No. 19-_____

In the Supreme Court of the United States

MICHAEL J. MURRAY, M.D.,

Petitioner,

v.

MAYO CLINIC,
A MINNESOTA NONPROFIT CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHI M. SANDWEISS
COUNSEL OF RECORD
ROGER L. COHEN
JABURG & WILK, P.C.
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, AZ 85012
(602) 248-1052
KMS@JABURGWILK.COM

FEBRUARY 3, 2020 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The Americans with Disabilities Act (ADA) forbids discrimination "on the basis of" disability, but does not specifically set forth the standard to be applied in determining causation. Is the "motivating factor" standard most consistent with the plain language and purposes of the statute, and Congressional intent, and therefore the appropriate standard to be applied under the ADA?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Michael J. Murray, M.D.

Respondents and Defendants-Appellees Below

- Mayo Clinic,
  a Minnesota Nonprofit Corporation
- Mayo Clinic Arizona,
  an Arizona Nonprofit Corporation,
- Wyatt Decker, M.D.
- Georgianna Decker
- Lois Krahn, M.D.
- Eric Gordon, M.D.
- Terrence Trentman, M.D.
- Laralee Trentman
- William Stone, M.D.
- Maree Stone
- David Rosenfeld, M.D.
- Melissa Rosenfeld, M.D.
- Roshanak Didehbon

LIST OF PROCEEDINGS

United States District Court for the District of Arizona

Case No. 2:14-cv-01314-SPL

Michael J. Murray, MD v. Mayo Clinic, a Minnesota nonprofit corporation; Mayo Clinic Arizona, an Arizona nonprofit corporation; Wyatt Decker, MD and Georgianna Decker, husband and wife; Lois Krahn, MD and Eric Gordon MD, wife and husband; Terrence Trentman, MD and Laralee Trentman, husband and wife; William Stone, MD and Maree Stone, husband and wife; David Rosenfeld, MD and Melissa Rosenfeld, MD, husband and wife; and Roshanak Didehbon, a single woman.

Date of Entry of Judgment: August 23, 2017

United States Court of Appeals for the Ninth Circuit

Docket No. 17-16803

Michael J. Murray, MD v. Mayo Clinic, a Minnesota nonprofit corporation; Mayo Clinic Arizona, an Arizona nonprofit corporation; Wyatt Decker, MD and Georgianna Decker, husband and wife; Lois Krahn, MD and Eric Gordon MD, wife and husband; Terrence Trentman, MD and Laralee Trentman, husband and wife; William Stone, MD and Maree Stone, husband and wife; David Rosenfeld, MD and Melissa Rosenfeld, MD, husband and wife; and Roshanak Didehbon, a single woman

Date of Opinion: August 20, 2019.

Date of Rehearing en Banc Denial: November 5, 2019

This opinion is published as
Murray v. Mayo Clinic, 934 F.3d 1101 (9th Cir. 2019)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

LIST OF PROCEEDINGS iii

TABLE OF AUTHORITIES xv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

I. Facts Material to Consideration of the Question Presented 4

II. District Court Proceedings 6

III. Basis for Federal Jurisdiction 7

REASONS FOR GRANTING THE PETITION 7

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON THE "MOTIVATING FACTOR" VERSUS "BUT-FOR" CAUSATION STANDARD UNDER THE ADA; IT IS THEREFORE NECESSARY AND APPROPRIATE THAT THIS COURT RESOLVE THE CONFLICT 10

A. Statutory Framework 10

B. The Fifth and Eighth Circuits Retain the Motivating Factor Standard 12

TABLE OF CONTENTS – Continued

Page

C. The Second, Fourth, and Ninth Circuits Have Adopted the But-For Standard....... 13

D. Intra-Circuit Confusion and Inconsistency Reigns in the First, Sixth and Seventh Circuits. 17

II. THE NINTH CIRCUIT COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 24

A. The Motivating Factor Causation Standard in Status-Based Discrimination Claims Under the ADA Is Not Prohibited by *Gross* and *Nassar,* and Is the Standard That Complies With Congressional Intent and the Plain Language of the Statute. 24

B. The Ninth Circuit Incorrectly Concluded that the *Gross* ADEA Statutory Analysis and the *Nassar* Retaliation Analysis Transfer to the ADA. 35

CONCLUSION.. 39

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United States Court of Appeals for the Ninth Circuit (August 20, 2019) 1a

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (August 20, 2019) 14a

Order of the United States District Court for the District of Arizona (June 8, 2017) 20a

Order of the United States District Court for the District of Arizona (March 31, 2017) 25a

REHEARING ORDERS

Order of the United States Court of Appeals for the Ninth Circuit Granting Extension of Time to File Petition for Rehearing (August 26, 2019) 59a

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc (November 5, 2019) 60a

TABLE OF CONTENTS – Continued

Page

STATUTORY PROVISIONS

Relevant Statutory Provisions 61a

42 U.S.C. § 12112
Discrimination
(Effective: January 1, 2009) 61a

42 U.S.C. § 12112
Discrimination
(Effective: to December 31, 2008) 67a

42 U.S.C. § 2000e-2
Unlawful Employment Practices 73a

42 U.S.C. § 12117
Enforcement 84a

42 U.S.C. § 2000e-5
Enforcement Provisions 85a

TRIAL TRANSCRIPTS

Michael Murray–Direct Examination
Reporter's Transcript of Proceedings,
Jury Trial Day 1, Excerpt
(August 15, 2017) 98a

Michael Murray–Direct Examination
Reporter's Transcript of Proceedings,
Jury Trial Day 2, Excerpt
(August 16, 2017) 100a

Plaintiff's Closing Argument
Reporter's Transcript of Proceedings,
Jury Trial Day 5, Excerpt
(August 22, 2017) 125a

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

First Amended Complaint (Jury Trial Requested)
(August 29, 2014) 128a

Memo Letter to Dr. Murray
(May 19, 2014) 153a

TABLE OF AUTHORITIES

Page

CASES

Babb v. Wilkie,
139 S. Ct. 2775 (2019) 31

Baird ex rel. Baird v. Rose,
192 F.3d 462 (4th Cir. 1999)............................... 23

Belk v. Sw. Bell Tel. Co.,
194 F.3d 946 (8th Cir. 1999) 23

Brumfield v. City of Chicago,
735 F.3d 619 (7th Cir. 2013) 22

Buchanan v. City of San Antonio,
85 F.3d 196 (5th Cir. 1996).................................. 23

Bukiri v. Lynch,
648 F.App'x 729 (9th Cir. 2016) 10

Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 139 S.Ct. 2693 (2019) 31

Delaval v. PTech Drilling Tubulars, L.L.C.,
824 F.3d 476 (5th Cir. 2016) 12

EEOC v. LHC Grp., Inc.,
773 F.3d 688 (5th Cir. 2014) 12

Galbraith v. Cty. of Santa Clara,
307 F.3d 1119 (9th Cir. 2002) 14

Gentry v. E. W. Partners Club Mgmt. Co. Inc.,
816 F.3d 228 (4th Cir. 2016) 14, 15

