No. 19-995

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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

All six circuits that have considered the question – the First, Second, Fourth, Sixth, Seventh, and Ninth – agree that *Gross v. FBL Financial Services*, 557 U.S. 167 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) require disability discrimination plaintiffs under the Americans with Disabilities Act ("ADA") to prove that an ADA violation was the but-for cause of their injury. Should this Court review the correct decision of the Ninth Circuit to that effect where no circuit has disagreed?

RULE 29.6 DISCLOSURE STATEMENT

Mayo Clinic Arizona, an Arizona non-profit corporation, is an affiliate of Mayo Clinic, a Minnesota non-profit corporation. Mayo Clinic has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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The Petition suggests that, as to the causation standard within the Americans with Disabilities Act ("ADA"), all is chaos in the circuits since *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). In those cases, this Court taught that in antidiscrimination statutes – the Age Discrimination in Employment Act ("ADEA") in *Gross*, and Title VII's anti-retaliation provision in *Nassar* – words amounting to "because of" entail a but-for standard of causation. The Petition's portrait of circuits confused and riven with conflict on this point is untrue, or at the very least, grossly overstated.

Gross and *Nassar* began a journey of statutory interpretation that is now nearly complete. Circuit after circuit has applied this Court's clear reasoning in those cases – that courts must take care not to apply rules that apply under one statute to another "without careful and critical examination" – to the text of the ADA. *Gross*, 557 U.S. at 174. Six circuits deciding the question since *Gross* have found in the ADA a but-for causation standard – the Seventh in 2010, the Sixth en banc in 2012, the First in 2012, the Fourth in 2016, and the Second and Ninth in 2019. By contrast, no circuit has considered the question and expressed disregard for this Court's teachings in *Gross* and *Nassar*. There is simply no such split among the circuits before this Court, the Petition's wishful framing aside.

Worse yet for the Petition, far from presenting a square conflict with the *Gross-Nassar*-derived rule that the ADA requires but-for causation, the two

circuits supposedly presenting that square conflict have implied they will adopt the rule. The Eighth Circuit has correctly expressed doubts about whether a "motivating factor" causation standard in the ADA could survive *Gross* and *Nassar*. *See Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757 n.6 (8th Cir. 2016); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (6th Cir. 2012) ("We have our doubts about the vitality of the pre-*Gross* precedents. . . ."). The Fifth Circuit has likewise noted doubts that mixed-motive alternatives survived *Gross*, but declined to address the question based on waiver. *Clark v. Boyd Tunica, Inc.*, 665 Fed. App'x 367, 371 n.4 (5th Cir. 2016) (unpublished). Critically, while the Petition cites three Fifth Circuit cases to argue that the "motivating factor" standard controls under the ADA, those cases do not even mention – much less disagree with – *Gross* and *Nassar*.

For these reasons, the "irreconcilable split" touted by the Petition is thus far from a real split. It is simply the gradual working of a well-stated rule of law through the circuits. The Ninth Circuit correctly followed this Court's guidance last year, as did the Second Circuit, continuing that progression. There is no reason to believe the Fifth and Eighth Circuits will not as well when the question is presented to them. This orderly evolution gives this Court no reason to issue the writ.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

A. An Altercation in an Operating Room Leads Mayo to Discharge Dr. Murray.

This case arises out of an altercation that one physician provoked with another physician during an operation at Mayo Clinic Arizona ("Mayo") in Phoenix, Arizona on February 19, 2014, and Mayo's termination of the offending physician. During the operation, anesthesiologist and eventual plaintiff Dr. Michael Murray admits that he "grabbed" another anesthesiologist, Dr. James Chien, "by the shoulders and pushed him into an IV pole, yelling and then screaming at Dr. Chien." (App. to Pet. Cert. 38a).

Mayo immediately suspended Dr. Murray on paid administrative leave pending its investigation. Two days later, Dr. Murray took a six-week medical leave. When he eventually returned, Mayo obtained his side of the story. After two Mayo committees reviewed and approved the recommendation to do so, Mayo discharged Dr. Murray. As Dr. Murray has recognized many times, firing him was consistent with Mayo's zero-tolerance policy for physical contact between employees and also its past response to similar incidents.

B. Dr. Murray Sued Mayo For Disability Discrimination and Lost After a Jury Trial.

On August 29, 2014, Dr. Murray filed an amended complaint against Mayo and certain affiliated persons under the ADA. Dr. Murray claimed that Mayo had

failed to reasonably accommodate his disability, and that Mayo unlawfully terminated him in violation of the ADA. Dr. Murray also asserted claims not at issue in this Petition, including wrongful discharge under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and claims under the Family and Medical Leave Act ("FMLA").

