and certiorari is warranted.

II. THE FIFTH CIRCUIT'S RULE NEEDLESSLY EXPOSES PUBLIC EMPLOYERS LIKE *AMICI*'S MEMBERS TO EXPANSIVE LIABILITY AND UNDERMINES INTERNAL REVIEW PROCESSES DESIGNED TO PROTECT EMPLOYEES AND THE PUBLIC ALIKE.

The decision below not only misreads this Court's precedents in *Staub* and *Nassar*, it also contravenes "Congress' intention to promote conciliation rather than litigation in the Title VII context" through "the creation of . . . effective grievance mechanisms." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). In *Ellerth* and *Faragher*, the Court examined the circumstances under which an employer can be held vicariously liable for a supervisor's unfulfilled threats to alter a subordinate's terms of employment because of sex. *Ellerth*, 524 U.S. at 754. The Court held that an employer could establish an affirmative defense in part by "exercis[ing] reasonable care to prevent and correct promptly any sexually harassing behavior." *Id.* at

765. "The Court reasoned that tying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose to promote conciliation rather than litigation of Title VII controversies." *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004) (internal quotation marks omitted).

The Fifth Circuit's decision is flatly contrary to that principle. Consistent with Congress's intent, many employers, including the local governments and school boards who are members of *amici*, provide thorough review of employee grievances. In some instances, these processes are required under state or local law or by the terms of collective bargaining agreements. The Fifth Circuit's holding discourages employers and legislators from investing scarce resources in these important review mechanisms, because even the most rigorous grievance procedures cannot protect an employer from liability if a jury later decides that the review relied in part on information from a supervisor who harbored retaliatory animus. *See* Pet. App. 13-14. In the meantime, for employers obligated (at least in the short term) to utilize such procedures, the holding renders these significant expenditures wasteful and inefficient, and creates incentives to minimize the resources devoted to these procedures.

This Court recognized in *Ellerth* and *Faragher* that "Title VII's . . . basic policies of encouraging forethought by employers and saving action by objecting employees" should animate the statute's application. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807. Review is necessary to prevent the decision below from eviscerating that fundamental principle of Title VII law.

A. Local Governments And School Boards Provide Thorough And Independent Review Of Employee Grievances And Disciplinary Issues.

State and local governments accounted for more than 19 million jobs in 2014—nearly 13 percent of the Nation's workforce.[2] These jobs are essential to the well-being of citizens in communities across the country—law enforcement, emergency services, and public works, to name a few.

Likewise, approximately 13,500 school districts play an important role in the education of the over 50 million children who attend public schools.[3] Public school employees are responsible for creating a safe and nourishing educational environment for these important and vulnerable members of society.

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[2] Richard Henderson, *Industry employment and output projections to 2024*, U.S. Dep't of Labor, Bureau of Labor Statistics, at tbl. 1 (Dec. 2015), *available at* http://www.bls.gov/opub/mlr/2015/article/industry-employment-and-output-projections-to-2024.htm.

[3] National Center for Education Statistics, *Table 214.30: Number of public elementary and secondary education agencies, by type of agency and state or jurisdiction: 2011-12 and 2012-13* (Mar. 2015), *available at* http://nces.ed.gov/programs/digest/d14/tables/dt14_214.30.asp?current=yes; National Center for Education Statistics, *Table 105.20: Enrollment in elementary, secondary, and degree-granting post-secondary institutions, by level and control of institution, enrollment level, and attendance status and sex of student: Selected years, fall 1990 through fall 2024* (Mar. 2015), *available at* http://nces.ed.gov/programs/digest/d14/tables/dt14_105.20.asp?current=yes.

Effective management of employees in these positions of trust is critical to the public-service missions of local governments and school boards. Employees serve and frequently interact with members of the public—often in potentially tense situations, as in the case of law enforcement—so officials take great care to maintain order and discipline at all levels. An issue that may be relatively innocuous in other settings, such as tardiness, takes on much greater significance when the employee is a firefighter or a teacher. And charges calling into question the integrity of a public servant are taken exceptionally seriously, particularly when leveled against employees with law enforcement responsibilities or a role in community leadership. Local governments and school boards accordingly establish detailed procedures for, among other things, evaluating employee performance and administering discipline for misconduct.

When discipline is administered or an employee grievance is filed, local governments and school boards employ rigorous review procedures to ensure that the employee is treated fairly. These review measures, often prescribed by statute, rely upon the expertise of multiple layers of professionals familiar with commonly arising issues and often include opportunities for citizen participation. In the vast majority of cases, these systems operate effectively to achieve good-faith results based on the available evidence.

