No. _____

In The
Supreme Court of the United States

RICHARD NATOFSKY,

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Americans with Disabilities Act permits employees to proceed under a mixed-motive causation standard before the burden shifts to employers to ultimately prove that a non-disability based reason was the but-for cause of the adverse employment action.

PARTIES TO THE PROCEEDINGS

The petitioner is Richard Natofsky.

The respondent is the City of New York.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Richard Natofsky is an individual.

RELATED CASES

Richard Natofsky v. City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, and John and Jane Doe, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendants, United State District Court for the Southern District of New York: Civil Action No. 14 Civ. 5498 (Judge Naomi Reice Buchwald) - Opinion entered August 8, 2017.

Richard Natofsky v. City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, and John and Jane Doe, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendants, United States Court of Appeals for the Second Circuit: Docket No. 17-2757 - Opinion entered April 18, 2019.

Richard Natofsky v. City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, and John and Jane Doe, said names being fictitious, the persons intended being

RELATED CASES—Continued

those who aided and abetted the unlawful conduct of the named defendants, United States Court of Appeals for the Second Circuit: Docket No. 17-2757 - denial of rehearing en banc July 9, 2019.

Richard Natofsky v. City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, and John and Jane Doe, said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named defendents, Supreme Court of the State of New York, County of New York, Index No. 158401/2017 - case is pending.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The August 8, 2017, unreported order of the United States District Court for the Southern District of New York is reproduced at App. 44-87 of the Appendix. *Natofsky v. City of New York*, No. 14 CIV. 5498 (NRB), 2017 WL 3670037 (S.D.N.Y. Aug. 8, 2017). The April 18, 2019, opinion of the Second Circuit is reproduced at App. 1-43 of the Appendix. *Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019). The July 9, 2019, denial for a rehearing en banc of the United States Court of Appeals for the Second Circuit is reproduced at App. 88-89 of the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit entered its final judgment on April 18, 2019. On July 9, 2019, the Second Circuit denied the petition for rehearing en banc. On September 30, 2019, Justice Ruth Bader Ginsburg extended the time for filing a petition for writ of certiorari to December 6, 2019.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act of 1990, provides that "no covered entity shall discriminate against

a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Section 794(a) of the Rehabilitation Act of 1973 provides that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a).

Section 794(d) of the Rehabilitation Act of 1973 also states "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d).

STATEMENT OF THE CASE

A. Overview

In 1992, Congress amended the Rehabilitation Act of 1973 (the "Rehabilitation Act"), requiring it to be interpreted under the same causation standard as the American with Disabilities Act (the "ADA") for claims of employment discrimination. This case arises from

allegations of disability discrimination, under the Rehabilitation Act against the City of New York ("Respondent") and the Rehabilitation Act's incorporation of the ADA. App. 1-43; App. 44-87; App. 88-89. Applicant-Petitioner ("Natofsky") alleged discrimination on account of his disability, a severe hearing impairment, when Respondent gave him negative performance reviews and ultimately demoted him with a substantial pay cut.

B. Factual History[1]

Richard Natofsky suffers from a severe hearing impairment. App. 3. He must wear hearing aids and intently focus on the speaker's lips in order to fully understand what an individual is saying. App. 4-5. This requires him to focus all his attention on the speakers at meetings, thus substantially affecting his ability to multi-task during these meetings. App. 6. Because of this significant hearing disability, Natofsky worked longer hours to stay up-to-date with his work. For example, Natofsky used this extra time to respond to emails he was unable to address while attending meetings. App. 6. Despite his disability, Natofsky was

[1] Because this case was decided on a motion for summary judgement, "reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014). The Supreme Court also admonished, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id*. at 1866.

continually promoted throughout his career with the City of New York.

In December 2012, Natofsky was hired as the Director of Human Resources and Budget for the New York City Department of Investigation (the "DOI"). App. 5. When he was hired in 2012, his direct supervisor was Shaheen Ulon ("Ulon"), the Deputy Commissioner for Administration. App. 5. The Commissioner of the DOI was Rose Gill Hearn ("Gill Hearn"). App. 5. In November 2013, Natofsky earned two awards: (1) "going above and beyond in his job performance" and (2) "good record of performance." App. 5. Natofsky also received a memorandum from Gill Hearn that increased his salary by three percent for good performance. App. 5.

At the end of March 2013 and again in early June 2013, Ulon demanded that Natofsky respond to emails more promptly, change his schedule to arrive at work later in the morning between 9:00 a.m. and 10:00 a.m. when Ulon was scheduled to arrive, and submit fewer leave requests. App. 6. Natofsky explained that he could not respond to emails as promptly as Ulon wanted because he had to spend "extraordinary effort" to listen during meetings, taking away his ability to multi-task and respond to emails at the same time. App. 6. Natofsky also explained that he arrived early between 8:00 a.m. and 8:30 a.m. to compensate for his lost time and he used that time to respond to emails. App. 6. Ulon did not withdraw her demands until Gill Hearn organized a meeting to discuss the demands with Natofsky;

however, Ulon's differential treatment towards Natofsky did not stop. App. 6-7.

