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Brief in Opposition. City of Houston v. Zamora, 136 S.Ct. 2009 (2016) (No. 15-868), 2016 U.S. S. Ct. Briefs LEXIS 1615, 2016 WL 1445907

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No. 15-868

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

CHRISTOPHER ZAMORA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does the liability standard in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), apply to retaliation claims under Title VII?

(2) Under *Staub*, where a supervisor for an unlawful purpose has engaged in conduct that was intended to and did in fact cause an adverse employment action, the existence of an independent investigation by other officials does not limit liability unless that investigation reveals a new basis for that adverse action that is "unrelated" to the conduct of the supervisor.

The second question presented is:

> Should the Court overturn the decision in *Staub*, and hold that an employer can avoid liability on grounds other than those permitted in *Staub*?

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STATEMENT

A. Legal Background

Staub v. Proctor Hospital, 562 U.S. 411 (2011), addressed a common personnel practice, in which decisionmaking responsibilities are divided among several officials of an employer. "An employer's authority to reward, punish or dismiss [employees] is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of ... assessments by other supervisors." 562 U.S. at 420. The Court referred to the official who makes the final decision as the "ultimate decisionmaker," and to an official whose earlier assessment or action plays a role in the final decision as the "earlier agent." 562 U.S. at 420. In *Staub*, as in the instant case, the earlier agent acted with an unlawful motive, but the ultimate decisionmaker had no such impermissible purpose.

Staub reasoned that the standard for determining whether an employer is liable in such a situation should be based on general principles of tort law. 562 U.S. at 417, 418. Applying those tort principles, the Court held that "[a]nimus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct." 562 U.S. at 421. Under this standard, a plaintiff must show both that the earlier agent intended his or her conduct to bring about the adverse action in question, and that the conduct of

the earlier agent had that intended consequence. Under those circumstances the earlier agent *is* the employer for liability purposes, no less so than the ultimate decisionmaker. "[S]ince a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it...." *Id.* "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment action." *Id.*

Staub also expressly addressed the issue of whether an employer could avoid liability if the ultimate decisionmaker (or some other official acting with no unlawful intent) undertook an "independent investigation" (however defined) of the allegations that were the basis of the adverse action. The Seventh Circuit in *Staub* had held that an "independent investigation" does immunize an employer from liability. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009).[1] This Court rejected that defense. 562 U.S. at 421. The Court in *Staub* held that an independent investigation by an unbiased official will prevent liability only if it "results in an adverse action for

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[1] See *Staub*, 560 F.3d at 656 (employer not liable if the employer (through an unbiased official) "conducts its own investigation into the facts relevant to the decision"; key question is "whether the decisionmaker conducted her own investigation"), 657 ("the employer is off the hook if the decisionmaker did her own investigation"), 659 ("It is enough that the decision-maker 'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'").

reasons *unrelated* to the supervisor's original biased action...." *Id.* (emphasis added).

This case presents a straightforward application of those well-established principles.

B. Events Giving Rise To This Action

(1) In 2007, several Hispanic members of the Houston Police Department, including Lieutenant Manuel Zamora, sued the city for racial discrimination and retaliation. Officer Christopher Zamora, the son of Lieutenant Zamora and the plaintiff in the current appeal, joined the lawsuit in September 2008. Initially Officer Zamora alleged only that the Department had retaliated against him in March 2008, because of his father's involvement in the lawsuit, by removing him from an assignment to the Department's prestigious Crime Reduction Unit (CRU). App-2.

During discovery, Officer Zamora deposed several of his former supervisors at the CRU. Following those depositions, Lieutenant Zamora filed a complaint with the Department's Internal Affairs Division (IAD), alleging that four deponents – all supervisors – had violated Department policies in a number of ways, including by lying under oath during the depositions. App-2. The officials named in Lieutenant Zamora's complaint were three CRU supervisors, Sergeant Mark Myskowski, Lieutenant Steven Casko, and Captain Michael Graham, and a higher ranking official with authority over that unit, Assistant Chief Kirk Munden.

Lieutenant Zamora's complaint triggered an investigation by the Internal Affairs Division. An "Investigative Report" was created under certain rigid procedures and limitations mandated, at least in part, by a collective bargaining agreement.[2] A series of police officers were directed in succession to prepare written "administrative statements" related to that complaint. The order in which the officers were directed to do so was of critical importance, because each officer was given copies of all the statements already submitted by other officers. Lieutenant Zamora and Officer Zamora were the first and second officers, respectively, directed to provide administrative statements.

In requesting an administrative statement from Officer Zamora, IAD asked him to respond to fifteen detailed questions. Concerned that these questions were being used as a form of discovery in the then ongoing litigation, Officer Zamora initially responded to the IAD request by providing certain documents from the litigation related to the questions posed, and directing IAD to other documents that had already been provided to counsel for the city of Houston in that litigation. IAD, however, was not satisfied with that response, and directed Officer Zamora to remain in a Houston Police Department office until he had written out detailed answers. Zamora requested that before having to provide detailed responses on the

[2] The Report was compiled by Sergeant Dirk Bogaard.

spot, he first be given "access to ... all my job performance meetings and supervisory notes," and a number of other documents, to "refresh my memory and enable me to respond accurately to all questions posed."[3] That access was denied, and Officer Zamora then wrote out detailed answers totaling more than ten single-spaced typed pages.