There is no dispute in the record that Dr. Murray is a "qualified person" entitled to the protections of the ADA. Dr. Murray originally pleaded that he was disabled. As the case progressed, there was some testimony that he had bipolar disorder, and conflicting testimony about whether he had post-traumatic stress disorder. Before trial, Dr. Murray abandoned his reasonable accommodation claim, as he testified he never sought and did not need an accommodation. Ultimately, Dr. Murray conceded at trial that he was not resting his claim on a specific disability, but on his assertion that he was "regarded as" disabled by defendants.

Dr. Murray was ultimately unsuccessful on all claims in the district court. Before trial, he lost his USERRA claims on summary judgment because he "failed to show that his military service was a motivating factor in his termination" (App. 50a) and because "[n]o reasonable jury could find that Defendants lacked cause to fire" Dr. Murray after the February 19, 2014 altercation. (App. 51a). Dr. Murray also lost his ADA and FMLA claims against defendant Mayo Clinic on summary judgment because that Mayo entity was not his employer. (App. 52a-55a).

Dr. Murray tried his ADA claim and remaining FMLA claim against Mayo Clinic Arizona to a jury in the district court between August 15 and 23, 2017, and lost. The district court instructed the jury that Dr. Murray had the burden to prove he (1) had a disability, (2) was qualified to do the job, and (3) was discharged because of his disability. Dr. Murray objected to that instruction, arguing that under *Head v. Glacier Northwest, Inc.*, the Ninth Circuit employed a motivating-factor causation test. 413 F.3d 1053 (9th Cir. 2005). But the district court agreed with Mayo that *Head* did not control because *Gross* and *Nassar* dictated but-for causation.

C. The Ninth Circuit Affirmed the District Court, Agreeing That *Gross* and *Nassar* Had Overruled the Ninth Circuit's Prior Motivating-Factor Case Under the ADA.

Dr. Murray timely appealed the judgment against him. He challenged the various partial summary judgments against him, certain evidentiary rulings, and three rulings on jury instructions. One of those three was the district court's decision to instruct the jury consistent with the but-for causation standard from *Gross* and *Nassar*, rather than the motivating-factor standard from the Ninth Circuit's prior decision in *Head*.

The Ninth Circuit affirmed, carefully parsing *Gross* and *Nassar*. It began by noting that *Head* had followed other circuits in concluding, without

substantial analysis, that "a motivating factor [causation standard] was most consistent with the ADA's plain language and purpose." 934 F.3d at 1105. The Ninth Circuit noted *Gross*' warning against transposing "motivating factor" causation from Title VII into the ADEA context, and given the similar causation language in the ADEA and the ADA, applied *Gross*' reasoning to the ADA context. *Id*. at 1106. Thus, just as Congress' choice to add motivating-factor language to Title VII but not the ADEA meant that the ADEA required but-for causation, so it must be in the ADA. *Id*. (citing *Gross*, 557 U.S. at 174).

For those reasons, the Ninth Circuit held that its prior motivating-factor case law, in particular *Head*, was "clearly irreconcilable" with *Gross* and *Nassar*, and thus overruled its own precedent. 934 F.3d at 1105. The Ninth Circuit reinforced this conclusion by pointing to the uniformity of the circuits on the question of whether the ADA requires but-for causation: "Our decision comports with the decisions of all of our sister circuits that have considered this question after *Gross* and *Nassar*." *Id.* at 1107 (citing the consistent decisions of the Second, Fourth, Sixth, and Seventh Circuits).

The Ninth Circuit disposed of Dr. Murray's other appellate arguments in a memorandum disposition. *Murray v. Mayo Clinic*, 784 Fed. App'x 995 (9th Cir. 2019) (unpublished). Dr. Murray sought rehearing en banc on the question of whether the district court correctly instructed the jury on but-for causation, given *Gross* and *Nassar*. The Ninth Circuit denied the

motion for rehearing en banc, with no judge requesting a vote on whether to rehear the appeal. (App. 60a).

Dr. Murray's Petition timely followed, challenging only the district court's decision to instruct the jury that the ADA requires but-for causation, consistent with *Gross* and *Nassar*. The Petition abandoned all other issues in this case.

REASONS FOR DENYING THE WRIT

The Petition fails to make a case for certiorari. The "irreconcilable split" it claims is greatly overstated. Since *Gross* and *Nassar*, the circuits have generally understood that to prevail on a discrimination claim under Title I of the ADA, plaintiffs must show that their disability is the but-for cause of their claimed injury. The First, Second, Fourth, Sixth, Seventh, and Ninth Circuits have considered this question in the past decade. Each of these circuits follows *Gross* and *Nassar*. Suggestions of intracircuit conflict within these six circuits are meritless, as explained below.

