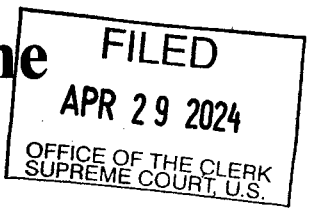
No. 23-10806

24-5069

In The Supreme Court of the United States



Phile Andra Watson

Petitioner,

v.

FedEx, Federal Express Corporation

Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 8, 2024

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 are 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?

2. Is the employer liable under ADA if there are multiple But-for reasons for an employee's termination and disability was one those reason?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

Phile Andra Watson
Pro Se
1402 Homestead Ln. Carrollton

Respondents and Defendants-Appellees Below

FedEx Express Corporation

LIST OF PROCEEDINGS

United States District Court for the Northern District of Texas

Case No. 322 cv-01738

Phile Andra Watson v. FedEx Express, Corporation

Date of Entry of Judgment: January 24, 2024

United States Court of Appeals for the Fifth Circuit Docket No. 23-10806 Phile Andra Watson v. FedEx Express profit corporation; Federal Express Date of Opinion: January 30, 2023. Date of Rehearing en Banc Denial: February 22, 2024 this opinion is unpublished as Phile Andra Watson v. FedEx

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDERS

REHEARING ORDERS

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

TABLE OF CONTENTS – Continued

Page

STATUTORY PROVISIONS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

page

TABLE OF AUTHORITIES—Continued

page

TABLE OF AUTHORITIES—Continued

STATUTES,

TABLE OF AUTHORITIES—Continued

page

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Phile Andra Watson petitions for a writ of certiorari to review the Opinion of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals, filed August 3, 2023 and published as *Phile Andra Watson v. FedEx Express (5th Cir.2024)*, is included below at App.1a. The Order of the United States District Court for the District of Northern District of Texas for Summary Judgment, filed June 24, 2023. The order granting an extension to file a Petition for Rehearing En Banc filed November 16, 2023 and the order denying the Petition for Rehearing En Banc filed January 30, 2024. Doc. 00517050280 Page1

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered February 22, 2024. On August 26, 2019, the U.S. Court of Appeals for the Fifth Circuit entered an Order extending the deadline for filing a Petition for Rehearing En Banc to February 22, 2024. A Petition for Rehearing En Banc was untimely filed on February 22, 2024. The Petition for Rehearing En Banc was denied /mandated on February 23, 2024. 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 or

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.

Footnotes: 42U.S.C § 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 . .

STATEMENT OF THE CASE FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

This case arise out of claims of workplace discrimination, Mental Illnesses Discrimination, ADA/ADAAA, Failure to Accommodate, and retaliation. Phile Andra Watson (petitioner) was a rehire with FedEx Express Corporation plus I served In the U.S. Army Ft. Hood, Texas form October 1981 - March 1986.

Watson (Petitioner) was rehired with FedEx Express from May 2017 – February 2020 as a Material Handler/ Ramp, where I worked alone side other Veterans. Watson (Petitioner) reported "veteran status harassment" from two different veterans to fear of my life. Daily I was experiencing harassment, intimidation threats where it affected my psychological well-being. Watson reported this to Human Resources and Management March 2019, alone with depression and a fear for his life. Watson followed all protocol, (Management, Human Resources), to get the harassment stopped including requested for FMLA/MLOA (Family Medical Leave Act /Medical Leave Of Absent).

April 2019 I was granted FLMA / LOA Medical Leave of Absent. May 2019, (Page Id. 500) Watson provided the proper Doctor notes regarding the treatments by my primary physician (Baylor Scott &

White),(Page Id.496) and psychiatrist (Prime Psychiatry See: (518-525), (Depression, anxiety, insomnia, disorders). On all doctors note gave a return to work date and I was walked off the job ordered by HCMP advisor, Myriam Rayne, 3 or 4 times because of being under psychotherapy/doctors care.

June 2019 Watson felt that it was a sham investigation and contact the Alert Line (Page ID.464-469) because of the continuance of harassment, nothing done, and pressure from HCMP advisor to end my medical or displaced, which caused more stress, anxiety and hospital visits resulted in affecting my Performance /attendance.

Foot notes: (HCMP) Human Capital Management advisor (is who takes over the FLMA program including attendance) all medical treatments and doctor's notes are emailed or hard copied. August 2019 and October 2019, HCMP first to receive the Doctor's notes regarding reasonable accommodation See: (Page Id.519 and 544).

December 2018, Watson Requested GFTP (Guaranteed fair Treatment Procedure),(FedEx Grievances process) because of performance reminder/ attendance. Attendances were (shift manager Alonzo Wiley), (senior manager Erik Miglan), (Human Resources Advisor Ed Harvey), (senior administration manager director oversee Human Resources Julie Hughes).

Julie Hughes was unaware of the reasons of performance reminder / attendance issues, failure of reasonable accommodation, and harassment. After discussion of attendance.