All the other officers, prior to preparing administrative statements, were given copies of the statements of the Zamoras, which they could review and comment on before making their own statements. The four supervisors who were the subject of Lieutenant Zamora's complaint were among the last directed to provide administrative statements, which meant that they could review statements by virtually all the other officers in crafting their own statements. Neither Lieutenant Zamora nor Officer Zamora saw copies of any of these statements until the IAD process was over.

In their administrative statements, the four supervisors who were the subject of the underlying complaint defended their conduct and prior statements. Those supervisors also aggressively attacked the credibility and competence of Officer Zamora. "Casko and Myskowski both had written highly negative comments about Plaintiff regarding their opinions that he was untruthful. Graham and Munden's administrative statements reinforced [the]

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[3] D.Ex. 84, p. 68, COH16001.

strongly negative portrayal of Plaintiff." App-37 to App-38.[4] Statements by two of the CRU supervisors specifically attacked the accuracy of Officer Zamora's administrative statement, which had been provided to them by IAD.[5] Neither Officer Zamora nor Lieutenant Zamora saw these allegations until IAD had reached its conclusions.

The Report itself contained no recommendations. The Report consisted of a compilation of these administrative statements; no interviews were conducted. The highly structured record-building process was manifestly calculated to produce a result favorable to the supervisors against whom the complaint had been filed; that process also proved very prejudicial to both Lieutenant Zamora and Officer Zamora.

A separate memorandum of recommendations was issued by Lieutenant Spjut of IAD. Spjut's memorandum was dated August 23, 2010, and referred to the "attached" Investigative Report. But the Investigative Report is dated August 25, 2010, and includes administrative statements dated August 24, 2010. Spjut later acknowledged that the memorandum that

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[4] "Casko ... repeatedly expressed [the view] that Plaintiff was not credible and suffered from a 'lack of truthfulness.' ... Myskowski described multiple incidents where he claims Plaintiff was untruthful.... He directly identified Plaintiff and his administrative statement as untruthful on multiple occasions." App-37 n.11.

[5] D.Ex. 84, pp. 119, 122, 128, 144.

bore the date August 23, 2010, included material changes that a Houston Police Department lawyer ordered him to make in November, 2010. Spjut stated that his failure to change the date of the memorandum was an oversight.[6]

Spjut rejected all the allegations against the four supervisors named in Lieutenant Zamora's complaint. A number of those allegations concerned inaccuracies in deposition testimony that they had given about a meeting in March 2008, at which Officer Zamora had been pressed to transfer out of the CRU unit. Unbeknownst to those supervisors, Officer Zamora had recorded that meeting. Spjut dismissed those inaccuracies as the result of an understandable lapse of memory over the two years between the meeting and the 2010 depositions. "The discrepancies between the ... record[ing] [of the] meeting and the[ ] depositions [of Casko and Graham] appear to be errors of semantics coupled with the foibles of human memory."[7]

Having rejected the allegations against the four supervisors, which were the actual subject of the Investigative Report, Spjut's memorandum then

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[6] Tr. Day Three, Doc. 402, pp. 121 ("I was told to change it."), 180 ("it is a directive."; "Q. ... [Y]ou were ordered to make changes? A. Correct. Q. And the people who ordered you to make the changes, their names aren't on this document, are they? A. No."); see *id.* 120-23.

[7] COH 15914.

addressed a series of "allegation[s]" against Officer Zamora[8] and Lieutenant Zamora.[9] The origin of these "allegations" is never explained. On Officer Zamora's disciplinary records, the source of the complaint against him is listed as Lieutenant Zamora; Spjut explained that the records so state because the allegations against Officer Zamora had been made in connection with the investigation of Lieutenant Zamora's complaint against the four supervisors.[10] Lieutenant Zamora never made any of the allegations against his son. The first that Officer Zamora or Lieutenant Zamora learned that there were any allegations against them was when they received a copy of Spjut's memorandum sustaining those charges.

Spjut sustained all of the listed allegations against Officer Zamora and Lieutenant Zamora. The three sustained allegations against Officer Zamora all asserted that he had made untruthful statements in the administrative statement that he had been directed to write. Spjut's conclusions regarding Officer Zamora was then reviewed by another supervisor, who recommended that the violations be classified as warranting sanction level E, which could have led to indefinite suspension or dismissal.

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[8] COH 15921, 15922.

[9] COH 15917, 1520, 15921.

[10] Tr. Day Three, pp. 135-36, 142.

The matter was then referred to an Administrative Disciplinary Committee (ADC). App-26. There was conflicting testimony regarding whether anyone on the ADC ever reviewed Spjut's memorandum or the Investigative Report. App-40 n.15. A majority of the ADC recommended that the discipline be reduced to sanction level D, and be set at a 10-day suspension.[11] That recommendation was then referred to the Police Chief (or his deputy, the record is unclear). The Chief upheld the three findings of untruthfulness recommended by Spjut, and then added a fourth finding of untruthfulness regarding yet another issue.[12] The Chief agreed to limit the sanction to a 10-day suspension.

