No. 19-732

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner, an employee of the City of New York, sues under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Rehab Act), alleging that he experienced adverse employment actions as the result of his hearing disability. The Rehab Act expressly prohibits discrimination "solely by reason of" a person's disability. Petitioner assumes that employment-related claims under the Rehab Act are governed not by that language, but rather by the causation standard of the Americans with Disabilities Act (ADA), which prohibits discrimination "on the basis of disability." In any event, this Court has already confirmed that statutory language prohibiting discrimination "based on" an identified characteristic requires a showing of but-for causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). The petition does not dispute that summary judgment is proper under a but-for causation (or sole-cause) standard. The question presented is:

Whether petitioner's federal claims require, at the least, a showing that his disability was the but-for cause of the challenged employment actions.

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INTRODUCTION

Petitioner Richard Natofsky asks the Court to grant certiorari to decide whether employment-discrimination claims under the ADA require a showing that the plaintiff's disability was a but-for cause of the challenged actions, or whether a lesser showing that the disability was a motivating factor in the actions is sufficient.

Even ignoring that Natofsky's federal claims arise under the Rehab Act, not the ADA, certiorari is unwarranted. The petition's question is cleanly answered by this Court's recent precedents holding that the standard of but-for causation applies to discrimination claims under the Age Discrimination in Employment Act and retaliation claims under Title VII of the Civil Rights Act of 1964. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 350-54 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-78 (2009).

As the Second Circuit correctly recognized, the ADA's text governing employment-based claims is substantially similar to language that the Court has already said specifies a standard of but-for causation. Seven other circuit courts have agreed that but-for causation applies, and no circuit has rejected it after squarely considering the question in light of the Court's precedents. Thus, the petition presents no substantial question, and there is no split or confusion in the circuit courts requiring the Court's intervention. Certiorari should be denied.

STATEMENT

A. Natofsky's allegations of discriminatory treatment by two different sets of supervisors under two different agency commissioners

In late 2012, Natofsky began working for the New York City Department of Investigation (DOI) as the Director of Human Resources and Budget. Upon starting his position, Natofsky told his supervisor, Shaheen Ulon, that he had a hearing impairment (Pet. App. at 5).

Shortly into Natofsky's tenure, Ulon asked him to follow up on emails more quickly, adjust his work schedule, and request leave less frequently (but for longer stretches). Natofsky contacted the then-agency commissioner to object to Ulon's requests (*id.* at 6-7). After a meeting with the commissioner, Ulon approved Natofsky's leave requests and withdrew her objection to his work schedule (*id.* at 48-49).

Following a mayoral transition, a new DOI commissioner was named in February 2014 (*id.* at 5). The new DOI head appointed a new chief of staff and deputy commissioner, Susan Pogoda, to assess the agency and potentially reorganize it (*id.* at 5, 50). Both Pogoda and the new commissioner concluded that it was inappropriate to have one person in charge of both the budget and human-

resources portfolios, as Natofsky had been (*id*. at 50).

Natofsky alleged that Pogoda "kept staring at his ears" during their first meeting and shook her head and rolled her eyes after he explained his hearing disability (*id*. at 6). Natofsky also claimed that Pogoda often told him to speak more quickly and clearly (*id*. at 6).

In March 2014, about a month after his appointment, the new commissioner expressed frustration when Natofsky and Ulon were unable to answer questions about how many new people he could hire (*id*. at 8, 51). The same month, Pogoda emailed a colleague that "Shaheen [Ulon] and Richard [Natofsky were] clueless" (*id*. at 8, 51). She also expressed other concerns to Ulon about the human-resources and budget functions (*id*. at 52). Around the same time, Ulon criticized Natofsky for the poor quality of documents created by the human-resources department (*id*. at 7, 52).