Gross v. FBL Financial Services, Inc.,
557 U.S. 167 (2009) .... passim

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 30

TABLE OF AUTHORITIES—Continued

Page

Head v. Glacier Northwest, Inc.,
413 F.3d 1053 (9th Cir. 2005) 6, 7, 13, 14

Hooper v. Proctor Health Care Inc.,
804 F.3d 846 (7th Cir. 2015) 21

Hostettler v. College of Wooster,
895 F.3d 844 (6th Cir. 2018) 19

Husky Int'l Elecs., Inc. v. Ritz,
136 S. Ct. 1581 (2016) 27

Iancu v. Brunetti,
139 S. Ct. 2294 (2019) 33, 34

Katz v. City Metal Co.,
87 F.3d 26 (1st Cir. 1996) 23, 24

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 33

Lewis v. Humboldt Acquisition Corp.,
681 F.3d 312 (6th Cir. 2012) .... passim

Lipp v. Cargill Meat Sols. Corp.,
911 F.3d 537 (8th Cir. 2018) 12

Machinchick v. PB Power, Inc.,
398 F.3d 345 (5th Cir. 2005) 12

Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911 (6th Cir. 2013) 19

McNely v. Ocala Star–Banner Corp.,
99 F.3d 1068 (11th Cir. 1996) 13

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003) 14

TABLE OF AUTHORITIES—Continued

Page

Milner v. Dep't of Navy,
562 U.S. 562 (2011) 30

Monroe v. Indiana Dep't of Transp.,
871 F.3d 495 (7th Cir. 2017) 20, 21, 22

Morrissey v. Laurel Health Care Co.,
946 F.3d 292 (6th Cir. 2019) 19, 20

Murtha v. New York State Gaming Comm'n, 17
Civ. 10040 (NSR), 2019 WL 4450687
(S.D.N.Y. 2019) 17

Natofsky v. City of New York,
921 F.3d 337 (2d Cir. 2019)......................... 15, 16

NLRB v. Federbush Co.,
121 F.2d 954 (2d Cir. 1941)............................... 33

Oehmke v. Medtronic, Inc.,
844 F.3d 748 (8th Cir. 2016)........................ 12, 13

Palmquist v. Shinseki,
689 F.3d 66 (1st Cir. 2012).......................... 23, 24

Pulczinski v. Trinity Structural Towers, Inc.,
691 F.3d 996 (8th Cir. 2012) 13

Reed v. Columbia St. Mary's Hosp.,
915 F.3d 473 (7th Cir. 2019) 22

Roberts v. City of Chi.,
817 F.3d 561 (7th Cir. 2016) 21

Serwatka v. Rockwell Automation, Inc.,
591 F.3d 957 (7th Cir. 2010) 21, 23

Stone v. INS,
514 U.S. 386 (1995) 27

TABLE OF AUTHORITIES—Continued

Page

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 34

United States v. Quality Stores, Inc.,
572 U.S. 141 (2014) 31

University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 (2013) ...... passim

Watley v. Dep't of Children & Families,
3:13-CV-1858(RNC), 2019 WL 7067043
(D. Conn. 2019)... 17

Whitaker v. Wisconsin Dep't of Health Servs.,
849 F.3d 681 (7th Cir. 2017) 22

Whitfield v. Tennessee,
639 F.3d 253 (6th Cir. 2011) 19

STATUTES

ADA Amendments Act of 2008 (ADAAA),
Public Law 110-325 .... passim

Age Discrimination in Employment Act
(ADEA) .... passim

Americans with Disabilities Act (ADA),
42 U.S.C. §§ 12101 *et seq.*......................... passim

Civil Rights Act of 1964................................ 3, 18, 25

Civil Rights Act of 1991.................................... 17, 33

Family Medical Leave Act (FMLA),
29 U.S.C. §§ 2601, *et seq.* 6, 7

TABLE OF AUTHORITIES—Continued

Page

Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333 .... 6, 7

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 7

29 U.S.C. § 623 29

42 U.S.C. § 1981 31

42 U.S.C. § 2000e-2 .... 3, 15, 36, 37

42 U.S.C. § 2000e-2(m) .... passim

42 U.S.C. § 2000e-3(a) 37

42 U.S.C. § 2000e-4 .... 3, 11, 25, 32

42 U.S.C. § 2000e-5 .... passim

42 U.S.C. § 2000e-5(g)(2)(B) .... passim

42 U.S.C. § 2000e-6 .... 3, 11, 25, 32

42 U.S.C. § 2000e-8 .... 3, 11, 25, 32

42 U.S.C. § 2000e-9 .... 3, 11, 25, 32

42 U.S.C. § 12112(a) .... passim

42 U.S.C. § 12116 3

42 U.S.C. § 12117(a) .... passim

42 U.S.C. § 12203(a) 29

JUDICIAL RULES

Sup. Ct. R. 13.1 2

Sup. Ct. R. 14(1)(g)(ii) 7

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

28 C.F.R. Part 35 26

28 C.F.R. Part 36 26

LEGISLATIVE MATERIALS

101 Cong. Rec. 2599
(daily ed. May 22, 1990) 35

154 Cong. Rec. S8840
(daily ed. Sept. 16, 2008) 26

OTHER AUTHORITIES

ADA Anniversary Website,
https://www.adaanniversary.org/ 8

Bureau of Labor Statistics, U.S. Department of
Labor, *Persons with a Disability: Labor Force Characteristics–2018*,
News Release, February 26, 2019..................... 8

Merriam-Webster.com... 30

Oxford English Dictionary (1933) 29

The Random House Dictionary of the English
Language (1966) 29

U.S. Department of Labor,
Office of Disability Employment Policy.
https://www.dol.gov/odep/topics/ADA.htm 7

TABLE OF AUTHORITIES—Continued

Page

United States Courts Website, *Just the Facts: Americans with Disabilities Act*, https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act#fig2 8

Webster's Third New International Dictionary (1966) 29, 30

PETITION FOR WRIT OF CERTIORARI

Michael J. Murray, M.D. ("Dr. Murray") petitions for a writ of certiorari to review the Opinion of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, filed August 20, 2019, and published as *Murray v. Mayo Clinic,* 934 F.3d 1101 (9th Cir. 2019), is included below at App.1a. The Order of the United States District Court for the District of Arizona on Motions for Summary Judgment, filed March 31, 2017, is included below at App.25a. The order granting an extension to file a Petition for Rehearing En Banc filed August 26, 2019, and the order denying the Petition for Rehearing En Banc filed November 5, 2019, are not reported but included below at App.59a, 60a.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered August 20, 2019. On August 26, 2019, the U.S. Court of Appeals for the Ninth Circuit entered an Order extending the deadline for filing a Petition for Rehearing En Banc to September 17, 2019. A timely Petition for Rehearing En Banc was filed on September 13, 2019. The Petition for Rehearing En Banc was denied on November

5, 2019. This petition is timely under Supreme Court Rule 13.1 because it is filed within 90 days of entry of the denial of rehearing. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

AMERICANS WITH DISABILITIES ACT (ADA)

42 U.S.C. § 12112(a), effective January 1, 2009 (61a) (emphasis added).

> 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), effective to December 31, 2008 (67a) (emphasis added).

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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. § 12117(a) (84a).

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2 (73a)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(g)(2)(B) (85a; 95a)

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and

> attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title;

42 U.S.C. § 2000e-2(m) (73a; 81a)(emphasis added).

> Except as otherwise provided in this subchapter, an 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.

STATEMENT OF THE CASE

I. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Dr. Michael Murray is a board certified anesthesiologist and 30-year+ member of the U.S. Army Reserves. He has served his country throughout the world, including in combat zones in Iraq, Kuwait, and Afghanistan. (99a).