Following the Chief's decision, Officer Zamora was entitled to challenge the suspension before an Independent Hearing Examiner appointed by the City Civil Service Commission, sometimes referred to in the proceedings below as an arbitrator. This proceeding was the first formal opportunity afforded to Officer Zamora to offer evidence in response to the allegations that he first learned of when they were sustained by Spjut or by the Chief. In the proceeding before the Hearing Examiner, the city sought to avoid specifically defending the findings on each of the four allegations, instead arguing that at least there was

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[11] P.Ex. 305.

[12] P.Ex. 24, at COH 15875. In some documents, the various findings of untruthfulness by Officer Zamora are referred to as "citations."

enough to warrant a finding of a pattern of dishonesty.[13] The Hearing Examiner "found that the citations were baseless, overturned the suspension, and awarded Plaintiff his lost back pay." App-27.

> To find untruthfulness on these cites after two years recollection is quite a stretch. Officer Zamora may be defensive, glib and perceive the world differently than his superiors. However, this does not prove he is untruthful or intentionally, knowingly or recklessly misrepresented facts or misleads others. The evidence is not there to prove this case.... Officer Zamora ... should not be disciplined for cites of his administrative statement when he was trying to give full information two years ago without notes.

P.Ex. 34, p. 8.

(2) The nature of the disputed allegations is important to understanding the litigation that followed. Whether Spjut or the other reviewing officials concluded that Officer Zamora had been untruthful would likely have been affected by the repeated assertions by the CRU supervisors that Zamora had a history of prevarication. On the other hand, most of

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[13] P.Ex. 54, p. 7 ("The city asks that each incident not be dissected instead consider all of Officer Zamora's actions together. The position is that Officer Zamora has a pattern of misleading. The statement in the city's brief ... is 'If he had only done it one time, he may not have been disciplined in this manner, it could have been a mere coincidence.' ").

the allegations did not involve factual disputes that turned on conflicting witness statements.

Zamora was charged with untruthfulness for stating that two white CRU officers had not been "chastised" when they improperly brought a prisoner into the jail without detecting a loaded gun on his person. The parties agree that at some time after Zamora left the CRU, those two officers were suspended for one day. The allegation of untruthfulness turned on whether Zamora knew of the suspensions (in which case he was untruthful) or did not (in which case he was just mistaken). No witness testified that Zamora was told of the suspensions, or that Zamora indicated knowing about it prior to his administrative statement. There are more than 5,000 officers on the Houston Police Department; there was no evidence that one-day suspensions are usually announced to the entire force. The Hearing Examiner rejected this allegation because there was no evidence that Zamora knew of the suspensions.[14]

The Chief concluded that Zamora was untruthful when he asserted in his administrative statement that he was not notified in advance of the subject of the disputed March 2008 meeting. The Hearing Examiner rejected this allegation because "[n]o one

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[14] P.Ex. 54, p. 7 ("Neither [punishment nor even scolding] were done to Zamora's knowledge. Certainly Zamora would not be privy to other officer's discipline. Their discipline occurred after he left CRU. This is not untruthfulness. This is ignorance....").

testified Officer Zamora was given notice of the content of the meeting.... There is nothing in the testimony or recording that states Zamora was untruthful when he stated no notice was given." P.Ex. 54, pp. 6-7.

The third allegation of untruthfulness concerned the timing of certain events in early 2008, two years before Zamora's administrative statement. See App-26. Zamora asserted that in 2008 he agreed to two "administrative letters" (statements acknowledging deficiencies in his work) because he had been coerced by a pattern of mistreatment; he cited as an example of that mistreatment the failure of his supervisors to announce at roll call that Zamora had been named South Patrol Officer of the Year for 2007. The parties now agree that Zamora's chronology was incorrect; the award was made in May 2008, but the letters were agreed to in February and March of that year. The question was whether the administrative statement was simply a mistake (because Zamora did not recall the order of events two years earlier), or a lie. No witness testified that in 2010 Zamora actually recalled the correct order. The Hearing Examiner rejected this allegation of untruthfulness, concluding the evidence showed no more than a mistake.

The only allegation that could have turned on conflicting statements concerned Zamora's account that the recorder he used to record the 2008 meeting had been obtained from his partner, Officer Horn. Horn disputed that. App-26.

C. Proceedings Below

Officer Zamora, who was already party to litigation alleging that his removal from the CRU unit was retaliation forbidden by Title VII, amended his complaint to assert that his suspension also had been the result of retaliation for his participation, or the participation of Lieutenant Zamora, in the litigation. He asserted that the citation for untruthfulness, even though ultimately overturned, had caused compensatory damages and continued to injure his career within the Houston Police Department. Zamora did not contend that either the ADC (in recommending the suspension) or the Police Chief (in ordering it) had acted with a retaliatory motive; rather, Zamora asserted that the CRU supervisors who were the subject of Lieutenant Zamora's complaint had brought about the suspension for retaliatory reasons.[15]

In basing his claim on the asserted motives of the CRU supervisors, Zamora sought to invoke the standards established by this Court's decision in *Staub*. The city suggested that *Staub*, which arose under the Uniformed Services Employment and Reemployment Rights Act (USERRA), might not apply in this case, which arises under the anti-retaliation provision of Title VII. 42 U.S.C. § 2000e-3(a). The district court rejected that suggestion, and charged the jury that it could return a verdict for Zamora even

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[15] There was also substantial evidence that Spjut and IAD had acted with a retaliatory intent. App-38, n.13.

if the ultimate decisionmaker did not have a retaliatory motive.

