No. 19-0410

IN THE SUPREME COURT OF TEXAS

APACHE CORP.,

Petitioner,

v.

CATHRYN DAVIS,

Respondent.

On Appeal from the Court of Appeals of Texas, 14th District

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE SUPPORTING RESPONDENT

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In particular, we seek vigorous enforcement and proper interpretation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"), as well as state anti-discrimination laws protecting older workers across the nation, including in Texas. *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (ADEA); *Green v. Dallas Cnt.y Scs.*, 537 S.W.3d 501 (Tex. 2017) (per curiam) (finding in favor of plaintiff on disability claim); *Little v.*

[1] No counsel to a party authored this brief, in whole or in part; and no person or entity, other than Amici, their members, and their counsel have made a monetary contribution to the preparation or submission of this brief.

Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004) (unanimous) (reversing summary judgment in disability case); *Scamman v. Shaw's Supermarkets, Inc.*, 157 A.3d 223 (Me. 2017) (unanimous) (finding in plaintiff's favor in age discrimination case); *Knotts v. Grafton City Hosp.*, 786 S.E.2d 188 (W. Va. 2016) (unanimous) (ruling in plaintiff's favor on rehearing in age discrimination case).

This case concerns critical issues regarding the legal standards plaintiffs must meet to prove retaliation and discrimination claims. Preserving strong protections from retaliation and discrimination is essential to helping the 50+ population, particularly those with lower incomes, achieve and maintain financial security.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Protection from discrimination is toothless without protection from retaliation. As the U.S. Supreme Court has explained, "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). For this reason, courts have consistently held that to effectuate the anti-discrimination laws' purpose, the standards for proving a retaliation claim must not be overly stringent.

In particular, as relevant here, both Texas courts and federal ones have taken a broad protective approach when determining whether the employee complaint leading to retaliation (1) adequately put the employer on notice that unlawful discrimination was at issue, and (2) that there was an objectively reasonable basis for the claim. Employees need not comprehensively describe every fact underlying their complaints of discrimination or be able to conclusively prove those complaints are true to fall within the retaliation provision's ambit; they must merely put the employer on notice of the perceived discrimination and have a reasonable, good-faith belief that discrimination is occurring. Defendant's cramped view of the law—that plaintiffs may *only* rely on the four corners of their internal complaints to prove to a jury that their belief was reasonable—effectively nullifies this deliberately permissive structure. The Court should follow the lead of the Fifth Circuit as well as other courts who have permitted plaintiffs to rely on "unreported" evidence to show a jury that their belief was reasonable, rather than overturning the jury verdict in Davis's favor on this unprecedented basis.

Similarly, the Court should affirm the jury's conclusion that Davis's belief that Apache Corporation ("Apache") was discriminating against older women was objectively reasonable. Hybrid or composite discrimination claims, in which a plaintiff argues that her employer discriminated against a group of people with multiple statutorily protected characteristics, are well-recognized claims in federal

court under Title VII of the Civil Rights Act. Because both age and sex are characteristics protected by the Texas Labor Law, the discrimination Davis perceived—unfavorable treatment of older women in particular—falls well within the bounds of a viable legal claim. It is also consistent with significant scientific evidence showing that older women—more than older adults generally or women as a group—experience discrimination in employment at a far higher rate than their peers. They are less likely to be hired and more likely to be underpaid in jobs, and they are far more likely to encounter discriminatory treatment in general during their tenure in the workforce. It makes sense to allow employees who perceive that this well-known phenomenon in the workplace to report it without fear of retribution.

ARGUMENT

I. Facts Not Specifically Identified in the Plaintiff's Initial Complaint of Discrimination to the Employer May Support the Plaintiff's Showing that She Reasonably Believed Discrimination Occurred.

A. Legal Standards in Retaliation Cases are Less Stringent than in Underlying Discrimination Claims, Including the Standard for Showing that the Plaintiff Engaged in "Protected Activity."