Dr. Murray was employed by Mayo Clinic from 1986 until his termination in May, 2014, practicing at different campuses in the Department of Anesthesiology, working as a professor of anesthesiology at the Mayo Clinic College of Medicine, and teaching Molecular Pharmacology and Experimental Therapeutics at the Mayo Graduate School. (134a).

In March 2012, Dr. Murray was called to active duty, for his most recent military deployment, to pro-

vide care in the intensive care unit to critically wounded soldiers in the immediate hours after evacuation from the battlefields of Afghanistan. His original six-month tour of duty was extended several times. (135a). By Fall 2012, the constant daily influx of critically wounded and dying young soldiers had taken a toll on Dr. Murray and he was treated by the Army for Post-Traumatic Stress Disorder (PTSD) and other medical issues. Dr. Murray was eventually sent for treatment at the Warrior Transition Unit at Fort Bliss, Texas. (135a-136a; 124a).

In early fall, 2013, Dr. Murray passed his Army exit physical and was honorably discharged from active military duty. (136a). Dr. Murray thereafter resumed his duties at Mayo Clinic, initially without incident. (101a). On February 19, 2014, Dr. Murray was inducing anesthesia in a patient, using powerful sedatives, when another anesthesiologist, who was off duty for the day, entered the operating room, squeezed into a small space between the patient and Dr. Murray, and attempted to manipulate the anesthesia monitoring equipment. (101a-118a). An altercation then ensued, the specifics of which were described by the district court as "hotly disputed." (27a).

Immediately following the February 2014 incident, Dr. Murray was placed on administrative leave. (118a). Dr. Murray described his state of mind at that time: "I was sad, I was depressed, I was having nightmares again, and I was suicidal." Dr. Murray sought treatment from a psychiatrist specializing in PTSD. As he began to struggle with some of the symptoms he previously experienced from his PTSD and other military-service-related conditions, Dr. Murray notified Mayo that he would need to take medical leave under the Family

Medical Leave Act ("FMLA"). (120a). Dr. Murray's treating psychiatrist, Dr. Gary Grove, provided FMLA certification paperwork stating that Dr. Murray suffered from bipolar II, "elements of PTSD," required "long term outpatient treatment," and had "problems with anger outburst, concentration." (123a).

On May 19, 2014, Mayo Clinic terminated Dr. Murray's employment. (153a).

II. DISTRICT COURT PROCEEDINGS

On June 13, 2014, Dr. Murray filed suit against Mayo Clinic and the individually named Defendants (the "Mayo Clinic Parties"), asserting claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA); he thereafter filed an amended complaint, adding claims under the ADA and FMLA. (128a).

The district court granted a motion for partial summary judgment filed by the Mayo Clinic Parties on the USERRA claims. (25a). The remaining claims were tried to a jury. With respect to jury instructions, the parties disagreed whether Dr. Murray's ADA discrimination claim should be tried under a but-for causation standard or a motivating factor causation standard. *See Murray*, 934 F.3d at 1102. Dr. Murray argued that the Ninth Circuit's established precedent in *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005) required him to show only that his disability was a motivating factor in the Mayo Clinic Parties' adverse employment decision. *Id.* The district court instead instructed the jury to apply a but-for causation standard to the ADA claim. The instruction provided that Dr. Murray must prove he was discharged <u>because of</u> his disability. *Id.* at 1103. The jury returned a verdict

for the Mayo Clinic Parties and Dr. Murray appealed. *Id.* A three-judge panel of the Ninth Circuit Court of Appeals affirmed, expressly overruling *Head,* and held that the district court correctly instructed the jury to require the heightened "but-for" causation standard on Dr. Murray's claim for disability discrimination. *Id.* at 1105. The Court denied a Petition for Rehearing En Banc.

III. BASIS FOR FEDERAL JURISDICTION

Dr. Murray seeks review of a judgment of a United States Court of Appeals. *See* Rule 14(1)(g)(ii), Supreme Court Rules. The district court had federal subject matter jurisdiction over Dr. Murray's claims under 28 U.S.C. § 1331, because Dr. Murray's complaint asserted claims pursuant to 29 U.S.C. §§ 2601, *et seq.*, the FMLA; 42 U.S.C. §§ 12101 *et seq.*, the ADA; and 38 U.S.C. §§ 4301-4333, the USERRA.

REASONS FOR GRANTING THE PETITION

This summer, America will celebrate the 30th anniversary of the Americans with Disabilities Act (ADA), "landmark legislation designed to ensure a more inclusive America, where every person has the right to participate in all aspects of society, including employment." U.S. Department of Labor, Office of Disability Employment Policy. https://www.dol.gov/odep/topics/ADA.htm.

Nearly six million Americans with disabilities are at work in our labor force, and thousands of them are asserting their rights under the ADA. In 2018,

the employment-population ratio—the proportion of the population that is employed—was 19.1% among those with a disability. By contrast, the employment-population ratio for people without a disability was 65.9%. U.S. Department of Labor, The Bureau of Labor Statistics. U.S. government statistics show that 5,767,000 Americans age sixteen and over with a disability were employed in the civilian labor force in 2018. *See*, *Persons with a Disability: Labor Force Characteristics–2018*, Bureau of Labor Statistics, U.S. Department of Labor, News Release, February 26, 2019.

In the twelve-month period ending December 31, 2017, the number of ADA cases filed in the U.S. district courts was 10,773, about 4% of the total civil docket and 27% of civil rights cases. From 2005 to 2017 filings of civil rights cases excluding ADA cases decreased 12%, while filings of ADA cases increased 395%. From 2005 to 2017, filings of ADA cases raising employment discrimination claims rose 196%, from 843 to 2,494. https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act#fig2

The ADA Anniversary on July 26, 2020 will be celebrated in workplaces, schools and communities. https://www.adaanniversary.org/. And yet there is no clear, uniform standard for bringing discrimination claims under the ADA; courts around the country are relying on and citing decisions of this Court that arose under materially different analytical paradigms. This case therefore raises an issue of national importance.

In *Gross* and *Nassar*, this Court established a but-for causation standard in the context, respectively, of the Age Discrimination in Employment Act (ADEA), and retaliation-based claims under Title VII. *Gross*

v. FBL Financial Services, Inc., 557 U.S. 167 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). But this ADA case is not controlled by those Opinions or their reasoning. To require a "but-for" showing in an ADA discrimination case is not only to depart from the express language of the statute but to create a grossly unfair imbalance: The disabled plaintiff faces the virtually impossible task of attributing the employer's conduct to the plaintiff's disability status, to the exclusion of all other causes, while the employer is permitted simply to ignore the disability and offer up any number of reasons for termination. *See Gross*, 557 U.S. at 191 (Breyer, J., dissent). Nevertheless, courts around the country, in reliance on *Gross* and *Nassar*, are establishing causation standards, in incompatible and contradictory fashion, often to the disadvantage of the disabled claimant. Other courts, however, have continued to hew to the motivating factor standard.

The result is a hodgepodge of rulings, with no corresponding effort to reconcile decisions among, between, and even within, the Circuits. On the 30th anniversary of the ADA, this case presents the opportunity for the Court to provide consistency and guidance by clarifying the ADA causation standard—a standard that is extremely important to the millions of individuals with disabilities that rely on the ADA to provide a workplace free from discrimination.