Although the city objected to giving a *Staub* instruction, it did not object to the form of that instruction, which required Zamora to prove that the retaliatory motive of the lower level supervisors was a but-for cause of his suspension.[16] The jury found that a retaliatory motive was a but-for cause of the suspension.[17] "The jury thus found that HPD would not have issued the citations and discipline to Plaintiff but for Plaintiff or his father engaging in protected activity." App-27 (footnote omitted). The jury awarded $23,000 in compensatory damages and $127,000 in future compensatory damages. App-27 to App-28.

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[16] "If Plaintiff Chris Zamora demonstrates by a preponderance of the evidence that a person with retaliatory intent had influence or leverage over the official decision-maker regarding an adverse employment action, you may impute the person's retaliatory intent to the decision-maker. However, if you decide that the official decision-maker would have taken the same adverse employment action independent of the influence of the person with retaliatory intent, you should find for Defendant City on that adverse employment action." Doc. 359, p. 9; see *id.* p. 8 ("Plaintiff Chris Zamora does not have to prove that unlawful retaliation was the sole cause of the adverse employment action but he does have to prove that it was a determinative factor in the adverse employment action.").

[17] The jury found for Zamora on the following question: "Do you find by a preponderance of the evidence that Plaintiff Chris Zamora would not have been issued a citation and would not have received a 10-day suspension for untruthfulness but for his father, Manuel Zamora, and/or Plaintiff engaging in activity protected by the civil rights laws?" Doc. 364.

The district court rejected the city's motion for judgment as a matter of law. It concluded that under *Staub* an employer could be liable in a Title VII retaliation case for adverse actions caused by lower level supervisors. App-31 to App-35. The trial judge also held that there was sufficient evidence to support a finding that the three CRU supervisors had acted with a retaliatory motive (App-35 to App-36), and that the actions of those supervisors was the but-for cause of the suspension. App-36 to App-41. "The jury easily could have concluded that Spjut ... was heavily influenced by the statements submitted by the CRU supervisors [attacking Zamora's truthfulness] when he recommended findings that Plaintiff had been untruthful." App-37 to App-38 (footnote omitted).

> The jury was entitled to construe IAD's decision to pursue untruthfulness charges against Plaintiff as an indication of the influence wielded by the CRU supervisors in IAD's decisionmaking process. The underlying IAD complaint filed by Manuel Zamora ... had made no allegations against Plaintiff, and Spjut therefore was not required to address any alleged untruthfulness by Plaintiff in order to resolve the pending complaint.... [T]he factual inconsistencies for which Plaintiff was held to be "untruthful" ... were largely peripheral to Manuel Zamora's charges and the ensuing investigation. Some also were matters of personal opinion or subjective judgments not susceptible to conclusive determination by others.... As further evidence supporting Plaintiff's argument regarding

> the CRU supervisors' influence on HPD's ultimate decisions, the jury was entitled to find that the accountability standards for truthfulness applied to Plaintiff were not consistently applied to Casko, Myskowski, Graham and Munden....

App-38 to App-39. "As to the issue of 'but-for' causation, the jury was entitled to find that HPD's citations and discipline against Plaintiff would not have occurred but for the extremely negative assessments of Plaintiff from [the CRU supervisors]." App-39 to App-40.

The court of appeals held that in a Title VII retaliation action an employer can be held liable under *Staub*. App-5 to App-9. In *University of Texas Southwest Medical Center v. Nassar*, 133 S.Ct. 2517 (2013), it reasoned, "the Court changed only the strength of the causal link – between the supervisor's actions and the adverse employment action – that the plaintiff must establish." App-8. "*Nassar* says nothing about whether a supervisor's unlawful animus may be imputed to the decisionmaker; it simply requires that the supervisor's influence with the decisionmaker be strong enough to actually cause the adverse employment action." App-8 to App-9.

The Fifth Circuit held that there was sufficient evidence for the jury to conclude that the CRU supervisors had acted with a retaliatory motive (App-10 to App-12), and that their attack on Zamora's credibility was a but-for cause of Zamora's suspension. App-12 to App-15. "That the investigation of Zamora's CRU

supervisors resulted in a recommendation to instead punish Zamora for untruthfulness was in large part due to his supervisors' retaliatory statements." App-12. "In short, the CRU supervisors managed, with their retaliatory statements, to turn an investigation of purported wrongdoing by them into a recommendation that one of their accusers be disciplined." App-13. "Without [the CRU supervisors' retaliatory] statements against Zamora, Spjut would not have recommended discipline; the departmental disciplinary committee would not have adopted Spjut's recommendation; and the Chief of Police would not have had any recommendation to approve." App-13.

The court of appeals noted that this case did not fall within the exception recognized in *Staub* for investigations that result in discipline for reasons "unrelated" to the earlier actions of the unlawfully motivated officials. "The City counters that the many layers of review between the CRU supervisors' statements and the ultimate decisionmaker necessarily broke the chain of causation. Not so. Neither Spjut nor anyone above Spjut conducted an investigation that 'result[ed] in an adverse action for reasons *unrelated* to the [CRU] supervisor[s'] original biased action[s]' – the retaliatory statements." App-13 to App-14 (quoting *Staub*, 562 U.S. at 421; emphasis added).