We move to doctor's note and harassment, she demands that Watson to receive two IEEO packages ASAP Veteran Status Harassment and Harassment by management see: Page Id. 630 and Julie Hughes asked about a transfer and there were nowhere to transfer me to accommodate the reasonable accommodation, (Depression, Anxiety, and Insomnia,) See: (Page Id. 519 and 544).

Therefore, Watson had to bid on a position within the department in a new job family Material Handler/ dockworker. Other than Material Handler/ Ramp. See: page (Id. 614 -615).

Page (Id. 616) is an example of job description of what matches for the job Watson applied for (RC221318), Material Handler/warehouse job family: Dockworker.

January 2020 Watson received and signed the **job offer** see: page (Id. 618-619). Watson was the most qualified out of three. They fail to reasonably accommodate, when the other two started working in the warehouse / dockworker position, Watson questioned Alonzo Wiley his start date and the continuance of harassment. Requested to file an IEEO complaint, (Management never provided the complaint).

January 12, 2020, After reporting to duty A.M. Shift too early I was sent home that morning by Alonzo Wiley and received a text from him later that evening "Change of Supervisor" to come in on my vacation day to start on an unknown P.M. shift that I was never on scheduled. He begin to threating my attendance if I don't report to the P.M shift on my vacation day and by him being reported for harassments, retaliation sexual harassment to IEEO an management had a P.M Shift manager (Jeff Klein) to go against company policy and my reasonable accommodation to have me placed on his shift the same day he had me to go home when I reported to work too early.

Warehouse/Ramp as shown above, is not the same as hired position was warehouse/ dockworker (RC221318).

January 14, 2020, Watson informed management how this is stressing him out and after released from the hospital from (recurrence) of medical treatment. (see: page Id. 506).

January 14 2020 **Suspended,** Watson requested a meeting with managers for attempting taking Watson's vacation day (January 13,2020),failure to reasonably accommodate, harassment retaliation, and not providing a grievance See: page (Id. 611). Watson was suspended instead by A.M Shift and Senior Managers Alonzo Wiley and Erik Miglan, who denied Watson IEEO complaint forms, retaliated by forcing Watson on and unknown evening P.M. shift other than the awarded position Watson was reasonably accommodated.

January 2018, A.M., P.M., and HCMP, management, and Human resources, collectively using the word "**evening**" lieu warehouse/ dockworker and yes both are evening with different times and job descriptions See; page Id. 617.

"I was sad; I was depressed, I was having nightmares sought treatment from a psychiatrist specializing in PTSD, anxiety, insomnia, and depression. As I began to struggle with some of the symptoms he previously experienced from depression and other military-service related conditions, HCMP Question the doctor's decision on meds and capabilities, letter was sent by Respondent and singed by the doctor notified Human Capital Management about the "Reasonable accommodation". That he would need to take medical leave under the Family Medical Leave

Medical Leave Act ("FMLA"),("MOLA") Human Capital Management (HCMP) violated Title VII American Disability Act 1967

II. DISTRICT COURT PROCEEDINGS

United States Magistrate Judge Robecca Rutherford dated June 26, 2023. The Court has made a De nov reviw of tose portion of the propsed Finding, Conclusions, and Recommendation to which objection were made the objection were overruled.

III. BASIS FOR FEDERAL JURISDICTION

Federal Courts are limited jurisdiction (limited power). Generally, only two types of cases can be heard in federal court: cases involving federal questions and cases involving diversity of citizenship of the parties. Under 28 U.S.C. ~ 1331, a case arising under the United States Constitution of the federal laws or treaties is a federal question case. Under 28 U.S.C. ~1332, a case in which in which a citizen of one state sues a citizen of another State or Nation and the amount at stake is more than 75,000.00 is a diversity of citizenship case.in a diversity of citizenship case, no defendant may be a citizen of he same state as any plaintiff.

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,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, and 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 8413 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 abut-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.

BUT-FOR NASSAR, THERE WOULD NOT BE A CAUSATION CONUNDRUM IN TITLE VII RETALIATION LITIGATION: HOW UNIVERSITY OF *TEXAS SOUTHWEST MEDICAL CENTER V. NASSAR* MAKES IT HARDER FOR EMPLOYEES TO PREVAIL

THE FIFTH 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.

Seyfarth Synopsis: The US Supreme Court has never directly decided and the federal courts of appeal have not reached a unanimous decision on whether the "but for" or "motivating factor" standard applies to retaliation claims under the Family and Medical Leave Act (FMLA). An interlocutory appeal recently taken from the federal court in the Western District of Texas may give the Fifth Circuit a chance to weigh-in directly

on this issue and provide clarity for litigants and the lower courts throughout Texas, Louisiana, and Mississippi.

The Sister Circuit, 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 at1105 (*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 even conflicting decisions within the same circuit. 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 9of 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 2000e2(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 expresses 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 (8thCir. 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, 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 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 hat 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 "on the basis of 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 thepowers, 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 W 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*." , 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] rational 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,s 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 Gross 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-G ross imposition of the but-for standard overruled Katz, asserting that the "motivating factor" language was only dictum and that "the loose language in *Katz i*s 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 ADA2 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, §

" 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 ADA must be construed broadly to effectuate its remedial purpose." *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.

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,

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