At the end of 2013, Gill Hearn left DOI when a new mayoral administration appointed Mark Peters ("Peters") DOI Commissioner. App. 5. Peters became commissioner in late February 2014. App. 5. Shortly after this, Ulon wrote a memorandum purporting to highlight Natofsky's performance deficiencies, primarily in the area of writing. App. 7. Ulon resigned on May 1, 2014. App. 7. On her last day in the office, Ulon continued to berate Natofsky's work habits with a written evaluation. App. 7. The evaluation was directly contrary to the commendations he had received just months before for "going above and beyond in his job performance" and having a "good record of performance." App. 5. At that time, Natofsky received a raise for his work performance. App. 5. Yet, on her last day at work, around May 2014, Ulon rated Natofsky's overall performance a two out of five. App. 7. Ulon rated Natofsky as "needs improvement" in seven of fourteen categories complaining that his "email responsiveness need[ed] improvement[.]" App. 7. Ulon made this complaint despite Natofsky explaining how his disability affected his ability to respond to emails quickly. App. 7. Natofsky appealed this evaluation but Susan Pogoda ("Pogoda"), the new DOI Chief of Staff and Deputy Commissioner for Agency Operations under the new Commissioner Peters, denied the appeal. App. 7.

When Natofsky met Pogoda for the first time in February 2014, Pogoda was staring at and observing his disability. App. 8. She was noticeably impatient

with him, demanding he speak more clearly and quickly, then shook her head and rolled her eyes when Natofsky informed her of his disability. App. 8.

In early March 2014, following a meeting between Peters, Pogoda, and Natofsky, Peters testified in his deposition that he was frustrated with Natofsky at that meeting and a subsequent meeting a week later. App. 8. Pogoda claims that she referred to Natofsky and Ulon as "clueless." App. 8. There is no evidence that neither Peters nor Pogoda ever told Natofsky they were displeased with his performance before his demotion.

Within two months, in May 2014, Natofsky was demoted to Associate Staff Analyst, and his salary decreased by fifty percent. App. 8. His old position was assumed by two non-disabled employees, Egardo Rivera and Shayvonne Nathaniel. App. 8. Immediately after his unexpected demotion, Natofsky wrote an email to Peters and Pogoda on May 28, 2014, protesting their decision to demote him. App. 9. On June 6, 2014, Pogoda reassigned Natofsky from his private office to a high-traffic, high-volume cubicle previously used by his former assistant, not suitable for Natofsky's disability. App. 9. He was moved to a more suitable workplace only after he complained to Rivera. App. 9.

Natofsky appealed his demotion to the Deputy Commissioner for Administration in the Department of Citywide Administrative Services ("DCAS") on June 18, 2014. App. 9. He argued that he was "given no justifiable reason as to why [his] salary was so drastically cut" and his demotion was "illegitimate and contrary

to law." App. 9. DCAS agreed and stated that a manager should not lose more than twenty percent of his or her salary if reassigned. App. 9. DCAS ordered Natofsky's salary to be raised to the maximum amount permitted for Natofsky's new title. App. 9. Despite the mandated raise from $68,466 to $88,649, Natofsky knew he was subject to the same supervisors who tried to undercut his wages, demoted him and ridiculed his disability, and would be under scrutiny every day at his job. Natofsky felt compelled to resign from the DOI in December 2014 after facing a campaign of retaliatory acts. App. 9. He then began working as an Operations and Budget Administrator at the New York City Department of Transportation. App. 9-10.

C. Proceedings Below

Natofsky filed a complaint on July 22, 2014, alleging that the City of New York violated the Rehabilitation Act by discriminating against him on the basis of his disability,[2] by failing to accommodate his hearing impairment, and by retaliating against him when he complained about their discriminatory actions. App. 10. The district court granted Respondent's motion for summary judgement on all claims under the Rehabilitation Act. App. 10 Addressing Natofsky's disability

[2] The complaint had allegations against other individual defendants who are no longer before the court as part of the federal proceedings, but who are currently defendants in the state court proceedings that were subsequently filed after the district court declined to exercise supplemental jurisdiction over the state and city anti-discrimination claims. App. 86-87.

claim, the district court held that Natofsky failed to show that Ulon's negative performance reviews were given "solely because of Natofsky's disability" and that he was demoted "solely because of" a discriminatory reason. App. 10.