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON THE "MOTIVATING FACTOR" VERSUS "BUT-FOR" CAUSATION STANDARD UNDER THE ADA; IT IS THEREFORE NECESSARY AND APPROPRIATE THAT THIS COURT RESOLVE THE CONFLICT.

The Ninth Circuit, referring to *Gross* and *Nassar,* found that "against this backdrop, sister circuits have 'retreated from the motivating factor standard of causation in ADA cases.'" *Murray*, 934 F.3d at 1105 (citing *Bukiri v. Lynch*, 648 F.App'x 729, 731 n.1 (9th Cir. 2016)). But there is a split among the circuits, with some cases adopting a but-for standard and others retaining a motivating standard, and an overall lack of clarity in enunciating the proper standard, a vigorous community of dissenters in the Ninth Circuit's cited circuit opinions, and <u>even conflicting decisions within the same circuit</u>. To summarize:

- The Fifth and Eighth Circuits retain the motivating factor standard.
- The Second, Fourth, and Ninth Circuits have adopted the but-for standard.
- The decisions of the First, Sixth, and Seventh Circuits are internally conflicting and inconsistent.

A. Statutory Framework

Two points of statutory construction are material to the issues raised here: (1) the impact of a change in statutory language under the ADA Amendments Act of 2008 (ADAAA), and (2) the effect of express adoption, in the ADA, of Title VII enforcement provisions that specifically enunciate a "motivating factor" causation standard.

Prior to 2008, 42 U.S.C. § 12112(a) provided that employers were prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual 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." (emphasis added). Under the ADAAA, the language was changed from "because of disability" to "on the basis of disability." 42 U.S.C. § 12112(a).

> The ADA explicitly cross-references and adopts Title VII's enforcement section, including "powers, remedies, and procedures." 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures [of] this subchapter . . . "). Section 2000e-5, as so incorporated, provides for remedies as to claims "in which an individual proves a violation under section 2000e-2(m)." Section 2000e–2(m) explicitly adopts a motivating factor standard: an 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 . . . (emphasis added).

Each of the Circuit Court decisions discussed below involves, to greater or lesser extent, an analysis of one or both of these points of statutory interpretation.

B. The Fifth and Eighth Circuits Retain the Motivating Factor Standard

In its most recent pronouncement, the Fifth Circuit expressly adopted a "motivating factor" test under the ADA, holding that "discrimination need not be the sole reason for the adverse employment decision . . . [so long as it] actually play[s] a role in the employer's decision making process and ha[s] a determinative influence on the outcome.'" *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 479–80 (5th Cir. 2016) (alterations in original), quoting *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) ("portions of the record supported the inference that discrimination was a motivating factor in the employee's termination"). *LHC* held that 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." *LHC,* 773 F.3d at 702, quoting the pre-*Gross* decision in *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 355 (5th Cir. 2005).

The Eighth Circuit is likewise clear on the motivating factor standard, although it has expressed questions as to its continuing vitality. In 2018, the Court held that an employee with lung disease had not shown that a discriminatory attitude was more likely than not a motivating factor in her termination. *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544 (8th Cir. 2018). *Lipp* follows and is consistent with *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 756 (8th Cir. 2016), applying a mixed-motive causation standard, "allowing claims based on an adverse employment action that was motivated by both permissible and

impermissible factors." However, a lengthy footnote in *Oehmke* acknowledged the potential effect of *Gross.* The Court concluded that because the issue had been only cursorily briefed by Medtronic and because the Court agreed with the district court that Medtronic was entitled to summary judgment "even under the less restrictive mixed-motive causation standard, we decline to address this important question at this time." *Id.* at 757, fn 6. *See also Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012) ("We have our doubts about the vitality of the pre-*Gross* [ADA] precedent.").

C. The Second, Fourth, and Ninth Circuits Have Adopted the But-For Standard

Prior to the Opinion in this case, the Ninth Circuit since 2005 had applied a "motivating factor" standard. *Head*, 413 F.3d at 1065. *Head* held that the ADA outlaws adverse employment decisions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation. 413 F.3d at 1065. The *Head* Court cited with approval an Eleventh Circuit opinion concluding that "importing the term 'solely' would undermine the very purpose of the ADA: 'the elimination of discrimination against individuals with disabilities.'" 413 F.3d at 1064, quoting *McNely v. Ocala Star–Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996) (emphasis added).

In this appeal, the Ninth Circuit Panel expressly overruled *Head*, affirming the district court's decision to apply a "but-for" causation standard as to Dr. Murray's disability, rather than a motivating factor standard. *See Murray,* 934 F.3d at 1105. Acknowledging that a three-judge panel may not normally overrule

a prior decision of the court, *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), the panel said that if "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point," a three-judge panel may then overrule prior circuit authority. *Murray*, 934 F.3d at 1105 (quoting *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002)). Noting that the appropriate test is whether the higher court "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," the panel concluded that *Head's* reasoning is "clearly irreconcilable" with *Gross,* 557 U.S. 167 and *Nassar*, 570 U.S. 338. *Id.* Without extensive independent reasoning, the Ninth Circuit imported the reasoning of *Gross* (ADEA) and *Nassar* (retaliation under Title VII) while summarily dismissing the distinct language of the ADA, 934 F. 3d 1106, and the explicit cross-referencing to and adoption of Title VII's enforcement section, which expressly adopts a motivating factor standard. *Id.* at 1107. The Ninth Circuit concluded that *Gross* and *Nassar* "undermine *Head's* reasoning" and held that ADA discrimination claims under Title I must be evaluated under a but-for causation standard. *Id.*

The Fourth Circuit also expressly relies on *Gross* and *Nassar* in adopting the but-for standard in ADA cases, albeit with more comprehensive analysis. In *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 234 (4th Cir. 2016), the Court considered the former employee's argument that *Gross* was not controlling because, unlike the ADEA, the ADA indirectly incorporates Title VII's "motivating factor" standard by reference. The *Gentry* Court said that

while the language incorporates Title VII's "Enforcement provisions" in § 2000e-5, it does not incorporate the "Unlawful employment practices" in § 2000e-2, including § 2000e-2(m), which establishes mixed motive employment practices as unlawful. The Court found that the former employee's argument encouraged a "broad reading" of the statutes, "particularly inadvisable as *Gross* instructs us to hew closely to the text of employment discrimination statutes." 816 F.3d at 235. Addressing *Nassar,* the Fourth Circuit examined the textual differences and concluded that there was no "meaningful" difference between "on the basis of" disability, 42 U.S.C. § 12112(a) and the terms "because of," "by reason of" or "based on," terms this Court explained connote "but-for" causation. 816 F.3d at 236, citing *Nassar,* 133 S.Ct. at 2527–28.

The Second Circuit authorities are somewhat mixed. The Ninth Circuit in this case cites as a supporting decision *Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019), Petition for Writ of Certiorari docketed December 10, 2019. *Natofsky*, a 2-1 decision, arises out of a different statute, the Rehabilitation Act, with materially different language. The Rehabilitation Act provides that no individual shall be subject to discrimination in any program or activity receiving federal financial assistance "solely by reason of her or his disability." *Natofsky*, 921 F.3d at 344. The Second Circuit expressly noted that the language differs from the ADA's anti-discrimination language "<u>on the basis of</u> disability," 42 U.S.C. § 12112(a) (emphasis added), but concluded the causation standard is the same under the Rehabilitation Act and the ADA. *Id.* at 345. Like the Fourth and Ninth Circuits, the Second Circuit concluded that *Gross* and *Nassar*

"dictate our decision here" and that the phrase "on the basis of" in the ADA requires but-for causation. *Id.* at 348-349.

