Cause for Concern or Cause for Celebration?: Did *Bostock v. Clayton County* Establish a New Mixed Motive Theory for Title VII Cases and Make It Easier for Plaintiffs to Prove Discrimination Claims?

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ABSTRACT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee "because of" race, color, religion, sex, or national origin. This seems simple enough, but if an employer makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason, i.e., if the employer acts with a mixed motive, has the employer acted "because of" the impermissible reason? According to *Gross v. FBL Financial Services, Inc.*[1] and *University of Texas Southwestern Medical Center v. Nassar*,[2] the answer is no. The Courts in *Gross* and *Nassar* held that proving that an employer acted "because of" an impermissible reason requires proving "but for" causation, which means proving that the employer acted "solely because of" an impermissible reason. A United States Senator who participated in the debates surrounding the enactment of Title VII said, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."

On June 15, 2020, the Supreme Court decided *Bostock v. Clayton County*[3] and held that an employer that terminates an employee because the employee is gay or transgender violates Title VII's prohibition against sex discrimination. But that is not all *Bostock*[4] did. At several points in the opinion, the Court held a Title VII plaintiff proves her employer acted "because of" an impermissible reason and proves "but for" causation even

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1. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

2. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).

3. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

4. *See, e.g.*, *id.* at 1739, 1741–46, 1748.

in cases where the employer acted with a mixed motive, so long as an impermissible reason was one of those motives, and the impermissible reason was decisive. *Bostock* thus departed from *Gross* and *Nassar* in its framing of what "but for" causation means in Title VII cases.

This Article posits that *Bostock* articulated a new mixed motive theory that allows a Title VII plaintiff to prove "but for" causation in cases where the employer acted partly for an impermissible reason and partly for a permissible reason so long as the impermissible reason was decisive. Under this view of *Bostock*, it is now easier for a plaintiff whose employer acted with a mixed motive to prove "but for" causation and receive the full panoply of Title VII remedies.

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INTRODUCTION

If an employer makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason, i.e., if the employer acts with a mixed motive, has the employer acted "because of" the impermissible reason? For example, if an employer declines to promote a female employee because she is abrasive and because she does not dress sufficiently "feminine," did the employer discriminate against the employee "because of sex"? In *Price Waterhouse v. Hopkins*, six

Justices on the Supreme Court of the United States said yes,[5] and in the Civil Rights Act of 1991 (1991 Act),[6] Congress codified this aspect of the *Price Waterhouse* holding. Under the 1991 Act, however, employers that prove they would have made the same decision had the impermissible reason played no role in the decision are liable, but not for damages, and they cannot be ordered to admit, reinstate, hire, promote, or pay the employee.[7]

In the aftermath the 1991 Act, a Title VII plaintiff has two ways to prove her employer violated the law: one, she can prove by a preponderance of the evidence that her employer made an adverse employment decision "because of" race, color, religion, sex, or national origin;[8] or two, she can prove by a preponderance of the evidence that her employer was motivated by "race, color, religion, sex, or national origin" in making an adverse employment decision.[9]

If a Title VII plaintiff proceeds under the theory that her employer discriminated "because of" an impermissible reason, she has to prove that the causal link between the employer's adverse employment decision and her injury is so close that her injury would not have occurred "but for" her employer's discriminatory motive,[10] and in *Gross v. FBL Financial Services, Inc.*[11] and *University of Texas Southwestern Medical Center v. Nassar*,[12] the Supreme Court effectively held that this requires proving that the employer acted solely because of an impermissible reason. This is very difficult to do as evidenced by this quote from United States Senator Clifford Philip Case, Jr., of New Jersey, who participated in the debates surrounding the enactment of Title VII: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[13]

If a Title VII plaintiff proceeds under the theory that her employer was motivated by an impermissible reason in making an adverse employment decision, she does not need to prove that her injury would not have occurred but for her employer's discriminatory motive. Rather, she only needs to prove that her employer's adverse employment decision was

5. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (Brennan, Marshall, Blackmun, and Stevens, JJ., plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring).

6. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m).

7. 42 U.S.C. § 2000e-5(g)(2)(B).

8. 42 U.S.C. § 2000e-2(a).

9. 42 U.S.C. § 2000e-2(m).

10. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343, 348 (2013).

11. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–78 (2009).

12. *Nassar*, 570 U.S. at 343.

13. 110 Cong. Rec. 13837 (1964) (statement of Sen. Clifford Philip Case, Jr.).

motivated by a discriminatory motive.[14] The Court describes this as a "lessened causation standard," which means a Title VII plaintiff can obtain some relief, albeit limited, if she proves that her employer acted partly for an impermissible reason and partly for a permissible reason and her employer proves that it would have made the same decision had the impermissible reason played no role at all.[15]

Because the relief available to a plaintiff who proceeds under a "motivating factor" theory is so limited, Title VII plaintiffs have an incentive to proceed under the "because of" theory. However, doing so means the plaintiff loses if the employer successfully demonstrates that it acted with a mixed motive rather than a single motive.[16]

Employers have incentives too. When a plaintiff alleges an employer made an adverse employment decision "because of" race, color, religion, sex, or national origin, the employer can defeat the plaintiff's claim by arguing other permissible reasons played a role too. Therefore, the impermissible reason was not a "but for" reason for the decision. If the employer succeeds in making this argument, the plaintiff who proceeded under the "because of" theory loses.

On June 15, 2020, the Supreme Court decided *Bostock v. Clayton County* and held that an employer that terminates an employee because the employee is gay or transgender violates Title VII's prohibition against sex discrimination.[17] But that is not all *Bostock* did. At several points in the opinion, the Court said a Title VII plaintiff proves her employer acted "because of" an impermissible reason even in cases where the employer acted with a mixed motive, so long as an impermissible reason was one of those motives, and the impermissible reason was decisive.[18] *Bostock* thus departed from *Gross v. FBL Financial Services, Inc.* and *University of Texas Southwestern Medical Center v. Nassar* in its framing of what but for causation means in Title VII cases and what a plaintiff proceeding under a because of theory has to prove.[19]

This Article posits that *Bostock* articulated a new mixed motive theory that allows Title VII plaintiffs to proceed under a "because of"

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14. *Nassar*, 570 U.S. at 343 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); *Price Waterhouse*, 490 U.S. at 259–60 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring); 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)).

15. *Nassar*, 570 U.S. at 343. A prevailing plaintiff in a mixed motive case can obtain declaratory relief, certain injunctive relief, and attorneys' fees and costs that are "directly attributable only to the pursuit of [the] [mixed motive] claim," however, her employer is not liable for damages, nor can it be ordered to admit, reinstate, hire, promote, or pay the plaintiff. 42 U.S.C. § 2000e-5(g)(2)(B).

16. *Compare* 42 U.S.C. § 2000e-2(m), *with* 42 U.S.C. § 2000e-5(g)(2)(B).

17. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

18. *See, e.g.*, *id.* at 1739, 1741, 1744–46, 1748.

19. *Compare id.* at 1739, 1741, 1744-1746, 1748, *with* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–78 (2009), *with Nassar*, 570 U.S. at 348–50.

theory in cases where the employer acted partly for an impermissible reason and partly for a permissible reason so long as the impermissible reason was decisive.[20] If this understanding of *Bostock* is correct, two mixed motive theories are now available under Title VII: one where the impermissible motive was decisive, in which case the plaintiff can prove "but for" causation and is eligible for the full panoply of Title VII remedies,[21] and one where the impermissible motive was not decisive, in which case the plaintiff cannot prove "but for" causation, but is eligible for a limited form of declaratory and injunctive relief.[22] Under this view of *Bostock*, it is now easier for a plaintiff whose employer acted with a