Moreover, the Petition's claims that two circuits stand in conflict with *Gross* and *Nassar* on this question do not withstand scrutiny. The Fifth and Eighth Circuits have explained that mixed-motive analysis under the ADA likely does not survive *Gross*, thus indicating a disposition to adopt the rule of *Gross* and *Nassar* when a case squarely presents the question. Finally, the Petition's claim that the Ninth Circuit erred

in applying a but-for standard in the case at bar is wrong.

I. THE PETITION'S REPORT OF AN "IRRECONCILABLE SPLIT" IS SIGNIFICANTLY OVERSTATED AND FAILS TO JUSTIFY REVIEW.

Since *Gross* and *Nassar*, the circuits have understood that the ADA requires but-for causation. The circuits have heeded this Court's direction not to carelessly import standards for liability from other statutes. *Nassar*, 557 U.S. at 174. The Petition's claims of confusion within the circuits do not withstand scrutiny, and the orderly progression of this rule of law through the circuits gives this Court a strong reason not to issue the writ.

A. The First, Second, Fourth, Sixth, Seventh, and Ninth Circuits Have All Followed *Gross* and Held That an ADA Plaintiff Must Demonstrate But-For Causation.

While the Petition suggests that there is difficulty among the circuits in understanding this Court's teachings, a review of the law of different circuits demonstrates that this is wrong.

1. The Petition Correctly Concedes That the Second, Fourth, and Ninth Circuits Have Adopted the But-For Standard.

The Second, Fourth, and Ninth Circuits have all followed *Gross* and *Nassar* and concluded that ADA plaintiffs must show that disability is the but-for cause of the adverse employment decision of which they complain. *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019), *petition for cert. filed*, 88 U.S.L.W. 3265 (U.S. Feb. 10, 2020) (No. 19-995); *Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019) ("*Gross* and *Nassar* dictate our decision here."), *petition for cert. filed*, 88 U.S.L.W. 3202 (Dec. 10, 2019) (No. 19-732); *Gentry v. E.W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 234 (4th Cir. 2016) ("The Supreme Court's analysis in *Gross* dictates the outcome here."). Like the Ninth Circuit, each of these circuits adopted a but-for causation standard citing and carefully following the reasoning of *Gross* and *Nassar*. The consistencies among these circuits illustrate that the law is progressing in an orderly fashion and that the lower courts are receiving the teachings of *Gross* and *Nassar* as this Court intended. But there is still more consistency among the circuits than the Petition suggests.

2. The Petition Is Wrong To Suggest That the Sixth Circuit Has Not Adopted the But-For Standard.

There is no question that the Sixth Circuit followed *Gross* and adopted but-for causation in a lengthy

and well-stated en banc decision. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (en banc). *Lewis* correctly read *Gross* as holding that "by amending Title VII to provide recovery under a 'motivating factor' theory, Congress made this theory available to Title VII claimants but not to claimants under other civil rights statutes given that Congress did not extend this framework to the other statutes." *Id.* Because Congress did not add "motivating factor" language to the ADA, the Sixth Circuit held, "*Gross* resolves this [ADA] case," requiring but-for causation as the standard for liability. *Id.*

Other courts see no "[c]onfusion" about whether the Sixth Circuit has adopted this standard. (Pet. 17). Indeed, the very circuits the Petition claims demonstrate a split justifying review – the Fifth and Eighth – cite the Sixth Circuit as a court that followed *Gross* to adopt a requirement of but-for causation in ADA cases. *Oehmke*, 844 F.3d at 757 n.6; *Clark*, 665 Fed. App'x at 371 n.4. Far from the "[c]onfusion and [i]nconsistency" the Petition incorrectly projects upon the Sixth Circuit, *Lewis* is instead a clear and leading case.

Ironically, *the Petition itself* makes the point that *Lewis* solidly carries forth a rule of but-for causation in the ADA. Within an unavailing attempt to show confusion in the Seventh Circuit, the Petition itself refers to "the Sixth Circuit en banc *Lewis* decision, which squarely holds that the ADA causation standard is 'but-for.'" (Pet. 22). On this point, the Petition is right. *Lewis* does squarely present that holding, and through an en banc court, which should settle the issue.