In his dissent in *Natofsky*, Judge Chin, while agreeing that but-for causation applies to retaliation claims, emphasized that discrimination and failure to accommodate claims are properly governed by the traditional motivating-factor standard, even in light of *Gross* and *Nassar*. *Id.* at 355. Judge Chin relied on the disparate burdens of persuasion under Title VII and the ADEA, pointing out that the ADA incorporates the powers, remedies, and procedures of Title VII, whereas the ADEA incorporates the powers, remedies, and procedures of the Fair Labor Standards Act. 921 F.3d at 355. Moreover, "Congress neglected to add such a [motivating-factor] provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways." *Id.* When amending Title VII in 1991, Congress incorporated the motivating-factor language into the ADA, by explicitly adopting the enforcement provisions of Title VII, including § 2000e-5. *See* 42 U.S.C. § 12117(a). Because Congress did not do the same with the ADEA, the subject of *Gross,* Judge Chin convincingly concludes, "We . . . cannot draw the same inference from Congress's actions as the Supreme Court did in *Gross* for the ADEA." 921 F.3d at 355 (dissent).

Nevertheless, the district courts in the Second Circuit are now treating *Natofsky* as establishing a but-for standard in status-based ADA cases. *See Murtha v. New York State Gaming Comm'n*, 17 Civ. 10040 (NSR), 2019 WL 4450687, at *11 (S.D.N.Y.

Sept. 17, 2019) ("As the Second Circuit recently ruled, the 'but for' causation standard announced in *Gross* also applies under the ADA"); *Watley v. Dep't of Children & Families*, 3:13-CV-1858(RNC), 2019 WL 7067043, at *8 (D. Conn. Dec. 23, 2019). The confusion, inconsistency and overreliance on *Gross* and *Nassar* again lead to the need for clarification.

D. Intra-Circuit Confusion and Inconsistency Reigns in the First, Sixth and Seventh Circuits.

1. Sixth Circuit—Confusion and Inconsistency in Explication and Application of Causation Standard under the ADA.

The Ninth Circuit stated that its decision "comports with the decisions of all of our sister circuits that have considered this question after *Gross* and *Nassar." Murray,* 934 F.3d at 1107. Among the cases specifically relied on for this conclusion was *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (en banc) ("[*Gross's*] rationale applies with equal force to the ADA."). *Id.* But *Lewis* includes multiple vigorous dissents, and the proffered analyses are both critical and persuasive. (Judge Clay (pp. 322-25) concurring in part and dissenting in part, with Judge Martin joining; Judge Stranch (pp. 325-31), concurring in part and dissenting in part, with Judges Moore, Cole and White joining; Judge Donald (pp. 331-42) concurring in part and dissenting in part).

As Judge Stranch points out, Congress used the Title VII amendments in the Civil Rights Act of 1991 to codify the "motivating factor" standard into the ADA

through the Title VII provisions that it had previously incorporated into the ADA. *See* 42 U.S.C. § 12117(a) (incorporating enumerated Title VII sections). The "Enforcement Provisions" of Title VII directly reference the "motivating factor" standard. *See* 42 U.S.C. § 2000e -5(g)(2)(B). Therefore, the Civil Rights Act implemented the prior Congressional decision by inserting in Title VII, and thereby including in the ADA, the "motivating factor" language. *Lewis,* 681 F.3d at 330 (Stranch dissent).

The ADA expressly links to § 2000e-5, which in turn refers to 2000e-2(m) in two places (§ 2000e-5(g)(2)(B) and § 2000e-5 (g)(2)(B)(i)). As Judge Donald points out, by incorporating § 2000e-5 into the ADA, Congress effectively declared that ADA plaintiffs are entitled to the remedies described therein. *Lewis,* 681 F.3d at 340. Since these remedies have meaning only in the context of § 2000e-2(m), "it is more than reasonable to assume that the entire context, meaning both the motivating factor test and the same decision test, is also incorporated into the ADA." *Id.* Judge Donald noted that this conclusion is underscored by the twin references, in this explicitly incorporated provision, to 2000e-2(m), which declares the motivating factor test for liability. *Id.* To edit out the reference to 2000e-2(m) is "to render Title VII's only remedies section devoid of meaning as to the ADA, nullifying Congress's clearly expressed intent to incorporate into the ADA Title VII's remedies." *Id.*

In *Lewis*, Judge Donald dissented from the majority's view that, under the ADA, the plaintiff alone must shoulder the burden of persuasion as to causation. *Id.* at 331–32. She noted that in the three years between *Gross* and *Lewis*, the lower courts had

"grappled with the implications of *Gross* outside of the ADEA context." *Id.* at 338. Near the end of her lengthy, erudite, partial dissent, Judge Donald noted that some courts have actually defined "motivating factor" and "but-for" as meaning precisely the same thing. Viewed in this light, the question before the Court "is really not about causation standards at all, but about the appropriate sharing of the burden of proof." *Id.* at 341. By linking the ADA and Title VII's remedial scheme, Judge Donald concluded, Congress apparently intended "that for actions brought under the ADA, 'motivating factor' is the applicable causation standard for establishing liability" and accordingly opposed the majority's importation of *Gross's* but-for causation standard into the ADA. *Id.*

Since the *Lewis* decision in 2012, at least three Sixth Circuit decisions, the most recent written by Judge Donald, have expressly referred to "motivating factor" as the controlling standard. In late 2019, the Sixth Circuit concluded that "[d]irect evidence of disability discrimination 'does not require the fact finder to draw any inferences' to conclude 'that the disability was at least a motivating factor.' *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018) (quoting *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 916 (6th Cir. 2013))." *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292 (6th Cir. 2019) (emphasis added). *See also Whitfield v. Tennessee*, 639 F.3d 253, 264 (6th Cir. 2011) (Judge Stranch concurring, urging "the en banc court to reconsider our initial importation of the sole motivation standard from the RA into the ADA. I do not find our position justifiable in light of the tenets of statutory construction." Writing that "every other

circuit that has addressed the issue, save one, has held an employee may recover under the ADA if the employee's disability was a 'motivating factor,'" Judge Stranch concluded that those circuits "have adopted an analytical approach akin to that under Title VII, as envisioned by legislative history and incorporated in statutory language.")

It is unclear whether the *Morrissey* Court was adopting Judge Donald's dissenting view in *Lewis* that "but-for" and "motivating factor" are the same, or merely concluding that the standard is different in the context of direct evidence. But the continued use of "motivating factor" by at least some panels of the Sixth Circuit, even following the en banc decision in *Lewis,* furthers the confusion and undercuts the Ninth Circuit's conclusion that its decision is supported by consistent Sixth Circuit precedent.

2. The Seventh Circuit Expressly Disclaims But-For Causation Standard, but Nevertheless Cites *Lewis*, Creating More Confusion.