REASONS FOR DENYING THE WRIT

Petitioner does not contend that either question presented involves an issue about which the court of appeals are divided. This Court does not ordinarily grant review unless there is such a circuit conflict. This case falls far short of presenting the extraordinary circumstances that would warrant review by this Court in the absence of such a conflict.

With regard to the first question presented, petitioner effectively concedes that all the courts of appeals agree that *Staub* can be applied to statutes that require proof of but-for causation, such as the anti-retaliation provision of Title VII or the provisions of the Age Discrimination in Employment Act (ADEA). The second question, whether an employer can avoid liability under *Staub* itself by pointing to the occurrence of some sort of independent investigation, was expressly litigated and resolved in *Staub*. The city has never claimed that it falls within the scope of the limited exception recognized in *Staub*, and it fails to demonstrate that *Staub*'s resolution of this question should be revisited by this Court.[18]

[18] One amicus brief suggests that certiorari be granted to decide three other questions: (1) whether there was sufficient evidence that any retaliatory officials acted as agents of the employer, (2) whether there was sufficient evidence that any retaliatory officials intended to cause adverse action to be taken against the plaintiff, and (3) whether the basis on which plaintiff was disciplined fell within the exception recognized in *Staub* for disciplinary grounds "unrelated" to the statements or actions of

(Continued on following page)

I. THERE IS NO CIRCUIT CONFLICT REGARDING WHETHER *STAUB* APPLIES TO STATUTES REQUIRING A PLAINTIFF TO PROVE BUT-FOR CAUSATION

Petitioner does not contend that there is any circuit conflict regarding whether *Staub* can be applied to statutes that require proof of but-for causation, such as the ADEA or the anti-retaliation provision of Title VII, at issue in this case. The Fifth Circuit recognized that the appellate courts are in agreement on this question, citing decisions in the Sixth, Eighth, Tenth and Eleventh Circuits. App-7. "We now join the circuits that have addressed the question and hold that, in the context of Title VII retaliation claims, cat's paw analysis remains a viable theory of causation." App-9 (footnote omitted). Petitioner does not dispute the accuracy of the Fifth Circuit's summary of the law in this area. The district court noted that decisions in the Third, Sixth, Seventh and Tenth Circuits had applied *Staub* to such statutes. App-34 n.8.

The petition asks the Court to grant review to "[b]ring clarity to this important area of federal employment discrimination law." Pet. 27. Action by

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the retaliatory officials. Brief of *Amici Curiae* Texas Municipal League, *et al.*, City of Houston v. Zamora, 15-868 3-11. Petitioner did not preserve any of these issues in either court below, and they clearly are not encompassed within the questions presented in the petition.

this Court is unnecessary; the law is already quite clear.

Much of the petition is devoted to arguing that the lower court consensus on this issue is incorrect. Pet. 16-27. Such arguments do not ordinarily warrant expenditure of this Court's limited resources, and they certainly do not do so here. The petition criticizes the decision below, and all the circuits which agree with it, as "unthinking" and "mindless." Pet. 23-25. Such harsh language does not add to the grounds for granting review. That language is particularly inappropriate here, because the elaborate merits arguments now detailed in the petition itself were not advanced in the courts below. The city's opening brief in the Fifth Circuit said little more than that it was unclear whether *Staub* applied to a Title VII retaliation case.[19] The city's reply brief was no more elaborate. Even if the merits arguments now advanced by the city were substantial – and they are not – a petition for writ of certiorari in this Court is not the place where such new legal analysis should be advanced for the first time.

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[19] Defendant-Appellant Cross-Appellee City of Houston's Brief of Appellant, *Zamora v. City of Houston*, 14-20125, available at 2014 WL 5427603, at *14 ("It is undetermined whether the cat's paw theory of liability can even be recognized where a plaintiff must show 'but-for' causation. Some courts of appeals, including this one, have questioned whether a cat's paw theory is viable under a 'but-for' causation standard.").

II. THE FIFTH CIRCUIT'S INTERPRETATION OF *STAUB* IS CORRECT

Petitioner's new arguments that *Staub* cannot be applied to a Title VII retaliation claim rest on four distinct errors.

First, petitioner insists that the holding in *Staub* turned on the wording of USERRA, which provides that a plaintiff in an action under that statute need not establish that a motive forbidden by the law was a but-for cause of the adverse employment action in question. Pet. 17.[20] That is not correct. *Staub* was based on general tort and agency law, which are as much part of the background of Title VII as they are of the background of USERRA. "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law." 562 U.S. at 417. "[W]e consult general principles of law, agency law, which form the background against which federal tort laws are enacted." 562 U.S. at 418.

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[20] The petition repeatedly asserts that under USERRA an employer will be liable so long as an unlawful motive was a motivating factor, even if that motive was not the but-for cause of the adverse employment action. Pet. 2, 17. That is not correct. Under USERRA an employer can avoid liability by showing that the unlawful purpose was not the but-for cause of the adverse action. 38 U.S.C. § 4311(c) (no liability if "the employer can prove that the action would have been taken in the absence of [membership in the armed forces]."). The only difference between USERRA and the anti-retaliation provision of Title VII concerns which party bears the burden of proof regarding but-for causation.