The Petition is also right to note that there were three partial dissents. But there are several reasons they do not show the "confusion and inconsistency" that the Petition incorrectly claims prevails in the Sixth Circuit. *First*, they are simply dissents. Dissents do not make the law unclear or confusing. *Second*, the fact that the Sixth Circuit has not revisited *Lewis* in the eight years since it was published demonstrates clarity and coherence within the circuit. *Third*, the dissents were written one year before *Nassar* revisited and amplified the logic of *Gross*. There is no suggestion in the seven years since *Nassar* of continued misgivings with *Gross.*

The particular Sixth Circuit decisions to which the Petition points establish no contrary rule or significant confusion. *Morrissey v. Laurel Health Care Co.* merely reversed a summary judgment finding issues of fact as to whether an ADA plaintiff was disabled, whether her employer failed to accommodate her alleged disability, and whether that failure was a constructive discharge. 946 F.3d 292, 301-03 (6th Cir. 2019). *Morrissey* mentions *Lewis*' holding in passing and expresses no concern about it. *Id.* at 298 n.4. That case does refer to the possibility of showing that the disability "was at least a motivating factor," but in the context of discussing inferences from direct evidence. *Id.* at 298. *Morrissey* is not a case about whether but-for or motivating factor is the proper standard for causation under the ADA. It contains no holding questioning the rule of but-for causation, and does not criticize *Gross*, *Nassar*, or *Lewis*. For this reason, it cannot support a claim that the

circuits are split or confused about causation under the ADA.

Hostettler v. College of Wooster, a case cited in *Morrissey* upon which the Petition relies, is no more relevant. *See* 895 F.3d 844, 853 (6th Cir. 2018). It contains the statement quoted in *Morrissey* about inferences that "disability was at least a motivating factor." *Id*. But that statement is about evidentiary rules and irrelevant to the holding of *Hostettler*, for it is immediately followed by the conclusion that "[n]o inferences are required in this case. . . . Hostettler was fired solely because the college" could not accommodate her alleged disability. *Id*. So again, the case is not about the causation standard for ADA claims as such, and does not cite or criticize *Lewis*, *Gross*, or *Nassar*.

Finally, the concurrence to *Whitfield v. Tennessee*, 639 F.3d 253 (6th Cir. 2011), does not aid the Petition's analysis. (Pet. 19 (citing *Whitfield*, 639 F.3d at 264 (Stranch, J., concurring))). *First*, it predates *Lewis*, making it no demonstration of supposed "confusion" since *Lewis* resolved this issue in the Sixth Circuit. *Second*, citing it in a Petition about the appropriateness of a but-for causation standard is a non-sequitur. Before *Lewis*, the Sixth Circuit alone imported a requirement that the disability be the "sole" motivation for the adverse employment action. *Lewis*, 681 F.3d at 314-15. The pre-*Lewis* concurrence the Petition cites was quarreling with that "sole motivation" standard. 639 F.3d at 264. But *Lewis* undid the "sole motivation" standard in the Sixth Circuit, making Judge Stranch's concurrence no evidence of post-*Lewis* confusion.

Whether in 2011 one Sixth Circuit judge objected to "sole motivation" does not mean that after *Lewis* there is "confusion" about the but-for standard *Lewis* adopted.

3. The Petition Is Likewise Wrong To Suggest That the Seventh Circuit Has Not Adopted the But-For Standard.

The Seventh Circuit clearly adopted the but-for standard for causation under the ADA in reaction to *Gross*. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010). That court's analysis was spot-on, and very faithful to *Gross*. Applying *Gross* to the ADA, it wrote:

> Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that ***when another anti-discrimination statute lacks comparable language***, ***a mixed-motive claim will not be viable under that statute***.

Id. at 961 (emphasis added). Precisely so.

And other circuits – in the very cases upon which Petitioner relies in this Court, no less – see that *Serwatka* relied upon *Gross* and foreclosed ADA claims resting on motivating-factor causation, as opposed to but-for causation, in the Seventh Circuit. *See*, *e.g.*, *Oehmke*, 844 F.3d at 757 n.6; *Gentry*, 816 F.3d at 234

("In reaching this conclusion, we join the Sixth and Seventh Circuits."); *Lewis*, 681 F.3d at 319 ("The one circuit to address the ADA/Title VII question after *Gross* has taken the same path.").

The Petition's attempt to cobble together a suggestion of confusion or circuit split from more recent decisions in the Seventh Circuit fails badly. The Petition points to three cases that all follow *Serwatka* and but-for causation. (Pet. 20-22 (citing *Monroe v. Ind. Dep't of Transp.*, 871 F.3d 495, 503-04 (7th Cir. 2017), in turn citing *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))). Each of these cases notes that the ADA was amended to change the prohibition against discriminating "because of" a disability to prohibiting discriminating "on the basis of" a disability, and that plaintiffs in all three failed to argue that causation shifted from the but-for standard required by *Serwatka*, so that the Court would not consider such a question. There is nothing confusing about that, and it is no evidence of a circuit split.

