A *GROSS* MISUNDERSTANDING OF EMPLOYMENT DISCRIMINATION

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TABLE OF CONTENTS

I. INTRODUCTION

On Friday, January 18, 2013, the U.S. Supreme Court granted certiorari in *University of Texas Southwest Medical Center v. Nassar*[1] to address whether the retaliation provision of Title VII of the Civil Rights Act of 1964 (Title VII) and similarly worded statutes require plaintiffs to prove but-for causation or simply to meet the mixed-motive test (i.e., that an improper motive was one of multiple reasons the employment action was taken).[2] As the job market has tightened, employment discrimination claims have skyrocketed.[3] Because limited evidence in employment law cases places increased importance on who has the burden to prove causation and what evidence is needed to show it, this decision promises a substantial impact. Recent legal developments have led to disagreement over the applicable causation requirement in Title VII retaliation claims.[4] In contrast to the view expressed by most academics, this Essay explains why but-for causation applies to retaliation claims.

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1. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 978 (2013).

2. Petition for Writ of Certiorari at i, *Nassar*, 133 S. Ct. 978 (No. 12-484); *see* 42 U.S.C. § 2000e-2(a) (2006).

3. *See* Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N.Y. TIMES, Jan. 12, 2011, at B4, *available at* http://www.nytimes.com/2011/01/12/business/12bias.html.

4. *See* Petition for Writ of Certiorari, *supra* note 2, at 11–18 (describing the evolution of the recent circuit split).

II. EVOLVING INTERPRETATIONS OF CIVIL RIGHTS LEGISLATION

To understand the present debate, one must understand how the interpretation and text of Title VII and the Age Discrimination in Employment Act (ADEA) have changed over time. When Congress passed Title VII, it was the first legislative prohibition against employment discrimination.[5] Title VII declared it an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[6]

In 1967, the ADEA added workplace protections against age-based discrimination.[7] Using the same wording as Title VII, the ADEA made it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[8] The Court has recognized that the language of the ADEA is modeled after Title VII,[9] and the similar language has led to the two statutes being interpreted similarly.[10]

The mixed-motive theory at issue in *Nassar* began with the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[11] The Supreme Court granted certiorari to determine the appropriate allocation of the burdens of proof between the defendant and plaintiff under Title VII.[12] A four-justice plurality declared: "To construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[13] The plurality explained that "because of" does not mean "solely because of"; thus, Title VII considers decisions based on a mixture of legitimate and illegitimate considerations to be unlawful.[14] The Court's resulting test is the

5. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2006)).

6. *Id.* § 703(a)(1); *see also* 42 U.S.C. § 2000e-2(a)(1).

7. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634).

8. *Id.* § 4(a)(1); *see also* 29 U.S.C. § 623(a)(1).

9. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979).

10. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

11. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

12. *Id.* at 232.

13. *Id.* at 240 (footnote omitted).

14. *Id.* at 241 (footnote omitted).

mixed-motive, or motivating factor test: Once a plaintiff demonstrates a prima facie case of discrimination, the burden shifts to the employer to escape liability by showing it would have made the same decision without the prohibited criterion.[15] Therefore, Title VII's "because of" standard was read to mean a prohibited criterion cannot be used as a motivating factor.

Congress reacted to *Price Waterhouse* in the Civil Rights Act of 1991 ("Amendments").[16] First, the Amendments added 42 U.S.C. § 2000e-2(m), which declared it an unlawful employment practice if a claimant "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[17] This provision expressly added the mixed-motive test from *Price Waterhouse* into Title VII. Through 42 U.S.C. § 2000e-5(g)(2)(B), the Amendments also gave the plaintiff limited remedies if the defendant could prove he or she would have "taken the same action in the absence of the impermissible motivating factor."[18] No similar changes were made to Title VII's retaliation provision or the ADEA, although the ADEA was amended at the same time in other ways.[19]

In 2009, the Supreme Court addressed the Amendments' effect on the ADEA in *Gross v. FBL Financial Services, Inc.*[20] The Court found that the plain meaning of the text of the ADEA's discrimination provision controlled, without reference to Title VII's discrimination provision.[21] After the Amendments, Title VII's discrimination provision expressly provides for the mixed-motive test, but the ADEA has no such language, even though it was amended at the same time.[22] "When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[23] Starting with the text, the Court found the ordinary

15. *Id.* at 258.

16. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2006)).

17. *Id.*; *see also* 42 U.S.C. § 2000e-2(m).

18. Civil Rights Act of 1991 § 107(b); *see also* 42 U.S.C. § 2000e-5(g)(2)(B).

19. *See, e.g.*, Civil Rights Act of 1991 § 115.

20. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 169–70 (2009).

21. *Id.* at 175 n.2 (noting that the textual differences between Title VII and the ADEA prevent application of Title VII precedent to ADEA claims).

