No. 10-1447

In the Supreme Court of the United States

DUANE BONDS, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee's internal complaints regarding the purported discriminatory treatment of African-American participants in a federally funded clinical drug trial qualifies as activity that is protected against retaliatory personnel actions by the federal-sector provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 629 F.3d 369. The opinion of the district court (Pet. App. 42-142) is reported at 647 F. Supp. 2d 541.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2011. A petition for rehearing was denied on March 1, 2011 (Pet. App. 143-144). The petition for a writ of certiorari was filed on May 31, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, contains separate provisions regulating

employment practices by private- and federal-sector employers. In the private sector, it is an "unlawful employment practice" for an employer to "discriminate" against an individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). It is also unlawful under Title VII for a private-sector employer to "discriminate" against an employee or applicant "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," 42 U.S.C. 2000e-3(a). The latter provision—Section 2000e-3(a)—"expressly" forbids retaliation because of an individual's opposition to discriminatory employment practices or participation in the Title VII process. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

Title VII's federal-sector provision provides that "[a]ll personnel actions" affecting employees or applicants for employment with certain federal government employers "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). That provision does not expressly reference retaliation for opposing discriminatory employment practices or participating in the Title VII process. Section 2000e-16, however, provides that certain private-sector provisions in Title VII, including Section 2000e-5(g), shall, as applicable, "govern civil actions brought hereunder." 42 U.S.C. 2000e-16(d). Section 2000e-5(g), in turn, prohibits courts from ordering "the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay" if

the challenged personnel action was made "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation [of the anti-retaliation provisions] of section 2000e-3(a)." 42 U.S.C. 2000e-5(g)(2)(A); see *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008).

2. Petitioner is a female, African-American doctor formerly employed by one of the National Institutes of Health (NIH)—the National Heart, Lung, and Blood Institute (NHLBI)—as the Sickle Cell Coordinator for the NHLBI's Division of Blood Diseases and Resources. Pet. App. 2-4. Petitioner's duties in that position included serving as a project officer for the "Baby Hug" clinical trial, which studied whether administering the drug Hydroxyurea to infants with sickle-cell disease could prevent the onset of end-organ damage caused by the disease. *Id.* at 4. NIH provided funding for the Baby Hug project, but outside doctors and researchers performed the actual clinical trials. *Id.* at 4-5.[1]

Dr. Russell Ware, who worked as a principal investigator on the "Baby Hug" trial while in the employ of the St. Jude Children's Research Hospital, used a process known as Epstein-Barr virus-cell-line transformation to create an unlimited DNA supply from the blood samples of the infants participating in the study. Pet. App. 5, 47. Petitioner learned that Dr. Ware was using the Epstein-Barr process and claimed that, in doing so, Dr. Ware had immortalized the participants' cell lines without the consent or knowledge of the parents or guardians of the participants, all of whom (petitioner contends) were African-American. *Id.* at 5 & n.4, 47. Petitioner further

[1] For present purposes, the government draws upon the facts described by the court of appeals and district court, both of which read the summary-judgment record in the light most favorable to petitioner.

asserted that the NHLBI had not authorized Dr. Ware's immortalization of the cell lines and asked that Dr. Ware destroy them immediately. *Id.* at 5-6, 48.

Petitioner's supervisors, Dr. Charles Peterson and Dr. Blaine Moore, did not support petitioner's approach. Pet. App. 6. Petitioner thereafter raised the issue with NHLBI's Data and Safety Monitoring Board, which recommended that the cell lines be destroyed unless proper consent was obtained. *Ibid.* Petitioner also expressed her concerns to the Director of NHLBI, Dr. Elizabeth Nabel. *Ibid.* Director Nabel initially ordered that the cell lines be destroyed, but after learning that authority over the cell lines rested with the individual institutional review boards (IRBs) at the non-government clinics conducting the Baby Hug trials, she instead sent letters urging the IRBs either to destroy the lines or to obtain express consent to retain them. *Id.* at 6-7.

