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University of Texas Southwestern Medical Center v. Nassar: The Supreme Court's "Heads the Employer Wins, Tails the Employee Loses" Decision

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UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER v. NASSAR: THE SUPREME COURT'S "HEADS THE EMPLOYER WINS, TAILS THE EMPLOYEE LOSES" DECISION

INTRODUCTION

In June 2013, the U.S. Supreme Court dealt two blows to employees and the protections Congress guaranteed them under Title VII of the Civil Rights Act of 1964 by taking employer-friendly stances on fundamental questions regarding the interpretation and application of Title VII.[1] In fact, the Supreme Court's recent employment law jurisprudence has led Justice Ginsburg to label it as a "heads the employer wins, tails the employee loses" analysis.[2] In one of the recent decisions, *University of Texas Southwestern Medical Center v. Nassar*, the focus of this Note, the Supreme Court enforced a "but-for" causation standard for retaliation claims under Title VII, even after recognizing that Title VII status-based discrimination claims—claims involving direct discrimination based upon a person's race, color, religion, sex, or national origin—enjoy a lesser motivating-factor causation standard.[3]

Interestingly, the Supreme Court's decision rested in part upon the text and structure of a 1991 amendment to Title VII—an amendment that Congress itself labeled as an attempt to broaden protection under Title VII.[4] Instead, the Court construed the amendment in a way that actually restricts the protection intended for victims of retaliation.[5] Moreover, the Supreme Court disregarded established precedent that has both defined retaliation as just another form of status-based discrimination and determined that it should be treated as such.[6] Thus, the Supreme Court effectively created a distinction between different

1. *See* Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013); Vance v. Ball State Univ., 133 S. Ct. 2434, 2454 (2013).

2. *See Nassar*, 133 S. Ct. at 2545 (Ginsburg, J., dissenting).

3. *Id.* at 2528 (majority opinion). Status-based discrimination is direct discrimination in hiring, firing, promotion, and other employment decisions on the basis of an individual's protected status, i.e., discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a) (2006). Retaliation is discrimination on account of an employee having opposed, complained of, or sought remedies for, unlawful workplace discrimination. *See id.* § 2000e-3(a). These provisions will be discussed later in this Note. *See infra* Part I.

4. H.R. REP. NO. 102–40, pt. II, at 2–4 (1991). *See infra* Part III.

5. *See Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting).

6. *See infra* Part I.

types of discrimination and made it harder for employees to get relief for retaliatory efforts of their employers.

The effects of this decision are immediate and catastrophic, especially for trial courts left with the mess of trying to properly instruct juries in Title VII cases in which the plaintiff alleges both status-based discrimination and retaliation (a common occurrence).[7] Indeed, "[a]sking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion."[8] Moreover, because the decision weakens Title VII's prohibition against retaliation, employees will be less willing to confront discrimination in the workplace for fear of the retaliatory efforts of their employers.[9] Title VII's prohibition against status-based discrimination depends in large part on employees policing their employers, and, thus, without their participation, Title VII's overall scheme will suffer.[10] In light of these important adverse effects, Congress must act. Indeed, as Justice Ginsburg noted in her dissent in *Nassar*, the Supreme Court's "misguided judgment" in *Nassar* "should prompt yet another Civil Rights Restoration Act."[11]

Part I of this Note will discuss the applicable sections of Title VII, as well as Supreme Court decisions interpreting and broadening antiretaliation provisions. Part II will analyze the Supreme Court's decision in *Price Waterhouse v. Hopkins*, the Court's first major decision regarding causation standards in mixed-motive cases under Title VII. Part III will then discuss the Civil Rights Act of 1991 and its amendments to Title VII, as well as lower courts' decisions regarding the applicability of *Price Waterhouse* and the 1991 Act to Title VII retaliation claims. Part IV will then analyze *Gross v. FBL Financial Services, Inc.*, a key turning point in the Court's jurisprudence regarding causation standards. Part V will provide a detailed analysis of *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court's most recent decision regarding a motivating-factor standard in Title VII retaliation claims. Part VI will provide a critique of the Court's decision in *Nassar*. Finally, Part VII will propose that Congress amend Title VII in light of the Court's decision.

7. *See Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting).

8. *Id.*

9. *See infra* Part VI.C.

10. *See infra* Part VI.C.

11. *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting). Justice Ginsburg's suggestion of a "Civil Rights Restoration Act" refers to the 1991 Civil Rights Act, a set of amendments to Title VII, and other statutes Congress enacted in response to Supreme Court decisions which reduced the protections afforded to individuals under those statutes. *See also infra* Part III.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 (Title VII) makes it "an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[12] This provision prohibits "status-based discrimination," the first of two categories of wrongful employer conduct condemned by Title VII.[13] The second category of wrongful employer conduct prohibited by Title VII is employer retaliation against an employee who complains of discrimination in the workplace.[14] Title VII's prohibition against retaliation provides that an employer commits an unlawful employment practice when it "discriminate[s] against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[15] Thus, while status-based discrimination is direct discrimination based on an individual's protected status, retaliation is discrimination for complaining about status-based discrimination.[16]

Prohibitions against retaliation are necessary to reinforce prohibitions against status-based discrimination;[17] indeed, "[t]he realities of retaliation in

12. 42 U.S.C. §§ 2000e-2(a)(1)–(2) (2006). The full language of the provision is as follows:

> It shall be an unlawful employment practice for an employer—(1) 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

13. *See Nassar*, 133 S. Ct. at 2522.

14. *Id.*

15. 42 U.S.C. § 2000e-3(a). The exact language of this provision is as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

16. *Compare* 42 U.S.C. §§ 2000e-2(a)(1)–(2), *with* 42 U.S.C. § 2000e-3(a).

17. Individuals find it difficult to acknowledge that they have been discriminated against; once they overcome that hurdle and recognize the discrimination, they then struggle with

response to claiming discrimination necessitate strong legal protection from retaliation if the law is to provide meaningful nondiscrimination guarantees."[18] Even the Supreme Court has noted the importance of antiretaliation provisions:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.[19]

Many Supreme Court decisions have in fact demonstrated the Supreme Court's willingness to interpret Title VII's prohibition against retaliation in a way that strengthens the prohibition against status-based discrimination.[20] For example, in *Burlington Northern and Santa Fe Railway Co. v. White*, the Supreme Court held that the "scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."[21] In that case, after the employee complained about workplace discrimination, the employer changed the employee's job responsibilities and suspended her

challenging the discrimination. One commentator has described the reluctance many individuals face in first recognizing that they have been discriminated against:

> As anyone who has experienced bias or prejudice knows, naming and challenging discrimination is socially and psychologically difficult. By the time retaliation intervenes to punish someone for alleging discrimination, that person has already overcome a myriad of psychological and social forces operating to suppress that claim. Research in social psychology has documented a marked reluctance among the targets of discrimination to label and confront their experiences as such . . . . Retaliation performs important work in institutions. One of the most palpable functions of retaliation is to suppress challenges to perceived inequality. Retaliation performs much of this work without ever actually being inflicted on the potential challenger. Decisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so.

Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–26, 36 (2005). The fear of retaliation will be discussed in relation to Title VII's antiretaliation statute later in this Note. *See infra* Part VI.

18. Brake, *supra* note 17, at 42.

19. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67 (2006) (citations omitted). The Court further clarified:

> The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

Id. at 63.

20. For a more in-depth analysis of the Supreme Court's pro-plaintiff retaliation decisions, see Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115 (2014).

21. *Burlington*, 548 U.S. at 67.

for multiple weeks without pay.[22] Some courts had required employees to demonstrate a materially adverse change in the terms and conditions of employment to succeed on a retaliation claim, but the Supreme Court determined that any materially adverse employment action could constitute retaliation as long as the action would dissuade a reasonable worker from complaining about the discrimination.[23] Moreover, in *Thompson v. North American Stainless, L.P.*, the Supreme Court held that a third party who never complained of status-based discrimination but is the subject of retaliation after a different individual complained of status-based discrimination can maintain a retaliation claim under Title VII.[24]

Furthermore, not only has the Supreme Court broadened the scope of Title VII's antiretaliation provisions, it has also shown a willingness to view retaliation as just another form of discrimination in other contexts beyond Title VII.[25] Indeed, even when statutes do not explicitly proscribe retaliation but do proscribe status-based discrimination, the Supreme Court has determined that the status-based discrimination prohibition within the statute implicitly contains a prohibition against retaliation.[26] In doing so, the Court has stated that "[r]etaliation against a person because [he] has complained of . . . discrimination is another form of intentional . . . discrimination."[27] Thus, in *Jackson v. Birmingham Board of Education*, the Court determined that an individual could bring a retaliation claim under Title IX, even though the statute only explicitly prohibited sex discrimination.[28] Moreover, in *Sullivan v. Little Hunting Park, Inc.*, the Court held that a plaintiff could bring a retaliation claim under 42 U.S.C. § 1982, which provides that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[29] In *Gómez-Pérez v. Potter*, the Court held the federal-sector provision of the Age Discrimination in Employment Act (ADEA), which provides that "[a]ll personnel actions affecting employees or applicants for employment who are at

22. *Id.* at 58–59.

23. *Id.* at 60, 68.

24. Thompson v. N. Am. Stainless, L.P., 131 S. Ct. 863, 868–70 (2011).

25. This jurisprudence was a key argument in Justice Ginsburg's dissent in *Nassar*. *See infra* Part V. Indeed, when speculating about the outcome in *Nassar*, one commentator noted that the decision would boil down to whether or not a majority of the justices would follow the line of decisions that label retaliation as another form of discrimination. *See* Kevin Russell, *Argument Preview: Proving Retaliation Under Title VII*, SCOTUSBLOG (Apr. 23, 2013, 5:06 PM), http://www.scotusblog.com/2013/04/argument-preview-proving-retaliation-under-title-vii/.

26. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

27. *Id.*

28. *Id.* at 173–74.

29. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235 n.3, 237 (1969). Thus, a white tenant could sue under the statute for retaliation he suffered after complaining about discrimination towards his black tenant. *Id.* at 237.

least 40 years of age . . . shall be made free from any discrimination based on age," also prohibited retaliation.[30] And, in *CBOCS West, Inc. v. Humphries*, the Court determined that 42 U.S.C. § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," encompassed retaliation claims.[31]

Given the relatedness of Title VII's antidiscrimination and antiretaliation provisions, the extent to which the broad interpretation of retaliation strengthens the provision against status-based discrimination, and the history of Supreme Court decisions defining retaliation as another form of discrimination, one can easily understand Justice Ginsburg's observation that "the ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together."[32]

II. DEVELOPMENT OF CAUSATION STANDARD UNDER TITLE VII: *PRICE WATERHOUSE V. HOPKINS*

One continual point of contention under this framework has been the correct standard of causation a plaintiff must demonstrate in order to prove either status-based discrimination or retaliation when the employer considers both legitimate and illegitimate, i.e., discriminatory, reasons in making an employment decision.[33] Fundamental to understanding the history and complexity of the causation standard in these so-called "mixed-motive" cases is the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[34] Indeed, *Price Waterhouse* may be "[o]ne of the most important cases in Title VII history."[35] No analysis of the Court's decision in *Nassar* would be complete without fully examining the Court's reasoning in *Price Waterhouse*.

30. Gómez-Pérez v. Potter, 553 U.S. 474, 479 (2008) (quoting 29 U.S.C. § 633a(a) (2006)) (internal quotation marks omitted).

31. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008) (quoting 42 U.S.C. § 1981(a) (2006)) (internal quotation marks omitted).

32. Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2535 (2013) (Ginsburg, J., dissenting).

33. This Note will deal exclusively with the causation standards under these "mixed-motive" cases as opposed to pretext cases. A mixed-motive claim involves a situation where the employer has in fact considered both illegitimate and legitimate reasons for making its employment decision. A pretext claim, where the employer has not taken both illegitimate and legitimate factors into consideration, is governed by the *McDonnell Douglas* burden-shifting framework. *See* McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

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

35. Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-Gross World (But Should)*, 64 ALA. L. REV. 1067, 1075 (2013). "Not only did this case address burden shifting, gender stereotyping,

In *Price*, a female employee at an accounting firm sued her employer for sex discrimination when the firm refused to admit her as a partner.[36] While there were "clear signs" that partners at the firm "reacted negatively to [the employee's] personality because she was a woman,"[37] the employer also introduced evidence of her lack of interpersonal skills.[38] The trial judge concluded that even though the employer legitimately considered her lack of interpersonal skills in its decision to deny her partner status, the trial judge held that "[the employer] had unlawfully discriminated against [her] on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."[39] Moreover, the judge found that because the employer had not demonstrated that it would have denied her partner status regardless of the discrimination, the employer could not avoid equitable relief.[40]

On appeal, the Court of Appeals for the D.C. Circuit affirmed the district court's conclusion but determined that an employer could outright avoid Title VII liability if it proved "by clear and convincing evidence, that it would have made the same decision in the absence of discrimination."[41]

The Supreme Court, recognizing a split among the circuits, granted certiorari in the case to decide, in part, the proper standard of causation when an employer's adverse employment decision resulted from a mixture of legitimate and illegitimate motives.[42] Doing so required the Court to interpret the meaning of the words "because of" in Title VII's provision against

direct evidence, and the meaning of 'because of,' it was also one of several cases that led to Congress's passing of the 1991 Act." *Id.* (citations omitted).

36. *Price Waterhouse*, 490 U.S. at 231–32.

37. *Id.* at 235 ("One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school'. Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.' . . . [I]n order to improve her chances for partnership, [one male partner] advised, [the female employee] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" (citations omitted)).

38. *Id.* at 236.

39. *Id.* at 237.

40. *Id.*

41. *Price Waterhouse*, 490 U.S. at 237. Thus, while the district court found that an employer could avoid only equitable relief by demonstrating by clear and convincing evidence that it would have taken the same employment decision regardless of the discrimination, the D.C. Circuit determined that the employer could avoid *liability* by making that same showing. *Id.*

42. *Id.* at 232. The Supreme Court described the split in the lower courts that preceded its decision in *Price Waterhouse*. *See id.* at 238 n.2. For a more in-depth discussion of the Title VII causation standards before the Supreme Court decided *Price Waterhouse*, see Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

discrimination.[43] Although there was no majority opinion, six of the Justices did agree that an employer acts "because of" a protected status when that status is at least a motivating or substantial factor in taking an adverse employment action.[44]

Justice Brennan, writing for a plurality of the justices, began his analysis by laying out the exact language of the statute and stated: "We take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[45] Moreover, Justice Brennan decisively determined that "because of" did not mean "solely because of," citing Congress's rejection of an amendment that would have placed the word "solely" before the words "because of" in the statute.[46] This was demonstrative evidence in his eyes that Congress intended to eliminate employment decisions in which an illegitimate, discriminatory motive plays a part in an employment decision, even if it is not the sole reason for the decision.[47] Thus, he concluded that "[w]hen . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex."[48]

The Court did not end the analysis there, however. The Court went on to establish a burden-shifting framework, opening up the door for employers to claim an affirmative defense even if an employee could show that a discriminatory motive played a part in the employer's decision.[49] Thus, if the employee demonstrated that the prohibited trait was a motivating factor in the employment decision, the burden then shifted to the employer to demonstrate that it would have taken the same employment action in the absence of the

43. *Price Waterhouse*, 490 U.S. at 240. For the full language of the statute, see *supra* note 12.

44. *Price Waterhouse*, 490 U.S. at 248 (plurality opinion); *id*. at 259 (White, J., concurring); *id*. at 276 (O'Connor, J., concurring).

45. *Price Waterhouse*, 490 U.S. at 240 (plurality opinion).

46. *Id.* at 241 n.7.

47. *Id.* at 241. In response to the dissent's criticism of Brennan's construction of the words "because of," he stated:

> We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Id. at 241–42.

48. *Id.* at 241.

49. *Id.* at 242.

discrimination.[50] If the employer could make this showing, it would escape liability.[51]

The Supreme Court's decision in *Price Waterhouse*, at least at first glance, did grant some protection to employees by allowing them to only demonstrate that their protected status was a motivating factor in the employer's decision.[52] However, *Price Waterhouse* also allowed the employer to escape all liability if it could demonstrate that it would have made the same decision regardless of the discriminatory motive.[53] In the eyes of Congress, such a decision unduly restricted the protections guaranteed under Title VII.[54]

III. CONGRESS REACTS: CIVIL RIGHTS ACT OF 1991 BUT *PRICE WATERHOUSE* SURVIVES

A. Congress Extends Protection under the Civil Rights Act of 1991

In response to *Price Waterhouse* and a number of other Supreme Court decisions "that sharply cut back on the scope and effectiveness" of antidiscrimination laws,[55] Congress enacted the Civil Rights Act of 1991 (the 1991 Act).[56] Indeed, the purpose of the 1991 Act was to provide "additional protections against unlawful discrimination in employment."[57] The 1991 Act codified part of the framework of *Price Waterhouse* and discarded the rest.[58] Specifically, the legislation added a new subsection, § 2000e-2(m), to the

50. *Price Waterhouse*, 490 U.S. at 258 (White, J., concurring).

51. *Id.* Justice Brennan stated the new standard as follows:

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Id.

52. *Id.*

53. *Id.*

54. H.R. REP. NO. 102-40, pt. 2, at 2–4 (1991).

55. *Id.* Some of the other decisions overruled by the 1991 Act included *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989) (holding that 42 U.S.C. Section 1981 guaranteeing all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" does not prohibit racial harassment on the job and other forms of race discrimination occurring after the formation of a contract), and *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986) (holding that a party prevailing in a Title VII suit against the Government was not entitled to interest on attorney's fees because the provision permitting attorney's fees did not expressly waive sovereign immunity). *See id.*

56. *See* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071. For a more in-depth discussion on the Civil Rights Act of 1991, see Michael D. Moberly & Linda H. Miles, *The Impact of The Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY. U. L. REV. 475 (1993).

57. § 2, 105 Stat. at 1071.

58. *See* 42 U.S.C. §§ 2000e-2(m), -5(g)(2).

section governing status-based discrimination.[59] The new provision stated: "[A]n unlawful employment practice is established when the complaining party 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."[60] Therefore, the employee need only demonstrate that the prohibited status was a motivating factor in the employment decision.[61]

Although the amendment saved the motivating-factor standard, the legislation removed the ability of the employer to escape liability by demonstrating that it would have made the employment decision regardless of any discriminatory animus.[62] Instead, Congress enacted § 2000e-5(g)(2), which provides:

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and [the employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court . . . may grant declaratory relief, injunctive relief . . . and [limited] attorney's fees and costs . . . and . . . shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.[63]

Thus, under both *Price Waterhouse* and the 1991 Act's amendments, an employee claiming discrimination under Title VII must only demonstrate that the employee's protected status was a motivating factor in the employer's adverse employment decision.[64] However, while an employer could avoid liability by demonstrating that it would have made the same decision regardless of the discrimination under *Price Waterhouse*, the 1991 Act's amendments provided that an employer's demonstration that it would have made the same decision absent a discriminatory motive would only lessen damages.[65]

Key to the Supreme Court's ultimate decision in *Nassar* was Congress's decision to codify, at least in part, the decision in *Price Waterhouse* by adding the motivating-factor standards to the subsection of Title VII governing status-based discrimination claims and not in a subsection governing Title VII retaliation claims or a neutral Title VII subsection governing both types of Title VII claims.

59. *Id.* § 2000e-2(m). The prohibition against retaliation is in *id.* § 2000e-3.
60. *Id.* § 2000e-2(m).
61. *See id.*
62. *See id.* § 2000e-5(g)(2).
63. 42 U.S.C. § 2000e-5(g)(2).
64. Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989); 42 U.S.C. § 2000e-2(m).
65. *Compare Price Waterhouse*, 490 U.S. at 242, *with* 42 U.S.C. § 2000e-5(g)(2).

B. Causation Standard for Retaliation Claims: Price Waterhouse *or the 1991 Act?*

After Congress enacted the 1991 Act, courts disagreed regarding which standard governed Title VII retaliation claims.[66] Some courts applied the 1991 Act's motivating-factor framework, while other courts determined that the 1991 Act did not apply and instead used the *Price Waterhouse* framework.