20. *See generally Bostock*, 140 S. Ct. at 1731. For other articles discussing *Bostock* and its causation analysis, see Hillel J. Bavli, *Causation in Civil Rights Legislation*, 73 ALA. L. REV. 159 (2021) (examining the causation standard in antidiscrimination law and proposing legislation); Hillel J. Bavli, *Cause and Effect in Antidiscrimination Law*, 106 IOWA L. REV. 483 (2021) (examining the meaning of causation in antidiscrimination law, particularly in mixed-motive cases); Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879 (2019) (examining the meaning of but for causation, discussing causation in mixed-motive cases, and proposing a causation standard that is consistent with but for causation); William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419 (2021) (identifying "two persistent problems [in employment discrimination law]: asymmetry regarding the applicable causation standard and the closely related issue of uncertainty regarding applicable proof frameworks[,]" and proposing amendments to the Protecting Older Workers Against Discrimination Act "that would present Congress with a law that repairs much of the asymmetry and uncertainty in employment discrimination law."); Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731 (2020) (asserting that "Title VII['s] causation doctrine [is] fraught with conceptual error and is statutorily inadequate [because] [t]reating 'sex' as a binary, fixed, and homogenous classification misapprehends both actual sex and what an aggrieved worker may articulate and ultimately prove." The author proposes the use of "multiaxial analysis," which is "a framework with which judges and stakeholders identify the role of Title VII's protected traits as socially constructed along four axes: the aggrieved individual's self-identification, the defendant-employer, society, and the state." Multiaxial analysis "has the potential to give fuller effect to Title VII's provisions and purposes as compared to sex-stereotyping theory or the Court's reformulated 'but-for causation.'"); Paul W. Mollica, *What's on the Secret Title VII Menu?: Proving "Motivating Factor" and "Same Action" Under the 1991 Civil Rights Act*, 35 A.B.A. J. LAB & EMP. L. 53 (2020) (encouraging more litigants to use Title VII's motivating-factor theory notwithstanding the limited relief available under that theory); Robert G. Schwemm, *Fair Housing and the Causation Standard After* Comcast, 66 VILL. L. REV. 63 (2021) (detailing how *Comcast*'s "but for" causation standard applies in cases filed under the 1968 Fair Housing Act); Sandra Sperino, Comcast *and* Bostock *Offer Clarity on Causation Standard*, 46 HUM. RTS. 24, 24–25 (2021) (*Bostock* "put . . . to rest" the notion that "but for" cause means "sole cause" or that "an outcome [can] only have one 'but for' cause."); Sandra Sperino, *The Emerging Statutory Proximate Cause Doctrine*, 99 NEB. L. REV. 285 (2020) (reviewing of "all of the discrimination cases invoking proximate cause [since 2011] and [an exposé of] the chaotic, emerging statutory proximate cause doctrine."); Kayla King, Comment, *Tenth Circuit Ruled in Favor of Sex-Plus Age Claims of Discrimination Under Title VII in the Wake of* Bostock v. Clayton County, 62 B.C. L. REV. E-SUPPLEMENT II 185 (2021) (touting the United States Court of Appeals for the Tenth Circuit's recognition of a Title VII claim based on sex and age and positing that doing so is "sound policy and logically follows [*Bostock*]").

21. *See Bostock*, 140 S. Ct. at 1739.

22. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

mixed motive to prove "but for" causation and receive the full panoply of Title VII remedies.[23]

This Article is divided into two parts. Part I analyzes and discusses the development of the Supreme Court's causation doctrine under Title