After petitioner challenged Dr. Ware's handling of Baby Hug cell lines at St. Jude's, Dr. Ware wrote to Dr. Moore, petitioner's first-line supervisor at NHLBI, requesting that he remove petitioner as the project officer for a separate sickle-cell clinical drug trial (known as the "SWiTCH" trial) for which Dr. Ware was the principal investigator. Pet. App. 8. Dr. Ware, who chaired the Baby Hug Steering Committee, noted that he had a "decidedly negative" relationship with petitioner that had become worse during the cell-line controversy. *Ibid.* In addition, both Dr. Ware and the deputy chair of the Baby Hug Steering Committee reported that information provided to them by petitioner was so often incorrect that they no longer trusted her. *Id.* at 8-9. Separately, the NHLBI's deputy director had complained about problems with petitioner's management of the study. *Id.* at 9. Dr. Moore removed petitioner from her

role as project officer for the SWiTCH study in response to those complaints and because of his concern that petitioner could not work effectively in that role in light of her many other duties. *Ibid.*

In November 2005, Dr. Moore temporarily relieved petitioner from her role as project officer for the Baby Hug trial pending an investigation into petitioner's performance. Pet. App. 9-10. During that investigation, the agency discovered that petitioner had improperly distributed sensitive agency financial information about upcoming contract negotiations to individuals outside of the government. *Id.* at 10.

In December 2005, petitioner raised her Baby Hug cell-lines concerns to the Office of Special Counsel, which forwarded the allegations to the Secretary of Health and Human Services (HHS). Pet. App. 7-8. The HHS Office of Inspector General initiated an investigation, during which it interviewed Director Nabel, Dr. Peterson, Dr. Moore, and others. *Id.* at 8.

In March 2006, after having determined that petitioner improperly transmitted confidential agency information, the agency placed petitioner on paid administrative leave. Pet. App. 11. Later that month, the Food and Drug Administration put a "Full Clinical Hold" on the Baby Hug trial because the drug bottles used in the study lacked expiration dates. *Ibid.* That clinical hold prevented the infant participants from continuing to receive the drugs and stopped further enrollment in the study, thereby jeopardizing the chances of determining whether administering Hydroxyurea resulted in a statistical difference in spleen and kidney function. *Id.* at 12. The three staff members responsible for printing the bottle labels each reported that petitioner had ordered

the removal of their expiration dates. *Id.* at 11-12. Petitioner denied doing so. *Id.* at 12.

In May 2006, Dr. Moore proposed that the agency terminate petitioner's employment. Pet. App. 12, 73. He based that recommendation primarily on (1) petitioner's improper transmittal of confidential agency budget information and (2) petitioner's negligence as the Baby Hug project officer, which allowed the labeling problems that caused the trial to be placed on clinical hold. *Ibid.* Petitioner's second-line supervisor, Dr. Peterson, accepted the recommendation, but before terminating petitioner, he asked NHLBI Deputy Executive Officer Timothy Wheeles to review the decision because Wheeles had not been involved in any of the relevant events. *Id.* at 13, 74. Wheeles determined that Dr. Peterson had substantially supported each of the reasons for the termination and that petitioner's efforts at rebuttal failed to overcome the supporting documentation. *Ibid.* In October 2006, the agency terminated petitioner's employment. *Id.* at 13.

2. Petitioner filed a complaint with the NIH alleging unlawful discrimination and retaliation. Before the agency issued a decision, petitioner filed this suit asserting claims under Title VII; the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 2301 *et seq.*; and the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 1211 *et seq.* See Pet. App. 13-15.

The district court entered summary judgment for the government. Pet. App. 42-142. As relevant here, the court held that petitioner failed to establish unlawful Title VII retaliation based on petitioner's complaints about alleged discrimination against African-American participants in the Baby Hug trial. *Id.* at 93-110. The court ruled that those complaints did not qualify as pro-

tected activity under Title VII because Title VII protects against retaliation for opposing discriminatory employment practices or participating in the Title VII process, not for opposing discriminatory acts more generally. *Id.* at 95-100.