Protection from retaliation is an integral component of anti-discrimination law. The U.S. Supreme Court has recognized that "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it, . . . and the underlying discrimination would go unremedied." *Jackson v. Birmingham*

Bd. of Educ., 544 U.S. 167, 180-81 (2005); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.").[2]

To fully effectuate statutory retaliation protections, the U.S. Supreme Court has consistently treated these claims as broader than their underlying "substantive" counterparts. In *Burlington Northern*, the Court expressly emphasized the need for "broad protection from retaliation" to ensure witness cooperation. 548 U.S. at 67; *see also Hishon v. King & Spalding*, 467 U.S. 69, 76 n. 8 (1984) (National Labor Relations Act retaliation provision far broader than underlying prohibitions). Consistent with the general guiding principle that the Tex. Lab. Code §§ 21.001–.556 (formerly known as the Texas Commission on Human Rights Act) was intended to be interpreted in accord with parallel federal protections, *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003) (citing Tex. Lab. Code § 21.001), it is appropriate to take the same broad approach as federal law to enforcement of the TCHRA's anti-retaliation protections.

[2] Indeed, the U.S. Supreme Court has recognized that protection from discrimination inherently includes protection from retaliation. *Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) (recognizing retaliation cause of action implicit in federal-sector prohibition on age discrimination); *see also Jackson*, 544 U.S. at 176-77 (finding that the gender discrimination prohibition in Title IX of the Civil Rights Act implicitly encompasses retaliation claim); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (finding that 42 U.S.C. § 1982 implicitly prohibited retaliation against white lessee for complaining of discrimination against black lessee).

Construing retaliation protections broadly is not merely an abstract concept, but a concrete interpretive principle that has rightly governed construction of the specific elements of a retaliation claim. This includes the requirement that the internal complaint constituted "protected activity."[3] To establish this element, a plaintiff must show that her conduct (1) constituted an "opposition;" and (2) was based on a good-faith, objectively reasonable belief that discrimination occurred. *See Alamo Heights Ind. Sch. Dist. v. Clark*, 544 S.W.3d 755, 786-87 (Tex. 2018). By design, neither standard is stringent.[4] Protected "opposition" does not have to be a formal complaint; it can involve merely disclosing that the employee disagrees with the employer's behavior or refusing to follow a discriminatory order. *Crawford*, 555 U.S. at 277-78. An employee's affirmative expression of opposition need not use "magic words," but need only "alert the employer" that the employee believes "discrimination is at issue" by giving "some indication of [discriminatory] motivation." *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 786–87.A more exacting standard, the U.S. Supreme Court has explained, would

[3] To establish a retaliation claim under the Texas Labor Code, a plaintiff must show: (1) that she engaged in "protected activity" by opposing conduct she reasonably believed to be prohibited by law; (2) that the employer took an adverse action against her; and (3) there is a causal link between the protected activity and the adverse action. *Cabral v. Brennan*, 853 F.3d 763, 766-67 (5th Cir. 2017); *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 137 (Tex. 2015).

[4] Consistent with this approach, the U.S. Supreme Court has established a broader standard for establishing an "adverse action" in retaliation claims than the "adverse *employment* action" standard for underlying discrimination claims, and Texas courts have followed suit. 548 U.S. at 67; *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 442 (Tex. App., 2016) (applying *Burlington Northern* standard to TCHRA retaliation claim).

"undermine . . . the statute's 'primary objective' of 'avoiding harm' to employees." *Crawford*, 555 U.S. at 279 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998)).

Likewise, employees need not establish the merits of their underlying claims to show that they had an objectively reasonable belief that discrimination occurred. *Nicholas*, 461 S.W.3d at 137 (noting that activity may be protected "irrespective of the merits of the underlying discrimination claim" and collecting cases establishing "reasonable belief" standard); *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 240 (5th Cir. 2016) (collecting federal cases establishing "reasonable belief" standard).

In *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981) the Fifth Circuit explained at length its reasons for joining multiple circuits in adopting the "reasonable belief" standard. 654 F.2d at 1137-41.. The court cited with approval the Ninth Circuit's reasoning that "appropriate informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist." *Id.* at 1137-38 (citing *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (internal citations omitted)). Similarly, the court was persuaded by the Seventh Circuit's conclusion that:

> to interpret the opposition clause to require proof of an actual unlawful employment practice "undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys

> one of the chief means of achieving that purpose, the frank and nondisruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own."

Id. at 1138 (quoting *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980)). Ultimately, the court adopted the reasonable belief standard "[t]o effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise." *Id.* at 1141.

In short, Texas courts, the Fifth Circuit, and the Supreme Court have repeatedly confirmed that the standards for proving a retaliation claim—including the "protected activity" standards central to this case—should be construed broadly because any other construction would seriously undermine the statutes' central purpose of stamping out workplace discrimination.