On appeal, the Second Circuit addressed the causation standard for establishing discrimination based upon disability under the Rehabilitation Act. The Second Circuit held the Rehabilitation Act incorporated the ADA's causation standard for claims of employment discrimination on the basis of disability.[3] App. 14. Additionally, the Second Circuit held that the ADA's "on the basis of disability" language was similar in meaning to Title VII's "because of" language. App. 23. Thus, the Second Circuit concluded the but-for standard—not the mixed motive standard—applied to the ADA and the Rehabilitation Act for claims of disability based discrimination. App. 23. The Second Circuit affirmed the district court's award of summary judgment to the defendant because "Natofsky failed to demonstrate that the adverse employment decisions he experienced would not have been made but for his disability." App. 4.

Judge Chin dissented and stated four reasons as to why the ADA incorporates a motivating factor standard for claims of employment discrimination on

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[3] In *Natofsky*, the Second Circuit correctly held that based upon the plain language of the Rehabilitation Act, the standards for an employment discrimination claim under § 794(a) of the Rehabilitation Act "shall be the standards applied under title I of the Americans with Disabilities Act of 1990." App. 13.

the basis of disability. App. 35. First, the reasoning in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), did not apply to Natofsky's claim because *Gross* analyzed the Age Discrimination in Employment Act of 1967 ("ADEA") and not the ADA. App. 36-38. Second, the 2008 amendments to the ADA showed Congress intended to retain the broad scope of a motivating factor standard for employment discrimination claims. App. 38-39. Third, the ADA expressly incorporated Title VII's § 2000e-5 and § 2000e-5(g)(2)(B) provisions which specifically refer to the motivating factor standard. App. 39-40. Thus, Congress intended the motivating factor standard to apply to the ADA. App. 40. Finally, the legislative history of the ADA showed Congress intended the ADA's remedies to parallel Title VII's remedies. App. 40-41. Therefore, a motivating factor standard should apply to an employment discrimination claim under the ADA, just as it applies to an employment discrimination claim under Title VII. App. 41. Ultimately, Natofsky's motion for rehearing en banc was denied by the Second Circuit on July 9, 2019. App. 88.

REASONS FOR GRANTING THE WRIT

This case presents this Court with the opportunity to clarify the appropriate causation standard for the ADA. Since the creation of the ADA and the 2008 amendments to the statute's language, the circuit courts have inconsistently applied various causation standards to claims of employment discrimination on

the basis of disability. Even after the Court addressed different causation standards for some federal anti-discrimination statutes in *Gross* and *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), the confusion across the circuit courts continues with regard to the ADA's causation standard for employment discrimination claims. This is the appropriate case for this Court to resolve this confusion and provide a unified standard for courts, lawyers, and individuals with disabilities to apply in claims of employment discrimination under the ADA. Furthermore, the congressional intent for enacting and amending the ADA was to protect individuals with disabilities from discrimination, therefore clarifying the proper causation standard would further this important national interest.

I. The Court Is Currently Addressing The Causation Standard Under 42 U.S.C. § 1981 And The ADEA, And Should Also Clarify The Causation Standard Under The ADA.

The Court has a demonstrated interest in resolving confusing causation standards under federal employment statutes. Over the years, the Court has systematically clarified the required causation standard under various federal anti-discrimination statutes. *See Nassar*, 570 U.S. at 362 (clarifying causation standard for Title VII retaliation claims); *Gross*, 557 U.S. at 179 (2009) (resolving causation for the ADEA); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (defining causation under Title VII). In *Gross*, the Court cautioned that lower courts "must be careful not to apply rules

applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174 (internal quotation and citation omitted). However, many lower courts ignore this warning and apply the Court's analysis in *Gross* for claims of discrimination under the ADEA to overturn precedent regarding the ADA. The lower courts have applied inconsistent approaches to employment discrimination claims under the ADA partially because this Court has not yet determined whether the ADA's "on the basis of disability" language requires but-for causation or permits a motivating factor analysis. 42 U.S.C. § 12112(a).

Currently before this Court are two analogous questions of causation under two separate federal antidiscrimination statutes, 42 U.S.C. § 1981 and the ADEA. In *Comcast Corp. v. Nat'l Ass'n of African Am. Owned Media*, a failure to contract case, the Court is addressing whether § 1981 requires a plaintiff to show race was a motivating factor or the but-for cause of the refusal to contract. 139 S. Ct. 2693 (2019). In *Babb v. Wilkie*, the Court is faced with similar conflicting standards of causation under the ADEA as it relates to federal-sector employees. 139 S. Ct. 2775 (2019). This case presents the Court with a similar issue of national importance: whether motivating factor or but-for causation is required under the ADA and the Rehabilitation Act for claims of employment discrimination claims on the basis of disability.