23. There are a number of judicial decisions that can be read to support this view. Nathan v. Great Lakes Water Auth., 992 F.3d 557, 567 (6th Cir. 2021) (district court dismissing a Title VII sexual harassment claim because the harassers harassed the plaintiff because of her sex and her size. The Sixth Circuit reversed based on *Bostock*'s language that "[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."). *But see* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (declining to apply *Bostock*'s but for causation standard to Age Discrimination in Employment Act of 1967 (ADEA) cases and applying *Gross*'s but for causation standard instead); Starnes v. Butler Cnty. Ct. of Common Pleas, 50th Jud. Dist., 971 F.3d 416, 426-427 (3d Cir. 2020) (affirming a district court's denial of qualified immunity for sexual harassment claim and citing *Bostock* for the proposition that "[a]n employer violates Title VII if the employee's sex was one but-for cause of her disparate treatment"); Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–49 (10th Cir. 2020) (holding that a sex-plus-age claim is cognizable under Title VII even though age is not a prohibited basis for an employment decision under Title VII. The Court based its holding on *Bostock*'s language that "so long as sex plays a role in the employment action, it 'has no significance' that a factor other than sex 'might also be at work,' even if that other factor 'play[s] a more important role [than sex] in the employer's decision."); Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 550–52 (9th Cir. 2020) (after the district court dismissed the plaintiff's ADEA and Title VII retaliation claims, the Ninth Circuit reversed and held that under *Bostock*, a plaintiff "need only show that his protected activity 'was *one* but-for cause of [the adverse employment] decision'"); Myers v. IHC Constr. Cos., No. 18-cv-4887, 2021 WL 1172740, at *8–11 (N.D. Ill. Mar. 29, 2021) (citing *Bostock* and *Comcast*, the district court denied a defendant's motion for summary judgment in a 42 U.S.C. § 1981 case, finding that a plaintiff can satisfy his or her burden to prove "but for" causation in a § 1981 case by proving that his or her race was one "but for" cause of the adverse decision); Flores v. Va. Dep't of Corr., No. 5:20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) (citing *Bostock*, the district court denied a defendant's motion to dismiss a Title VII disparate treatment sex-discrimination claim, finding that under Title VII, "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision[, and] [s]o long as the plaintiff's sex was *one* but-for cause of that decision, that is enough to trigger the law"); Hill v. Big Horn Elementary Sch. Dist. 2 (Arrow Creek Elementary Sch. Dist.), No. CV 20-42-BLG-SPW-TJC, 2021 WL 835524, at *5–6 (D. Mont. Feb. 16, 2021) (citing *Bostock* and *Comcast*, the district court denied a defendant's motion to dismiss the plaintiff's 42 U.S.C. § 1981 claims, finding that a plaintiff can satisfy his or her burden to prove "but for" causation in a § 1981 case by proving that his or her race was one "but for" cause of the adverse decision); Keller v. Hyundai Motor Mfg., No. 2:19cv207-MHT, 2021 WL 190904, at *4 (M.D. Ala. Jan. 19, 2021) (citing *Bostock*, the district court rejected the defendant's argument that in an ADEA case, "'an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was any other proscribed motive involved'." The court held that proving "but for" causation under the ADEA does not require proving that age was "the sole cause of the [adverse] employment action"); Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 1195, 1201–05 (S.D. Ind. 2020) (defendant arguing that Title VII's religious exemption provision, 42 U.S.C. § 2000e-1(a), allowed it to decline to renew the employment contract of a gay woman who was married to a woman. The defendant asserted that the plaintiff's marriage violated her employment contract and contravened the teaching of the Catholic Church. The district court denied the defendant's motion to dismiss the plaintiff's sex discrimination claim, finding that under *Bostock*, discrimination against person for being gay is sex discrimination, and so long as sex is a decisive reason for taking an adverse employment action against an employee, the employer violates Title VII, even if other factors, such a religion, played a role in the decision.).

VII, the Age Discrimination in Employment Act of 1967 (ADEA), and 42 U.S.C. § 1981. Part II discusses how *Bostock* departed from the Court's previous pronouncements on what "but for" causation means and how that departure resulted in a new mixed motive theory that makes it easier for a plaintiff whose employer acted with a mixed motive to prove "but for" causation and receive the full panoply of Title VII remedies.