B. "Unreported Acts" May Help Form the Basis of the Plaintiff's Reasonable Belief that Discrimination Occurred.

It would be inconsistent with courts' approach to retaliation claims to unduly constrict the evidence plaintiffs may submit to support their "reasonable belief" that discrimination occurred. Defendants argue that as a matter of law, "unreported acts"—here, facts suggesting discrimination but not specifically identified in Davis's internal complaint—cannot be adduced or considered to show that the plaintiff's belief was reasonable. The Court of Appeals properly rejected that argument.

Davis's brief correctly notes that the Fifth Circuit has expressly permitted plaintiffs to rely on unreported evidence to support a showing that their belief was objectively reasonable. Resp't, Cathryn Davis', Br. on the Merits 43 (citing *Rite Way*, 819 F.3d at 243)).[5] This approach is not unusual. The Ninth Circuit also addressed this issue in *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951 (9th Cir. 2009), in which the plaintiff's complaint to his employer, resulting in his termination, had referred to merely one derogatory comment about his religion by his supervisor. 581 F.3d at 963-64. Plaintiff testified at trial, however, that his supervisor made numerous other derogatory comments about his national origin and religion, which he did not report because he was afraid to complain. *Id.* at 964. The court explained that the previous comments were relevant because they were part of the many circumstances creating the "context in which [the complaint was] made." *Id.* Ultimately, the court held that "[u]nreported comments . . . are relevant to the inquiry concerning the reasonableness of the belief that a violation has occurred." *Id.*; *accord Fergus v. Faith Home Healthcare, Inc.*, No. 18-cv-2330, 2019 WL 3817961, at *2 (D. Kan. Aug. 14, 2019) (citing standard that unreported

[5] As Davis explains, case law does not limit consideration of unreported acts to ones that were of the "same character" as those included in the initial complaint, and rightly so. This standard, which Apache essentially invents out of whole cloth, would create an unnecessary and subjective line-drawing exercise for the court and invade the jury's province of determining whether the contextual evidence the plaintiff presents supports a finding that her belief at the time of the complaint was reasonable.

but known acts may be considered in assessing reasonableness of plaintiff's belief that discrimination occurred). As one court put it, a defendant advancing Apache's position could not "cite[] any authority suggesting that, in order to constitute protected opposition, a plaintiff's sexual harassment complaint to her employer must spell out the details of underlying incidents in a manner demonstrating the existence of an actionable hostile environment." *Livingston v. Marion Bank & Trust Co.*, 30 F. Supp. 3d 1285, 1316 (N.D. Ala. 2014).

In addition, courts that have not explicitly addressed the issue have, nevertheless, considered unreported acts as part of the overall context of the plaintiff's beliefs at the time of the complaint. *E.g.*, *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (considering information known to the complaining employee but not revealed in his complaint); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1179-80 (2d Cir. 1996) (finding that numerous unreported facts supported jury's conclusion that plaintiff had a reasonable belief discrimination was occurring); *Boyer-Liberto v. Fontainebleu Corp.*, 786 F.3d 264, 286-87, 287 n.7 (4th Cir. 2015) (emphasizing the importance of focusing on facts known to plaintiff at the time of the complaint's filing without delineating between those reported and not). In sum, courts analyze the reasonableness of plaintiffs' beliefs based on all the facts they knew at the time of the complaint—not all the facts they included in their complaints. *See Strothers v. City of Laurel*, 895 F.3d

317, 328 (4th Cir. 2018) (describing the appropriate inquiry as "whether the circumstances known to Strothers at the time of her complaint support a reasonable belief that a hostile work environment existed or was in progress.").

One crucial reason that courts analyzing plaintiffs' "reasonable beliefs" consider all *known* evidence, rather than all *reported* evidence as Apache suggests, is that doing otherwise would unravel the permissive standards courts have set for retaliation claims, discussed above. *See* Part I.A, *supra*. The deliberately broad "notice" standard for informal complaints, *see Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 586, (Tex. 2017), would be meaningless if, once litigation began, plaintiffs could not rely on anything not specifically cited in those complaints, *see Livingston*, 30 F. Supp. 3d at 1316 (plaintiffs need not specifically identify all incidents in complaint). Likewise, narrowing the universe of evidence the jury may consider to the four corners of a plaintiff's complaint would have exactly the chilling effect the courts sought to avoid in crafting the "reasonable belief" standard in the first place. *See McLemore's Wholesale*, 654 F.2d at 1138, 1140-41. Under such a stringent standard, if employees do not list every fact that could support their claim in an internal complaint, they will have need to fear reprisal because any complaint that is less than comprehensive will be unprotected. *Cf. Go Daddy Software, Inc.*, 583 F.3d at 956 (employee did not report all incidents of harassment because "there's a culture in Go Daddy. You complain you get fired.").