The Petition's discussion of Seventh Circuit law concludes with two cases that in no way advance the Petition's cause. *See Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473 (7th Cir. 2019); *Whitaker v. Wis. Dep't of Health Servs.*, 849 F.3d 681 (7th Cir. 2017). The portion of *Reed* that the Petition cites involves the Rehabilitation Act, which in its plain text prohibits discrimination based "solely by reason of" a person's disability and thus provides protections that parallel the ADA. *See* 29 U.S.C. § 794(a); *id.* § 794(d) ("The standards

used to determine whether [the Rehabilitation Act] has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the [ADA]. . . .”). In comparing the two statutes, *Reed* offhandedly asserts that the ADA permits mixed-motive claims. 915 F.3d at 484. This statement is clearly dictum given that the court did not apply a mixed-motive analysis to the Rehabilitation Act claim. *See id*. at 484-85 (reversing summary judgment against the plaintiff because “a reasonable jury could find that the hospital intentionally discriminated against [her] solely on the basis of her disability”). The statement is also wrong. It not only fails to take *Serwatka* into account, but like the Petition, it cites to *Whitaker*, a Rehabilitation Act case that does not address causation. *Whitaker*, 849 F.3d at 686 (“Since [the plaintiff] failed to establish that she was an ‘otherwise qualified’ employee, we need not address whether she properly requested an accommodation, or whether her accommodation request was reasonable.”). These two cases thus utterly fail to aid the Petition in its effort to gin up unclarity in the Seventh Circuit.

4. The First Circuit Agrees That *Gross* Mandates But-For Causation in the ADA, and the Petition’s Attempt To Find “Confusion” There Misses the Mark.

There is no confusion in the First Circuit about the question at bar – *Gross* dictates a but-for causation

standard in ADA cases. *Palmquist v. Shinseki*, 689 F.3d 66, 73-77 (1st Cir. 2012). The First Circuit in *Palmquist* began its analysis by stating that the Rehabilitation Act has the same standard for causation as that in the ADA. *Id.* at 73 ("[T]he Rehabilitation Act borrows the causation standard from the [ADA]."). It then focused on the close textual similarity between the causation standards in the ADEA and ADA – "because of" in the ADEA, discussed in *Gross*, and "because" in the ADA. *Id.* at 74. Given that close similarity, the First Circuit correctly concluded that this Court's holding in *Gross* that ADEA causation is but-for necessarily generalized to the very similar ADA. *Id.* ("*Gross* is the beacon by which we must steer. . . .").

The Petition's quibble, from which it purports to derive a "[p]attern of [i]nconsistency" and "confusion," is that *Palmquist* did not state that it overruled a 1996 First Circuit case that understandably allowed mixed-motive ADA claims thirteen years before *Gross–Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996). (Pet. 23). This overstated position is wholly unpersuasive. *First*, *Katz* is necessarily no part of any pattern of inconsistency as to post-*Gross* views of ADA causation, because it predates *Gross*. *Second*, the Petition does not suggest that since *Gross* any First Circuit panel has cited *Katz* to permit a motivating-factor standard for ADA claims. And for good reason – none have. *Third*, one would not expect there to be any such cases – the four-page exposition of this issue in *Palmquist* is elegant and complete, and dovetails well not only with *Gross* but its many progeny requiring but-for causation under the

ADA in the Second, Fourth, Sixth, Seventh, and Ninth Circuits.

B. The Petition's Suggestion That the Fifth and Eighth Circuits Squarely Oppose the Rule of *Gross* and *Nassar* Is Inaccurate.

1. The Petition Omits To Note That the Fifth Circuit's Most Recent Discussion of the Issue Acknowledged Doubts That A "Mixed Motive" Analysis Survived *Gross*.

The Petition mistakenly suggests that in "its most recent pronouncement, the Fifth Circuit expressly adopted a 'motivating factor' test." (Pet. 12 (citing *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476 (5th Cir. 2016))). To the contrary, though unpublished, the Fifth Circuit's most recent examination of this issue was in *Clark v. Boyd Tunica* and was substantially more equivocal. In *Clark*, the Fifth Circuit stated that it had "recognized a mixed-motive alternative" but noted doubts by both parties and the Sixth Circuit as to whether such claims survived *Gross*. 665 Fed. App'x at 371 n.4. The Court of Appeals expressly declined to "resolve that question" because the argument was waived, and affirmed summary judgment against plaintiff. *Id.* As such, the Fifth Circuit has made clear that if the issue were squarely framed to it, it would need to examine whether *Gross* controlled and barred motivating-factor causation as the Sixth Circuit had. This undercuts the Petition's rationale for review.