In April 2014, Pogoda informed Ulon that the department was being reorganized and her position was being eliminated, which led her to resign (*id*. at 7, 52-53). Before she left, Ulon issued Natofsky's written evaluation for 2013, which rated him as "need[ing] improvement" on half of the 14 evaluation categories, citing his failure to stay on schedule, slow responses to emails, and difficulty taking direction (*id*. at 7, 52-53). Pogoda would go

on to deny Natofsky' appeal of this evaluation several months later (*id.* at 7).

In May 2014, Pogoda informed Natofsky that the human-resources and budget units were being reorganized and that Natofsky would be reverted to his former civil-service title and a lower salary (*id.* at 8). Two employees assumed the human-resources and budget functions temporarily, and DOI ultimately hired two different individuals to head up the two units (*id.* at 57).

In June 2014, Pogoda informed Natofsky that he would be moved from his private office to a cubicle (*id.* at 9). After he complained that his new cubicle was in a high-traffic area, Natofsky was moved to a different cubicle (*id.* at 9).

Natofsky left DOI in December 2014 to return to his former employer, the New York City Department of Transportation (*id.* at 9-10, 50).

B. The Second Circuit's application of a "but for" causation standard to Natofsky's claims under the Rehabilitation Act

1. In July 2014, while still at DOI, Natofsky filed this suit against the City and three individual defendants. He asserted federal claims alleging disability discrimination under the Rehab Act and claims under state and local laws alleging age and disability discrimination (Pet. App. 10).

2. The United States District Court for the Southern District (Buchwald, J) granted summary judgment for defendants. The district court rejected Natofsky's Rehab Act claims, primarily on causation grounds, and declined to exercise supplemental jurisdiction over his state-law claims (*id.* at 63-87).

3. The Second Circuit affirmed. The Court first held that the Rehab Act incorporates the causation standard of the ADA (Pet. App. 14-16). The Court next concluded, citing this Court's reasoning in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013), that the ADA imposes a standard of but-for causation (*id.* at 23). Finally, the Court held that Natofsky's claim failed under that standard as a matter of law (*id.* at 25-35).

Judge Chin dissented, saying that he would have applied a motivating-factor causation standard and allowed Natofsky's federal claims to proceed (App. 41-43). The full Second Circuit denied rehearing en banc.

4. Meanwhile, Natofsky has re-filed his state- and local-law claims in New York state court. The local statute applies a motivating-factor analysis, so Natofsky's contentions will be evaluated under that test regardless of the outcome here. *See Melman v. Montefiore Medical Center*, 98 A.D.3d 107, 127 (N.Y. App. Div. 2012). The New York trial

court has denied defendants' motion for summary judgment and ordered the case to proceed to trial. *Natofsky v. City of New York*, Index No. 158401/2017 (N.Y. Sup. Ct., N.Y. Cty., Feb. 26, 2020).

REASONS TO DENY THE PETITION

A. The question presented is neither a close one under the Court's recent precedents nor the subject of disagreement among the circuit courts.

1. A grant of certiorari is unwarranted because, as the Second Circuit correctly held, the Court's recent cases leave no doubt that the standard of but-for causation, at a minimum, applies here.

Though petitioner's only federal claims arise under the Rehab Act, the petition assumes that the Second Circuit correctly held that the claim is governed by the causation standards of the ADA. But see *infra*, at 13-15 (noting strong reasons to conclude otherwise). The ADA, enacted in 1990, originally prohibited employment discrimination against otherwise qualified individuals "because of" disability. In 2008, Congress amended the section to prohibit discrimination "on the basis of" disability. 42 U.S.C. § 12112(a). This amendment was one of a number of changes intended to clarify the scope of the statute's coverage and not to "lower the causation standard for employment discrimination claims" (Pet. App. 24-25). *See Gentry*

v. E. W. Partners Mgmt. Co., 816 F.3d 228, 236 (4th Cir. 2016).

In two decisions issued over the past decade, the Court has held that statutory language closely resembling the ADA's text establishes a standard of but-for causation. In *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), the Court rejected the use of a motivating-factor causation standard for claims under the Age Discrimination in Employment Act. The Court determined that the ADEA's statutory language—prohibiting discrimination "because of" age—required that age be "the reason" for the discrimination. *Id.* at 176-77. Describing similar phrases with the same meaning, the Court observed that the phrase "based on" likewise specifies a but-for causation standard. *Id.* at 174-78.