In a typical municipality or district, for example, an employee who wishes to challenge a disciplinary measure often will begin by filing a written grievance with her supervisor, who must meet in person with the employee to review the issue. If the employee is

dissatisfied with the supervisor's determination, she may forward her grievance to the head of her department, who will meet with her and her supervisor. If the employee remains dissatisfied, she may forward the grievance to a grievance review board. In the case of a school-district employee, that ultimate decisionmaker frequently is the school board itself. The review board is typically charged with evaluating factors such as whether substantial and reliable evidence supports the imposition of discipline and whether the discipline is in line with the discipline imposed in similar circumstances. In order to make those determinations, review boards often conduct hearings and interview the employee, supervisor(s), and any witnesses to the alleged misconduct. The employee is frequently entitled to have a representative or witness present at multiple stages of the review.

These review procedures are products of careful consideration by government officials and school boards. They also reflect protection for public employees—often grounded in state or local law—that goes above and beyond the at-will employment to which employees in the private sector are generally subject. Moreover, where employees are represented by unions, collective bargaining agreements frequently provide for *additional* layers of protection, such as the independent arbitration that took place in this case (and resulted in the overturning of respondent's suspension). *See* Pet. App. 3.

The details of the procedures vary from jurisdiction to jurisdiction, but the core of the process is consistent: gradual escalation of issues to more and more authoritative and disinterested decisionmakers to determine whether misconduct has occurred and

whether any disciplinary measures were fair and just.

In addition to their fundamental truth-seeking role, these robust review procedures serve a number of other valuable ends. They express to all employees—from the city manager or superintendent to the entry-level support staff—that the employer is committed to fairness. They encourage employees to take advantage of the resources and procedures offered to them to address their complaints and workplace issues, rather than allowing those issues to grow more serious and potentially result in litigation. They offer employees a valuable forum for addressing more mundane disciplinary and performance issues having nothing to do with potential retaliation or discrimination. Finally, they reinforce the principle that local officials have the primary responsibility to manage their departments effectively and to address workplace issues fairly.

B. The Fifth Circuit's Rule Renders These Careful Review Procedures Ineffectual And Wasteful, Instead Encouraging Resolution Of Grievances Through Costly Litigation.

The rigorous review procedures employed by local governments and school boards are the polar opposite of the "rubber stamp" concern that motivated the development of cat's-paw liability in the lower courts. And yet, under the Fifth Circuit's rule, all of this process is for naught when it comes to avoiding liability for intentional retaliation under Title VII. If that decision stands, rational employers who are able to do so will sensibly shift their resources to defending against inevitable and costly lawsuits, rather than continuing to maintain a time-consuming and

resource-intensive internal dispute resolution system that (according to the Fifth Circuit) cannot prevent or even meaningfully reduce the risk of litigation. Legislators and other governmental authorities likewise will have good reason to question whether it is in the public interest to continue to mandate such expensive and newly ineffectual measures. And employers constrained by existing law or a current collective bargaining agreement will be forced to expend resources on intensive investigations and reviews, only then to spend additional and even more substantial sums defending those investigations in court.

The likelihood of litigation created by the decision below is unavoidable in any practical sense. Any time an employer's independent factfinding process relies on any evidence from any supervisor, the door is open to cat's-paw liability because of the risk that the employee might later persuade a jury that the supervisor was acting out of retaliatory animus. And some degree of reliance is inherent in most reviews: When the facts at issue are disputed, an investigator or reviewing official must make complex and difficult determinations regarding what really happened and the propriety of any disciplinary action. Even the most thorough review must rely upon evidence outside the control of reviewers, such as employee evaluations and disciplinary records written by supervisors. Not all of that information can be independently verified or recreated. Inevitably, the reviewers' task will often require credibility determinations about information and testimony provided by supervisors or other employees without the benefit of independent corroborating evidence. In other words, under the decision below, even the best

and fairest review procedure will fail meaningfully to reduce the employer's risk of liability.