The district court also held that petitioner failed to establish unlawful Title VII retaliation based on her opposition to discriminatory employment practices or participation in the Title VII process. After noting that petitioner did not dispute that she failed to proffer any "direct evidence of a retaliatory intent," Pet. App. 102, the court held that petitioner also failed to establish a circumstantial case of retaliation that might survive summary judgment, *id.* at 102-110. The court concluded that petitioner failed to proffer evidence indicating that the government's "legitimate, nondiscriminatory reasons for [petitioner's] removal"—*i.e.*, (1) "her disclosure of confidential information" and (2) "her role in the remov[al of] the [drug-bottle] expiration dates"—were "pretextual." *Id.* at 109-110.

The district court similarly concluded that petitioner's failure to adduce evidence of pretext defeated her Title VII discrimination claims. Pet. App. 72-93.

Finally, the district court found petitioner's parallel CSRA and WPA claims insufficient. The court dismissed petitioner's CSRA claim challenging her allegedly discriminatory and retaliatory discharge on the ground that petitioner failed to exhaust her administrative remedies. Pet. App. 132-134, 140; see *id.* at 122-141. The court separately granted the government summary judgment on petitioner's WPA claim alleging retaliation for whistleblowing on the purportedly unlawful perpetuation of the Baby Hug cell lines. *Id.* at 110-122. The court concluded that petitioner had failed to demon-

strate a causal connection between any protected activity and allegedly retaliatory acts. *Ibid.*

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1-38.

The court of appeals affirmed the grant of summary judgment on petitioner's Title VII retaliation and discrimination claims. Pet. App. 30-38. First, with respect to retaliation, the court held that petitioner's complaints concerning the cell lines from "primarily African-American" participants in the Baby Hug study was "not protected under Title VII." *Id.* at 30; see *id.* at 30-33. The court explained that although Title VII's federal-sector provision in Section 2000e-16 "does not explicitly provide protection against retaliation," it nevertheless "'incorporate[s] the protections against retaliation' afforded to private employees by [Section] 2000e-3(a)." *Id.* at 31-32 (citation omitted). And like Section 2000e-3(a), the court explained, the federal-sector provision "is not a general bad acts statute" that would prohibit retaliation for an employee's "opposition to discriminatory practices that are outside the scope of Title VII." *Id.* at 31, 33. The court concluded that Section 2000e-16 instead protects against retaliation only for acts that "constitute opposition to an unlawful *employment* practice." *Id.* at 30.

Second, the court affirmed the summary judgment on petitioner's Title VII claim that "she was terminated because of her race and gender," holding that petitioner failed to raise "a genuine issue of material fact regarding whether [the government's legitimate] reasons [for her dismissal] were a pretext." Pet. App. 36-37; see *id.* at 36-38. The court reasoned that the agency explained that petitioner's discharge was based on her "unautho-

rized disclosure of agency information" and "removal of the expiration dates from the drugs being used in the trial" and that petitioner did "not seriously argue" that those reasons "were not the actual reasons" for her termination. *Id.* at 37.

Finally, the court of appeals reversed and remanded for further proceedings on petitioner's CSRA and WPA claims. Pet. App. 38. The court held that petitioner administratively exhausted and properly raised in district court her CSRA claim challenging her discharge, *id.* at 16-21, and proffered sufficient evidence to survive summary judgment on her WPA claim alleging retaliation for reporting the Baby Hug cell-line issue to Director Nabel and the Office of Special Counsel, *id.* at 21-30.

ARGUMENT

Petitioner contends (Pet. 3-6) that her claim that she experienced retaliation for opposing non-employment-related discrimination by non-government actors against participants in a federally funded clinical drug trial is actionable under Title VII's federal-sector provision. The court of appeals correctly rejected that contention, and its interlocutory ruling does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Title VII's federal-sector provision provides that federal agency "personnel actions" shall be made free from "any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Assuming that Section 2000e-16(a)'s use of "the statutory phrase 'discrimination based on [race],'" like other statutory provisions, "includes retaliation based on the filing of [a race] discrimination complaint," see *Gomez-Perez* v. *Potter*, 553 U.S. 474, 479, 488 n.4 (2008) (reserving

that question), such a prohibition on retaliation could apply only where the retaliation is in response to the action of an employee or applicant opposing *employment* discrimination proscribed by Title VII.