The Court applied the same reasoning four years later in *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013), holding that a plaintiff raising retaliation claims under § 2000e-3(a) of Title VII must establish but-for causation. The Court reiterated that the statutory term "because of"—along with similar language like "based on," "by reason of," or "on account of"—specifies but-for causation. *Id.* at 350.

The Second Circuit correctly held that "*Gross* and *Nassar* dictate [the] decision here" (Pet. App. 21). The ADA's prohibition of discrimination "on the basis of" disability is essentially identical to the

"based on" language that the Court has already concluded tracks but-for causation.

In contrast, Title VII's § 2000e-2(m) expressly uses the phrase "motivating factor" in describing the causation analysis for discrimination claims under that statute. While Natofsky is correct that the ADA adopts the "powers, remedies, and procedures" set forth in Title VII, the accompanying ADA text cross-references several specific Title VII provisions, *not* including § 2000e-2(m) (*see* App. 22). That omission only reinforces the conclusion that the ADA follows the general rule of but-for causation. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("The expression of one thing implies the exclusion of others" (internal citations and quotations omitted)).

2. Unsurprisingly, every circuit that has addressed the issue in light of *Gross* and *Nassar* has held that employment-discrimination claims under the ADA are subject to the but-for causation standard. All told, fully eight circuits apply that test. And the only circuit that has applied the motivating-factor test after *Gross* and *Nassar* failed to acknowledge or address those two decisions.

In addition to the Second Circuit, the First, Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits have expressly applied the but-for causation standard to employment-based ADA claims following *Gross*. *See, e.g.*, *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), *cert. denied*,

571 U.S. 939 (2013); *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229, 236 (3d Cir. 2013); *Gentry v. E. W. Partners Mgmt. Co.,* 816 F.3d 228, 234 (4th Cir. 2016); *Lewis v. Humboldt,* 681 F.3d 312, 321 (6th Cir. 2012) (en banc); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 959-64 (7th Cir. 2010); *Murray v. Mayo Clinic,* 934 F.3d 1101, 1105-07 (9th Cir. 2019), *pet. for cert. pending*; *Duckworth v. Pilgrim's Pride Corp.*, 764 Fed. App'x 850, 853 (11th Cir. 2019).[1]

While the Tenth Circuit has not squarely addressed the question since *Gross,* its precedent strongly suggests that it will join its sister circuits when it does. *See Doe v. Bd. of County Comm'rs*, 613 Fed. App'x 743, 746-47 (10th Cir. 2015) (applying a sole-cause test under Title I of the ADA and suggesting that *Gross* limits the motivating-factor test to Title VII discrimination claims). And the Third and Eleventh Circuits both adopted but-for causation for employment-based ADA claims even before *Gross* and *Nassar* were decided. *New Direction Treatment Servs. v. City of Reading*, 490 F.3d 293, 301 (3d Cir. 2007); *Farley v. Nationwide*

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[1] The First Circuit's *Palmquist* decision refutes petitioner's claim (Pet. 20-21) that the motivating-factor analysis of *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996), is "still controlling" in that circuit. *Katz* predated this Court's decision in *Gross*, which *Palmquist* later cited as "the beacon" pointing the way to applying the but-for causation standard. 689 F.3d at 74.

Mut. Ins. Co., 197 F.3d 1322, 1334 (11th Cir. 1999); *see also Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878-79 (10th Cir. 2004) (effectively applying but-for causation before *Gross).* Petitioner offers no good reason for suggesting that those courts would adopt a different view now, with the benefit of *Gross* and *Nassar*, and indeed their recent decisions continue to apply the but-for test. *See, e.g.*, *Duckworth*, 764 Fed. App'x at 853; *C.G. v. Pa. Dep't of Educ.*, 734 F.3d at 236.[2]

The petition tries to discount some of these circuit cases because they involved claims governed by the pre-2008 ADA's "because of" causation language. But there is no reason to think that the post-2008 statute's "on the basis of" language would lead to any different result. Indeed, this Court has made clear that "because of" and "based on" both specify but-for causation. *Gross*, 557 U.S. at 174-78; *Nassar,* 570 U.S. at 350. Consistent with that understanding, the 2008 amendment was in no way intended to change the standard of causation (Pet.