Applying those principles, *Staub* held that "[a]nimus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct.... Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it...." 562 U.S. at 420-21; see Pet. 24 (noting "*Staub*'s careful analysis of agency principles"). When a supervisor acts with the purpose and effect of causing an adverse action against an employee, the supervisor's action *is* the action of the employer; that is true regardless of whether the supervisor's action happens to violate USERRA, the anti-retaliation provision of Title VII, or some other statute.

Staub also emphasized that if a plaintiff were required to prove the existence of an unlawful motive on the part of the ultimate decisionmaker – the view advanced by the employer in *Staub* and by the petitioner in the instant case – such an interpretation

> would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible

> meaning of the text, and one that is not compelled by its words.

562 U.S. at 420 (emphasis in original). That consequence is equally an improbable interpretation of any statute forbidding discrimination or retaliation in employment.

Second, petitioner asserts that "cat's paw cases are just a specialized form of 'mixed motive' cases." Pet. 3. That is not correct. So-called "cat's paw" cases, cases presenting the circumstance at issue in *Staub*, involve *two people*, each of whom has a distinct motive, who (acting sequentially) take two actions.[21] For example, a supervisor acting for an unlawful purpose falsely reports that a worker is incompetent, and then a personnel official (relying on that report) fires the worker for the purpose of getting rid of an incompetent worker. The motives of the supervisor and of the personnel official are *both* but-for causes[22]; in the absence of either motive, the worker would not have lost his or her job.[23] On the other hand, mixed-motive cases typically involve a single official who

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[21] See Pet. 13 ("the untainted ultimate decisionmaker takes action because it thinks the evidence supports that result, while the fabricator of the evidence acts from animus.").

[22] The jury in this case found that a retaliatory motive was the but-for cause of Zamora's suspension. The city does not in this Court question the sufficiency of the evidence to support that finding.

[23] As petitioner itself points out, "if [the ultimate decisionmaker] credit[s] fabricated testimony, that fabricated testimony will be the 'but-for' cause of the adverse action...." Pet. 29.

takes a single action but has *two motives*. If both of those motives would have been sufficient to lead the official to fire a worker (e.g., the official discovers both that the worker has been embezzling company funds and that the worker has reported an unlawful employment practice to federal officials, and would fire a worker for either action), then *neither* motive is a but-for cause. Even if one perceived problem had not arisen, the worker would still have been fired for the other reason.[24] Petitioner glosses over this distinction by describing both types of situations as cases in which "the employer acts for multiple sufficient reasons." Pet. 20. But whether "the employer acts" refers to two separate actions by two officials, or to a single action by one official (with multiple motives), is a distinction of controlling importance.

Third, petitioner asserts that the standard of but-for causation in tort law is different than the standard of but-for causation in the anti-retaliation provision of Title VII (and, presumably, the ADEA). It claims that "the Fifth Circuit conflated tort law's loose 'but-for' causation standard with the distinct and demanding 'but-for' test under Title VII's

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[24] Petitioner quotes a statement in Justice Ginsburg's dissent in *Nassar*, that "a Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors." Pet. 21 (quoting *Nassar*, 133 S.Ct. at 2546 (Ginsburg, J., dissenting)). But in this passage Justice Ginsburg is referring to a tort with two concurrent causes, which is analogous to a single decisionmaker making a single decision for two reasons.

anti-retaliation provision...." Pet. 25. Although petitioner does not fully explain the distinction, it insists that the but-for causal connection required by *Nassar* for retaliation cases is different from and more stringent than the but-for causation in tort. That is not correct. *Nassar* is expressly based on and incorporates the tort standard.

> This case requires the Court to define the proper standard for causation for Title VII retaliation claims. Causation in fact – *i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury – is a standard requirement of any tort claim.... [T]his standard requires the plaintiff to show "that the harm would not have occurred" in the absence of – that is, but for – the defendant's conduct....

133 S.Ct. at 2525 (quoting Restatement of Torts, § 431, Comment *a* (negligence)). "It is thus textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 2525 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). *Nassar* cited the Restatement of Torts (in its various iterations) fifteen times.

Fourth, petitioner asserts that the rule adopted by the Fifth Circuit in the instant case is broader than the rule stated in *Staub*. *Staub* holds that even if the conduct of the earlier agent is a but-for cause of the adverse employment action, that conduct will not

be the proximate cause of the adverse action if some other official conducts an independent investigation and then takes an adverse employment action based on some misconduct revealed by that investigation that is "unrelated" to the original biased actions. 562 U.S. at 421. For example, if a biased supervisor falsely reported that a worker was coming in late, and an investigation stumbled across the fact that the worker had been embezzling company funds, the false report would not be the proximate cause of the dismissal. Petitioner asserts that the Fifth Circuit did not recognize any such proximate cause-based exception, but instead held that an employer is liable in *all* cases in which the biased action of an earlier agent is a but-for cause of an adverse employment action. Pet. 25. That is not correct. The court of appeals expressly noted that the city could have avoided liability by showing that some official had "conducted an investigation that 'result[ed] in an adverse action for reasons unrelated to the [CRU] supervisor[s'] original biased action[s]' – the retaliatory statements." App-13 to App-14 (quoting *Staub*, 562 U.S. at 421).