The majority of courts continued to apply the *Price Waterhouse* framework to Title VII retaliation claims. For example, in *Tanca v. Nordberg*, the First Circuit rejected the employee's contention that the 1991 Act's motivating-factor framework applied to Title VII retaliation claims, observing that the 1991 Act's motivating-factor provision did not explicitly refer to retaliation claims.[67] Thus, the court determined that *Price Waterhouse* still applied to Title VII retaliation claims.[68]

Some courts, however, did begin to apply the 1991 Act's motivating-factor framework to Title VII retaliation claims, though these cases lacked a clear analysis of why the 1991 Act applied. For example, the Seventh Circuit appeared to suggest in *Veprinsky v. Fluor Daniel, Inc.* that the 1991 Act's motivating-framework governed Title VII retaliation claims, but the court never engaged in a thorough analysis regarding the 1991 Act's applicability versus *Price Waterhouse*'s applicability.[69]

IV. CAUSATION REVISITED: *GROSS V. FBL FINANCIAL SERVICES, INC.*

A. Gross v. FBL Financial Services, Inc. *and the Resurgence of But-For Causation*

The Supreme Court, in deciding *Gross v. FBL Financial Services, Inc.*,[70] added another wrinkle to the already confusing area of causation standards in retaliation claims. In a 5–4 decision, the Court held that plaintiffs claiming discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) must show that age was the "but-for" cause of the employer's adverse employment action.[71]

66. For a more in-depth analysis of the circuit split following the 1991 Act, see Rosenthal, *supra* note 35, at 1069–73.

67. Tanca v. Nordberg, 98 F.3d 680, 680–82 (1st Cir. 1996).

68. *Id.* at 683.

69. Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 892–94 (7th Cir. 1996).

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

71. *Id.* at 169–70, 177. The relevant provision of the ADEA provides: "It shall be 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." 29 U.S.C. § 623(a)(1) (2006).

In *Gross*, the plaintiff-employee had worked for the defendant-employer for about thirty years when he was given the position of claims administrator in 2001.[72] Two years later, when the employee was fifty-four years old, the company restructured the employee's job and transferred many of his job responsibilities to a newly created position held by a younger employee.[73] The employer asserted various legitimate reasons for the restructuring of the employee's position,[74] but the employee, viewing his new position as a demotion, filed suit against the employer for violating the ADEA.[75]

At the close of trial, the trial court instructed the jury to find for the employee if he had demonstrated that his age had been a motivating factor in the employer's decision to demote him.[76] The trial court further instructed, however, that the jury must find for the employer if it had proven that it would have made the same decision regardless of the employee's age.[77] The jury returned a verdict for the employee, and the employer appealed.[78]

On appeal, the Court of Appeals for the Eighth Circuit, construing the appropriate standards of *Price Waterhouse*, found that the trial court had not given the proper jury instructions.[79] Specifically, the Eighth Circuit determined that under *Price Waterhouse*, the employee must present direct evidence demonstrating that his age actually motivated the adverse employment

72. *Gross*, 557 U.S. at 170.

73. *Id.*

74. *Id.* At trial, the employer defended its position by providing evidence that the employee's transfer to the new position was part of an overall corporate restructuring and that the new position was better suited to the employee's skills. *Id.*

75. *Id.* Although *Gross* dealt with a discrimination claim under the ADEA and not Title VII, courts deciding cases involving retaliation claims under Title VII after *Gross* was decided used *Gross* to establish a but-for causation standard for the retaliation claims as well. *See infra* Part IV-B. Moreover, the Supreme Court used the reasoning in *Gross* when deciding *Nassar*. *See infra* Part V.

76. *Id.* at 170–71.

77. *Gross*, 557 U.S. at 171. The instructions, in part, were as follows:

> Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence: . . . [The] plaintiff's age was a motivating factor in defendant's decision to demote plaintiff. However, your verdict must be for defendant . . . if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. . . . As used in these instructions, plaintiff's age was a motivating factor, if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff.

Id. at 192 (Breyer, J., dissenting) (internal quotation marks omitted). To compare this instruction with the standards in *Price Waterhouse*, see Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

78. *Gross*, 557 U.S. at 171 (majority opinion).

79. *Id.*

decision.[80] Absent such a showing, the burden never shifted to the employer to demonstrate that it would have taken the same decision regardless of the discrimination.[81] Thus, because the trial court's instructions allowed the burden to shift to the employer upon the employee presenting any category of evidence showing his age was a motivating factor, the trial improperly construed *Price Waterhouse*.[82] Moreover, because the employee conceded that he had not presented any direct evidence, the Eighth Circuit determined that the trial court should not have even given the mixed-motive instruction but should have instead instructed the jury "only to determine whether [the employee] had carried his burden of 'prov[ing] that age was the determining factor in FBL's employment action.'"[83] The employee appealed, and the Supreme Court granted certiorari.[84]

Although the Court acknowledged that "[t]he question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA],"[85] the Court instead decided to answer whether a mixed-motive instruction is even allowed in ADEA discrimination cases, noting that it could not answer the former question without having answered the latter question.[86] The Court began by stating that "Title VII is materially different with respect to the relevant burden of persuasion," and, therefore,

80. *Id.* at 172.

81. *Id.*

82. *Id.*

83. *Gross*, 557 U.S. at 172–73 (citation omitted).

84. *Id.* at 173.

85. *Id.* at 169–70.

86. *Id.* at 173. "Although the parties did not specifically frame the question to include this threshold inquiry, '[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'" *Id.* at 173 n.1 (citation omitted). The dissent was particularly disturbed by the "majority's inattention to prudential Court practices" in even answering the mixed-motive instruction question, stating:

> The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it acknowledges, this was not the question we granted certiorari to decide. Instead, the question arose for the first time in respondent's brief, which asked us to "overrule *Price Waterhouse* with respect to its application to the ADEA." In the usual course, this Court would not entertain such a request raised only in a merits brief: "We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, thereby assuring adequate preparation time for those likely affected and wishing to participate." Yet the Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.

Id. at 181 (Stevens, J., dissenting) (citations omitted).

decisions that construe Title VII, including *Price Waterhouse*, do not control its construction of the ADEA.[87] The Court continued:

> This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. 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." Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.[88]

Moreover, the Court noted that while Congress amended Title VII to provide for a motivating-factor standard, it neglected to add a similar provision to the ADEA, even though it chose to amend the ADEA in other ways at the same time.[89] The Court determined that it could not "ignore" Congress's decision to not add the motivating-factor provision to the ADEA, reasoning, "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[90]

Having established that cases construing Title VII did not apply in this context, the Court turned to the actual text of the ADEA and, as it did in *Price Waterhouse*, narrowed in on the meaning of the words "because of."[91] This time, however, after examining dictionary definitions of the word "because," the Court determined that "because of" means "[b]y reason *of*; on account *of*," and, therefore, that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[92] Given the "ordinary meaning" of the ADEA's provision, the Court concluded that the plaintiff must establish that age was the but-for cause of the employer's adverse action in order to prevail on an ADEA discrimination claim.[93]

The Court concluded by rejecting the employee's argument that *Price Waterhouse* controlled the Court's interpretation, arguing that the *Price*

87. *Id.* at 173 (majority opinion).

88. *Gross*, 557 U.S. at 174 (citing Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

89. *Id.*

90. *Id.*

91. *Id.* at 176.

92. *Id*. Justice Stevens criticized the majority's new interpretation:

> We were no doubt aware that dictionaries define "because of" as "by reason of" or "on account of." Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define "because of" as "*solely* by reason of" or "*exclusively* on account of." In *Price Waterhouse*, we recognized that the words "because of" do not mean "*solely* because of," and we held that the inquiry "commanded by the words" of the statute was whether gender was a motivating factor in the employment decision.

Id. at 183 n.4 (Stevens, J., dissenting) (citations omitted).

93. *Gross*, 557 U.S. at 177 (majority opinion).

Waterhouse approach was difficult to apply and may not even be doctrinally sound.[94] Thus, the Court concluded:

> We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[95]

Justice Stevens, in his dissent, focused his argument on the Court's analysis in *Price Waterhouse*, noting that it construed the identical "because of" language of Title VII to imply that the text "proscribes adverse employment actions motived in whole or in part by the age of the employee."[96] He further chastised the majority for interpreting the words "because of" under the ADEA "as colloquial shorthand for 'but-for' causation," an interpretation the Court in *Price Waterhouse* had squarely rejected.[97] Moreover, Justice Stevens rejected the notion that cases construing Title VII had no weight to the case at hand, stating, "The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII."[98]

Justice Stevens also reasoned that Congress's reaction to *Price Waterhouse*, in enacting the 1991 Act, actually supported the notion that "because of" should not be interpreted to mean "but-for causation," noting that Congress actually codified *Price Waterhouse*'s motivating-factor standard and rejected the but-for causation standard advocated by *Price Waterhouse*'s dissent.[99] Therefore, according to Justice Stevens, given that courts have consistently held that Title VII cases apply to cases involving the ADEA, even if the motivating-factor standard within the 1991 Act's amendments to Title

94. *Id.* at 178–79. Interestingly, in his dissent, Justice Breyer argued that the "but-for" causation standard was not free of its own defects in the employment context, noting: "In a case where we characterize an employer's actions as having been taken out of multiple motives . . . to apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different." *Id.* at 191 (Breyer, J., dissenting). For a more in depth discussion of Justice Breyer's critique of the but-for standard, *see infra* Part VI.

95. *Id.* at 180 (majority opinion).

96. *Id.* at 182 (Stevens, J., dissenting).

97. *Id.* at 183.

98. Gross, 557 U.S. at 183 (Stevens, J., dissenting) (internal quotation marks omitted) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

99. *Id.* at 185. Justice Steven's later stated, "The Court's resurrection of the but-for causation standard is unwarranted. Price Waterhouse repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today." *Id.* at 187.

VII may not apply to the ADEA,[100] the *Price Waterhouse* interpretation of "because of" should still govern.[101]

B. Causation in Title VII Retaliation Claims After Gross: Gross, Price Waterhouse, or the 1991 Act?

The *Gross* decision was met with some contempt.[102] In fact, a bill was introduced in Congress to overturn *Gross*.[103] The bill, Protecting Older Workers Against Discrimination Act, was never enacted,[104] however, and courts were left to interpret how far-reaching of an effect the majority's analysis in *Gross* would have on retaliation claims under Title VII.

Although *Gross* construed the ADEA, many courts began to apply *Gross* in the Title VII context. In fact, the majority of courts faced with Title VII retaliation claims used *Gross* to hold that Title VII required the employee to demonstrate that his protected activity was the but-for cause of the employer's adverse employment action.[105]

The minority approach taken by the courts after *Gross* was decided was to apply *Price Waterhouse* to retaliation claims. For example, in *Smith v. Xerox Corporation*, the Fifth Circuit rejected the contention that *Gross* required the court to adopt a but-for causation standard for Title VII retaliation claims.[106] The Fifth Circuit argued that *Gross* did not apply because it involved the ADEA and not Title VII.[107] Thus, the court relied on *Price Waterhouse* to determine that the employee only had to show that her protected activity was a

100. The dissent noted that there may actually be good reason to think that the 1991 amendments to Title VII should apply to the ADEA as well:

> There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H.R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions).