The Petition is correct in noting that *Delaval* continues to recite the now-incorrect pre-*Gross* "mixed-motive" causation standard. 824 F.3d at 480. But significantly, *Delaval* affirmed summary judgment for the employer on an ADA claim because there was no evidence of any discriminatory animus. *Id.* *Delaval* would thus have come out the same under either a but-for or a mixed-motive standard, and for that reason does not rely on any mixed-motive rationale. *Id.* The Petition is likewise correct in citing *EEOC v. LHC Group*, which is the last time the Fifth Circuit not only cited the "mixed motive standard," but actually relied on mixed-motive analysis in sustaining a claim. 773 F.3d 688, 702 (5th Cir. 2014).

Yet what is missing from the Petition is a proper contextualization of these changes in law. *LHC* was decided in 2014, the year following *Nassar*'s amplification of *Gross*. And *LHC* was the last time the Fifth Circuit relied upon the "mixed-motive" analysis. Since then, in 2016, the Fifth Circuit recognized in *Clark* that *Gross* may have been the death-knell of "mixed-motive" analysis. With two additional circuits, the Second and Ninth, joining the First, Fourth, Sixth, and Seventh, there is good reason to believe the Fifth Circuit will get it right when the issue eventually arises there. There is no need to review this matter.

2. The Petition Correctly Points to the Eighth Circuit's Doubts as to the Continuing Vitality of Any Standard Other Than But-For Causation.

The Petition's portrayal of the Eighth Circuit as "retain[ing] the motivating factor standard" is at best incomplete. (Pet. 12). In *Oehmke*, the Eighth Circuit case of most relevance, that court sidestepped the issue by stating that "*Gross*'s reasoning . . . arguably could be extended to the comparable 'on the basis of' language in the ADA." 844 F.3d at 756-57 n.6. Indeed, *Oehmke* called whether *Gross* foreclosed use of what it called the "mixed-motive causation standard" an "important question" best not reached because that case's plaintiff would lose under either a but-for or mixed-motive standard, and the issue was only "cursorily briefed by" the defendant. *Id.*

As the Petition concedes, the Eighth Circuit already expressed its "doubts about the vitality of pre-*Gross* ADA precedent." *Pulczinski*, 691 F.3d at 1002. Notably, *Pulczinski* predates *Nassar*, which can only add to those doubts. And while the Petition holds out *Lipp v. Cargill Meat Solutions Corp.* as proof of the continued vitality of a motivating-factor standard in the Eighth Circuit, that appeal was resolved on the basis that plaintiff was not a "qualified individual" under the ADA, and not the application of a different causation standard. 911 F.3d 537, 544 (8th Cir. 2018). And there have been no cases in the Eighth Circuit tending to suggest the vitality of mixed-motive analysis beyond the mixed bag the Petition highlights. As such, the

Eighth Circuit stands ready to decide whether *Gross* requires the use of a but-for standard in ADA cases when the issue is framed and presented. The Eighth Circuit's longstanding "doubts" and the consensus of other circuits suggests that the Eighth will readily follow suit. There is again no reason to review the result below.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT *GROSS* AND *NASSAR* CONCLUSIVELY ESTABLISH THAT THE ADA REQUIRES BUT-FOR CAUSATION.

Surprisingly – or perhaps tellingly – the Petition fails to squarely address this Court's holdings in *Gross* and *Nassar* – decisions that the court below and many of its sister circuits have determined are controlling. Although its final few pages are littered with references to both decisions, the Petition never engages with the textual analysis that this Court developed for discerning a statute's causation standard. That analysis conclusively establishes that the ADA, like the statutes addressed in *Gross* and *Nassar*, applies a but-for causation standard.

A. *Gross* and *Nassar* Establish That the ADA's Text Reveals Congress' Intent to Establish a Rule of But-For Causation.

This Court decided *Gross* and *Nassar* in the wake of two related developments in employment-discrimination law. First, in *Price Waterhouse v. Hopkins*, the

Court addressed causation under Title VII discrimination claims. 490 U.S. 228 (1989). "Although no opinion in that case commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision." *Nassar*, 570 U.S. at 348 (quoting *Price Waterhouse*, 490 U.S. at 258). Then, "[t]wo years later, Congress passed the Civil Rights Act of 1991," which, among other things, codified the "motivating factor" causation standard for Title VII status discrimination. *Id.* Specifically, the Act "added a new subsection to the end of § 2000e-2, i.e., Title VII's principal ban on status-based discrimination." *Id.* Section 2000e-2(m) now states that "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." 42 U.S.C. § 2000e-2(m).