I. WHAT IT MEANS UNDER TITLE VII TO DISCRIMINATE "BECAUSE OF" RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

What does it mean under Title VII[24] to discriminate against an employee "because of" race, color, religion, sex, or national origin?[25] What does it mean to make an adverse employment decision "motivated by" an impermissible reason?[26] And how does one prove that "but for" an impermissible reason, an employer would not have made an adverse employment decision? In order gain a fuller understanding of the meaning and application of Title VII's "because of" and "motivating factor" theories, as well as how one proves "but for" causation under Title VII, one should start with *Price Waterhouse v. Hopkins*, a case the Supreme Court of the United States decided on May 1, 1989.[27]

A. Price Waterhouse v. Hopkins *Establishes the Mixed Motive Theory Under Title VII and an Employer Affirmative Defense.*

Ann Hopkins served as a senior manager for Price Waterhouse, a national professional accounting partnership. In 1982, partners in the Washington D.C. office where she worked proposed her as a candidate for the partnership.[28] At that time, 7 of Price Waterhouse's 662 partners were women, and of the eighty-eight candidates proposed for partnership that year, Ms. Hopkins was the only woman.[29]

Thirty-two partners weighed in on Ms. Hopkins's partnership candidacy.[30] Thirteen supported her candidacy, three recommended that it be placed on hold, eight did not have an informed opinion about her, and eight recommended that she not be admitted into the partnership.[31]

The partners described her as "an outstanding professional" with a "deft touch," and "strong character, independence, and integrity."[32] Her

24. *See generally* 42 U.S.C. §§ 2000e–2000e-17.
25. *See* 42 U.S.C. § 2000e-2(a).
26. *See* 42 U.S.C. § 2000e-2(m).
27. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
28. *Id.* at 231–33.
29. *Id.* at 233.
30. *Id.*
31. *Id.*
32. *Id.* at 234.

clients thought likewise.[33] However, not every assessment of her was positive.[34] Prior to her partnership candidacy, the partners who evaluated her work advised her to improve her relations with staff members, some of whom found her abrasive and brusque.[35]

Nearly all of the negative comments the partners made about her in connection with her partnership candidacy centered on how she interacted with people, which some described as "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[36] Some partners, however, couched their critiques of Ms. Hopkins in gendered terms.[37] One described her as "macho"; another intimated that she "overcompensated for being a woman"; and another recommended that she enroll in "a course at a charm school."[38]

A number of partners criticized Ms. Hopkins's use of profanity, which prompted another partner to suggest that her use of profanity was objectionable only "because it's a lady using foul language."[39] A partner who supported her partnership candidacy described her as someone who "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate."[40]

Forty-seven of the eighty-eight candidates proposed for partnership the same year as Ms. Hopkins were admitted to the partnership, twenty-one were rejected, and twenty, including Ms. Hopkins, were held over to be reconsidered the next year.[41] Thomas Beyer served as Ms. Hopkins's mentor at Price Waterhouse.[42] He informed her that her chances for being admitted to the partnership would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[43]

Although her partnership candidacy had been put on hold for a year, before that year lapsed, two of the partners who supported Ms. Hopkins's candidacy withdrew their support, and Price Waterhouse informed her that

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 234–35. The thirteen partners who supported her partnership candidacy also made negative comments about how she interacted with people. *Id.*

37. *Id.* at 235.

38. *Id.*

39. *Id.* at 235.

40. *Id.*

41. *Id.* at 233.

42. Emily Bazelon, *Ann Hopkins: The Accountant Who Struck a Blow Against Gender Stereotyping*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2018/12/27/magazine/lives-they-lived-ann-hopkins.html [https://perma.cc/9Z2B-9DFD].