As a matter of judicial efficiency, granting certiorari to provide a definitive standard of causation under the ADA and the Rehabilitation Act is the next logical

step in the Court's continued efforts to clarify causation standards under federal anti-discrimination statutes. The causation question presented in this case is just as important as the causation questions previously addressed by the Court in *Nassar*, *Gross*, and *Price Waterhouse*; and currently before the Court in *Babb* and *Comcast*. Further, the meaning of "on the basis of disability" is central to the interpretation of both the ADA and the Rehabilitation Act for litigating claims of employment discrimination. Therefore, this case presents an appropriate vehicle for this Court to define the standard for both statutes.

II. There Was Confusion In The Circuit Courts Over The Causation Standard Under The ADA Before *Gross* And That Confusion Continues Today.

The ADA's causation standard has historically caused discord across the circuits, and continues to create confusion today. This confusion among the courts was enhanced when Congress amended the language of the ADA in 2008. Before the amendment, Title I of the ADA prohibited discrimination "because of" an individual's disability. When Congress passed the ADA Amendments Act of 2008 ("ADAAA"), it changed the relevant causation standard from "because of" to "on the basis of" disability. 42 U.S.C. § 12112(a). This change to the language of the statute indicates a departure from but-for causation, as it makes little sense for Congress to change the language intending to impose the exact same causation standard.

Even before this change, and prior to the Court's decision in *Gross*, the circuits were split in their interpretation of the ADA causation standards for claims of employment discrimination on the basis of disability. Most circuit courts required plaintiffs to show their disability was a motivating factor of the adverse employment action, while the rest of the circuits struggled to determine the appropriate causation standard with uniformity. Post-*Gross*, several circuit courts have overturned their precedents and now require but-for cause. Currently some circuit courts require plaintiffs to show but-for cause in an ADA employment discrimination claim, while other circuits still apply a motivating factor standard. The circuit courts' lack of uniformity in interpreting the ADA's "on the basis of" language for the appropriate causation standard invites this Court to grant certiorari in this case.

A. Before the Court's ruling in *Gross*, circuit courts favored a motivating factor causation standard under the ADA.

Historically, ADA causation standards have caused confusion across the circuits. Before the Court's decision in *Gross*, most circuits understood claims of employment discrimination under the ADA as subject to a motivating factor causation standard. These courts included the First, Second, Fourth, Fifth, Eighth, and Ninth Circuits. *See Head v. Glacier Nw.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (finding "that a 'motivating factor' standard is most consistent with the plain language of the statute and purpose of the ADA"); *Parker v.*

Columbia Indus., 204 F.3d 326, 337 (2d Cir. 2000) ("[E]limination of the word 'solely' from the causation provision of the ADA suggests forcefully that Congress intended the statute to reach beyond the Rehabilitation Act to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action."); *Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (addressing Title II of the ADA the court stated, "Thus, if a plaintiff claiming discrimination under § 12132 demonstrates that his or her disability played a motivating role in the employment decision, the plaintiff is entitled to relief."); *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1033 (7th Cir. 1999) (" 'A' motivating factor (as opposed to 'the' motivating factor) obviously means that the discriminatory factor, here the alleged disability, need not be the employer's only reason for termination."); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (stating a plaintiff must show he "was fired because of a disability, or that his disability was a motivating factor"); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996) (relating Title VII and the ADA, applying motivating factor analysis); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) ("An employee is entitled to some relief if he or she proves that his or her disability was a 'motivating factor' in the decision made, 'even though other factors also motivated' the employer's decision."). These circuits found, although the ADA did not include explicit mixed-motive language, Congress only intended to require a plaintiff to prove that the employer relied on impermissible considerations in coming to its decision.

In contrast, other circuits treated the ADA's "on the basis of" language as a standard of "solely by reason of his handicap." *Cotter v. Ajilon Servs. Inc.*, 287 F.3d 593, 598 (6th Cir. 2002) (quoting *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996)); *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995) (regarding the plaintiff's ADA claim, "we need not address the remaining element of his claim, whether York terminated him solely because of his disability."). These circuits relied on their interpretation of the plain language of the statute when considering the causation standard under the ADA.

Prior to the Court's decision in *Gross*, the Eleventh Circuit alone purported to use a but-for causation standard. The Eleventh Circuit first reasoned that importing the restrictive "solely" from the Rehabilitation Act to the ADA is contrary to the ADA's purpose. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996). The court ultimately settled upon a but-for causation standard. *Id.* at 1077. The Eleventh Circuit stated:

> We hold that the 'because of' component of the ADA liability standard imposes no more restrictive standard than the ordinary, everyday meaning of the words would be understood to imply. In everyday usage, "because of" conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but-for' liability standard.