III. THERE IS NO CIRCUIT CONFLICT REGARDING WHETHER UNDER *STAUB* AN INDEPENDENT INVESTIGATION WILL IMMUNIZE AN EMPLOYER FROM LIABILITY

Petitioner asks this Court to grant review to decide whether, or under what circumstances, an independent investigation or internal review would

absolve an employer from liability under *Staub*. Pet. 27-32. Petitioner does not, however, contend that there is a circuit conflict about this issue. That alone is ample reason to deny review. Moreover, the issue that petitioner seeks to raise was extensively aired and squarely decided by the Court in *Staub* itself; there is no need to revisit this question.

The legal issue posed by the second question presented was not preserved below. Although the city suggested in the district court that *Staub* might not apply to a Title VII retaliation claim, it did not contend that the jury instruction that was given failed to accurately state the legal standard established by *Staub*. Under that instruction, the jury was authorized to impute a retaliatory intent to the ultimate decisionmaker if a person with a retaliatory intent had influence over that decisionmaker, and the decisionmaker would not have suspended Zamora but for that influence. Doc. 359. The city never asked for an instruction that the jury could not return a verdict for Zamora if there was an independent investigation, if the decision of the ultimate decisionmaker was affected by credibility, or if the IAD decision was subject to review.

IV. THE FIFTH CIRCUIT'S APPLICATION OF *STAUB* IS CORRECT

A. A central question before this Court in *Staub* was whether an employer could avoid liability by showing that an unbiased official engaged in some form of independent investigation or review before

the adverse employment action was taken. The Seventh Circuit in *Staub* itself had held that an independent investigation is a bar to liability. 560 F.3d at 656, 659. In this Court, the employer contended that a defendant could avoid liability by showing that there had been "a good faith investigation" (Oral Arg., Tr. 26, 36), or "[a]n independent, post-termination review of a [disputed employment] decision." Brief for Respondent, *Staub v. Proctor Hospital*, 09-400, p. 51. In *Staub*, company officials had considered and rejected grievances filed by the dismissed employee asserting that his supervisors had misrepresented the relevant facts.[25] The defendant contended that it should not be held liable if a higher official who rejected that grievance had been mistaken in crediting what might have been the false account of those supervisors.[26]

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[25] "Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck adhered to her decision." 562 U.S. at 414. "Staub filed a written grievance with Buck protesting his termination.... Buck considered Staub's arguments including his claim that the January 27 corrective action was false, but ultimately denied his grievance ... Staub filed another grievance directly with the Hospital President and CEO...." Brief for Respondent, *Staub v. Proctor Hospital*, 09-400, p. 9.

[26] "Even if some of the witnesses ... had a hidden agenda, that alone is not sufficient to compel a finding that the agenda caused the adverse action. Where the employer's decision maker tries to get all sides of the story, the employer will not be held liable solely because one side might harbor a hidden bias against

(Continued on following page)

On the other hand, the plaintiff in *Staub* contended that the existence of an independent investigation was irrelevant. Reply Brief, *Staub v. Proctor Hospital*, 09-400, pp. 6-12. The United States argued that an independent investigation would not bar liability except in certain narrow circumstances. Brief for the United States as Amicus Curiae Supporting Petitioner, *Staub v. Proctor Hospital*, 09-400, pp. 22-24. Several amicus briefs from potential defendants urged the Court not to adopt a legal standard under which liability would turn on whether an employer had conducted an independent investigation. The Equal Employment Advisory Council advised the Court that making the existence of a formal investigation a defense

> will do nothing to encourage compliance or motivate companies to expand their prevention efforts. This is so because such investigations would be prohibitively expensive, logistically impossible, and unlikely to lead to the discovery of discrimination much beyond what is already reported by employees themselves.

Motion for Leave to File Brief Out of Time and Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Respondent, *Staub v. Proctor Hospital*, 09-400, p. 25. The National School Boards Association insisted that

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the plaintiff employee." Brief for Respondent, *Staub v. Proctor Hospital*, 09-400, p. 49.

> investigations aimed at uncovering animus are unlikely to be productive. Biased subordinates intent on misleading the decisionmaker are unlikely to reveal bias even when asked directly about it.... It is also questionable whether employees facing an adverse employment action and other relevant witnesses would necessarily reveal discriminatory bias of [sic] informing when asked directly about it, especially if they were not willing to bring it up themselves beforehand.... [T]he employer's burden in chasing this fleeting dragon in the sky would be inordinate, unreasonable, [and] unnecessary....

Brief of the National School Boards Association as Amicus Curiae Supporting Respondent, *Staub v. Proctor Hospital*, 09-400, pp. 20-21.

These issues did concern the Court at the oral argument in *Staub*, but the concerns were resolved in the opinion that followed. *Staub* expressly rejected the argument advanced by the employer, and by Justice Alito in a concurring opinion, that there should be "a rule immunizing an employer who performs an independent investigation...." 562 U.S. at 421; see 562 U.S. at 425 (Alito, J., concurring). The Court stated: "We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect." 562 U.S. at 421. "Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent

investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule." 562 U.S. at 420-21.