Id. at 186 n.6.

101. *Id.* at 186–87.

102. *See, 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, 69 (2010) (responding to the *Gross* decision).

103. *See* Andrew Kenny, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1032–33 (2011) (discussing the proposed amendment).

104. *Id.*

105. For a discussion of the cases that used *Gross* to establish a but-for causation standard for Title VII retaliation claims, see Rosenthal, *supra* note 35, at 1100–05.

106. Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010). *Nassar* also came out of the Fifth Circuit.

107. *Id.* at 329.

motivating factor in the employer's adverse employment action.[108] If the employee made that showing, the Fifth Circuit determined, the employer could then avoid liability by demonstrating that it would have made the same decision absent the retaliatory motive.[109] Judge Jolly dissented, arguing that *Gross* controlled and that the proper standard for retaliation claims was the but-for causation.[110]

Only three years after *Smith* was decided, the Supreme Court granted certiorari in *Nassar* to resolve the split and decide the proper standard of causation for Title VII retaliation claims.

V. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

A. Facts of University of Texas Southwestern Medical Center v. Nassar

The University of Texas Southwestern Medical Center ("University") is an academic institution which specializes in medical education.[111] In an effort to give its students hands-on experience at healthcare facilities, the University had affiliated itself with a number of hospitals, including Parkland Memorial Hospital ("Hospital").[112] The affiliation agreement between the University and the Hospital provided that the Hospital would offer the University's faculty members empty staff physician positions at the Hospital.[113] Under this framework, Naiel Nassar, a doctor of Middle Eastern descent, was hired to work both as an assistant professor at the University and as a staff physician in the infectious disease division of the Hospital.[114]

In 2004, Dr. Beth Levine became Nassar's ultimate supervisor when she was hired as the University's Chief of Infectious Disease Medicine.[115] After being hired, Levine began criticizing Nassar's billing practices and productivity and made comments to the effect that "Middle Easterners are

108. *Id.* at 330.

109. *Id.* at 333.

110. *Id.* at 336 (Jolly, J., dissenting). Judge Jolly stated:

> [T]he majority effectively creates an unnecessary split in the circuits by failing properly to apply the Supreme Court's ruling in *Gross v. FBL Financial Services, Inc*. As the Seventh Circuit has correctly reasoned, without statutory language indicating otherwise, the mixed-motive analysis is no longer applicable outside of Title VII discrimination, and consequently does not apply to this retaliation case.

Id.

111. Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

112. *Id.*

113. *Id.*

114. *Id.* Nassar was first employed in 1995 but resigned his positions in 1998 to attend more schooling. *Id.* In 2001, he was rehired to work again as both a faculty member and staff physician. *Id.*

115. *Id.*

lazy."[116] Nassar felt that Levine's actions were a result of a bias against him because of his religion and ethnicity.[117] After meeting several times to complain of Levine's harassment with Dr. Gregory Fitz, the University's Chair of Internal Medicine, Nassar began to consider ways to continue to work at the Hospital without being subject to Levine's supervision.[118] To this end, Nassar inquired whether the Hospital would be willing to employ him regardless of whether he was a faculty member of the University.[119] When the Hospital indicated it would, Nassar resigned his position at the University and, in a letter to Fitz, cited Levine's harassment and discrimination as the catalyst for his resignation.[120]

Fitz, having expressed his concern over the humiliation the letter had caused Levine and the need to "publicly exonerat[e]" her, appealed to the Hospital to rescind its offer of employment to Nassar.[121] Fitz argued that the affiliation agreement required the Hospital to offer staff positions to University faculty, and, as such, any offer to Nassar was barred by the agreement.[122] In response to the opposition, the Hospital withdrew its offer of employment.[123]

B. Procedural Posture

As a result of these events, Nassar filed a suit in the United States District Court for the Northern District of Texas.[124] Nassar alleged that Levine's harassment led to his constructive discharge, and, thus, the University had discriminated against him on the basis of his race, religion, and national origin—a status-based discrimination claim under § 2000e-2(a) of Title VII.[125] Nassar further alleged that the University had retaliated against him for complaining about Levine's harassment—a retaliation claim under § 2000e-3(a) of Title VII.[126] After a trial, the jury found for Nassar on both the status-based and retaliation claims, awarding him $400,000 in backpay and over $3

116. *Nassar*, 133 S. Ct. at 2523.
117. *Id.*
118. *Id.*
119. *Id*. at 2523–24.
120. *Id.* at 2524. The letter read in part:

> The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine . . . . I have been threatened with denial of promotion, loss of salary support and potentially loss of my job[.] . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment.

Nassar v. Univ. of Tex. S.W. Med. Ctr., 674 F.3d 448, 451 (5th Cir. 2012).
121. *Nassar*, 133 S. Ct. at 2524.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Nassar*, 133 S. Ct. at 2524.

million in compensatory damages.[127] The district court reduced the compensatory damages to $300,000 and entered judgment.[128]

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed in part and vacated in part.[129] Specifically, the Fifth Circuit found that Nassar had not demonstrated sufficient evidence that Levine's harassment and discrimination resulted in his constructive discharge.[130] Thus, the Fifth Circuit vacated the entry of judgment in favor of Nassar on the status-based discrimination claim.[131] The Fifth Circuit, however, affirmed the decision in favor of Nassar on the retaliation claim.[132] The Fifth Circuit first noted that the required proof for a Title VII retaliation claim is less demanding than a constructive discharge claim.[133] The Fifth Circuit then qualified that its review was limited. Specifically, the court observed that it only needed to determine that "the record contains sufficient evidence . . . that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another *motivating factor*."[134] Thus, even though the University argued that "Fitz thwarted Nassar's prospective employment at Parkland as a routine application of [its] rights under [its] affiliation agreement," the Fifth Circuit found that Nassar had offered sufficient proof that a motivating factor in Fitz's opposition of the offer of employment was Nassar's complaint about Levine.[135]

Importantly, the University had argued in its Brief on Appeal that the district court erred in instructing the jury on a mixed-motive theory of retaliation.[136] Instead of addressing the argument in the text of its opinion, however, the Fifth Circuit devoted only three sentences to the argument in a footnote, stating the mixed-motive causation argument was foreclosed by its decision in *Smith*.[137]

The University subsequently filed a petition for rehearing and rehearing en banc.[138] In the opinion denying the petition for rehearing and rehearing en banc, some of the Fifth Circuit judges outlined their views regarding the

127. *Id.*

128. *Id.*

129. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 450 (5th Cir. 2012).

130. *Id.* at 453.

131. *Id.* at 456.

132. *Id.*

133. *Id.* at 454.

134. *Nassar*, 674 F.3d at 454 (emphasis added).

135. *Id.*

136. *Id.* at 456 n.16.

137. *Id.* The footnote read in part, "UTSW also urges error based on the jury having been instructed on a mixed-motive theory of retaliation. UTSW concedes that its argument is foreclosed by our decision in *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir.2010). We therefore find no error in the jury instructions." *Id.*

138. *See* Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211 (5th Cir. 2012).

causation argument.[139] Specifically, Judge Elrod, in her concurring opinion, argued that the University had waived the mixed-motive causation argument at the trial level.[140] In a dissenting opinion, however, Judge Smith vehemently argued that the Fifth Circuit should overturn the decision in *Smith* because it was an erroneous interpretation of the statute regarding the causation standard.[141] In his opinion, the case presented the perfect vehicle to resolve the conflict regarding the appropriate causation standard for retaliation claims under Title VII.[142]

The University then filed a writ of certiorari to the Supreme Court.[143] The Supreme Court must have agreed with Judge Smith that *Nassar* represented the perfect vehicle to resolve the conflict, as it granted certiorari on January 18, 2013.[144]

C. Majority Opinion

1. The Motivating-Factor Provision Does Not Apply to Retaliation Claims

Justice Kennedy, writing for the majority, began the analysis by discussing the ordinary but-for standard for causation found in usual tort claims.[145] Because the ordinary but-for standard is the "background against which Congress legislated in enacting Title VII," the Court presumed that Congress intended to incorporate the usual causation standard "absent an indication to the contrary in the statute itself."[146]

Having determined the proper framework, the Court then proceeded to discuss the judicial and legislative attempts to define the causation requirement under Title VII, including its decision in *Price Waterhouse* and Congress's response in the Civil Rights Act of 1991.[147] In discussing the 1991 Act's addition of § 2000e-2(m) to Title VII, the Court admitted that Congress clearly legislated the proper standard for status-based discrimination claims under §2000e-2.[148] Thus, status-based discrimination claims under Title VII are in fact governed by the lesser causation standard that requires the employee to

139. *Id.* at 211–12.

140. *Id.* at 212 (Elrod, J., concurring). Judge Elrod found that the University had failed to raise a timely objection to the jury instruction and that the University had originally drafted its own jury instruction to include a motivating-factor standard. *Id.* at 211.

141. *Id.* at 212–13 (Smith, J., dissenting).

142. *Id.* at 213.

143. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 978, 979 (2013).

144. *Id.*

145. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013).

146. *Id.* at 2525.

147. *Id.* at 2525–26.

148. *Id.* at 2526.

show that race, color, religion, sex, or national origin was only a motivating factor in the employment action.[149]

The Court next discussed its decision in *Gross*, noting that while *Gross* arose under the ADEA and not Title VII, the "particular confines of *Gross* [did] not deprive it of all persuasive force."[150] In fact, the Court stated that *Gross* provided "two insights" as it interpreted the term "because" in relation to causation and it demonstrated the significance of the structural choices in Title VII and the 1991 Act's provisions.[151]

With this background in mind, the Court proceeded to analyze whether the 1991 Act's amendments to Title VII establishing the proper standard of causation for status-based claims also applied to retaliation claims under Title VII.[152] The Court concluded that it did not and instead decided that, "[g]iven the lack of any meaningful textual difference between the text in [Title VII's antiretaliation provision] and the [statute] in *Gross*, the proper conclusion, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[153]

The Court then focused on dispelling the contention that Title VII retaliation claims should be governed by the motivating-factor standard in § 2000e-2(m) and treated the same as Title VII status-based discrimination claims, arguing that: (1) the plain language of § 2000e-2(m) applied only to status-based discrimination claims, (2) the design and structure of § 2000e-2(m) demonstrated that it applied only to status-based discrimination claims, and (3) there was no general rule that the Court treats bans on status-based discrimination as bans on retaliation when interpreting federal antidiscrimination laws.[154]

The Court first argued that the "plain language" of § 2000e-2(m) did not support an assertion that it applied to retaliation claims.[155] Despite the fact that § 2000e-2(m) began by stating "an unlawful unemployment practice is established when," and Title VII defined retaliation as an unlawful employment practice, the Court stated that § 2000e-2(m) did not actually extend to all unlawful employment practices under Title VII.[156] Because §

149. *Id.*; *see* 42 U.S.C. § 2000e-2(m) (2006).