The conflict and confusion within a single Circuit extends to the Seventh Circuit. In a 2017 case, the Seventh Circuit noted that, to prove a violation of § 12112(a), a plaintiff must show that: (1) he is disabled; (2) he is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) the adverse job action was caused by his disability. *Monroe v. Indiana Dep't of Transp.*, 871 F.3d 495, 503–04 (7th Cir. 2017). The Court held that "a plaintiff must show a genuine issue of material fact exists regarding whether his disability was the 'but-for' reason for the adverse action,

in this case termination." *Id.* at 504, citing *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).[1] In so doing, however, the Court qualified its reliance on *Serwatka*, making clear that the holding of the latter case

> applies to the language of the ADA before it was amended by the [ADAAA] . . . to change the language from prohibiting employers from discriminating "because of" a disability to prohibiting employers from discriminating "on the basis of" a disability.

Id.

The Court, in language incompatible with the Ninth Circuit's interpretation of its holding, proceeded to made clear that it was expressing no opinion as to the appropriate causation standard under the ADA as modified by the ADAAA:

> We noted in *Serwatka*, and in other cases since then, that it is an open question whether the change from "because of" to "on the basis of" changes the "but for" causation standard. *Id.* at 961 n.1; *see also Roberts [v. City of Chi.]*, 817 F.3d [561]at 565 n.1 [(7th Cir. 2016)]; *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 n. 2 (7th Cir. 2015). Like the parties in *Roberts* and *Hooper*, the parties in this case have not argued that another causation standard should apply, so

[1] The Seventh Circuit in *Serwatka* reversed the district court's judgment finding a violation of the ADA, holding that "[t]here is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision." 591 F.3d at 962.

> we will continue to apply the "but for" causation standard.

Id. (emphasis added).

In a 2019 case, the Seventh Circuit seemingly provided an answer to the question left open in *Monroe*, holding explicitly that the motivating-factor test applies to the ADA:

> The ADA and the Rehabilitation Act are otherwise very similar, but the Rehabilitation Act prohibits discrimination only if it is "solely by reason of" a person's disability. The ADA permits mixed-motive claims. *See Whitaker v. Wisconsin Dep't of Health Servs.*, 849 F.3d 681, 684 (7th Cir. 2017).

Reed v. Columbia St. Mary's Hosp., 915 F.3d 473, 484 (7th Cir. 2019) (emphasis added) (analyzing ADA Title III, disability discrimination by public accommodations, rather than Title 1, discrimination in employment).

Whitaker, cited in *Reed*, is a Rehabilitation Act case; the Court there notes that "[e]xcept for its "solely by reason of" standard, the Rehabilitation Act "incorporates the standards applicable to Title I of the [Americans with Disabilities Act]." *Whitaker,* 849 F.3d at 684 (emphasis added), citing *Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013). *Brumfield* adds that the "solely by reason of" standard of causation "is unique" to the Rehabilitation Act "and not present in the ADA," but in the same sentence cites the Sixth Circuit en banc *Lewis* decision, which squarely holds that the ADA causation standard is "but-for." *Id.*

3. The First Circuit's Pattern of Inconsistency Leads to Further Confusion.

Decisions in the First Circuit evidence similar inconsistency and confusion. The Court in *Palmquist v. Shinseki*, 689 F.3d 66, 74–75 (1st Cir. 2012), noted that "*Gross* tells us to evaluate closely whether Title VII's unique mixed-motive causation standard should be imported into other statutes," and stated further that, "[i]t is precisely that sort of searching examination that persuades us that we must follow the *Gros*s Court's lead." Citing the Sixth Circuit in *Lewis* and the Seventh Circuit in *Serwatka,* the Court concluded that, in analogous circumstances, two sister circuits "have been persuaded to this view. Ruling with the benefit of *Gross,* these courts have resisted efforts to transplant Title VII's mixed-motive remedies into the ADA." *Id.* Responding to the plaintiff's citations of *Belk v. Sw. Bell Tel. Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (using 42 U.S.C. § 2000e-2(m) in ADA cases), *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (same), and *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996) (same), the *Palmquist* Court concluded that those cases are not persuasive because they predate *Gross. Id.* The *Palmquist* Court thus held that "the ADA's but-for causation standard controls whether a defendant is liable for retaliation" and that where the standard has not been satisfied, the Rehabilitation Act dictates that Title VII's mixed-motive remedies do not pertain. *Id.*

But *Palmquist* leaves standing, and fails to reverse, the opposite holding in *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996). In this pre-*Gross* case, the First Circuit expressly held that the jury must determine whether Katz's "disability was a motivating

factor in City Metal's decision to fire him." 87 F.3d at 33. The *Palmquist* Court refused to squarely address whether its post-*Gross* imposition of the but-for standard overruled *Katz*, asserting that the "motivating factor" language was only dictum and that "the loose language in *Katz* is inconsequential here." *Palmquist,* 689 F.3d at 75. Again, these intra-circuit inconsistencies and confusion require this Court's clarification.

II. THE NINTH CIRCUIT COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. The Motivating Factor Causation Standard in Status-Based Discrimination Claims Under the ADA Is Not Prohibited by *Gross* and *Nassar*, and Is the Standard That Complies With Congressional Intent and the Plain Language of the Statute.

1. Congress's Intent in Enacting the ADA in 1990 and Amending Title I of the ADA in 2008 Was to Ensure That the Statute Be "Broadly Construed to Effectuate its Remedial Purpose."

The ADA was enacted in 1990 to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing standards on behalf of individuals with dis-

abilities; and to invoke the sweep of congressional authority, to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. § 12101.

Title I of the ADA prohibits discrimination by employers and others "on the basis of disability." 42 U.S.C. § 12112(a). The prohibition against discrimination on the basis of disability extends to job application procedures, hiring, advancement, discharge of employees, compensation, job training "and other terms, conditions and privileges of employment." *Id.*

Similarly, Title VII of the Civil Rights Act of 1964 prohibits unlawful employment practices, including discrimination "against any individual with respect to his compensation terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2. While this prohibition does not refer to disability, Title I of the ADA explicitly cross-references and adopts Title VII's enforcement section: 42 U.S.C. § 12117(a) declares that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures [of] this subchapter . . . " The operative language of Title 1 of the ADA[2] must therefore be read in light of the enforcement and remedies provisions of Title VII.

---

[2] The distinction among Titles in the ADA is significant, because each Title includes its own enforcement section. For example, the enforcement provision of Title 2, public services, refers to the remedies, procedures and rights set forth in § 794a of Title 29 (Labor).

In June, 2008, the House passed the ADAAA, HR 3195, by a vote of 402-17. The ADAAA was signed into law by President George W. Bush in September 2008. Public Law 110-325, sec. 8. The express purpose of the ADAAA was to reinstate "a broad scope of protection to be available under the ADA." ADAAA, § 2(b)(1). The new "findings and purposes" section focused exclusively on the restoration of Congress's broad interpretation of the term "disability" to ensure expansive coverage. Department of Justice, Office of the Attorney General, 28 CFR Parts 35 and 36, CRT Docket No. 124; AG Order No. 3702-2016, RIN 1190–AA59, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008. Consistent with the foregoing, the ADAAA deletes two findings of the ADA: (1) that "some 43,000,000 Americans have one or more physical or mental disabilities," and (2) that "individuals with disabilities are a discrete and insular minority." *Id.*, citing 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008)). As explained in the 2008 Senate Statement of the Managers, "[t]he [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the <u>ADA must be construed broadly to effectuate its remedial purpose</u>." *Id.*, citing 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (emphasis added).

