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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. THIS COURT'S HOLDINGS IN *GROSS* AND *NASSAR* DO NOT MANDATE THE APPLICATION OF A "BUT-FOR" CAUSATION STANDARD UNDER THE ADA; THIS COURT SHOULD CLARIFY THE LIMITS OF *GROSS* AND *NASSAR*.

Respondents complain that the Petition "fails to squarely address this Court's holdings in [*Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)] and [*University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013)]." (Opp.Br.20). But a detailed analysis of *Gross* (Age Discrimination in Employment Act (ADEA)) and *Nassar* (retaliation) makes clear that this Court's prior holdings do not support the extension of a "but-for" causation standard to the Americans with Disabilities Act (ADA) as modified by the Americans with Disabilities Act Amendments Act (ADAAA).

Respondents characterize *Gross* and *Nassar* as coming in the wake of what they describe as two "related developments" in employment-discrimination law—*Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and the Civil Rights Act of 1991, codifying the motivating factor causation standard for Title VII status-based discrimination claims by amendment to § 2000e-2. (Opp.Br.20). Both the Ninth Circuit and Respondents incorrectly conclude that, because of this confluence of factors, the *Gross* ADEA statutory analysis and the *Nassar* retaliation analysis transfer to the ADA. A more nuanced analysis reaches a contrary result.

A. Because the Relevant Portions of Title VII Are Not Linked to the ADEA, the Reasoning of *Gross* Is Inapplicable Here.

Gross, properly read, provides a roadmap for the distinction between the causation under the ADEA and the ADA/ADAAA.

In *Gross,* an employee sued under the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a). *Gross,* 557 U.S. 167. The District Court instructed the jury to enter a verdict for Gross if he proved that his age was a motivating factor (*i.e.*, played a part) in his demotion. The court also instructed the jury to return a verdict for the employer if it proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. 557 U.S. at 168. The employer challenged the jury instructions and the Eighth Circuit reversed and remanded, holding that the jury had been incorrectly instructed under *Price Waterhouse. Gross,* 557 U.S. at 171. In *Price Waterhouse*, six Justices agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or "substantial" factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. *Id.* That is, once a "plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." *Id.* at 173-174. Congress thereafter amended Title VII, explicitly

authorizing claims where an improper consideration was "a motivating factor" for an adverse employment decision. *See* 42 U.S.C. § 2000e-2(m) ("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" (emphasis added by Court)); § 2000e-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations of § 2000e-2(m)). *Id.*

Mayo emphasizes that, in addressing the causation standard in the ADEA, the *Gross* Court "first highlighted the absence in the ADEA of the explicit motivating-factor language that Congress added to Title VII under § 2000e-2(m)." (Opp.Br.21). But Mayo's own characterization highlights the inapplicability of *Gross*'s analysis to the present case.

First, as *Gross* itself teaches, statutory interpretation is an individualized inquiry, precluding blanket applicability: "Our inquiry therefore must focus on the text of the ADEA[.]" 557 U.S. at 175. Further, the Court "'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination,'" *Id.* at 174, quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

Second, the standards and burdens of persuasion under Title VII and the ADEA are not identical. The ADA incorporates the powers, remedies, and procedures of Title VII, *see* 42 U.S.C. § 12117(a), (*i.e.*, "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9"), whereas the ADEA incorporates the analogous provisions of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) (*i.e.*, "the powers, remedies, and procedures

provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). Nor is this distinction immaterial. As *Gross* notes, "it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* [*v. Costa*, 539 U.S. 90 (2003)] to federal age discrimination claims." 557 U.S. at 175, fn 2.

Third, as *Gross* points out, the absence in the ADEA of explicit motivating factor language is the result of intentional Congressional decisions regarding amendments. "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.* at 174. "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Id.* at 174 (emphasis added). When Congress amends one statutory provision but not another, "it is presumed to have acted intentionally." *Id.* at 175. Further, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted." *Id.*

Here, in contrast, Congress, when amending Title VII in 1991, 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), thereby precluding any argument that it intentionally neglected to modify the causation standard applicable to the ADA. Based on this Court's explicit analysis in *Gross,* the *expressio unius est exclusio alterius* approach fails.