150. *Nassar*, 133 S. Ct. at 2527.

151. *Id.* at 2527–28.

152. *Id.* at 2529. *See supra* Part III (discussing the 1991 Act and its amendments to Title VII).

153. *Nassar*, 133 S. Ct. at 2528. *See supra* notes 15 and 71 for the full text of these provisions.

154. *Nassar*, 133 S. Ct. at 2528–29.

155. *Id.* at 2528.

156. *Id. See also* 42 U.S.C. § 2000e-2(m) (2006). As stated previously, the full text of this provision is as follows: "[A]n unlawful employment practice is established when the complaining party 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." *Id.*

2000e-2(m) also referred to the status-based discrimination actions, the Court concluded that the reference represented "Congress' intent to confine that provision's coverage to only those types of employment practices."[157] Thus, even though the beginning of the provision applied to "an" unlawful unemployment practice, because the statute did not outright state that it applied to retaliation, the Court found it would be "improper to conclude that what Congress omitted from the statute is nevertheless within its scope."[158]

The Court next argued that interpreting § 2000e-2(m) as applying to Title VII retaliation claims would ignore Congress's ability to design the provision and choose its structure.[159] Congress's choice in structuring a statute should be presumed to be deliberate, the Court argued, and, thus, by including § 2000e-2(m) in the section prohibiting status-based discrimination and not in the section prohibiting retaliation or in a section that exclusively applied to both claims, Congress intended § 2000e-2(m) to only apply to status-based discrimination claims.[160] Further, the Court found it relevant that a different portion of the 1991 Act contained an express reference to all unlawful employment actions.[161] If it wanted the motivating-factor standard to apply to both status-based and retaliation claims, the Court argued, Congress would have used the same express language.[162]

In its last refutation to the claim that § 2000e-2(m) applied to retaliation claims, the Court addressed the argument that its precedent treated prohibitions against status-based discrimination as a general prohibition against retaliation as well when interpreting federal anti-discrimination statutes.[163] Though the Court admitted that its decisions in *CBOCS*, *Gomez*, and *Jackson* stated "the general proposition that Congress's enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation . . . even where the statute does not refer to retaliation in so many words," the Court determined that those cases were not controlling because the laws in those cases were broad general bans on discrimination while Title VII was a precise, complex, and exhaustive statute.[164] In other words, "[the] fundamental difference in statutory structure render[ed] inapposite decisions which treated

157. *Nassar*, 133 S. Ct. at 2528.

158. *Id*.

159. *Id.* at 2529.

160. *Id.*

161. *Id.* ("The relevant portion of the 1991 Act, § 109(b), allowed certain overseas operations by U.S. employers to engage in 'any practice prohibited by section 703 or 704,' *i.e.*, § 2000e–2 or § 2000e–3, 'if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located." (citation omitted)).

162. *Nassar*, 133 S. Ct. at 2529.

163. *Id.*

164. *Id.* at 2530.

retaliation as an implicit corollary of status-based discrimination."[165] Therefore, in the Court's estimation, references to status-based discrimination were not always to be treated as synonyms for retaliation.[166]

2. Need of Judicial Resources Demands a Stricter Standard for Retaliation Claims

In support of its decision to apply the stricter but-for standard to retaliation claims under Title VII, the Court next launched into a judicial efficiency argument.[167] In the Court's view, the proper interpretation of the causation standard for retaliation claims had "central importance" to the fair and responsible allocation of judicial resources, especially given the growth of retaliation claims in recent years.[168] Citing Equal Employment Opportunity Commission (EEOC) statistics as evidence of this growth, the Court noted that the number of retaliation claims exceeded those for every type of status-based discrimination except race.[169] Thus, if the Court allowed a motiving-factor standard, the number of frivolous claims could increase and divert resources away from genuine efforts to combat discrimination.[170]

3. Refusal to Give Deference to EEOC or *Price*

Even though the EEOC guidelines clearly stated that retaliation claims could be shown using the lesser motivating-factor standard, the Court refused to give the EEOC's interpretation deference because, in the Court's opinion, the EEOC's explanations for its interpretation of the proper causation standard for retaliation claims "lack the persuasive force that is a necessary precondition to deference."[171] The EEOC had first defended its interpretation on the theory that retaliation claims had consistently been governed under the same causation standard as status-based discrimination claims, stating "Courts have long held that the evidentiary framework for proving [status-based] discrimination . . . also applies to claims of discrimination based on retaliation."[172] The Court rejected this explanation, however, noting that it failed "to address the particular interplay among the status-based discrimination provision (§ 2000e–2(a)), the antiretaliation provision (§ 2000e–3(a)), and the motivating-factor provision (§ 2000e–2(m))."[173]

165. *Id.*
166. *Id.* at 2530–31.
167. *Nassar*, 133 S. Ct. at 2531.
168. *Id.*
169. *Id.*
170. *Id.* at 2531–32.
171. *Id.* at 2533.
172. *Nassar*, 133 S. Ct. at 2533. For further understanding of the EEOC's position, see 2 EEOC Compl. Man. (BNA) § 8(E)(1) (May 20, 1998).
173. *Nassar*, 133 S. Ct. at 2533.

The EEOC's second explanation for its interpretation was that "an interpretation . . . that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism."[174] The Court rejected this explanation as well, however, stating that the reasoning was "circular" because it assumed what causal relationship must be shown in order to prove retaliation.[175]

Finally, the Court refused to apply the *Price Waterhouse* standard, even though the Court admitted that the case expressly interpreted causation under Title VII.[176] In the Court's estimation, Congress displaced the entire *Price Waterhouse* standard when it adopted the 1991 Act's amendments to Title VII.[177] Further, the Court found that applying *Price Waterhouse* would be inconsistent with *Gross*'s interpretation of the word "because."[178]

D. Dissent Disagrees

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, began her dissent by also describing the two different types of discrimination under Title VII—status-based claims and retaliation claims.[179] Instead of sweepingly discussing the two claims as the majority did, however, Ginsburg set out the statutory language which created each claim and made a point to emphasize the similarity in the language of both subsections.[180] Specifically, Ginsburg emphasized that both subsections made it an unlawful employment practice to discriminate against an employee *because of* certain protected traits or activities.[181] In doing so, Ginsburg set the foundation for her argument: status-based discrimination and retaliation claims were "twin safeguards" that should require the same causation standard.[182]

174. *Id.*
175. *Id.* at 2533–34.
176. *Id.* at 2534.
177. *Id.*
178. *Nassar*, 133 S. Ct. at 2534.
179. *Id.* (Ginsburg, J., dissenting).
180. *Id.* Justice Ginsburg puts her own emphasis on the word "because" in both subsections. Thus, she states:

> Title VII of the Civil Rights Act of 1964 . . . makes it an '"unlawful employment practice" to "discriminate against any individual . . . *because of* such individual's race, color, religion, sex, or national origin." § 2000e–2(a) (emphasis added). Backing up that core provision, Title VII also makes it an "unlawful employment practice" to discriminate against any individual "*because*" the individual has complained of, opposed, or participated in a proceeding about, prohibited discrimination. § 2000e–3(a) (emphasis added).

Id.
181. *Id.*
182. *Id.* at 2535.

1. History of Treating Status-Based Claims and Retaliation Claims Together

Ginsburg first noted that the two Title VII claims had "traveled together"—plaintiffs often raised the two claims in tandem and the Court had regularly interpreted them similarly.[183] Indeed, in Ginsburg's estimation, by establishing a rule that "drives a wedge between" the two claims, the majority decision broke with the principle that the Supreme Court's Title VII jurisprudence made clear: "Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it. Indeed, [the Supreme] Court has explained again and again that 'retaliation in response to a complaint about [proscribed] discrimination *is* discrimination.'"[184]

Specifically, Justice Ginsburg argued that the Supreme Court precedent supported the "symbiotic relationship" between the prohibition against discrimination and the prohibition against retaliation.[185] Prohibitions against rehabilitation, she noted, helped reinforce the purpose of prohibitions against status-based discrimination by making sure that employers did not unlawfully interfere with an individual's efforts to secure the protections afforded them under such status-based prohibitions.[186] Without protections from retaliation, the antidiscrimination provisions within Title VII have no real sting, as employees would not feel free to air their grievances.[187] Thus, she argued, effective enforcement of proscriptions on status-based discrimination *depended* on a strong and effective proscription on retaliation.[188]

Given the relationship between status-based discrimination and retaliation, Ginsburg noted that the Supreme Court had consistently held—until the majority's decision in *Nassar*—that a ban on discrimination encompassed retaliation.[189] In supporting her claim, Ginsburg examined the different cases that unequivocally established that retaliation *was* discrimination; she then

183. *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting).

184. *Id.*

185. *Id.* at 2537.

186. *Id.*

187. *Id.* In other words, if employees bear a heavy burden in establishing a violation of the retaliation provision, employees will be less likely to speak up regarding discrimination. Thus, requiring a tougher but-for causation standard for retaliation claims will have the effect of actually lessening the force of a strong prohibition against discrimination. Therefore, applying the same standard of causation for both retaliation and status-based claims actually comports with the purpose of the act in protecting against discrimination. Such protection, furthermore, was the intent with which Congress enacted the motivating-factor standard in the 1991 Act. *See infra* Part VI.

188. *See Nassar*, 133 S. Ct. at 2537 (Ginsburg, J., dissenting).