2. The Amended Statutory Language, and that the Language Was Amended, Are Material Factors to Consider in Construing Title I of the ADA.

Congress further changed critical language of 42 U.S.C. § 12112(a) through the 2008 amendments. In the statute's prior version, employers were prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment." (emphasis added). Under the ADAAA, the corresponding provision, while otherwise unchanged, reads: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Ninth Circuit Panel acknowledges the amendment, but finds "no meaningful textual difference in the two phrases with respect to causation." *Murray*, 934 F.3d at 1106, fn 6.

But in finding "no meaningful textual difference," the Ninth Circuit not only disregards Congress's clear statement of intent, but violates a cardinal rule of statutory interpretation—that courts must presume that Congress "intends its amendments to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). An amendment is best understood as reflecting a certain Congressional expectation. *Id.*; *see also*, *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) (addition of term "actual fraud" into bankruptcy discharge exception statute not duplicative, but connotes further ground for denial of discharge).

In approaching the amended statutory language, therefore, it must be presumed that Congress did not

intend "on the basis of disability" to mean the same thing as "because of the disability." Proceeding from this premise, and given Congress's express statement of intent, the clear inference is that Congress would not have changed the relevant statutory language unless it intended the change to have substantive effect consistent with its intent to broaden the "scope of protection" afforded to the disabled under the ADA.

The difference in language is not mere happenstance; it reflects a conscious legislative decision. Absent some overriding contrary consideration, the only reasonable conclusion is that, in changing "because of" to "on the basis of," Congress acted deliberately and intended a different meaning. If Congress desired to make (or leave) the ADA standard comparable to the standards in the ADEA and the anti-retaliation statute, it would not have made the change. Congress's alteration of significant statutory language is not merely superficial. Rather, it indicates that the intended change is "real and substantial."

Conversely, given the change in statutory language, coupled with the Congressional statement of purpose, it cannot reasonably be concluded that the change in statutory language is meaningless. Rather, it must be presumed that Congress did not intend "on the basis of disability" to mean the same thing as "because of the disability."

Two additional factors undercut the Ninth Circuit's reading of the current version of § 12112(a):

First, while the Ninth Circuit treats *Gross* and *Nassar* as turning on identical statutory language, that is an over-simplification. The operative language

in *Gross*, "because of," appears in the ADEA, which provides that it is unlawful for an employer to discriminate against any individual, "because of such individual's age." 29 U.S.C. § 623. The Title VII term considered in *Nassar*, in contrast, is simply "because":

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a) (emphasis added). While perhaps a fine distinction, the context of the two statutes suggests that the terms are not synonymous. Among other things, the prohibition against retaliation in § 12203(a) requires that the claimant have acted in a way that is not only definable and provable, but can logically be connected to the prohibited discrimination by temporal contiguity or otherwise. The ADEA, in contrast, refers to a status—age—that, while easily proved, is more difficult to connect to discriminatory conduct, particularly where the defendant has a colorable alternative explanation.

Second, following this Court's approach in *Gross*, the dictionary definitions of "because of" and "on the basis of" are definitionally distinct. The phrase "because of" means "by reason of: on account." *Gross*, 557 U.S. at 176, citing Webster's Third New International Dictionary 194 (1966), Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason of, on account of" (emphasis in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account").

Therefore, 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. *Id.*, citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome"). The online version of Webster's dictionary similarly defines "because of" as "by reason of: on account of." Merriam-Webster.com.

The phrase "on the basis of," in contrast, is defined by Merriam-Webster.com, as "according to: based on." *Id.* Conspicuously missing in that definition is any suggestion of sole, or "but-for" causation; rather, the definitional term "based on" is reasonably interpreted as non-exclusive of other factors. Accordingly, while "because of" and "on the basis of" are similar in usage and meaning, it cannot be assumed that the "but-for" concept read into "because of" by the *Gross* Court would apply equally to "on the basis of." To treat the terms as functionally synonymous, under these circumstances, would contravene established principles of statutory construction and fail to give effect to express Congressional intent.

Justice Kagan has written that, "[t]hose of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). The statutory language here in question is a quintessential example of statutory text that is reasonably subject to multiple interpretations, as

evidenced by the conflicting Circuit Court decisions.[3] Yet, the intent of Congress in adopting the ADAAA's "on the basis of" formula is clear and unambiguous—the purpose of the ADAAA was to broaden the scope of the ADA for the benefit of disabled claimants. ADAAA, § 2(b)(1). Given that express statement of intent, together with the corollary principle that the courts must find purpose in a statutory amendment, the modified statutory formula must be read as referring to the more liberal standard of causation—motivating factor.

3. Congress Explicitly Cross-References the ADA to Title VII, Which Expressly References Mixed-Motive or Motivating-Factor Claims.

When interpreting a statute, the court's beginning point is the relevant statutory text. *United States v. Quality Stores, Inc.*, 572 U.S. 141 (2014).

> While the ADA is separate and distinct from Title VII, it does not include its own enforcement provisions. Rather, it incorporates the enforcement provisions of Title VII. Section 107 of the ADA, 42 U.S.C. § 12117(a), states that the "powers, remedies and procedures" available to a claimant "alleging discrimination on the basis of disability in violation of

---

[3] This Court is, indeed, grappling with causation, and granted certiorari, in other discrimination contexts. *See Babb v. Wilkie*, 139 S. Ct. 2775 (2019) (whether 29 U.S.C. § 633a(a), requires proof that age was a but-for cause); *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 139 S.Ct. 2693 (2019) (whether claim of race discrimination under 42 U.S.C. § 1981 fails in absence of but-for causation).

> any provision of this Act" shall be "[t]he powers, remedies, and procedures set forth in . . . 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9." The enforcement provisions so incorporated include § 2000e-5(g)(2)(B), which addresses the available remedies for mixed-motive claims, *i.e.*, claims: in which an individual proves a violation under section 2000e-2(m)[4] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor.

The Ninth Circuit Panel, while acknowledging the incorporation of § 2000e-5(g)(2)(B) into the ADA, nevertheless concludes that the Title VII enforcement provisions are inapplicable here because, like the ADEA and unlike Title VII, the ADA does not contain any explicit "motivating factor" language. *Murray,* 934 F.3d at 1106. But the Ninth Circuit's analysis ignores the explicit link between the ADA and Title VII. While it is correct that the words "motivating factor" do not appear directly in the ADA, the legislative history shows that by choosing to link the statutes, Congress intended enforcement remedies under the ADA be identical to those of Title VII:

> An amendment was offered . . . that would have removed the cross-reference to Title VII

---

[4] § 2000e–2(m) explicitly adopts a motivating factor standard: an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a <u>motivating factor</u> for any employment practice . . .

> and . . . substituted the actual words of the cross-referenced sections. . . . This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women. By retaining the cross-reference to Title VII, the Committee's intent is that the remedies of Title VII, currently and as amended in the future, will be applicable to persons with disabilities.

H. Rep. No. 101–485(III) at 48 (1990), reprinted in 1990 U.S.C.C.A.N. 445 at 471 (House Report for the ADA) (emphasis added).