43. *Price Waterhouse*, 490 U.S. at 235.

it would not reconsider her candidacy.[44] After hearing this, Ms. Hopkins resigned and sued Price Waterhouse in the United States District Court for the District of Columbia for sex discrimination under Title VII of the Civil Rights Act of 1964.[45]

After a five day trial,[46] the district court found Price Waterhouse's consideration of Ms. Hopkins's interpersonal skills in its partnership decisions were legitimate and genuine.[47] It also found some of the partners' comments about her reflected "an impermissibly cabined view of the proper behavior of women . . . Price Waterhouse . . . [did] nothing to disavow reliance on such comments,"[48] and Price Waterhouse "consciously [gave] credence and effect to partners' comments that resulted from sex stereotyping."[49]

The court held Price Waterhouse could avoid liability for equitable relief, but not legal relief, if it could prove by clear and convincing evidence that it would have made the same decision to put Ms. Hopkins's partnership candidacy on hold even if sex discrimination had played no role its decision making process.[50] Price Waterhouse did not make this showing; therefore, the court found it liable for discriminating on the basis of sex against Ms. Hopkins by permitting stereotypical views about women to play a role in its decision not to admit her into the partnership.[51]

The court determined that Ms. Hopkins was entitled to back pay from the date she should have been admitted to the partnership until the date she resigned but found that she failed to present evidence as to the amount of compensation she was due. Therefore, she could not recover any damages except attorneys' fees.[52] The court also found that she failed to establish that she had been constructively discharged following Price Waterhouse's announcement that it would not reconsider her partnership candidacy. Therefore, the court did not award her back pay for the time period following her resignation, nor did it order Price Waterhouse to admit her into the partnership.[53] Ms. Hopkins and Price Waterhouse both appealed to the United States Court of Appeals for the District of Columbia Circuit.[54]

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44. *Id.* at 233 n.1.

45. *Id.* at 231–32, 233 n.1; Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1111 (D.D.C. 1985).

46. Hopkins v. Price Waterhouse, 825 F.2d 458, 461 (D.C. Cir. 1987).

47. *Hopkins*, 618 F. Supp. at 1113–14.

48. *Price Waterhouse*, 490 U.S. at 236–37.

49. *Id.* at 237.

50. *Id.*; *Hopkins*, 618 F. Supp. at 1120–21.

51. *Price Waterhouse*, 490 U.S. at 237; *Hopkins*, 825 F.2d at 463–64; *Hopkins*, 618 F. Supp. at 1120.

52. *Hopkins*, 825 F.2d at 463–64.

53. *Id.*

54. *Id.* at 465.

The circuit court agreed with the district court that Price Waterhouse illegally discriminated against Ms. Hopkins on the basis of sex.[55] The court disagreed, however, with the district court's finding that Price Waterhouse did not constructively discharge her, and it disagreed with the district court's finding that she was not entitled to back pay. Therefore, it reversed the district court on those issues and remanded the case with instructions to award her full relief.[56]

The circuit court also disagreed with the district court's finding that Price Waterhouse could avoid liability for equitable relief, but not legal relief, if it could prove by clear and convincing evidence that it would have made the same decision to put Ms. Hopkins's partnership candidacy on hold even if sex discrimination had played no role its decision making process.[57] Instead, according to the circuit court, if an employer proves by clear and convincing evidence that it would have made the same decision even if an impermissible consideration had played no role in the decision, it is not liable at all.[58]

Under the circuit court's approach, if a Title VII plaintiff proves that an employer acted with a mixed motive in its employment decision, the employer has a complete defense to the plaintiff's claim if it proves by clear and convincing evidence that it would have made the same decision even if the impermissible motive had played no role in the decision making process.[59] Under the district court's approach, if a plaintiff proves that an employer acted with mixed motive in its employment decision, if the employer proves by clear and convincing evidence that it would have made the same decision even if the impermissible motive had played no role in the decision making process, the employer is liable for legal relief, but not equitable relief.[60]

When the circuit court decided *Hopkins v. Price Waterhouse*, other United States circuit courts were divided on the question of whether an employer is liable pursuant to Title VII under a mixed motive theory and if the employer would have made the same decision had the impermissible reason had played no role in the decision.[61] The Supreme Court of the

55. *Price Waterhouse*, 490 U.S. at 237; *Hopkins*, 825 F.2d at 465–68.