189. *Id.*

concluded that there was no "sound reason" to stray from the precedent established in those cases.[190]

Beyond discussing the Supreme Court precedent that had consistently treated retaliation as a form of discrimination, Justice Ginsburg also argued that legislative intent regarding the codification of the motivating-factor causation standard also demonstrated that claims for retaliation and claims for status-based discrimination were designed to be tested under the same analysis.[191] As Justice Ginsburg noted, the 1991 Amendment was intended to add *additional protections* against discrimination and to respond to Supreme Court decisions that had limited the effectiveness of the antidiscrimination laws.[192] One such decision that Congress was concerned about was *Price Waterhouse*, as the Supreme Court had concluded that an employer could avoid liability under Title VII by demonstrating that it would have taken the same employment action regardless of the discriminatory motive.[193] In Justice Ginsburg's eyes, Congress had actually endorsed the Court's finding in *Price Waterhouse* that the discrimination need only be a motivating factor in an adverse employment decision in order for an employer to be liable under Title VII; Congress detested, however, the provision of *Price Waterhouse* that allowed an employer to avoid liability by demonstrating that it would have made the decision regardless of the discrimination.[194]

Thus, Congress made clear that its amendment was designed to establish a motivating-factor standard for discrimination claims—an attempt, Justice Ginsburg noted, to "restore" the rule several courts had followed that placed liability on employers when discrimination actually played a role in making an adverse employment decision.[195] Moreover, Justice Ginsburg pointed out that the rule Congress attempted to restore had been applied to *both* status-based claims and retaliation claims under Title VII.[196] In fact, the Congressional Report discussing the amendment cited with approval the decision in *Bibbs v. Block*, which held that an employer violated Title VII when an unlawful motive played some party in the employment decision.[197] The holdings of *Biggs*, even before the enactment of the 1991 Act, had been applied to establish claims of retaliation, not just claims of status-based discrimination.[198] Thus, given the clear congressional intent to strengthen the protections of Title VII and its approval of decisions applying the motivating-factor standard to

190. *Id.* at 2537–38.
191. *See id.* at 2539.
192. *Id.* 2538.
193. *Nassar*, 133 S. Ct. at 2538.
194. *Id.* at 2539.
195. *Id.*
196. *Id.*
197. *Id.*; Bibbs v. Block, 778 F.2d 1318, 1323–24 (8th Cir. 1985) (en banc).
198. *Nassar*, 133 S. Ct. at 2539 (Ginsburg, J., dissenting).

claims of retaliation, Justice Ginsburg concluded that there was "scant reason to think that . . . Congress meant to exclude retaliation claims from the newly enacted 'motivating factor' provision."[199]

Moreover, in Justice Ginsburg's estimation, the placement of the provision that the majority found to be conclusive evidence of Congress's intent to limit the motivating-factor standard to status-based discrimination claims may not have been so conclusive after all.[200] Indeed, Justice Ginsburg argued that by not placing the framework in a provision that dealt specifically and exclusively with status-based discrimination claims, Congress actually made clear that the new provision was not limited to status-based claims.[201] Further evidence that Congress intended the provision to apply equally to both claims, Justice Ginsburg argued, was that the new provision clearly stated that it encompassed "any employment practice."[202]

2. Implications of the Majority's Decision

As noted earlier, Ginsburg also took aim at the majority's decision by noting its total lack of forethought to the effect it would have on trial judges left to figure out how to properly determine violations of the prohibition against retaliation, especially given the fact that retaliation claims were almost always joined by claims of status-based discrimination.[203] In Ginsburg's own words, "[t]he Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination 'because of,' e.g., race is coupled with a claim of discrimination 'because' the individual has complained of race discrimination."[204] Indeed, even jurors "will puzzle over the rhyme or reason for the dual standards."[205]

Of "graver concern" to Ginsburg, however, was the effect the Court had on a provision designed to strengthen Title VII protections, not limit them.[206] Ginsburg lamented that "the Court has seized on a provision . . . adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation."[207]

199. *Id.*
200. *Id.* at 2539–40.
201. *Id.* at 2539.
202. *Id.* (citation omitted).
203. *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*

VI. ANALYSIS: THE MOTIVATING-FACTOR STANDARD SHOULD GOVERN RETALIATION CLAIMS

The Supreme Court, in granting certiorari in *Nassar*, had the chance to solidify and strengthen the relationship between Title VII's status-based discrimination statue and its retaliation statute. Instead of determining that retaliation claims can be proven under the lesser motivating-factor framework allowed for status-based discrimination claims, however, the Court unnecessarily differentiated between the two types of discrimination and held that retaliation claims *must* proceed under the but-for causation standard.[208] In doing so, the Court unduly burdened employees and created a pointless hurdle to succeeding on Title VII retaliation claims. Indeed, the Supreme Court should have allowed Title VII retaliation claims to enjoy the same motiving-factor causation standard that governs status-based discrimination claims under Title VII.

Specifically, the Court in *Nassar* reached the wrong result for the following three reasons: 1) the majority's reasoning rested on incomplete and unfounded conclusions, 2) the but-for causation standard will be difficult to prove and even harder for jurors to apply, and 3) the purpose and policy behind Title VII's antiretaliation statute call for a lesser causation standard.

A. The Majority's Reasoning Was Incomplete and Unfounded

1. "Because of" Does Not Require But-For Causation

Contrary to the majority's assertion, "because of," at least as it is used in Title VII's antidiscrimination and antiretaliation statutes, does not mean "solely because of." Instead of looking to cues from Congress to help interpret the language of the statute, the majority looked to *Gross* and its reliance on dictionary definitions in determining what Congress meant when it used the words "because of" in Title VII's antiretaliation provision.[209] In the process, the majority ignored the clear indication that "because of" does not require a but-for causation standard. Indeed, as Justice Brennan noted when the Supreme Court first interpreted Title VII's use of the words "because of" in *Price Waterhouse*, Congress clearly did not want the words "because of" to be construed to mean "solely because of," as it rejected an amendment that would have placed the word "solely" in front of the words "because of."[210] In fact, the

208. *Nassar*, 133 S. Ct. at 2534 (majority opinion).

209. *Id.* at 2527.

210. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 n.7 (1989). One scholar, writing before *Price Waterhouse* was decided, discussed the legislative history of Title VII and found the following:

> One piece of the legislative history does indicate a clear recognition of the mixed-motive dilemma. Senator McClellan proposed an amendment that would have defined a [T]itle

assertion that "because of" meant solely because of was so absurd to Justice Brennan that it only required a sentence and a footnote for him to dispose of the claim.[211] An assertion that was so easy for Justice Brennan to reject, however, held the day in *Nassar*. To the majority, *Gross*'s reasoning was a good indication of the natural meaning and fair interpretation of the words of Title VII.[212] Indeed, the majority never even addressed Congress's rejection of the word "solely" in connection with the words "because of."[213] Apparently, at least in the eyes of the majority, a case that relied on the dictionary definition of a word is a better indicator of the meaning of the statute's language than Congress's own actions in drafting the statute.

Moreover, even though the Supreme Court in *Price Waterhouse* had previously determined that the words "because of" in the Title VII context did not mean "solely because of" but actually implied that discriminatory intent could not be a motivating factor in the employer's adverse employment decision,[214] the majority refused to give deference to *Price Waterhouse*.[215] According to the majority, Congress rejected all of *Price Waterhouse* when it enacted the 1991 Act.[216] Such a bare assertion by the majority misconstrues what Congress actually did in passing the 1991 Act, however. While Congress did reject the part of *Price Waterhouse* that gave the employer the ability to avoid liability altogether by showing that it would have made the same employment decision absent a discriminatory intent,[217] Congress actually embraced *Price Waterhouse*'s interpretation of the words "because of."[218] Indeed, Congress codified the part of *Price Waterhouse* that allowed an

> VII violation as occurring only when prohibited discrimination was the *sole* ground for the personnel action. Senator Case responded: "The Senator from Arkansas, as always, seeks to provide the benefit of great clarity and simplicity in his objectives and methods. The difficulty with this amendment is that it would render [T]itle VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless. I therefore regret that we are obliged to oppose the amendment, and also to recommend that it be rejected." The McClellan amendment and a similar proposal in the House were both defeated.

Brodin, *supra* note 42, at 296–97.

211. *Price Waterhouse*, 490 U.S. at 241 n.7. Justice Brennan addressed the assertion by stating, "Moreover, since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id*. at 241.

212. *Nassar*, 133 S. Ct. at 2534.

213. *See id.*

214. *Price Waterhouse*, 490 U.S. at 241.

215. *Nassar*, 133 S. Ct. at 2534.

216. *Id.*

217. *Compare Price Waterhouse*, 490 U.S. at 242, *with* 42 U.S.C. § 2000e-5(g)(2) (2006).

218. *Compare Price Waterhouse*, 490 U.S. at 242, *with* 42 U.S.C. § 2000e-2(m).

employee to demonstrate that his or her protected status was a motivating factor in an employer's adverse employment decision.[219] Such a standard is only appropriate, however, if the words "because of" do not mean "solely because of." Thus, in embracing *Price Waterhouse*'s motivating-factor standard, and implicitly rejecting the but-for standard advocated by the *Price Waterhouse* dissent, Congress clearly signaled that the words "because of" should not be construed to require but-for causation but should be construed to allow for a motivating-factor standard. Thus, even if the actual text of the 1991 Act does not apply to Title VII retaliation claims, *Price Waterhouse*'s interpretation of "because of" should still govern, as it most closely reflects Congress's indications that "because of" does not mean "solely because of."

Finally, the majority's reliance on *Gross* is inappropriate. In *Gross*, the Supreme Court strenuously tried to distinguish Title VII from the ADEA, stating that "[b]ecause Title VII is materially different with respect to the relevant burden of persuasion . . . [decisions construing Title VII] do not control our construction of the ADEA."[220] Thus, the Supreme Court in *Gross* refused to give weight to cases interpreting Title VII in determining what "because of" meant under the ADEA.[221] However, when the majority in *Nassar* was tasked with determining what "because of" meant under Title VII's retaliation statute, it looked to *Gross* as a guiding light in its analysis and rejected *Price Waterhouse* as inconsistent with *Gross*.[222] Therefore, according to the majority, while it is not appropriate to use Title VII cases to interpret "because of" under the ADEA, it is more than appropriate, even necessary, to give deference to ADEA cases in deciding how to interpret "because of" under Title VII. This very flip-flop between principles led Justice Ginsburg to ask the only natural question in this situation: "What sense can one make of this other than 'heads the employer wins, tails the employee loses'?"[223]

2. Supreme Court Precedent Demonstrates that Retaliation Is Discrimination

The majority also failed to follow Supreme Court precedent that has consistently construed retaliation to be another form of discrimination.[224] In the majority's view, its previous decisions stated only a "general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who

219. *See* 42 U.S.C. § 2000e-2(m). *See also supra* note 156.
220. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).
221. *Id.* at 174.
222. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).
223. *Id.* at 2545 (Ginsburg, J., dissenting).
224. *Id.* at 2529–30; *see supra* Part I.

oppose[d] that discrimination."[225] Because Title VII is a precise, complex, and exhaustive statute, the majority argued, the decisions which treat retaliation as an implicit corollary of status-based discrimination are inapposite.[226] The majority's sweeping dismissal of the precedential value of that line of cases, however, ignores the clear language and reasoning the Supreme Court used in deciding those cases. For example, in *Jackson v. Birmingham Board of Education*, the Supreme Court decided that a ban on sex discrimination under Title IX implicitly included a ban on retaliation because "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination."[227] Thus, retaliation against someone for complaining of status-based discrimination, according to the Supreme Court in *Jackson*, constituted intentional discrimination on the basis of that protected status.[228] To the majority in *Nassar*, this reasoning only applies when it is a broad statute proscribing discrimination.[229] As Justice Ginsburg aptly noted, however, "[i]t is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation."[230]

The more informed interpretation, given the Court's previous assertions that retaliation is just another form of status-based discrimination, is that references to status-based discrimination should be read to include retaliation. Thus, the motivating-factor standard adopted by the 1991 Act, because it applies to status-based discrimination claims, should also be read to apply to retaliation claims.