The majority in *Staub* also rejected the contention advanced by the employer and Justice Alito that an employer should not be responsible if the ultimate decisionmaker relied on what proved to be inaccurate information from a supervisor. See 562 U.S. at 421 (Alito, J., concurring).

> Contrary to Justice Alito's suggestion, the biased supervisor is not analogous to a witness at a bench trial. The mere witness is not an actor in the events that are the subject of the trial. The biased supervisor ... however, acted as [an] agent[ ] of the entity that the plaintiff seeks to hold liable....

562 U.S. at 421-22.

B. Petitioner argues that an independent investigation constitutes a defense under *Staub*, because (it asserts) *Staub* only holds an employer liable when the ultimate decisionmaker "rubber stamps the animus of a supervisor." Pet. 28; see *id.* 29 ("rubber stamp"), 30 ("rubber stamp"). But a "rubber stamp" standard is the standard unsuccessfully advanced by Justice Alito (562 U.S. at 425), but not the standard adopted by the majority. Petitioner insists that an ultimate decisionmaker who does more than merely "reflexively fire[ ] the employee without investigating the veracity of [the supervisor's] information" is not really a "cat's

paw." Pet. 16. But the term "cat's paw" appears nowhere in the standard established by *Staub*.

C. Petitioner offers no reason why this Court should revisit the issues fully vetted and squarely decided in *Staub*. Petitioner's proposed new defenses confirm the wisdom of this Court's decision.

Petitioner urges that an employer should be able to avoid liability if an unbiased official conducted a sufficient "independent investigation." Petitioner does not suggest that just any investigation would do; it describes the requisite investigation variously as "formal" (Pet. 4), "elaborate" (Pet. 1), "meaningful" (*id.*), or as an inquiry whose parameters demonstrate that the employer was "trying to get to the bottom of matters" (Pet. 5), was "mak[ing] every effort to root out discrimination" (Pet. 28), "d[id] its level best" (Pet. 15), or "has done everything he can." Pet. 30. Disputes about whether a particular investigation met one of these divergent and unavoidably vague standards would pointlessly complicate and prolong litigation.

Those problems are illustrated by petitioner's insistence that the investigation in this case would satisfy its proposed standard. First, the investigation in this case was only an inquiry into asserted wrongdoing by the four supervisors; there was no investigation of the untruthfulness "allegations" against Officer Zamora. For example, IAD concluded that Zamora had lied (rather than merely been mistaken) when he said two officers in CRU had not been chastised for certain misconduct; but IAD never attempted to find

out if anyone had actually told Zamora about the one-day suspensions of those officers. Zamora was cited for untruthfulness for stating that he was not notified in advance about the purpose of the March 2008 meeting; but neither IAD nor the Chief bothered to ask the officials who had attended that meeting if any of them had notified Zamora of its purpose. Second, the entire process was structured in a way likely to produce an unreliable conclusion. The very supervisors whom Zamora claimed had already retaliated against him were given copies of Zamora's administrative statement and were effectively invited to comment on it; their scathing attack on the veracity of that statement, and of Zamora generally, was not disclosed to Zamora until *after* IAD had decided to sustain the "allegations" of untruthfulness against Zamora. If that is the paradigm of the type of a supposedly "thorough" and "meaningful" independent investigation that will immunize an employer, the standard is a very low one indeed.

Petitioner suggests that an employer should not be held liable if an adverse employment action occurred because the ultimate decisionmaker mistakenly credited information provided by a supervisor who turned out to be untruthful. But that would bar liability in almost every *Staub* case. Ordinarily, biased and retaliatory supervisors cause adverse employment actions against workers by providing the ultimate decisionmaker with false or incomplete information, or with a slanted recommendation. Such a scheme can *only* succeed if the ultimate decisionmaker

credits the information or recommendation from the unlawfully motivated supervisor.[27] In that sense almost all *Staub* cases involve a credibility assessment by the ultimate decisionmaker. In *Staub* itself the ultimate decisionmaker decided to credit the information from Staub's supervisors rather than accept Staub's assertion that he had done nothing wrong. In this case the "credibility" determinations involved statements by individuals who had never been interviewed by IAD or by anyone in the chain of decisionmakers. This proposed defense would largely eviscerate *Staub*.

Finally, petitioner argues that an employer should not be liable if the decision of an unbiased official is in turn reviewed by some other official. The existence of such a review process, it insists, should constitute a defense except in "the rare case." Pet. 32.[28] That is essentially the same as the standard proposed by the employer in *Staub*; it would permit any employer to immunize itself from liability for violations of the anti-retaliation provision of Title VII, or of the ADEA, simply by providing for review of

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[27] "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." Brief for *Amici Curiae* International Municipal Lawyers Association, 17.

[28] The only exception that petitioner would recognize is "where the internal review process betrayed its professed independence and credited obviously fabricated testimony because of animus." Pet. 32.

terminations or other disputed employment decisions. This proposed defense would be available in the instant case despite evidence suggesting that no member of the ADC actually read the IAD file before agreeing to uphold the citations against Officer Zamora. App-40 n.15. Such a defense would render *Staub* meaningless, and would render largely unenforceable the anti-retaliation provision of Title VII and the prohibitions of the Age Discrimination in Employment Act.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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