Id.[4]

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[4] While the Eleventh Circuit purported to use a but-for standard, other circuits articulated this as support for using a motivating

Pre-*Gross*, the Third, Tenth, and D.C. Circuits were not clear on which causation standard was appropriate for ADA claims. The Tenth Circuit cited the *Foster* and *White* cases, *see* discussion *supra* pages 14-15, but used language more reminiscent of a but-for causation standard when deciding their cases. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) (finding plaintiff must provide "some evidence that her disability was *a determining factor*" in the employer's decision to terminate her) (emphasis added); *see also Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) ("The final prong of the test requires the plaintiff to present some affirmative evidence that disability was *a determining factor* in the employer's decision.") (emphasis added). The D.C. and Third Circuits show similar uncertainty about their exact causation standard. *See Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 934 (D.C. Cir. 1999) (stating to sustain a claim under the ADA the employee must show "that he suffered an adverse employment action *because of* his disability") (emphasis added); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157-58 (3d Cir. 1995) (stating a plaintiff "need prove only that the illicit factor 'played a role in the

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factor analysis. *See Head*, 413 F.3d at 1065 ("[*McNely*] explained that 'the "because of" component of the ADA liability standard imposes no more restrictive standard than the ordinary, everyday meaning of the words would be understood to imply. In everyday usage, "because of" conveys the idea of a factor that made a difference in the outcome' "); *Parker*, 204 F.3d at 337 ("[T]he 'substantially identical . . . causal language' used in Title VII and the ADA, *McNely* indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well.").

employer's decision-making process and that it had a *determinative effect* on the outcome of that process.' ") (emphasis added). These cases exemplify the confusion that existed in the circuit courts prior to the Court's decision in *Gross*. Since *Gross*, confusion about the ADA causation standard continues.

B. Some circuits post-*Gross* have adopted a but-for causation standard, other circuits have maintained a motivating factor standard, and some still struggle with identifying a causation standard.

In light of the Court's decisions in *Gross*, several circuit courts have adopted a but-for causation standard for employment discrimination claims under the ADA. The First, Fifth, and Eighth Circuits retain a motivating factor standard, while other circuits remain unclear. The Court should grant certiorari to resolve the circuit split and provide a uniform standard.

The Second and Ninth Circuits

The Second Circuit in *Natofsky* focused on the Court's interpretation of *Gross* and *Nassar* in reaching its decision to overrule its precedent. Additionally, the Second Circuit held there is no difference between "because of" in the ADEA and the ADA's "on the basis of" language—even though the ADA was purposely amended by Congress to incorporate this language. 42 U.S.C. § 12112(a); App. 14.

Judge Chin dissented, highlighting the importance of the words Congress used, and that the intent of Congress was to acquiesce and retain the motivating factor analysis. App. 36-43. Judge Chin argues that the ADA incorporates Title VII in several locations, which shows Congress's intent to adopt motivating factor analysis. App. 36-38. Judge Chin's dissent states:

> [T]he 2008 Amendments show that Congress wanted to retain, not eliminate, the motivating-factor standard. The primary purpose of the 2008 Amendments was to 'reinstat[e] a broad scope of protection to be available under the ADA' because several Supreme Court cases had narrowed that scope of protection. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554 (2008).

App. 38.

The Ninth Circuit's consideration and analysis in *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019), was decidedly different. The panel in *Murray* discounted the legislative change in the ADA that changed the language from "because of" to "on the basis of." The panel reasoned that "on the basis of" means the same as "because of," "based on," "by reason of," or "on account of." *Id.* at 1106. The Ninth Circuit places less weight on the limited textual analysis, and more on the decisions of this court and its sister circuits. *Id.* at 1105-07. The Ninth Circuit relied on *Gross*'s analysis to read a but-for cause into the ADA. *Id.*

The Fourth, Sixth, and Seventh Circuits

The Fourth, Sixth, and Seventh Circuits have abandoned a motivating factor standard for a but-for cause standard. The Fourth Circuit, similar to the Second Circuit, has held that *Gross* dictates the interpretation of the statue, and that "on the basis of" is analogous to "because of." *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016). They continue to say the but-for standard serves the legislative intent of refocusing the act. *Id.*[5]

The Sixth and Seventh Circuits relied on different analysis in reaching a but-for causation standard. The Sixth Circuit applies the *Gross* analysis to the 1990 ADA's plain language and legislative history, rather than the 2008 amendments (at least separate from the analysis of why solely is the wrong standard). *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 317-21 (6th Cir. 2012). Judge Clay provides a dissent, joined by Judge Stranch and Judge Donald, addressing the increased burden to discrimination victims, as well as contrasting the application of *Gross* to a non-ADEA statute. *Id.* at 322-25. Judge Clay explains, "[b]ecause the ADA is explicitly tied to Title VII's remedies provisions—unlike the ADEA—a careful examination of the two statutes makes clear that a plaintiff alleging discrimination under the ADA must only prove that the

[5] The interpretation is ambiguous as seen with Judge Chin's dissent in *Natofsky* finding the legislative intent was to maintain a motivating factor causation standard. *See* discussion *supra* pages 8-9.

discrimination was a motivating factor for the adverse action." *Id.* at 324. The Seventh Circuit similarly reflects *Gross*'s interpretation of "because of" and applies it to the ADA causation standard. *See Monroe v. Ind. DOT*, 871 F.3d 495, 504 (7th Cir. 2017) (stating that the court will continue applying a but-for causation standard to employment discrimination claims under the ADA irrespective of the statute's change of language from "because of" to "on the basis of" disability).