Faced with the reality that prophylactic processes—no matter how rigorous and fair—will not insulate them from liability, employers and legislators will have strong incentives to take steps to conserve employers' resources for inevitable litigation rather than devote time and attention to internal reviews. That is particularly true where the employee has made a prior complaint under Title VII and thus the potential for a claim of retaliation is evident. But it is also true in all instances of discipline, because the employee is under no obligation to disclose to reviewers her participation in any protected activity or her belief that the supervisor harbors retaliatory animus. *See* Pet. App. 15 (an employer is liable even where a decision "appears to the decisionmaker to be a non-retaliatory action"). Because the employer is liable for a supervisor's animus even where there is no indication in the review process—not even an accusation—that it exists, every adverse employment decision carries the potential of a future claim. *See*, *e.g.*, *Bishop*, 529 F. App'x at 698 (employer liable for retaliation where investigator consulted "someone else who was influenced by" biased supervisor). And if a comprehensive investigation has no greater claim to legitimacy than a perfunctory review when the employer's decision is second-guessed in court, it is

only reasonable for the employer to focus more on the steps needed to prevail in litigation.[4]

Meanwhile, employers that are (for the present) legally obligated to provide comprehensive procedures, such as school boards, are in a no-win situation: They must expend financial and human resources on statutorily mandated internal investigations and reviews, only to face significant additional litigation costs and potential liability based on a claim that the review process unknowingly credited a biased supervisor's statements. And even where an employer is constrained to offer reviews, the incentive will be to minimize wherever possible the resources devoted to them, given that they will be ignored in litigation regardless of their thoroughness.

Moreover, because the Fifth Circuit's rule applies regardless of any indication that a supervisor's account is suspect, employers who hope to minimize their exposure to liability are heavily incentivized to presume that information conveyed by *any supervisor* must be independently verified in order to form

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[4] Claims for Title VII retaliation already made up approximately 35% of individual charge filings—over 30,000—to the Equal Employment Opportunity Commission in fiscal year 2014. *See* U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1997 Through FY 2014*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 4, 2016). Even putting aside the likelihood that the Fifth Circuit's rule will lead to *more litigation*, the practical impossibility of reliably avoiding *liability* in such a large pool of cases certainly will increase costs for employers.

the basis of an adverse decision. That approach fundamentally undermines the role of supervisors in maintaining discipline among employees. It also severely hamstrings employers' abilities to review disciplinary issues and other grievances, as one key aspect of a supervisor's role is to provide an accurate assessment to management of employee conduct. That is particularly true in large cities like Houston, where the large public workforce by necessity increases the number of supervisors and layers of supervision. In many cases, there is no reliable source of information on employee behavior that has not been influenced by the views of a supervisor. An employer that cannot satisfy itself that a disciplinary action is warranted independent of facts conveyed by supervisors is confronted with the undesirable choice of dropping the disciplinary action or rolling the dice on whether it will prevail in a lawsuit.

Beyond these perverse implications for Title VII litigation, the Fifth Circuit's decision suggests that internal review procedures are incapable of giving employees a fair review in general. Review procedures operate not only as a means for preventing litigation under Title VII, but also for adjudicating routine issues like an employee's claim that her negative performance evaluation was incorrect or unfair without regard to any protected status. Undergirding this system are the complementary premises (1) that an employee is given certain protections from adverse employment action without cause, and (2) that the employer provides a system of decisionmakers who are independent and treated as capable of determining whether an employee's challenge has merit. Rejecting the second premise, as the Fifth Circuit's rule does, destabilizes that entire regime, because employers (including governmental bodies that

make law touching upon the public workforce) who believe that their internal processes are prone to constant second-guessing will have less reason to offer terms beyond at-will employment. Undercutting internal reviews thus has negative implications that reach from civil-service protections, to collective bargaining agreements, to relations between private employers and employees.

None of this is necessary to ensure that employees are able to obtain review of adverse actions by parties free of retaliatory animus. If an employee has a legitimate claim that reviewing officials harbor a retaliatory motive themselves, the cat's-paw theory is unnecessary. If the reviewing officials are not engaged in a good-faith exercise of independent judgment, then perhaps in those limited circumstances the cat's-paw theory may reasonably be applied. *See supra* at 9; Pet. 22 n.4. Neither is the case here. Finally, for many employees, independent arbitration provides yet another layer of review by an undisputedly disinterested party, further confirming the absence of any justification for the draconian rule of strict liability adopted by the court below.

* * *

Title VII is meant "to promote conciliation rather than litigation" by incentivizing bona fide and thorough decisionmaking by employers. *Ellerth*, 524 U.S. at 764. The decision below turns that principle on its head. This Court's review is necessary to ensure that lower courts properly interpret Title VII consistent with Congress's intent, rather than creating costly litigation that allows juries to apply hindsight long after the fact to second-guess employer decisions made in good faith.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for certiorari should be granted.

Respectfully submitted.

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