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.

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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

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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]

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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

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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]

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).

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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

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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]

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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 uncem37.6( )]TJ/TT8 1 Tf

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*

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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).

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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-

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

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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

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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]

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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]

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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.*

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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.
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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

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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 tw

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*,

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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]

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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

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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-b

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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 (las

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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

> 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—

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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]

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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.

JENNA HUENEGER

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