The First Circuit

The controlling First Circuit precedent adopts a motivating factor causation standard. *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996). However, the First Circuit appears poised to abandon the motivating factor standard, but has not yet done so. In *Katz*, the First Circuit instructed the courts to use a motivating factor analysis when considering employment discrimination cases. *Id.* While not having ruled directly on the issue since, a panel strongly suggested in *Palmquist v. Shinseki*, that the *Katz* use of motivating factor was dicta and would not stand. 689 F.3d 66, 75 (1st Cir. 2012).[6] However, the First Circuit continues to

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[6] In *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), while discussing *Katz* the court explained:

> *Katz* only dealt with whether the employee had made out a prima facie case of discrimination using the temporal proximity between the onset of his disability and his firing. "The passage that the plaintiff quotes is pure dictum: 'it can be removed from the opinion without either impairing the analytical foundations of the court's

follow its precedent in applying a motivating factor standard.

The Fifth, Eighth, and D.C. Circuits

The Fifth and Eighth Circuits retain a motivating factor standard for ADA employment discrimination cases. The Eighth Circuit has directly stated, "[w]e apply a mixed-motive causation standard, allowing claims based on an adverse employment action that was motivated by both permissible and impermissible factors." *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 756 (8th Cir. 2016). *Oehmke* remains controlling precedent for the Eighth Circuit today.

In contrast, the D.C. Circuit Court has not directly addressed whether a motivating factor or but-for causation standard applies.[7] This lack of guidance by the D.C. Circuit has caused confusion in its district courts in recent years. Still, some district courts in the D.C. Circuit appear to continue applying a motivating factor analysis for employment discrimination claims under the ADA. Other district courts within the D.C. Circuit continue to rely on or reference uncertain causation standard analyses without record of being

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holding or altering the result reached.' " Thus, the loose language in Katz is inconsequential here.

Id. at 75 (internal citations omitted).

[7] In an unreported opinion, the D.C. Circuit affirmed the use of motivating factor analysis post-*Gross*, though without any substantial analysis. *See Gard v. United States Dep't of Educ.*, No. 11-5020, 2011 U.S. App. LEXIS 10799 (D.C. Cir. May 25, 2011) (per curiam).

overturned on appeal. Thus, the district courts in the D.C. Circuit often operate in absence of a clearly defined standard. *See generally*, *Smith v. Dist. of Columbia*, No. 16-1386 RDM, 2018 U.S. Dist. LEXIS 168005, *28 (D.D.C. Sept. 28, 2018) ("To establish causation, 'discrimination need not be the sole reason' for the exclusion of or denial of benefits.") (citations omitted); *Von Drasek v. Burwell*, 121 F. Supp. 3d 143, 154 (D.D.C. 2015) ("Thus, a discrimination or retaliation claim brought under the ADA can rest on a 'motivating factor' causation analysis[.]") (citations omitted); *Alston v. Dist. of Columbia*, 770 F. Supp. 2d 289, 297 (D.D.C. 2011) (citing the Fifth Circuit's *Pinkerton* and *Soledad* analyses) ("To show that the exclusion was 'by reason of' his or her disability, an individual must establish that the disability 'actually played a role in the . . . decision making process and had a determinative influence on the outcome.' ") (citations omitted). While some district courts in the D.C. Circuit appear to use the motivating factor analysis, some simply state that they are not using a "solely" standard.

The Fifth Circuit standard is equally confusing. The Fifth Circuit has held that:

> Under the ADA, "discrimination need not be the sole reason for the adverse employment decision . . . so long as it actually plays a role in the employer's decision making process and has a determinative influence on the outcome[.]" For this reason, an employee who fails to demonstrate pretext can still survive summary judgment by showing that an employment

> decision was "based on a mixture of legitimate and illegitimate motives . . . [and that] the illegitimate motive was a motivating factor in the decision."

EEOC v. LHC Grp., Inc., 773 F.3d 688, 702 (5th Cir. 2014) (citing *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008)). The Fifth Circuit's discussion highlights the confusion that exists both in the appellate and trial courts. The court rejects "sole cause" and appears to adopt a "but-for" causation standard by using "determinative influence" language.[8] The court has held that a case goes to trial if disability discrimination was a "motivating factor." *Id.* Currently, the Fifth Circuit continues to rely on *LHC Group* and *Pinkerton* applying motivating factor causation standard as the proper standard under the ADA.