Likewise, Apache's proposed standard cannot be squared with *Crawford*'s exhortation that a general expression of disagreement with discriminatory practice, or even a *failure* to act in some circumstances, must be protected in order to preserve the statute's effectiveness. 555 U.S. at 277. These actions or refusals to act would not be meaningfully "protected activity" because they almost never express *all* reasons the plaintiff believed the action at issue was discriminatory. Consequently, this conduct would almost never form the basis of an enforceable retaliation claim, allowing an employer to retaliate with impunity. Adopting this standard would, thus, serve "no redeeming statutory or policy purpose." *McLemore's Wholesale*, 654 F.2d at 1138 (quoting *Berg v. La Crosse Cooler Co.*, 612 F.2d at 1045).

The Court should therefore uphold the Court of Appeals' determination that all the evidence Davis knew at the time of her complaint was relevant to the reasonableness of her belief that Apache was discriminating based on age and gender.

II. Davis's Belief That Apache Discriminated Against Older Women is a Viable Legal Theory Consistent with Scientific Evidence.

A. Davis's Claim That Apache Discriminated Against Older Women Is a Valid Legal Theory Supported by Precedent and the Text of the Texas Commission on Human Rights Act.

The Texas Commission on Human Rights Act (the Act) prohibits discrimination on the basis of "race, color, disability, religion, sex, national origin, or age[.]" Tex. Labor Code Ann. § 21.051. As in the retaliation context, because the Texas Legislature intended the Act "to correlate state law with federal law in employment discrimination cases[,]" courts "look to federal law to interpret the Act's provisions." *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (quoting *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005)).

In deciding issues related to the Act, this Court has frequently relied on precedent from the federal Court of Appeals for the Fifth Circuit. *See, e.g.*, *AutoZone, Inc.*, 272 S.W.3d at 592-94 (relying on Fifth Circuit jurisprudence); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 639-42 (Tex. 2012) (relying on U.S. Supreme Court and Fifth Circuit jurisprudence); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 24-25 (Tex. 2000) (relying on U.S. Supreme Court and Fifth Circuit cases). Precedent from the U.S. Supreme Court, Fifth Circuit, and other federal appellate courts show that a composite discrimination claim based on sex and age is appropriate under the Act.

a. Federal courts have long recognized that composite claims are essential to effectuating Title VII's protections.

Seven years after the passage of the Title VII, the U.S. Supreme Court made clear that an employer cannot avoid accountability for discriminating against some members of a protected class merely because it does not discriminate against all of them. In *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971) (per curiam), the plaintiff challenged an employer's policy of refusing to consider employment applications from women with pre-school-age children, even though it hired similarly situated men. 400 U.S. at 543. The employer contended that because three-quarters of those hired for the position Phillips applied for were women, there could be "no question of bias." *Id.*

In summarily rejecting this position, the Supreme Court affirmed that "disparate treatment of a subclass of women could constitute a violation of Title VII." *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033 (5th Cir. 1980) (citing *Phillips*, 400 U.S. at 544); *see also Arnett v. Aspin*, 846 F. Supp. 1234, 1238 (E.D. Pa. 1994) (explaining that the theory that "the employer disparately treated a subclass within the protected class" was first recognized in *Phillips*).