56. *Hopkins*, 825 F.2d at 472–73.

57. *Id.* at 470–71.

58. *Id.*

59. *See id.*

60. *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985).

61. The United States Courts of Appeals for the Third, Fourth, Fifth, and Seventh Circuits held that if a plaintiff proves that an employer based an adverse employment decision on an impermissible reason and a permissible reason, in order for that plaintiff to prevail, he or she has to prove that "but for" the impermissible reason, the employer would not have made the adverse decision. Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365–66 (4th Cir. 1985); Peters v. City of Shreveport, 818 F.2d 1148, 1161 (5th Cir. 1987);

United States granted Price Waterhouse's petition for a writ of certiorari to resolve the circuit split regarding the plaintiff's and the defendant's burden of proof in a Title VII case when the evidence shows that the defendant made an adverse employment decision based on an impermissible reason and a permissible reason, i.e., the employer acted with a mixed motive.[62]

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."[63] The law also makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way [that] would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin."[64]

In *Price Waterhouse v. Hopkins*, the Supreme Court endeavored to resolve the precise meaning of what it means to discriminate against a person "because of" that person's race, color, religion, sex, or national origin.[65] First, the Court held it is erroneous to interpret the phrase "because of" to require proof of "but for causation" in cases where a Title VII plaintiff proves that an employer acted with a mixed motive.[66] The

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McQuillen v. Wis. Educ. Ass'n Council, 830 F.2d 659, 664–65 (7th Cir. 1987). The United States Courts of Appeals for the First, Second, Sixth, and Eleventh Circuits held that if a plaintiff proves that an employer based an adverse employment decision on an impermissible reason and a permissible reason and proves that the impermissible reason played a substantial or motivating role in the decision, the plaintiff prevails unless the employer proves it would have made the same decision even if the impermissible reason had not played a role in the decision. Fields v. Clark Univ., 817 F.2d 931, 936–37 (1st Cir. 1987); Berl v. County of Westchester, 849 F.2d 712, 714–15 (2d Cir. 1988); Terbovitz v. Fiscal Ct. of Adair Cnty., 825 F.2d 111, 116 (6th Cir. 1987); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983). In *Hopkins v. Price Waterhouse*, the United States Court of Appeals for the District of Columbia Circuit followed the same rule, except it required the employer to prove it would have made the same decision by clear and convincing evidence in order to avoid liability. *Hopkins*, 825 F.2d at 470–71. The United States Court of Appeals for the Ninth Circuit held that if a plaintiff proves that an impermissible reason played a part in an adverse employment decision, the plaintiff prevails; however, the employer can avoid a reinstatement order and liability for back pay if it proves by clear and convincing evidence it would have made the same decision had the impermissible reason not played a role in the decision. Fadhl v. City & Cnty. of S.F., 741 F.2d 1163, 1165–66 (9th Cir. 1984). The United States Court of Appeals for the Eighth Circuit followed the same rule, except it required the employer to prove it would have made the same decision by a preponderance of the evidence. Bibbs v. Block, 778 F.2d 1318, 1320–24 (8th Cir. 1985) (en banc).

62. Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989).

63. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

64. 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

65. *Price Waterhouse*, 490 U.S. at 239–58.

66. *Id.* at 240–42. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976), the Court held that when a Title VII plaintiff attempts to demonstrate an employer's reason for an

Court held that in determining whether a particular factor is a "but for" cause of an event, one begins by assuming that that particular factor existed at the time of the event, and then one asks whether that event would have occurred in the same way it did if that particular factor did not exist.[67]

According to the Court, in a Title VII mixed motive case, the critical inquiry is whether an impermissible motive played a role in an adverse employment decision at the moment the employer made the decision.[68] Additionally, the Court pointed out that during the congressional debates surrounding the enactment of Title VII, the United States House of Representatives and the United States Senate both rejected a proposed amendment that would have placed the word "solely" before the phrase "because of."[69] The way the Court saw it, if at the time employer makes an adverse employment decision, it does so based on an impermissible reason and a permissible reason, that decision is "because of" both the impermissible reason and the permissible reason, even if it later turns out that the employer would have made the same decision had the impermissible reason played no role in the decision.[70]