The Third and Eleventh Circuits

The Third Circuit also has addressed the idea of but-for causation post-*Gross*, but appears to have some reservations regarding their use of but-for causation. In *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229 (3d Cir. 2013), the court addressed whether Pennsylvania's method for distributing special education funds violated the ADA, under 42 U.S.C. § 12132, and Rehabilitation Act,

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[8] This "determinative" language is most commonly seen in decisions applying but-for analysis. *See, e.g.*, *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (citing *Gross*, 557 U.S. 167).

under 29 U.S.C. § 794(a). In a footnote, the Third Circuit explains:

> The existence of an alternative cause, however, may not necessarily be fatal to an ADA claim so long as disability "played a role in the . . . decisionmaking process and . . . had a determinative effect on the outcome of that process." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 300 n.4 (3d Cir. 2007) (reversing the denial of summary judgment in favor of plaintiff in part because the District Court improperly applied the RA's sole causation requirement to plaintiff's ADA claim, which required only "but for" causation).

C.G., 734 F.3d at 236 n.11.[9] The but-for causation expressed here appears to function similarly to a motivating factor analysis, in that the discrimination merely has to be the thing which pushes the adverse action over the edge.[10]

Similar to the Third Circuit, although the Eleventh Circuit has always claimed a but-for causation standard, the language the court uses conflates but-for with motivating factor causation:

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[9] Although *C.G.* is not an employment discrimination case, the decision is relevant to this matter because it discusses the court's interpretation of the "on the basis of" language.

[10] Additionally, in other areas, the Third Circuit appears willing to retain a motivating factor standard post-*Gross*. *See generally*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009) (addressing claims pursuant to § 1981 and Title VII).

> *McNely*'s "but-for" liability standard is perfectly consonant with the "motivating factor" language of the instruction. A "motivating factor" is synonymous with a "determinative factor" or, in the language of *McNely*, a factor which "made a difference in the outcome." While using "but-for" language would have been a clearer exposition of the law, the use of the "motivating factor" language is not a clear misstatement of the law, and certainly does not rise to the level of a plain error so fundamental as to affect the fairness of the proceedings.

Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1334 (11th Cir. 1999). *Farley* remains controlling in the Eleventh Circuit, having only been questioned once by a district court in 2015. *See Hendon v. Kamtek, Inc.*, 117 F. Supp. 3d 1325, 1333 (N.D. Ala. 2015). The Eleventh Circuit's lack of clarity in interpreting motivating factor and but-for language highlights the difficulty circuit courts face in determining the appropriate ADA causation standard.

The Tenth Circuit

It is unclear where the Tenth Circuit stands in regard to ADA Title I causation standards, but they appear to be uncertain post-*Nassar*. *See Doe v. Bd. of Cty. Comm'rs*, 613 F. App'x 743, 747 (10th Cir. 2015) (refusing to rule on the ADA Title I standard in a Title II case, stating "[i]f *Nassar* suggests anything regarding the instruction issue presented, it suggests that a

mixed-motive standard does not apply to any claims other than Title VII discrimination claims.").

The circuit courts' varied causation standards create confusion and discord under the ADA. Therefore, this Court should clarify the ADA's causation standard, for consistency and equal justice for claimants, and for its "central importance to the fair and responsible allocation of resources in the judicial and litigation systems." *Nassar*, 570 U.S. at 358.

III. To Further Congressional Intent And To Promote Efficiency In Litigation, The Court Should Establish A Uniform Causation Standard Under The ADA.

A. Establishing a uniform causation standard will help courts, lawyers, employers, and individuals with disabilities resolve claims of employment discrimination more efficiently.

Individuals with disabilities, employers, and their lawyers should know what to expect when pursuing a claim under the ADA and the Rehabilitation Act, and knowing what standard of causation applies is imperative. It takes a significant amount of time and resources to pursue a claim in federal court even with clearly defined standards of causation. Aggrieved employees pursuing a claim under the ADA or the Rehabilitation Act expend immense amounts of time and money just to clarify which standard of causation applies so that they can finally proceed on the merits.

Neither employees nor employers should have to engage in such time consuming and expensive litigation to simply determine the proper causation standard. Similarly, if this Court resolved the inter-circuit inconsistencies and adopted a uniform standard of causation to apply to the ADA and the Rehabilitation Act, the judiciary would benefit from the decreased burden on its docket and other judicial resources.