Following *Phillips*, circuit courts have substantially developed the contours of the jurisprudence concerning composite claims. Although courts have offered varying rationales, the decisions consistently support the proposition that, at a

minimum, composite claims based on protected categories enumerated in the same statute are proper under Title VII.[6]

The need for composite claims is perhaps best articulated in *Jefferies*, a Fifth Circuit decision recognizing sex-plus-race claims that has garnered widespread reliance. 615 F.2d 1025. The plaintiff in *Jefferies* claimed she had repeatedly been passed over for promotions because she was an African American woman. *Id.* at 1028-29. Analyzing her claim through the lenses of racial discrimination and sex-based discrimination as separate categories, the district court relied on the employer's recent promotion of an African American man and the presence of African American men and Caucasian women on staff to dismiss her case. *Id.* at 1032. In reversing, the Fifth Circuit explained that "an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. . . . [D]iscrimination against black females can exist even in the absence of discrimination against black men or white women." *Id.*

[6] Many cases involve the intersection of sex and other characteristics that are not explicitly protected by statute. *See, e.g.*, *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (sex plus hairstyle); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (sex plus marital status); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (sex plus status as parent). In *Willingham*, the Fifth Circuit articulated a test that allows composite claims if the additional characteristic is immutable or based on a fundamental right. 507 F.2d at 1091. This Court need not address the outer boundaries of composite claims in general to resolve this case because the Act expressly protects sex and age.

Two principal rationales undergirded *Jefferies*. First was the text of Title VII, which outlaws discrimination based on "race, color, religion, sex, *or* national origin." 615 F.2d at 1032 (citing 42 U.S.C. § 2000e-2(a)) (emphasis added). "The use of the word 'or,'" the court reasoned, "evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics." *Id.* The court accordingly concluded that reading the statute to exclude protection for African American women as a distinct subclass would not comport with the statute. *Id.* at 1032-33. Second, the court noted that *Phillips* and other precedent[7] mandated recognition of sex-plus-race claims—particularly because Title VII itself makes sex and race protected categories. *Id.* at 1033-34.[8]

After *Phillips*, circuit courts around the country had held that employers could not "apply different standards of treatment to women with young children, to married women, or to women who are single and pregnant." *Id.* at 1034. It would thus be "beyond belief" and "particularly illogical" to hold that Title VII's protections extended to subclasses of women who claimed discrimination based on classifications not in the statute, but not to composite race-and-sex claims. *Id.*

[7] *Willingham*, 507 F.2d 1084; *see also* n. 5, *supra* (discussing *Willingham*).
[8] The court also relied on the fact that the House of Representatives had turned down "an amendment which would have added the word 'solely' to modify the word 'sex.'" *Jefferies*, 615 F.2d at 1032.

The First, Sixth, Ninth, Tenth, and Eleventh Circuits have adopted *Jefferies* or approved of its reasoning. *See Franchina v. Providence*, 881 F.3d 32, 52-53, 52 n.17 (1st Cir. 2018); *Shazor v. Prof. Transit Mgmt, Ltd.*, 744 F.3d 948, 958 (6th Cir. 2014); *Mosley v. Ala. Unified Judicial Sys.*, 562 F. App'x 862, 866 (11th Cir. 2014); *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 977 (9th Cir. 2011); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987);. And the Fifth Circuit has affirmed the decision's continuing vitality. *See Williams v. City of Tupelo*, 414 F. App'x 689, 695 n.8 (5th Cir. 2011); *see also Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 822-23 (5th Cir. 1982). Even the U.S. Supreme Court has "cited *Jefferies* with approval." *Shazor*, 744 F.3d at 958 n.2 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 n.10 (1999)).

Other circuit cases where the issue has arisen have offered alternative grounds of resolution; as a result, courts have assumed, but not decided, if composite claims based on statutorily protected classes are viable. *See Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 336-37 (4th Cir. 2010) (declining to address composite sex-and-race discrimination claim because plaintiff waived it); *Logan v. Kautex Textron N. Am.*, 259 F.3d 635, 638 n.2 (7th Cir. 2001) (same).

No circuit appears to have rejected composite claims wholesale, and the only district court case to have done so provides little reasoning. *See Degraffenreid v.*

Gen. Motors, 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part and rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977).

b. The rationale underlying the available precedent underscores the viability of such claims under the Texas Commission on Human Rights Act.

As discussed above, courts have recognized sex-and-race composite claims under Title VII. Whether to recognize sex-and-age claims under Title VII remains an open question. *See Best v. Johnson*, 714 F. App'x 404, 410 (5th Cir. 2018); *Mulvihill v. Pac. Mar. Ass'n*, 587 Fed. App'x 422, 423 (9th Cir. 2014); *Morrison v. City of Bainbridge*, 432 Fed. App'x 877, 881-82 (11th Cir. 2011); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010); *Sherman v. Am. Cyanamid Co.*, No. 98-4035, 1999 WL 701911, at *1, 188 F.3d 509 (Table), (6th Cir. Sept. 1, 1999), *cert. denied*, 529 U.S. 1037. This question remains because age discrimination is covered by a different statute, so courts have not yet determined how to address claims that span both.