The primary purpose of anti-retaliation provisions such as Title VII's is "[m]aintaining unfettered access to statutory remedial mechanisms" established by Congress. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); see also *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 64, 66-67 (2006) (*Burlington*); cf. *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 452 (2008) (explaining that 42 U.S.C. 1982 "provides protection from retaliation for reasons related to the *enforcement* of the express statutory right" in Section 1982). For that reason, Title VII prohibits retaliatory personnel actions that would deter employees or applicants from reporting discrimination made unlawful by Title VII. See, *e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 852 (2009) (if "an employee who reported discrimination * * * could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses"); cf. *NLRB* v. *Scrivener*, 405 U.S. 117, 121 (1972) (interpreting National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*). Title VII's prohibition on retaliation thereby counteracts the potential for the "intimidation of prospective complainants and witnesses" in the employment discrimination proceedings that Congress established with Title VII, see *id.* at 122 (citation omitted), and "ensure[s] the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington*, 548 U.S. at 67; see *id.* at 66 (interpreting Title VII by analogy to the NLRA).

Moreover, as this Court has recognized, Section 2000e-16(d) reflects Congress's decision to "incorporate a remedial provision, § 2000e-5(g)(2)(A), that authorizes relief for a violation of § 2000e-3(a)." *Gomez-Perez*, 553 U.S. at 488 n.4. That incorporation of Title VII's private-sector retaliation provision into the statute's federal-sector regime confirms that any retaliation protection conferred by Section 2000e-16 parallels the private-sector anti-retaliation protection of Section 2000e-3(a). See Pet. App. 31-33; pp. 2-3, *supra*. Such protection applies only where individuals suffer retaliation for either "oppos[ing] any practice made an unlawful employment practice by [Title VII]" or "ma[king] a charge, testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a).

In other words, as the court of appeals explained, "Title VII is not a general bad acts statute" and "it does not prohibit private employers from retaliating against an employee based on her opposition to discriminatory practices that are outside the scope of Title VII." Pet. App. 31. Here, petitioner's complaints alleging discrimination by non-government actors against minority participants in a federally funded clinical drug trial do not constitute opposition to employment discrimination governed by Title VII. For that reason, they do not qualify as activity for which Section 2000e-16(a) could be said to prohibit retaliatory "personnel actions."[2] Instead, Congress has enacted other statutory provisions, like the

[2] The text of Title VII's federal-sector prohibition indicates that a federal employee bringing a Title VII claim must demonstrate that she has suffered an adverse "personnel action," 42 U.S.C. 2000e-16(a). In this case, as petitioner suggests (Pet. 3), petitioner's "remov[al] * * * from federal service" constitutes such a "personnel action."

WPA, that can provide more general protection for federal employees who report wrongdoing.

2. Other courts of appeals addressing retaliation claims by federal employees have agreed that Title VII's federal-sector provision parallels Section 2000e-3(a) by prohibiting retaliation against individuals who oppose employment discrimination made unlawful by Title VII or who participate in Title VII proceedings. See, *e.g.*, *King* v. *Jackson*, 487 F.3d 970, 972 (D.C. Cir. 2007); *Fitzgerald* v. *Henderson*, 251 F.3d 345, 358 (2d Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Hashimoto* v. *Dalton*, 118 F.3d 671, 680 (9th Cir. 1997), cert. denied, 523 U.S. 1122 (1998); *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Canino* v. *EEOC*, 707 F.2d 468, 471 (11th Cir. 1983); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976); cf. *Morales-Vallellanes* v. *Potter*, 605 F.3d 27, 35-36 (1st Cir. 2010) ("assum[ing] that the anti-retaliation provision applicable to private employers operates to prohibit retaliation in the federal sector"), cert. denied, 131 S. Ct. 978 (2011).