B. Under *Nassar*, Retaliation Claims Are Treated Differently than Status-Based Discrimination Claims; the *Nassar* Holding Is Logically Inapplicable to Status-Based ADA Disability Claims.

In *Nassar,* a physician of Middle Eastern descent brought two Title VII claims against his employer. 570 U.S. 338. First, Dr. Nassar alleged that his supervisor's racially and religiously motivated harassment had resulted in his constructive discharge, in violation of 42 U.S.C. § 2000e-2(a), (prohibiting status-based discrimination, *i.e.*, discrimination against an employee "because of such individual's race, color, religion, sex, and national origin"). *Id.* Second, Dr. Nassar alleged that efforts to prevent an affiliated hospital from hiring him were in retaliation for complaining about the harassment, in violation of § 2000e-3(a), (prohibiting employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge.") *Id.* The jury found for Dr. Nassar on both claims. The Fifth Circuit vacated as to the constructive-discharge claim, but affirmed as to the retaliation finding on the theory that retaliation claims brought under § 2000e-3(a)—like § 2000e-2 (a) status-based claims—require a showing that retaliation was only a motivating factor for the adverse employment action, not its but-for cause, *see* § 2000e-2(m). *Id.* This Court reversed, holding 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.* at 339.

Mayo's characterizations of *Nassar* spotlight the differences between status-based discrimination and retaliation claims. As Mayo correctly points out, "[u]n-

like 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." (Opp.Br.22). Further, "*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 . . . '." (Opp.Br.23).

Following the *Nassar* Court's analysis, a disability claim under the ADA is a status-based claim, comparable to a claim based on race, ethnicity, religion, and gender, and therefore properly distinguished from a retaliation claim. This Court noted that the term "status-based discrimination" refers "to basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like. *See* § 2000e-2(a)." *Nassar*, 570 U.S. at 342 (emphasis added). While not expressly addressing whether disability is included in that definition, the phrases "such as" and "and the like" certainly suggest that it is. *See Pub. Employees Ret. Sys. v. Betts,* 492 U.S. 158, 173 (1989)(superseded by statute on other grounds)(statute's use of "such as" clause suggests enumeration by way of example, not an exclusive listing). Using two such qualifiers suggests that Congress did not intend this to be an exclusive list. Indeed, the *Nassar* Court refers to Title VII prohibiting employers from discriminating against their employees on any of seven specified criteria, explain-

ing that "[f]ive of them—race, color, religion, sex, and national origin—are personal characteristics 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." 570 U.S. at 347-48. (emphasis added). The Court notes that these "latter two categories are covered by a separate, subsequent section of Title VII, § 2000e-3(a)." *Id.* While there is no mention of disability in this analysis, disability does not fall within the latter two categories covered by § 2000e-3.[1] Instead, disability is a personal trait.

Nassar 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

[1] The only reference in *Nassar* to the ADA, is a single paragraph explaining that the ADA includes a detailed description of the practices that would constitute prohibited discrimination, including an express anti-retaliation provision, thereby rebutting the claim that Congress must have intended to use the phrase "race, color, religion, sex, or national origin" as the textual equivalent of "retaliation." 570 U.S. at 357.

of unlawful employment practices." *Id.* (emphasis added). The Court thus 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 merely formal, but practical as well. As of 2013, the number of retaliation claims filed with the EEOC outstripped those for every type of status-based discrimination except race; 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? Worse, would the but-for standard give an employer the pretextual excuse every time, by allowing the employer to claim that there were reasons for the action other than her disability?