3. Maintaining a But-For Causation Standard Does Not Save Judicial Resources

The majority also noted that the proper interpretation of the causation standard for Title VII retaliation claims was important to the "fair and responsible allocation of resources in the judicial and litigation systems," especially since "the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race."[231] Though the majority did not say it in as many words, it clearly wanted to make it more difficult to bring a retaliation claim under Title VII to save judicial

225. *Nassar*, 133 S. Ct. at 2530 (majority opinion).
226. *Id.*
227. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005). *See also supra* Part I.
228. *Jackson*, 544 U.S. at 173.
229. *Nassar*, 133 S. Ct. at 2530.
230. *Id.* at 2541 (Ginsburg, J., dissenting).
231. *Id.* at 2531 (majority opinion).

resources and lessen the overall number of retaliation claims. The majority's "judicial resources" argument for the need of heightened, but-for causation standard is flawed in many respects.

To begin with, the majority improperly compared the number of Title VII retaliation claims to the number of each individual type of status-based discrimination claim.[232] Claims under the antiretaliation statute are often brought in conjunction with claims under the antidiscrimination statute.[233] Thus, for every one claim brought under the status-based discrimination statute, whether it is for discrimination based on race, sex, national origin, religion, or color, there is likely an additional claim brought under the antiretaliation statute. Therefore, instead of comparing the overall number of retaliation claims to the number of claims under each type of status-based discrimination, i.e., to the number of race claims, the number of sex claims, etc., the much fairer comparison is to the overall number of status-based discrimination claims. Indeed, when making this comparison, it becomes clear that the overall number of status-based claims still greatly eclipse the overall number of retaliation claims.[234] Thus, the need for a heightened causation standard for Title VII retaliation claims in order to save judicial resources is not as pressing as the majority would like it to seem.

Moreover, even if a heighted standard would prevent more employees from filing claims under the antiretaliation statute, there is no guarantee that this would actually save judicial resources. As stated, these claims are often brought in conjunction with one another.[235] While a heightened standard of causation for Title VII retaliation claims may prevent an individual from claiming retaliation, it would not prevent the individual from filing claims under the antidiscrimination statute. Thus, the overall number of charges may not meaningfully decrease.

Moreover, the preservation of judicial resources is not a justifiable reason for trying to effectively close the courthouse doors to employees claiming retaliation under Title VII.[236] Instead of enforcing a but-for causation standard

232. *Id.*

233. *Charge Statistics: FY 1997 Through FY 2013*, EQUAL EMP. OPPORTUNITY COMM'N, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 6, 2014).

234. *Id.*

235. *Id.*

236. Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1065–66, 1072 (2013). One scholar wrote:

> To be sure, judicial workload is a critical concern. As noted earlier, the lower courts have faced rising caseloads over the last several decades—a fact the justices have emphasized. Today, both federal district and appellate judges must contend with hundreds of filings per year, meaning that their ability to give attention to individual cases is greatly reduced. Employing the tools at hand, district judges have come to rely more heavily on the aid of magistrate judges, and appellate judges have come to rely on the assistance of staff

to make it less appealing to file a Title VII retaliation claim, the Supreme Court should focus on other ways to save judicial resources.

Finally, the majority also argued that lessening the standard could contribute to the filing of frivolous claims and siphon resources away from administrative agencies trying to fight workplace discrimination.[237] However, the EEOC, the administrative agency principally responsible for workplace discrimination claims, was not similarly worried about the filing of frivolous claims and the siphoning of its resources.[238] In fact, the EEOC argued that the motivating-factor standard should apply to Title VII retaliation claims, making the majority's assertion that it needed protection from frivolous claims unmoving.[239]

B. But-For Standard Is Too Difficult to Prove and Too Hard to Apply

The decision in *Nassar* is also flawed because the but-for causation standard is inappropriate in the Title VII context—it will be too difficult for employees to prove and too hard for juries to understand.[240] The but-for causation standard requires the employee to show that his or her protected activity was the but-for cause of the employer's adverse employment action, which essentially asks the employee to somehow determine what the employer would have done if it had not taken the protected activity into account.[241] As Justice Breyer noted in his dissent in *Gross*, this is no easy task:

> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. . . . In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud

attorneys and other case-management tools to cope with their workload. Still, judges and scholars alike have called for an expansion of the bench and limiting the flow of cases to alleviate the strain on the federal courts. Thus, when the justices express their desire to avoid inviting new claims into federal courts, the underlying concern is not a trivial one. The critical question, though, is whether considerations of judicial workload can stand as an independent factor in shaping the Court's interpretation of substantive law. . . . Therefore, although the Court may have a legitimate interest in ensuring that the number of filings, and particularly frivolous filings, does not become too high, it should be wary of using substantive law as the limiting device.

Id.

237. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–32 (2013).

238. *See id.* at 2533.

239. *Id.*

240. For a more in-depth critique of the but-for causation standard, see Brodin, *supra* note 42.

241. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190–91 (2009) (Breyer, J., dissenting).

> clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.[242]

Thus, employees will have to demonstrate to the jury what the employer would have done in a different scenario, but doing so will require the employee to "get inside" the employer's head to determine what it really thought when it made the adverse employment decision. Moreover, employees must make this showing even though the crucial evidence of what the employer would have done is under the control of the employer—the employee's adversary in the retaliation claim.[243] This places too great of a burden on employees trying to prove retaliation claims.

Moreover, the but-for causation standard does not have a sufficiently strong deterrent effect. One of the main purposes of Title VII is to deter employers from discriminating against employees.[244] The but-for causation standard, however, allows employers to retaliate against their employees as long as the retaliatory motive does not rise to the level of but-for causation.[245] Thus, employers are not deterred from engaging in discrimination. Unless the employee can succeed under the but-for causation standard—an unlikely event given that the employer holds the crucial evidence needed to prove the claim—the employer will not be held liable for its retaliatory actions.[246]

Furthermore, now that status-based discrimination claims and retaliation claims will be governed by two different causation standards, when the claims are brought together, the risk is much greater that juries will be confused and will have a difficult time applying the correct standard to each claim.[247] On the status-based discrimination claim, juries will only have to determine if the

242. *Id.*

243. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515–16, 516 n.104 (2006).

244. Brodin, *supra* note 42, at 317.

245. *See id.* at 316–17.

246. *See id.* at 317. Brodin states:

> Yet, [the but-for] causal theory appears to be based on two highly dubious assumptions. The first is that [T]itle VII's only goal is compensating "victims" . . . The first assumption flies in the face of congressional and judicial pronouncements that the primary objective (or at least one primary objective) of [T]itle VII is the elimination of discrimination in employment opportunities. With this deterrence goal in mind, why should a plaintiff be required, in order to establish a violation, to go beyond proving that race or another forbidden criterion was a motivating factor in the decision?

Id. (footnotes omitted).

247. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2546 (2013) (Ginsburg, J., dissenting).

discriminatory motive was a motivating factor in the employment decision,[248] while on the retaliation claim, the jury will have to determine that the discriminatory motive was the but-for cause of the employment action.[249] As Justice Ginsburg notes, because the Supreme Court has enforced this heightened causation standard on retaliation claims, courts will surely struggle with how to properly instruct juries in these cases.[250]

C. The Policy and Purpose Behind the Antiretaliation Statute Calls for a Lesser Standard

Most importantly, the *Nassar* decision was wrongly decided because the purpose behind the antiretaliation statute calls for a lesser standard. Congress sought to eliminate workplace discrimination when it enacted Title VII.[251] To this end, the status-based discrimination statute and retaliation statute are aimed at deterring employers from having a discriminatory or retaliatory motive when they make adverse employment decisions.[252] Moreover, according to the Supreme Court, while the antidiscrimination statute "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the antiretaliation statute "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[253] Thus, the two statues work hand-in-hand to accomplish Title VII's objectives.

The Supreme Court's recent decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* provides a further explanation of the purpose of Title VII's retaliation statute.[254] In deciding to interpret the antiretaliation statute broadly to cover an employee who did not speak out about discrimination on her own initiative, the Supreme Court noted that employees would not be willing to report discrimination unless the antiretaliation statute constituted a meaningful remedy.[255] The court hypothesized that "[i]f it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with

248. *See* 42 U.S.C. § 2000e-2(m) (2006).

249. *Nassar*, 133 S. Ct. at 2534 (majority opinion).

250. *Id.* at 2535, 2546 (Ginsburg, J., dissenting).

251. Brodin, *supra* note 42, at 294–95. "[Title VII's] purpose was stated broadly and ambitiously in a congressional report: 'to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.'" *Id.* (citation omitted).

252. *Id.* at 320.

253. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

254. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 271 (2009).