22. *Id.* at 174.

23. *Id.* (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008))

meaning of "because of" is "by reason of," which precedent holds means but-for causation.[24]

III. FULL BREADTH OF *GROSS*'S REACH

While *Gross* plainly eliminated the mixed-motive test from suits under the ADEA, its reach is hotly contested. In *Smith v. Xerox Corp.*, the Fifth Circuit held that a plaintiff can still win a Title VII retaliation claim on a mixed-motive theory because, while "the *Gross* reasoning could be applied in a similar manner to the instant case," *Gross* was an ADEA case.[25] The *Smith* court noted that *Gross* warns against applying rules from one statute to another statute.[26] Because the court interpreted *Gross* as holding the ADEA and Title VII involved separate interpretive schemes that should not be mixed, the *Smith* court applied *Price Waterhouse*'s interpretation of the "because of" standard.[27]

In *Serwatka v. Rockwell Automation, Inc.*, the Seventh Circuit heard a claim under the Americans with Disabilities Act (ADA),[28] which at the time stated: "No covered entity shall discriminate against a qualified individual with a disability because of the disability."[29] The court reasoned that "[a]lthough the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute."[30] Following *Gross*'s analysis, the *Serwatka* court examined the text, finding the causation phrase was "because of" and the ADA did not contain mixed-motive language comparable to Title VII's retaliation provision.[31] The court determined "because of" means but-for causation and the ADA does not authorize mixed-motive claims.[32]

Gross provides an analytic framework under which statutes should be

(internal quotation marks omitted).

24. *Id.* at 176 (citations omitted).
25. Smith v. Xerox Corp., 602 F.3d 320, 328–29 (5th Cir. 2010).
26. *Id.* at 329.
27. *See id.* at 330.
28. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 958 (7th Cir. 2010).
29. 42 U.S.C. § 12112(a) (2006) (Supp. 2008).
30. *Serwatka*, 591 F.3d at 961.
31. *See id.* at 962.
32. *See id.* at 962–64.

examined, and within that framework, mixed-motive claims under Title VII's retaliation provision cannot succeed. While *Gross* decided an ADEA claim, *Smith* and other court decisions have recognized that the reasoning in *Gross* was broad enough to apply to other civil rights statutes.[33] *Smith* attempted to limit *Gross* by claiming that *Gross* warns against reading interpretations from one statute to another and only addressed the ADEA claim.[34] Yet, when discussing the relevance of the Amendments only changing the language in Title VII, the Supreme Court stated, "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[35] Just like the amendments of one statute should not be read into another statute "without careful and critical examination,"[36] a canon of statutory construction calls for an assumption that when Congress amends one provision of a statute but not another, Congress intended to do something different to the two provisions.[37] *Gross* refused to assume the mixed-motive language from the amendments to one statute should apply to other statutes when such language was not added.[38] Similarly, according to *Gross*, we must also refuse to assume the mixed-motive language from the Amendments to one provision of a statute should apply to other provisions of that statute when such language was not added.[39]

Gross established two concepts reaching beyond the ADEA: (1) the Amendments show the phrase "because of" in Title VII does not include the mixed-motive test and (2) the ordinary meaning of the phrase "because of" means but-for causation. First, the Amendments are a congressional indication that "because of" in Title VII did not originally mean that the mixed-motive test applies. Under *Price Waterhouse*, "because of," in both Title VII's discrimination and retaliation provisions, meant courts should

33. *See, e.g.*, Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012) (applying *Gross* reasoning to the ADA); Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010); Bolmer v. Oliveira, 594 F.3d 134, 148–49 (2d Cir. 2010) (questioning whether the mixed-motive theory may be applied to Title VII discrimination claims after the *Gross* decision).

34. *Smith*, 602 F.3d at 329.

35. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009) (citing EEOC v. Arabian Am. Oil Co., 449 U.S. 244, 256 (1991)).

36. *Id.* (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)) (internal quotation marks omitted).

37. *See Arabian Am. Oil Co.*, 499 U.S. at 255–56.

38. *See Gross*, 557 U.S. at 174.

39. *See id.*

apply the mixed-motive test.[40] *Gross* says that "[i]f such 'motivating factor' claims were already part of Title VII, the addition of § 2000e–5(g)(2)(B) alone would have been sufficient."[41] Stating that an unlawful employment practice occurs either when an employment practice is made "because of" a prohibited factor or when a claimant "demonstrates that [a prohibited factor] was a motivating factor for any employment practice" would be repetitive if "because of" already meant "mixed-motive test";[42] the second statement would add nothing. Because courts should not read statutes in a way that renders language superfluous, the mixed-motive language must add something. That means before the statement was added, Title VII's discrimination clause did not allow mixed-motive claims. Thus, "because of," which determined the types of claims allowed under Title VII before the Amendments, must not authorize mixed-motive claims. Lower courts were bound to follow *Gross* and interpret the Amendments accordingly. Moreover, the Court will likely apply the same reasoning in *Nassar*, due to the doctrine of stare decisis and the practical fact that the same Justices will be rehearing the same argument shortly after having ruled one particular way.