A significant portion of federal court dockets in recent years are ADA claims. In 2017, there were 10,773 ADA filings in federal district court, which accounted for twenty-seven percent of civil rights cases. United States Courts, Just the Facts: Americans with Disabilities Act (July 2018).[11] While other civil rights claims decreased, claims arising under the ADA increased 395 percent from 2005 to 2017. *Id.* Of these increased ADA claims, a significant number of them were filed in the Second, Ninth, and Eleventh Circuits. *Id.* However, these circuits do not currently employ the same standard of causation for ADA cases. *See* discussion *supra* Section II(A)-(B). The fact that the outcome of a claim under the ADA could be determined by the location in which the claim was filed reflects the realistic

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[11] Available at https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act. These are the most recent statistics available. *See also* U.S. Equal Emp. Opportunity Comm'n, *Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) (includes concurrent charges with Title VII, ADEA, EPA, and GINA) FY 1997-FY 2018* (2018), https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (the average number of charges filed in 2018 was 24,605).

inconsistencies that courts and litigants are currently confronted with.

Many employees with employment discrimination claims face especially difficult economic barriers and an increasingly protracted timeline of litigation. Articulating the proper causation standard would provide plaintiffs with greater predictability. Employees often have limited resources and cannot afford the cost of litigation. Consequently, many of these litigants appear *pro se* in discrimination proceedings. In fact, between 1998 and 2017, nineteen percent of employment discrimination cases were litigated *pro se* because many workers lack the resources necessary to hire an attorney. Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. Chi. L. Rev. 1819, 1840 (2018). Additionally, even when appearing *pro se*, these plaintiffs must cover filing fees and other expenses often while underemployed or unemployed as a result of the discriminatory actions they are attempting to bring the claim about. This Court should clarify the causation standard for these litigants and provide greater predictability as to the likelihood of success of their claims.

The protracted timeline of fully litigating a claim is unsustainable for many individuals awaiting a decision about their current employment. The median time it takes to litigate a civil action in federal district court, excluding appeals, is 27.2 months, and 58,659 cases are

over three years old.[12] Litigating these claims is a lengthy and expensive process for all involved, from employers to employees, both plaintiff and defense counsels, and the courts. Clarifying the causation standard in ADA claims would provide both employers and employees greater predictability in the litigation process and greater ability to determine which ADA claims are valid at an earlier stage in the process, shortening litigation.

For example, *Natofsky* presently illustrates the prolonged timeline of litigation when the parties are litigating the causation standard. Natofsky filed his complaint in the United States District Court for the Southern District of New York on July 22, 2014.[13] The Second Circuit heard oral arguments for *Natofsky* four years later on September 21, 2018, and issued its decision seven months later on April 18, 2019. The fact that *Natofsky* remains in the judicial system today demonstrates how the litigation process is elongated by confusing standards of causation.

Despite the protections afforded to individuals with disabilities by the ADA and the Rehabilitation Act, individuals and employers incur unnecessary litigation costs in an effort to determine the appropriate standard of causation to apply in these claims, all while simultaneously consuming judicial resources.

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[12] *United States District Courts – National Judicial Caseload Profiles*, Fed. Court Mgmt. Statistics, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2018 .pdf.

[13] *Natofsky* was officially docketed on July 24, 2014.

This case affords the Court the opportunity to increase judicial efficiency by establishing a clear standard of causation for the ADA.

B. The issue presented is of national importance as reflected by the ADA's expressed legislative intent and by the 2008 amendments which aimed to provide broader protections for individuals with disabilities.

The ADA is an integral civil rights and anti-discrimination statute that protects the rights of sixty-one million individuals with disabilities, 19.1 percent of whom are employed, in the United States.[14] The confusion regarding the proper standard of causation to apply in ADA and Rehabilitation Act claims affects millions of individuals with disabilities and is an issue of national importance. Congress found that individuals with disabilities "occupy an inferior status in our society," thus ADA protections are indispensable to adequately safeguard individuals with disabilities from discrimination. 42 U.S.C. § 12101(a)(6).

The general purpose of the ADA and the ADAAA is to enhance protections for individuals with disabilities by providing "clear, strong, consistent, enforceable

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[14] Centers for Disease Control and Prevention, *Disability Impacts All of Us*, https://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf; Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics – 2018* (Feb. 26, 2019), https://www.bls.gov/news.release/pdf/disabl.pdf.

standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). In 2008, Congress amended the ADA in response to court holdings that "narrowed the scope of the ADA" and "thereby excluded many individuals whom Congress intended to cover under the law." ADA Amendments Act of 2008, 154 Cong. Rec. H 8286 (daily ed. Sept. 17, 2008) (statements of Rep. Hoyer and Rep. Sensenbrenner). When Congress passed the ADA and ADAAA, it intended for the statute and its amendments "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). On this matter of national importance, this Court should grant certiorari to provide a clear and comprehensive national causation standard.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Second Circuit.

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