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[2] Nor is petitioner correct in claiming that the Third and Eleventh Circuits call their standard "but for" while actually applying a test that "functions similarly" to a motivating-factor analysis (Pet. 24-25). There is not always a bright line between these tests in application to real-world circumstances. But these courts have expressly adopted a but-for test for ADA claims, and *Gross* and *Nassar*—far from requiring these courts to revisit their test—merely confirm they were correct to do so.

App. 24-25). *See Gentry,* 816 F.3d at 236. So it comes as no surprise that the Fourth and Ninth Circuits, like the Second Circuit, first adopted but-for causation in cases applying the post-2008 ADA. *Id.* at 234; *Murray,* 934 F.3d at 1105-07. And the Seventh Circuit has reiterated its but-for approach in several cases under the post-amendment statute.[3]

Contrary to petitioner's claims, no circuits have held that a motivating-factor test is the proper standard after *Gross* and *Nassar*. The circuits not cited above have simply not yet addressed the issue of the proper causation standard in light of those rulings. The Eighth Circuit declined to address the question in a case where summary judgment was warranted under either standard and the issue had been "only cursorily briefed." *Oehmke v. Medtronic*, 844 F.3d 748 (8th Cir. 2016). And petitioner is mistaken in asserting that an unreported decision of the D.C. Circuit "affirmed the use of motivating factor analysis post-*Gross*" (Pet. 21 n.7). In fact, the decision did not turn on or even address causation:

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[3] *See Monroe v. Ind. DOT*, 871 F.3d 495, 504 (7th Cir. 2017); *Roberts v. City of Chicago*, 817 F.3d 561, 565 n. 1 (7th Cir. 2016); *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 n.2 (7th Cir. 2015); *cf. Silk v. Bd. of Trns.*, 795 F.3d 698, 705-06 (7th Cir. 2015) (applying but-for causation, while noting that the amendment's effect had been insufficiently briefed).

the court simply held that the plaintiff's refusal to provide his employer with updated medical information was fatal to his failure-to-accommodate claim and that he had suffered no adverse employment action that could sustain a retaliation claim. *See Gard v. United States Dep't of Educ.*, No. 1-5020, 2011 U.S. App. LEXIS 10799 (D.C. Cir. May 25, 2011) (per curiam).

While petitioner is correct that the Fifth Circuit applied a motivating-factor test without analysis in *EEOC v. LHC Group*, 773 F.3d 688, 702-03 (5th Cir. 2014), that court did not address or even refer to *Gross* or *Nassar*. Nor is there any indication that the issue of the proper causation standard was raised by any party there.

In short, there is no relevant circuit split, and, despite petitioner's claims, there is no significant "confusion." Eight circuits have adopted the but-for test, either before or after *Gross*, and while the remaining circuits have not yet had the opportunity to confront the issue in light of *Gross* and *Nassar*, there is no reason to believe that any of them would reach a different result.

3. No more availing is petitioner's reliance on the Court's recent grants of certiorari in *Comcast Corp. v. National Association of African American Owned Media*, No. 18-1171, and *Babb v. Wilkie*, No. 18-882 (Pet. 10-12). While those cases also involve questions about standards of causation, the similarities stop there. Unlike this case, both

Comcast and *Babb* involve statutory language that is sharply different from the language discussed in *Gross* and *Nassar*, meaning that neither is resolved by a straightforward application of those decisions.

Comcast involves 42 U.S.C. § 1981, which provides that "all persons … shall have the same right … to make and enforce contracts … as is enjoyed by white citizens." So *Comcast* does not turn on the interpretation of the phrase "on the basis of," or the analogous "because of," or "by reason of"—phrases the Court has already held to mean "but for." Indeed, the fundamental question in *Comcast* is whether § 1981's unique statutory language permits an exception to the default but-for causation rule.