Second, *Gross* decreed that the ordinary meaning of a statute's language governs its interpretation, and the ordinary meaning of the phrase "because of" is but-for causation. In *Gross*, once the Court established that the first place to look is the text of the statute at issue rather than the text and court interpretations of Title VII, the Court held that the ordinary meaning of the statutory terms is the best indication of Congress's intent.[43] Examining the dictionary, the Court next determined that the phrase "because of" means "by reason of," so discrimination must be the reason the unlawful employment action occurred.[44] Thus, the Court found "because of" means but-for causation.[45] None of the Court's analysis relied on anything special about the ADEA; it only relied on the dictionary definitions of "because of" and "because" to discern their ordinary meaning.[46] That means, wherever those words appear, the ordinary meaning is the same. So, whenever a statute similar to the ADEA includes

40. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
41. *Gross*, 557 U.S. at 178 n.5.
42. 42 U.S.C. § 2000-2(m) (2006); *see Gross*, 557 U.S. at 185.
43. *Gross*, 557 U.S. at 175.
44. *Id.* at 176 (citations omitted).
45. *Id.*
46. *Id.*

"because of" to define causation, and if it does not include any other language that would alter the term's plain meaning, the statute will require but-for causation.

Applying *Gross*'s reasoning to Title VII's retaliation provision, the mixed-motive test does not apply. First, start with the text: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."[47] Unlike Title VII's discrimination provision, the retaliation provision was not amended in 1991,[48] so we cannot assume Congress intended the Amendments' mixed-motive language to apply to retaliation as well.[49]

Second, we look to the ordinary meaning of the terms in the provision at issue to determine Congress's intent.[50] The retaliation provision prohibits discrimination "because" an employee opposed an unlawful employment practice.[51] *Gross* already tells us that "because of" means "by reason of."[52] Removing "of" changes nothing because *Gross* used definitions of both "because of" and "because" in holding that "because of" means but-for causation.[53] Thus, *Gross* already tells us that when "because" is the causation standard, the ordinary meaning requires the plaintiff to prove but-for causation.[54]

Nothing relevant distinguishes the statutory text around the word "because" in the retaliation provision from the words "because of" in *Gross*.[55] Just like the ADEA or ADA, Title VII's retaliation provision prohibits adverse employment action because of certain characteristics of the employee and includes no mixed-motive language.[56] The ADEA protects age, the ADA protects disability, and the retaliation provision

47. 42 U.S.C. § 2000e-3(a) (2006).

48. *Id.* §§ 2000e-2 to e-3(a); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. §§ 2000e to e-17).

49. *See Gross*, 557 U.S. at 174–75 ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991))).

50. *Id.* at 175.

51. 42 U.S.C. § 2000e-3(a).

52. *Gross*, 557 U.S. at 176.

53. *Id.*

54. *See id.*

55. *See id.*

56. *See* 42 U.S.C. § 2000e-3(a).

protects previous opposition to an employer's unlawful conduct. The textual context in these three statutory provisions is the same so, similar to the ADEA, nothing in Title VII's retaliation provision's text changes the ordinary meaning of "because." Thus, but-for causation applies.

IV. RESPONSES TO OTHER COMMENTATORS

Commentators addressing the issue argue that *Gross* was either incorrectly decided or *Price Waterhouse* applies to retaliation claims. Their arguments take on three themes: (1) the protective goals of these civil rights statutes are better served by allowing mixed-motive claims,[57] (2) "because of" in Title VII means motivating-factor test,[58] and (3) *Price Waterhouse* still governs Title VII.[59]

Arguments about the best way to protect civil rights are addressed to the wrong branch of government. Title VII balances employee rights with employer prerogatives.[60] And, *Gross* does not eliminate this balancing—employers still cannot discriminate. It merely weighs more heavily the presumption that employers are not discriminating. As *Gross* declares, the text is the best evidence of congressional intent.[61] Congress's intent was to lower the burden for discrimination claims, but not retaliation claims. If people believe easing both requirements strikes a better balance, they should write to Congress, not to the courts.

Other commentators argue that "because of" was incorrectly interpreted in *Gross*.[62] Arguments that look first to the legislative history ignore *Gross*'s insistence on a text-based approach. Even if many

57. *E.g.*, Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 451 (2009).

58. *E.g.*, Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 93–94 (2010).

59. *E.g.*, Andrew Kenny, Note, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1052–60 (2011).

60. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

61. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (stating the assumption that the ordinary language of a statute accurately expresses the legislative purpose).