Nearly two decades later, *Gross* addressed the causation standard in the ADEA, which prohibits "discriminat[ion] against any individual . . . because of such individual's age. . . ." 29 U.S.C. § 623(a)(1). Concluding that this language invokes the but-for standard, this Court first highlighted the absence in the ADEA of the explicit motivating-factor language that Congress added to Title VII under § 2000e-2(m). *Gross*, 557 U.S. at 174. And given that the Civil Rights Act of 1991 "contemporaneously amended" both Title VII and the ADEA, this Court determined that Congress "acted

intentionally" by declining to add a similar motivating-factor provision to the latter statute. *Id.* at 174 (citing Civil Rights Act of 1991, Pub. L. No. 102-166 §§ 115, 302, 105 Stat. 1071, 1079, 1088).

Gross then examined the ADEA's use of the phrase "because of" in describing the cause of the discrimination. *Id.* at 175-76. Relying on dictionaries, this Court determined that this term means "by reason of: on account of." *Id.* at 176. The Court buttressed this conclusion by citing to its earlier determination that "the phrase 'based on'" in a different statute "indicates a but-for causal relationship and thus . . . has the same meaning as the phrase, 'because of.'" *Id.* (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63-64 & n.14 (2007)). Accordingly, "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" – i.e., the discrimination's but-for cause. *Id.*

Several years later, *Nassar* relied on this analysis in assessing the causation standard for Title VII retaliation claims. 570 U.S. at 351. Unlike the statute's status-discrimination provision, which includes the motivating-factor language added under § 2000e-2(m), the anti-retaliation provision under § 2000e-3 states that it is "unlawful . . . for an employer to discriminate against any of his employees . . . because he has opposed any practice" prohibited under Title VII. 42 U.S.C. § 2000e-3(a). "Given the lack of any meaningful textual difference between" this language and the ADEA's "because of" language addressed in *Gross*, this

Court determined that but-for causation also applies to Title VII retaliation claims. *Nassar*, 570 U.S. at 352.

Nassar also highlighted Congress' "structural choice[]" in including the motivating-factor language in § 2000e-2, which applies only to status discrimination, rather than adding it to a section of Title VII "that applies to all such claims. . . ." 570 U.S. at 353-54. This Court concluded that it must therefore "give effect to Congress' choice" by applying a but-for causation standard. *Id.* (quoting *Gross*, 557 U.S. at 177 n.3).

B. The Phrase "on the Basis of" in the ADA Does Not Meaningfully Differ from "Because of" or "Based On," and the ADA Likewise Lacks Explicit Motivating-Factor Language.

Under the ADA, it is unlawful to "discriminate against a qualified individual *on the basis* of disability in regard to . . . the terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). There is no "meaningful textual difference," *Nassar*, 570 U.S. at 352, between "on the basis of" and the phrases that *Gross* and *Nassar* concluded denote but-for causation. Indeed, the Petition indirectly concedes this point by arguing that "on the basis of" means "according to: *based on*." (Pet. 30). Although he then contends that this definition does not encompass but-for causation, "based on" is the precise phrase that this Court concluded "has the same meaning as the phrase, 'because of'" and cited to in

support of its analysis of the ADEA. *Gross*, 557 U.S. at 176 (quoting *Safeco Ins.*, 551 U.S. at 63-64 & n.14).

Moreover, like the ADEA and Title VII's retaliation provision, the ADA lacks the explicit motivating-factor language that Congress added to Title VII's status-discrimination provision. And because the Civil Rights Act of 1991 also "contemporaneously amended" the ADA (along with Title VII and the ADEA), §§ 109, 315, *Gross* instructs that Congress "acted intentionally" by not adding a motivating-factor provision to the ADA, as it did to part of Title VII. 557 U.S. at 174.

Attempting to evade this binding precedent, the Petition contends that the ADA indirectly incorporates Title VII's motivating-factor language. (Pet. 31-32). This circuitous argument is premised on a provision of the ADA that incorporates five separate sections of Title VII. 42 U.S.C. § 12117(a). Tellingly, none of these sections is § 2000e-2, the status-discrimination provision that Congress selectively amended in 1991 to codify the motivating-factor test articulated in *Price Waterhouse*. *See Nassar*, 570 U.S. at 348. Rather, the Petition relies on § 2000e-5, which, among eleven subsections, includes a single subparagraph that cross-references § 2000e-2(m), the motivating-factor provision. 42 U.S.C. § 2000e-5(g)(2)(B).