As Mayo correctly notes, *Nassar* highlights Congress's "structural choice" in including motivating-factor language in § 2000e-2 and applying it to status-based discrimination. But that "structural choice" applies likewise to the ADA, where Congress explicitly cross-references to Title VII, ("powers, remedies and procedures" available to a claimant "alleging discrimination on the basis of disability in violation of 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), *see* 42 U.S.C. § 12117(a), and in turn to claims "in which an individual proves a violation under section 2000e-2(m)," which explicitly adopts a motivating factor standard. *See* 42 U.S.C. § 2000e-5.

II. A PROPER TEXTUAL ANALYSIS OF THE ADA LEADS TO A DIFFERENT RESULT IN THIS CASE THAN IN *GROSS, NASSAR* AND NOW *COMCAST.*

Mayo on the one hand incorrectly asserts that the Petition "never engages with the textual analysis that this Court developed for discerning a statute's causation standard," (Opp.Br.21), and on the other hand disputes the textual analysis in the Petition (Opp.Br.23).

The Petition explains in detail that the operative language of Title 1 of the ADA must be read in light of the enforcement and remedies provisions of Title VII. The Petition further explains that Congress changed critical language of 42 U.S.C. § 12112(a) through the 2008 amendments, changing "because of the disability" to "on the basis of disability." 42 U.S.C. § 12112(a). 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.*

Mayo argues that the 2008 amendment did not alter "but-for causation." (Opp.Br.27). But the argument is directly controverted by the teachings of *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 589 U.S. ___, Sup. Ct. No. 18-1171, 2020 WL 1325816, at *6 (Mar. 23, 2020).[2] *Comcast* holds that under 42 U.S.C. § 1981 a plaintiff bears the burden of showing that his race was a but-for cause of the injury, and that burden remains constant over the life of the lawsuit. But this Court in *Comcast* specifically examined the impact of a Congressional decision whether to amend a statute. The Court pointed out that, in the Civil Rights Act of 1991, Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief. *Comcast,* 2020 WL 1325816, at *6. "[I]t's not as if Congress forgot about § 1981 when it adopted the Civil Rights Act of 1991. At the same time that it added the motivating factor test to Title VII, Congress also amended § 1981." But, "nowhere in its amendments to § 1981 did Congress so much as whisper about motivating factors." Significantly, "where, as here, Congress has simultaneously chosen to amend one statute in one way and a second statute in another way, we normally assume the differences in language imply differences in meaning." *Id.* (emphasis added)

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[2] Issued after the Petition and Opposition were filed.

Here, Congress did modify the relevant statutory language of the ADA, and, per the *Comcast* reasoning, would not have done so but for an intent that the change have substantive effect consistent with its intent to broaden the coverage of the ADA. *See* U.S. Congressional Record Proceedings and Debates of the 110th Congress 2nd Session, Vol. 154-part 10 (amendment "makes it absolutely clear that the ADA is intended to provide broad coverage to protect anyone who faces discrimination on the basis of disability."). *Gross* addresses 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; *Gross*, 557 U.S. at 167 (emphasis added). Similarly, while the term relied upon by *Nassar*—"because of"—appears in 42 U.S.C. § 12203 (anti-retaliation), it is notably absent from 42 U.S.C. § 12112 (status-based discrimination). The difference in words 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, intending 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, then why make the change? Congress's alteration of a statute must be treated as "real and substantial."

The lessons to be drawn from *Gross*, *Nassar,* and *Comcast* are therefore threefold: (1) statutory interpretation is an individualized inquiry; (2) in amending the statutory language in the ADA, but not in the other statutes, Congress did not intend "on the basis of disability" to mean the same thing as "because of the disability;" and (3) by expressly incorporating into the

ADA the powers, remedies, and procedures of § 2000e-5, which in turn links to 2000e-2(m), Congress declared that ADA plaintiffs are entitled to the remedies described therein, including relief from status-based discrimination on a showing of motivating factor causation.

CONCLUSION

The holdings in *Gross* and *Nassar* do not mandate the application of a "but-for" causation standard under the ADA; this Court should clarify the limits of *Gross* and *Nassar.*

Respectfully submitted,

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