Babb v. Wilkie is similar. It involves an ADEA provision specific to federal employees stating that "all personnel actions affecting [executive agency] employees or applicants … shall be made free from any discrimination based on age." Again, the arguments in *Babb* turn on the specific meaning of the "free from any discrimination" language and whether that language excepts the statute from the general but-for causation rule. Here, by contrast, the general rule clearly obtains: the ADA's language is "on the basis of," and this Court has already held that "based on" means "but for." *Gross*, 557 U.S. at 174-78.

B. This case is a poor vehicle for addressing the question presented.

Even if the question presented were otherwise cert-worthy, this case would be a poor choice in which to address the question for two reasons. First, the case presents a substantial threshold question that, if resolved in defendants' favor, would render the question presented beside the point. Second, the question presented is largely academic in any event in light of the parties' ongoing state-court litigation.

1. The petition seeks to present solely a question about the causation standard under the language of Title I of the ADA. But there is no ADA claim in this case; petitioner's only federal claims are asserted under the Rehab Act. Thus, in order for the question presented to be even relevant, petitioner would need to establish that the Rehab Act follows the ADA's causation standard. The petition appears simply to assume that is the case. But there are strong reasons to doubt that assumption.

Although petitioner barely acknowledges it, the Rehab Act expressly states its causation standard: a qualified individual shall not be subjected to discrimination "solely by reason of his or her disability." 29 U.S.C. § 794(a). The district court applied this sole-cause standard to Natofsky's claims (Pet. App. 63, 77). The Second Circuit, however, concluded that a 1992 amendment of the

Rehab Act displaced this standard in favor of the ADA's causation test. That amendment added § 504(d), 29 U.S.C. § 794(d), which provides, as relevant here, that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 USCS § 12111 et seq.)." The court held that the 1992 Rehab Act amendment overrides the Act's own specific causation language and incorporates the ADA causation standard in employment-based cases (Pet. App. 14-15).

That reading is far from self-evident. Indeed, the Fifth Circuit, addressing the effect of the amendment, held that the Rehab Act's express causation standard is "clearly" more specific than the general cross-reference to the ADA, and thus controls. *Soledad v. U.S. Dep't of Treasury*, 304 F.3d 500, 505 (5th Cir. 2002). Only two other circuits appear to have touched on this issue, with one endorsing each conclusion, although without extensive analysis. *See Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013); *Palmquist v. Shinseki*, 689 F.3d 66, 73 (1st Cir. 2012) (construing former 29 U.S.C. § 791(g), which is similarly worded to § 504(d)).

The Court would have to resolve this issue of statutory interpretation in petitioner's favor even to reach the question presented, since otherwise the ADA's causation standard is not in the case. The

Court would have to do so without the benefit of a developed body of law from the lower courts on the issue. And the Court would have to do so under circumstances calling into question whether petitioner is the right party to present the issue, given that he left it almost entirely unmentioned in the petition.

2. On top of all this, petitioner's ongoing state-court case renders the petition all but academic. Natofsky's claims under the New York City Human Rights Law recently survived summary judgment and have been ordered to proceed to trial under the very same motivating-factor standard that he now asks the Court to apply to his federal claims. *See Melman v. Montefiore Medical Center*, 98 A.D.3d 107, 127 (N.Y. App. Div. 2012). Even if the Court were to resolve the causation-standard question in petitioner's favor here and allow his federal claims to proceed under a motivating factor test, the ultimate outcome of this case could afford him no greater relief than he could get in the state case. And conversely, if he were to lose his state case under the City Human Rights Law's motivating-factor test, he could well be precluded from pursuing the same claims in federal court. *See generally Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984). Either way, petitioner would seem to have little practical incentive to zealously litigate the question presented in this Court, even if it were cleanly presented and cert-worthy, which it is not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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