This argument fails in at least two respects. *First*, it conflicts with the import that *Nassar* places on the "structural choices" Congress made in drafting and amending Title VII. 570 U.S. at 356. Just as the presence of motivating-factor language in the

status-based-discrimination section does not impute that causation standard to the neighboring retaliation provision of Title VII, the ADA does not *sub silentio* adopt motivating-factor causation by incorporating a section of Title VII that includes an isolated cross-reference to the motivating-factor provision. *Nassar* teaches that, had Congress intended this lessened causation standard to apply wholesale to the ADA, it would have made this choice explicit. *See* 570 U.S. at 354.

Second, the premise of the Petition's textual analysis is flawed. The ADA provision at issue directs that the remedies set forth in § 2000e-5 of Title VII shall be the remedies provided to "any person alleging" a "violation of any provision of this chapter" – i.e., the ADA. 42 U.S.C. § 12117(a). Conversely, the subparagraph under § 2000e-5 prescribes remedies for a violation of § 2000e-2(m), which *Nassar* made clear "address[es] only five of the seven prohibited discriminatory actions – actions based on the employee's status, i.e., race, color, religion, sex, and national origin." 570 U.S. at 353. Thus, an employer's status-based discrimination in violation of § 2000e-2(m) can never violate the ADA's disability-based protections. The Petition's multi-step link between § 12117 of the ADA and the motivating-factor language under § 2000e-2(m) of Title VII is therefore illusory. And although the Petition contends that this inevitable conclusion would render the ADA's incorporation of § 2000e-5 superfluous (Pet. 34), his argument ignores the fact that the ADA has no independent enforcement provisions and that § 2000e-5 of Title VII includes many other remedial measures on which the ADA relies.

Accordingly, the textual analysis that this Court developed in *Gross* and *Nassar* applies with equal force to the ADA and establishes that the statute's "on the basis of" language invokes but-for causation.

C. The ADA's Legislative History Underscores That its Amendment in 2008 Did Not Alter its But-For Causation Standard.

The Petition makes much of the fact that Congress' 2008 amendment to the ADA – among many other things – changed the phrase "because of the disability" to "on the basis of disability." *Compare* 42 U.S.C. § 12112(a) (2018), *with* 42 U.S.C. § 12112(a) (2006). (Pet. 27-28). This argument dovetails the Petition's review of the legislative history behind the amendment as a whole. (Pet. 26). But for all of the Petition's emphasis on how the ADA should be construed, it is revealing that none of the legislative history that it cites expressly addresses a congressional intent to alter the statute's causation standard.

In contrast, the legislative history to the 2008 amendment reveals that causation had no bearing on Congress' decision to include the phrase "on the basis of disability." Rather, the edit was meant to "ensure[] that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a

'person with a disability.'" 154 Cong. Rec. S8840-01 (daily ed. Sept. 16, 2008) (Statement of Managers), at 2008 WL 4223414. Thus, nothing about this edit affects the conclusion that the ADA, regardless of which synonymous phrase it uses, applies but-for causation.

D. The Consensus Among the Circuits That *Gross* and *Nassar* Require But-For Causation Under the ADA Reinforces the Correctness of the Ninth Circuit's Decision.

While it is this Court's reasoning that must control, that so many circuits have correctly discerned that *Gross* and *Nassar* require but-for causation underscores the correctness of the Ninth Circuit's opinion. The Ninth Circuit was right to say 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 1105. Significantly, the First, Second, Fourth, Sixth, and Seventh Circuits all correctly reached this result. *Palmquist*, 689 F.3d at 74 ("*Gross* is the beacon by which we must steer. . . ."); *Natofsky*, 921 F.3d at 348 ("*Gross* and *Nassar* dictate our decision here."); *Gentry*, 816 F.3d at 234 ("The Supreme Court's analysis in *Gross* dictates the outcome here."); *Lewis*, 681 F.3d at 318-19 ("*Gross* resolves this case."); *Serwatka*, 591 F.3d at 963 ("But in view of the Court's intervening decision in *Gross*, it is clear that the district court's decision . . . cannot be sustained.").

More injurious to the Petition, the two circuits it holds out as in conflict with this rule – the Fifth and

the Eighth – sound much the same. *See Clark*, 665 Fed. App'x at 371 n.4 (noting that "both parties questioned whether the mixed-motives alternative survived . . . *Gross*" and citing the en banc Sixth Circuit *Lewis* decision as "concluding that mixed-motive claims are not viable under the ADA in light of *Gross*"); *Pulczinski*, 691 F.3d at 1002 ("We have our doubts about the vitality of pre-*Gross* ADA precedent. . . .").

The Ninth Circuit reached the only result any circuit has reached that has been squarely presented with the question at bar since *Gross*. As shown above, all of these courts have read *Gross* and *Nassar* correctly. The law is developing precisely as this Court has taught it should. There is no error below to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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