62. *See, e.g.*, Martin J. Katz, Gross *Disunity*, 114 PENN. ST. L. REV. 857, 880 (2010) (discussing three normative flaws in *Gross*'s definition of "because of").

commentators dislike textualism, *Gross* explicitly showed that this is how these statutes are interpreted, and that will not change in *Nassar*. No crisis has come from the textualist approach, and the Court's composition has not relevantly changed. Therefore, arguments that the Court should not "start with the text" are unavailing.

Michael Harper tries a more textualist argument, claiming that the everyday use of "because of" is "to make a difference."[63] Although people often say they acted "because of" A to mean that A was part of the reason they acted, people do recognize this is not a true "because" statement.[64] People still consider "because" causal, yet sometimes use it as shorthand for "in part because of."[65] However, if one challenges the person, he will admit other factors were involved, and he acted in part because of A. If "because" truly included "in part because of," then speakers and readers would consider "in part because of" repetitive. Instead, it just sounds like someone carefully choosing his words. People are willing to use words incorrectly in casual conversation—we usually know what the other person is trying to say and understand the message—but when that shorthand obscures understanding, people clarify the true meaning of their words.

Statutes are more precise than a casual discussion. They carefully use words the way people ordinarily understand them; more like a dictionary than a chat. Thus, *Gross*'s dictionary references are a better source of ordinary meaning for statutory interpretation than casual discourse.

Finally, while *Price Waterhouse* did interpret all of Title VII, it no longer applies, absent specific statutory language. Andrew Kenny describes well the argument that *Price Waterhouse* still controls Title VII.[66] He notes that *Gross* says "it is far from clear that the Court would have the same approach were it to consider the question . . . today in the first instance."[67] Kenny argues that

> if the Supreme Court in *Gross* meant to overrule *Price Waterhouse* completely, then it would not be 'far from clear' that *Price Waterhouse* was the right standard. Rather it would be absolutely certain that *Price Waterhouse* was not the right standard, because the Court would have

63. *See* Harper, *supra* note 58, at 82–83.
64. *See id.*
65. *See Price Waterhouse*, 490 U.S. at 241.
66. *See* Kenny, *supra* note 59, at 1048–55.
67. *See id.* at 1052 & n.149 (footnote omitted).

> just said that *Price Waterhouse* is no longer applicable in any context.[68]

He concludes that because *Price Waterhouse* applied to all of Title VII, if it controls, then all of Title VII uses that definition of "because of." But, this argument ignores the citations in *Gross* following that statement and the prior footnote interpreting the Amendments.

Following the quoted language in *Gross* are two supporting citations that give insight into the Court's meaning.[69] The citations' explanatory parentheticals state that one case was "declining to introduc[e] a qualification into the ADEA that is not found in its text";[70] and the other was "explaining that the ADEA must be read . . . the way Congress wrote it."[71] These show that the Court's comment about not being sure it would make the same decision refers to creating the mixed-motive test *not* found in the statute's text. *Price Waterhouse* read the phrase "because of" as meaning a complicated, burden-shifting framework.[72] That interpretation cannot come from the ordinary meaning of "because of." *Gross* explains statutory interpretation begins with the ordinary meaning of the text.[73] The passage Kenny cites merely reinforces that idea; the Court doubts the textualist approach now employed, on the facts as they were before the Court when *Price Waterhouse* was decided, would produce the same result.

The Court's footnote explaining the impact of the Amendments further supports this interpretation. *Gross* says that the Amendments showed that "because of" in Title VII did not mean mixed-motive test.[74] Thus, if Kenny's reading is correct, the Court is requiring use of an interpretation of "because of" it admits is wrong in the footnote to the previous sentence. Under the interpretation this Essay provides, there is no such internal conflict.

68. *Id.* at 1052.

69. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 163, 179 (2009).

70. *Id.* (alteration in original) (quoting Penn Plaza LLC v. Pyett, 556 U.S. 247, 270 (2009)) (internal quotation marks omitted).

71. *Id.* (alteration in original) (quoting Meachmam v. Knolls Atomic Power Lab., 554 U.S. 84, 102 (2008)) (internal quotation marks omitted).

72. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989).

73. *Gross*, 557 U.S. at 175.

74. *Id.* at 178 n.5 (noting that the "motivating factor" language was explicitly added to Title VII by the 1991 amendments, which would be unnecessary if this test already existed based on the "because of" language).

V. CONCLUSION

The best reading of *Gross* is that *Price Waterhouse* was incorrect in interpreting "because of" in Title VII to permit use of the motivating-factor test, despite the clever arguments of several commentators. Under the analysis demonstrated in *Gross*, which the Court will employ again in *Nassar*, Title VII's retaliation provision requires but-for causation. Therefore, the Court should reverse *Nassar*, overrule *Smith*, and ensure Title VII is implemented the way Congress intended.