Congress used the Title VII amendments to the Civil Rights Act of 1991 to codify the "motivating factor" standard into the ADA. *See* 42 U.S.C. § 12117(a). The "Enforcement Provisions" of Title VII directly reference the "motivating factor" standard. 42 U.S.C. § 2000e–5(g)(2)(B). A statute is "to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citation omitted). As Judge Learned Hand wrote, and this Court quotes: "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *Iancu v. Brunetti*, 139 S. Ct. 2294, 2309 (2019) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

The Ninth Circuit's narrow reading of § 2000e-2(m), in this context, ignores express Congressional intent. *See Murray,* 934 F.3d at 1107 ("Section 2000e-

2(m) narrowly prohibits the consideration of race, color, religion, sex, or national origin as a motivating factor for any employment practice. It does not prohibit the consideration of disability.”).

The Ninth Circuit’s interpretation also violates a further principle of statutory construction: Courts should, to the extent possible, read statutes so that “no clause, sentence, or word shall be superfluous, void, or insignificant.” *Iancu,* 139 S. Ct. at 2309, quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). As established above, the ADA expressly incorporates the powers, remedies, and procedures of § 2000e-5, which in turn links to 2000e-2(m). By incorporating this provision into the ADA, Congress effectively declared that ADA plaintiffs are entitled to the remedies described therein. Given that these remedies have meaning only in the context of § 2000e-5(g)(2)(b), the motivating factor test must be incorporated into the ADA. As Judge Donald points out in her *Lewis* dissent, to edit out the reference to 2000e-2(m) is “to render Title VII’s only remedies section devoid of meaning as to the ADA, nullifying Congress’s clearly expressed intent to incorporate into the ADA Title VII’s remedies.” 681 F.3d 312 at 340.

In any event, the legislative history belies the Ninth Circuit’s limited view:

> The remedies for victims of discrimination because of disability should be the same as the remedies for victims of race, color, religion, sex, and national origin discrimination . . . <u>The remedies should remain the same, for minorities, for women, and for persons with disabilities. No more. No less</u>.

101 Cong. Rec. 2599, 2615 (daily ed. May 22, 1990) (emphasis added). "[T]he purpose of the ADA [is] to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H. Rep. No. 101–485(III) at 48 (1990), reprinted in 1990 U.S.C.C.A.N. 445 at 471.

This Court should clarify the causation standard evidenced by Congress's clearly expressed intent.

B. The Ninth Circuit Incorrectly Concluded that the *Gross* ADEA Statutory Analysis and the *Nassar* Retaliation Analysis Transfer to the ADA.

Neither *Gross* nor *Nassar* involved the ADA; *Gross* arose out of the ADEA, and *Nassar* arose out of a Title VII retaliation claim in connection with racial and religious harassment. While the Ninth Circuit asserts that its decision comports with the decisions of all sister circuits that have considered this question after *Gross* and *Nassar*, a more nuanced analysis reaches a contrary result.

1. Because the Relevant Portions of Title VII Are Not Linked to the ADEA, the Reasoning of *Gross* Is Inapplicable to the Present ADA Case.

Gross itself teaches that statutory interpretation requires individualized inquiry: "[W]e must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." 557 U.S. at 174. This Court emphasized that it cannot ignore Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA: "When Congress amends one statutory

provision but not another, it is presumed to have acted intentionally." *Id.* The language of *Gross* thus belies blanket applicability as it clearly undertakes an analysis only of the ADEA: "[o]ur inquiry therefore must focus on the text of the ADEA[.]" 557 U.S. at 175.

2. The Holding of *Nassar* does not Apply to ADA Disability Claims Because Retaliation Claims Are Textually and Practically Different than Status-Based Discrimination Claims.

This Court in *Nassar* expressly distinguishes between status-based discrimination and retaliation claims. Under *Nassar*, a disability claim under the ADA is a status-based claim, comparable to a claim based on race, ethnicity, religion, and gender, and distinct from a retaliation claim.

This Court noted that the term "status-based discrimination" refers "to basic workplace protection <u>such as</u> prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion <u>and the like</u>. *See* § 2000e-2(a)." *Nassar*, 570 U.S. at 342 (emphasis added). While not expressly addressing whether discrimination on the basis of disability is included in that definition, the phrases "such as" and "and the like" certainly suggest that it is. Using two such qualifiers suggests that Congress did not intend this to be an exclusive list. Indeed, this Court refers to Title VII prohibiting employers from discriminating against their employees on any of seven specified criteria, explaining that "[f]ive of them—race, color, religion, sex, and national origin—are personal char-

acteristics and are set forth in § 2000e-2 . . . [while t]he two remaining categories of wrongful employer conduct" —the employee's opposition to employment discrimination, and the employee's submission of a complaint that alleges employment discrimination—"are not wrongs based on personal traits but rather types of protected employee conduct." *Id.* (Emphasis added). The Court notes that these "latter two categories are covered by a separate, subsequent section of Title VII, § 2000e-3(a)." *Nassar*, 570 U.S. at 347–48. While there is no mention of disability in this analysis, disability does not fall within the latter two categories covered by § 2000e-3. Instead, disability is a status-based characteristic rather than a type of protected employee conduct.

This Court held that even though Title VII permits mixed-motive causation for claims based on "status-based" discrimination, it does not permit mixed-motive causation for retaliation-based claims. *Nassar,* 570 U.S. at 360. The Court noted that § 2000e-2(m), which contains the mixed-motive causation provision, "mentions just the . . . status-based [factors]; and it omits the final two, which deal with retaliation." *Id.*; *see also* 42 U.S.C. § 2000e-2(m). The Court also noted that "Congress inserted [the 'mixed-motive' test] within the section of the statute that deals only with [the status-based factors], not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices." *Id.* (Emphasis added.) Based on textual and structural indications, the Court concluded that "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m)." *Id.*

The difference between status-based discrimination and retaliation claims is not only textual, but practical as well. This Court in *Nassar* noted that, as of 2013, the number of retaliation claims filed with the EEOC outstripped those for every type of status-based discrimination except race. The Court said lessening the causation standard for retaliation claims would contribute to the filing of frivolous claims. *Id.* at 358. Where an employee knows he or she is about to be fired for poor performance, and to forestall that lawful action, "he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation." *Id.* In this context, the but-for standard makes sense: an employee can demonstrate unlawful retaliation only if he would not have been fired but-for his complaint of an unlawful employment practice.

But with status-based discrimination there are likely to be multiple reasons for an employer's decision to take adverse employment action or even multiple statuses. What of a black, disabled woman? Is she required to demonstrate that her employer took adverse employment action based solely on her disability, and not on her race or gender? How would she ever show that and, worse, would the but-for standard give an employer a pretextual excuse every time, by allowing the employer to claim that there were reasons for the action other than her disability? The questions answer themselves, and lead unalterably to the conclusion that status-based claims are properly distinguished with respect to proof of causation.

CONCLUSION

The ADA forbids discrimination "on the basis of disability." The Circuits are hopelessly in conflict as to the proper standard of causation to be applied in giving effect to this statutory language in claims of status-based discrimination. But the "motivating factor" standard is most consistent with the plain language and purposes of the statute, and is therefore the appropriate standard for causation under the ADA.

Accordingly, it is respectfully requested that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

KATHI M. SANDWEISS
COUNSEL OF RECORD
ROGER L. COHEN
JABURG & WILK, P.C.
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, AZ 85012
(602) 248-1052
KMS@JABURGWILK.COM

COUNSEL FOR PETITIONER

FEBRUARY 3, 2020