Petitioner cites no contrary authority. Petitioner primarily relies (Pet. 4) on *Ford* v. *Mabus*, 629 F.3d 198 (D.C. Cir. 2010), but *Ford* lends her no support. *Ford* interpreted the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a, in a suit asserting a discrimination claim; it did not address the application of Title VII's federal-sector provision to a retaliation claim. See 629 F.3d at 200. *Ford* concerns a different statute enacted at a different time with different text and a different history. *Ford* thus does not conflict with the court of appeals' decision in this case. Moreover, *Ford* holds that a federal-sector plaintiff asserting an age-discrimination claim under Section 633a does not need to establish that

age was the "but-for cause of the challenged personnel action" and instead can establish ADEA liability by showing that age was "*a* factor" in the adverse employment action. *Id.* at 207; see *id.* at 204-207. That holding on the causal link needed to establish age discrimination in no way supports petitioner's virtually limitless view of the scope of Title VII federal-sector retaliation claims.

Petitioner's reliance (Pet. 5) on *Porter* v. *Adams*, 639 F.2d 273 (5th Cir. Unit A Mar. 1981), is equally unavailing. *Porter* rejected a Title VII plaintiff's contention that she need not have exhausted her administrative remedies for her federal-sector retaliation claim because, in her view, such claims arose directly under the Fifth Amendment and were not cognizable under Section 2000e-16. *Id.* at 277. The court held that Section 2000e-16 protects against reprisals for bringing employment discrimination complaints, reasoning that Congress's "failure to outlaw reprisals specifically in [Section 2000e-16]" was not dispositive because that provision was "drafted broadly" as a "general proscription against discrimination," unlike its "more narrowly drawn" private-sector counterparts that simply prohibit "specific types of employment discrimination." *Ibid.* The court then stated in dictum that Section 2000e-16's text reflected Congress's intent "to bar the federal government from engaging in all those forms of discrimination identified" in the text of Sections 2000e-2 and 2000e-3 "and others as well." *Id.* at 278. The court's suggestion that Section 2000e-16 is not limited to the particular "types of employment discrimination" (*id.* at 277) enumerated in Title VII's private-sector provisions —*e.g.*, "fail[ures] or refus[als] to hire" or "discharge[s]" of employees, 42 U.S.C. 2000e-2(a)(1)—does not imply that Section 2000e-16 protects employees from adverse

actions based on conduct entirely unrelated to Title VII's focus on employment discrimination. And in any event, *Porter* itself cites circuit precedent ruling that Congress "intended to give federal employees the *same* rights as private employees" in Title VII. 639 F.3d at 278 (emphasis added).

3. This Court's review is unwarranted in this case for two additional reasons. First, petitioner's retaliation claim based on her Baby Hug cell-line complaints independently fails because petitioner has not proffered evidence that her dismissal resulted from retaliation. The district court thus entered summary judgment on petitioner's Title VII retaliation claims based on her protected activity on that ground, which is entirely independent from the question that petitioner now presents. The court held that petitioner failed to establish a circumstantial case of retaliation because she failed to show that the government's legitimate reasons for her termination—*i.e.*, her unauthorized "disclosure of confidential [agency] information" and "her role in the remov[al of] the [drug-bottle] expiration dates"—were pretextual. Pet. App. 109-110; see *id.* at 72-93 (same for Title VII discrimination claim). And although the court of appeals did not address that issue in its analysis of petitioner's retaliation claim, it specifically held that petitioner failed to show that the same reasons were pretextual in the course of affirming the dismissal of her Title VII discrimination claim. *Id.* at 36-38; see pp. 8-9, *supra*. The fact-bound analysis of pretext is the same in both contexts, and because both courts below concluded petitioner failed to raise a genuine issue of material fact disputing the lawful reasons for her dismissal, this Court's review on the question presented would not salvage petitioner's Title VII retaliation claim.

Second, the court of appeals remanded for further proceedings on petitioner's CSRA and WPA claims. Pet. App. 38; see p. 9, *supra*. The interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari). That is particularly true here, where petitioner's ongoing CSRA and WPA claims seek relief for the very same discharge that she claims was retaliatory under Title VII.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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