No. 15-868

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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

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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 recommenda-

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."

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*,,

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 su-

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

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.

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*

765. “The Court reasoned that tying the liability

A. Local Governments And School Boards Provide Thorough And Independent

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 en

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

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

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.