255. *Id.* at 271–72, 279.

no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."[256]

Beyond the Supreme Court's explanation of the purpose behind Title VII's antiretaliation statute, scholars have also documented the policy reasons behind broadly interpreting the antiretaliation statute in a way that provides the greatest amount of protection to employees as possible.[257] Studies demonstrate that retaliation works to suppress discrimination claims.[258] Indeed, "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."[259] If and when employees become willing to speak out against discrimination, retaliation steps in both to punish the employees and to return the workplace to its social norms.[260] Given the relationship between challenging discrimination and retaliation, therefore, "the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation."[261]

Thus, both the stated purpose behind Title VII and its antiretaliation statute and the policy behind interpreting retaliation statutes broadly demonstrate the need and appropriateness of allowing employees to proceed under a motivating-factor causation standard when bringing a Title VII retaliation claim. In fact, requiring the employee to demonstrate that his protected activity was the but-for cause of the employer's adverse employment action directly contradicts these stated purposes as it makes it harder for an employee to succeed on a retaliation claim and, therefore, weakens the antiretaliation statute. As the Supreme Court has recognized, without a strong prohibition against retaliation, employees will be less willing to confront discrimination in the workplace.[262] Title VII has no other meaningful enforcement mechanism, however. If employees refuse to police their employers and seek redress from discrimination, employers can continue to discriminate without much fear of being held accountable for their actions.[263] Thus, for Title VII to be effective in carrying out its purpose, employees must feel free to speak out against discrimination in the workplace. Instead of encouraging employees to challenge workplace discrimination, however, the but-for causation standard will only discourage people from speaking out. Indeed, the best way to encourage employees to confront discrimination and make Title VII more

256. *Id.* at 279.

257. *See* Brake, *supra* note 17, at 25–42; Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 378–79 (2010).

258. *See* Brake, *supra* note 17, at 21, 26, 36–37.

259. *Id.* at 20.

260. *Id.*

261. *Id.*

262. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 279 (2009).

263. *Id.*

effective is to enforce a motivating-factor standard for Title VII retaliation claims, as it gives an employee a much better chance of succeeding on a retaliation claim if the employer chooses to respond via retaliation to the employee's opposition to discrimination.

VII. PROPOSAL: CALL TO CONGRESS TO ACT

The Supreme Court's decision in *Nassar* must be addressed. In deciding that Title VII retaliation claims must proceed under a but-for causation standard, the Supreme Court greatly limited the ability of employees to get relief for their employers' retaliatory efforts. Such a result fails to adequately deter employers from engaging in retaliation. Moreover, the decision undermines the very purpose of Title VII in protecting employees from workplace discrimination. Without a strong prohibition against retaliation, employees will be less willing to confront discrimination in the workplace and the effectiveness of the prohibition against status-based discrimination will decrease.[264] Congress previously took action after the Supreme Court cut back on the scope and effectiveness of antidiscrimination laws,[265] and if it wants to ensure that the protections guaranteed under Title VII are still effective in eliminating workplace discrimination, Congress will need to act again.

Other scholars have previously called on Congress to address the causation standard for Title VII retaliation claims.[266] These scholars invited Congress to act before the Supreme Court decided *Nassar*. Now that the Supreme Court has signaled its clear intention to make it tougher for employees to succeed on retaliation claims, Congressional action is more important than ever. The only option left for employees to be properly protected against retaliation is for Congress to amend Title VII and create a motiving-factor provision for retaliation claims.

A. The Proposed Options for Congressional Amendment to Title VII

If Congress does choose to amend Title VII's antiretaliation statute and overturn the Supreme Court's decision in *Nassar*, Congress will have to decide which causation standard it should apply to retaliation claims. Congress may consider the following options: 1) the 1991 Act's framework, 2) *Price Waterhouse*'s framework, 3) formulations of the motivating-factor standard found in lower courts, or 4) a complete overhaul of Title VII.

Under the 1991 Act framework, employees claiming retaliation would need to demonstrate that their protected activity was a motivating factor in the

264. *See supra* Part VI.

265. *See supra* Part III; H.R. REP. NO. 102-40, pt. II, at 2–4 (1991).

266. *See, e.g.*, Rosenthal, *supra* note 35, at 1073, 1105.

employer's adverse employment action.[267] If an employee could make this showing, the employer could then lessen the damages it would have to pay by demonstrating that it would have made the same employment decision regardless of the discriminatory motive.[268]

Under the *Price Waterhouse* framework, employees would again need to only demonstrate that that their protected activity was a motivating factor in the employer's adverse employment action.[269] If an employee could make this showing, under this framework, the employer could avoid all liability by demonstrating that it would have made the same employment decision regardless of the discriminatory motive.[270]

Congress could also decide to adopt one of the lower court's formulations of the motivating-factor standard. Thus, it could require the employee to show by clear and convincing evidence (instead of the usual preponderance of the evidence) that a discriminatory motive was a motivating factor in an employment decision.[271] After the employee made this showing, Congress could either allow the employer to avoid all liability or just lessen the damages award by proving that it would have made the same decision even in the absence of discrimination.[272]

Finally, Congress could decide to completely overhaul Title VII instead of just amending Title VII to add a motivating-factor framework to the antiretaliation provision.

B. The Best Option: Adding the 1991 Act's Framework to the Antiretaliation Provision

Congress should choose to enact an approach similar to the 1991 Act, as it strikes the right balance between employees' and employers' needs. The *Price Waterhouse* framework, although less employer friendly than the but-for causation standard, is still too employer friendly. While the first leg of the Price *Waterhouse* framework—requiring the employee to demonstrate that his protected activity was a motivating factor in the employer's adverse employment decision[273]—may be appropriate to apply to Title VII retaliation claims, the second leg of *Price Waterhouse* warrants rejection of the framework as the best choice for a congressional amendment. The second leg allows the employer to escape liability by demonstrating that it would have

267. *See* 42 U.S.C. § 2000e-2(m) (2006).

268. *See id.* § 2000e-5(g)(2).

269. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

270. *Id.* at 248–50.

271. *See* Toney v. Block, 705 F.2d 1364, 1366–68 (D.C. Cir. 1983); Fadhl v. City & Cnty. of S.F., 741 F.2d 1163, 1166 (9th Cir. 1984).

272. *Toney*, 705 F.2d at 1370, 1373; *Fadhl*, 741 F.2d at 1166.

273. *Price Waterhouse*, 490 U.S. at 249.

made the same decision regardless of the employer's retaliatory intent.[274] By allowing the employer a "get out of a jail free" card, the standard loses most, if not all, of its deterrent effect. Employers would still be able to have a retaliatory motive without facing any consequences. Furthermore, because the employer can escape liability even if it does take the employee's protected activity into account, employees would be deterred from confronting discrimination in the workplace.

Most importantly, however, Congress has already shown its contempt for the second leg of the *Price Waterhouse* framework.[275] Indeed, Congress clearly believed that the second leg of the framework reduced the protections Title VII guaranteed to employees.[276] When it added the motivating-factor framework to the status-based discrimination provision, it did not include the provision that allowed the employer to escape liability.[277] Thus, on the whole, the *Price Waterhouse* standard is not the best option for Congress to choose if it does decide to amend Title VII.

The other formulations within the lower courts are also too employer-friendly and should be rejected. The formulations are variations on the 1991 Act and *Price Waterhouse* frameworks. Both formulations use a motivating-factor standard, but one formulation allows the employer to escape liability and the other allows the employer to lessen the damages it must pay.[278] The key distinction is that the formulations require employees to prove by *clear and convincing evidence* that their protected activity was a motivating factor in the adverse employment action.[279] A requirement that the employee prove its claim by clear and convincing evidence, as opposed to preponderance of the evidence, places too high of a burden on employees. Most of the evidence showcasing why an employer made an adverse employment decision is in the hands of the employer,[280] and therefore, the employee's chance of having enough evidence to prove his or her claim under a clear and convincing standard is unlikely. In this way, the clear and convincing burden of proof defeats the purpose of having a motivating-factor standard, and these lower court formulations must also be rejected.

At least one commentator has called on Congress to overhaul all of Title VII instead of amending it piece by piece.[281] Although an overhaul may

274. *Id.*

275. *See supra* Part III.

276. *Compare Price Waterhouse*, 490 U.S. at 242, *with* 42 U.S.C. § 2000e-5(g)(2) (2006).

277. *See* 42 U.S.C. § 2000e-5(g)(2).

278. *See* Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983); Fadhl v. City & Cnty. of S.F., 741 F.2d 1163, 1166–67 (9th Cir. 1984)

279. *See Toney*, 705 F.2d at 1367–68.

280. *See* Katz, *supra* note 243, at 515–16, 516 n.104.

281. *See* William R. Corbett, *Calling on Congress: Take a Page From Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 141–43 (2013).

provide the most benefit in the long run, getting Congress to completely overhaul Title VII is unlikely. In fact, to think that Congress would take the time to revisit all of Title VII is just downright unrealistic. Thus, at least in the interim, Congress needs to address the Supreme Court's decision in *Nassar* and provide for a lesser causation standard for retaliation claims.

Given the problems with the other options, if Congress were to amend Title VII and include a provision allowing for a lesser standard, the best option is to enact a standard similar to the 1991 Act's framework. Indeed, the 1991 Act's framework strikes the right balance. The first leg of the approach allows the employee to demonstrate that his protected activity was a motivating factor in the adverse employment action,[282] which properly protects employees and reassures them that employers will be held accountable for retaliatory acts. Thus, employees will be more willing to confront discrimination in the workplace, and Title VII's provisions will become more effective. Moreover, by allowing employers to lessen the amount of damages they must pay by demonstrating that they would have made the same decision in the absence of the retaliatory motive,[283] employers will still have a degree of protection. Thus, employers will still be deterred from engaging in retaliation, but employees will not receive a windfall by receiving compensation even if the employer would have made the same decision.

In all, the 1991 Act's standard most accurately reflects the purpose of the antiretaliation statute as well as the overall purpose of Title VII as a whole.

CONCLUSION

The Supreme Court's decision in *Nassar* created an unnecessary hurdle to jump through in order to succeed on a Title VII retaliation claim. By enforcing a but-for causation standard for Title VII retaliation claims, the Supreme Court weakened the protection employees need against the retaliatory actions of their employers and, in turn, lessened the effectiveness of Title VII's status-based discrimination statute in creating a discrimination-free workplace. If left unaddressed, the decision will threaten the very purpose of Title VII. Therefore, Congress must respond to the Supreme Court's decision in *Nassar*. Indeed, Congress should add a provision to Title VII's antiretaliation statute that creates a motivating-factor standard for retaliation claims similar to the motivating-factor provision already in place for status-based discrimination claims. By amending Title VII and adding a motivating-factor standard for

282. *See* 42 U.S.C. § 2000e-2(m) (2006).

283. *See* 42 U.S.C. § 2000e-5(g)(2).

retaliation claims, Congress will restore the protections guaranteed to employees and signal to the Supreme Court its desire that Title VII be read in a way that furthers the goal of eliminating discrimination in the workplace.

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