But the Court need not decide that issue here because the Texas Commission on Human Rights Act ("TCHRA") presents no such complications. In addition to other categories such as race and sex, the TCHRA "protect[s] age and disability." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 475 (Tex. 2001). Like Title VII, the Act uses the word "or" to "prohibit employment discrimination based on any or all of the listed characteristics." *Jefferies*, 615 F.2d at 1032. In other states

that have this type of "unified" statute, courts have had no trouble concluding that sex-plus-age claims are cognizable. *See Doucette v. Morrison Cty.*, 763 F.3d 978, 985 (8th Cir. 2014) (holding that "a claim of sex-plus-age discrimination is likely cognizable under the [Minnesota's Human Rights Act]," which prohibits discrimination on the basis of sex and age); *Myers v. Goodwill Industries of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997) (holding same for Ohio law, which also prohibits discrimination on basis of sex and age). Moreover, extensive precedent recognizes the necessity of recognizing composite claims to ensure that all the protected classes enumerated in the TCHRA are in fact protected. Given the text of the TCHRA and the precedent on composite claims, this Court should affirm that sex-and-age claims are viable a theory of recovery—supporting the conclusion Davis' belief that such discrimination was occurring objectively reasonable.

B. Extensive Evidence Demonstrates the Pervasive Discrimination Older Women Face in the Workplace.

Research underscores just how important it is for older women to be able to preserve and enforce their rights in the workplace. Women 40 and above, who comprise nearly a quarter of the United States population, face discrimination in multiple facets of employment, including in hiring and pay. As they continue to account for a greater share of the workforce in the coming decades, adequate legal protection will be even more crucial.

A 2017 study by economists at the University of California at Irvine and Tulane University found "robust evidence of age discrimination in hiring against older women, especially those near retirement age." David Neumark *et al.*, *Is It Harder For Older Workers To Find Jobs? New and Improved Evidence From a Field Experiment*, 127 J. Pol. Econ. 922, 924 (2019). This study involved 40,000 job applications for fictional job seekers, including older applicants (ages 64-66), middle-aged applicants (49-51), and younger applicants (29-31). *Id.* at 938, 966. Based on employers' reactions to these applications, determined by factors such as call-back rates, the researchers found that older women face more difficulty finding jobs than older men. *Id.* at 966.

When employers *do* employ older women, they frequently do not do so on equal terms with their male peers. It is well-known that women on average earn less than men for equal work, and this pay gap increases markedly with age. A recent analysis drawing on data from the U.S. Census found that while the pay gap is 16% for 18-year-olds, it increases steadily, to 24% for 65-year-olds. Andy Kiersz *et al.*, *Here's How Much Male and Female American Workers Earn at Every Age*, Bus. Insider (Apr 10, 2020, 10:36 AM) https://www.businessinsider.com/how-much-americans-earn-age-male-female-2019-1. This appears to be the case even when controlling for education levels and types of jobs. AAUW, *The Simple Truth About the Gender Pay Gap* 17 (Fall

2018), https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf.

Older women's experiences at work bear out these statistics. An AARP survey, for example, found that older women are more likely to report having seen or experienced age discrimination than men. Rebecca Perron, AARP, *The Value of Experience: Age Discrimination Against Older Workers Persists* 3 (July 2018), https://doi.org/10.26419/res.00177.000. As women continue to work in larger numbers and the country continues to age, older women are projected to comprise nearly a fifth of the country's workforce by 2050—an increase of 98% from the year 2000. Mitra Toossi, Bureau of Lab. Stats., *A Century of Change: the U.S. Labor Force, 1950-2050*, 15-16, https://www.bls.gov/opub/mlr/2002/05/art2full.pdf. Like all employees, older women deserve equal treatment in the workplace, and the law should protect them.

CONCLUSION

For the forgoing reasons, the Court should deny the petition for review or affirm the Court of Appeals' decision.

May 13, 2020

Respectfully Submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that, on May 13, 2020, I served the instant pleading via e-filing in accordance with the Texas Rules of Appellate Procedure to counsel of record as follows:

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