The Court did not think Congress's use of the phrase "because of" meant that a Title VII plaintiff is required to identify the precise causal role impermissible factors and permissible factors played in an employer's

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adverse employment decision is pretextual, the plaintiff is required to do no more than show that an impermissible reason was a but for cause of the decision. *Price Waterhouse* distinguished *McDonald* by saying that the statement in *McDonald* that "no more is required to be shown than that race was a 'but for' cause" does not mean a plaintiff *must* prove but for causation; rather, the statement means that if a plaintiff does prove but for causation, the plaintiff prevails. *Price Waterhouse*, 490 U.S. at 240 n.6. *Price Waterhouse* further distinguished *McDonald* by saying *McDonald* involved an employer making an adverse employment decision solely because of race, which made that case a single motive case rather than a mixed motive case like *Price Waterhouse*. *Id.*

67. *Price Waterhouse*, 490 U.S. at 240–41.

68. *Id.*

69. *Id.* at 241 n.7. Representative John Vernard Dowdy of Texas offered the amendment in the United States House of Representatives. 110 CONG. REC. 2728 (1964). The House rejected the amendment on February 10, 1964. Senator John Little McClellan of Arkansas offered the amendment in the United States Senate. 110 CONG. REC. 13837 (1964). The Senate rejected the amendment on June 15, 1964. 110 CONG. REC. 13837–38 (1964). Senator Clifford Philip Case, Jr., of New Jersey said changing the language from "because of" to "solely because of" would "render [T]itle VII totally nugatory." 110 Cong. Rec. 13837 (1964) (statement of Sen. Clifford Philip Case, Jr.). He said, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." *Id.* He further explained that "this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless." *Id.* Senator Warren Grant Magnuson of Washington echoed those concerns. *Id.* He stated that "a legal interpretation or a court interpretation of the word 'solely' would so limit this section as probably to negate the entire purpose of what we are trying to do." *Id.* Ultimately, the Senate rejected Senator McClellan's amendment by a vote of thirty-nine in favor, fifty against, and eleven not voting. 110 CONG. REC. 13838 (1964).

70. *Price Waterhouse*, 490 U.S. at 241.

adverse employment decision.[71] Instead, the Court found Congress required a Title VII plaintiff to prove that an employer relied on an impermissible factor in the decision, period.[72] On the other hand, the Court held reliance on an impermissible factor does not end the inquiry.[73] The Court held if a plaintiff does prove that the employer relied on an impermissible factor in making an adverse employment decision, the employer must prove by a preponderance of the evidence that it would have made the same decision had the impermissible factor played no role in the decision; otherwise, it faces Title VII liability.[74] The Court described this as an affirmative defense that is available to an employer if a plaintiff carries his or her burden of persuasion on the question of whether an impermissible factor played a role in the employer's adverse employment decision.[75] If the plaintiff carries his or her burden of persuasion on this question and the employer does not prove by a preponderance of the evidence that it would have made the same decision in the absence of the impermissible factor, the Court held a factfinder is entitled to conclude that the impermissible factor made a difference in the decision.[76]

The Court further held that if an employer makes an adverse employment decision based on a mixed motive, i.e., a decision based on an impermissible reason and a permissible reason, it does not make "sense to ask whether the legitimate reason was *the* true reason for the decision."[77] On the other hand, the Court found if a Title VII plaintiff does not prove by a preponderance of the evidence that an employer relied on an impermissible reason in making an adverse employment decision, he or she can only prevail by proving the employer's articulated reason for the decision is pretextual.[78]

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71. *Id.*

72. *Id.* at 241–42.

73. *See id.* at 242.

74. *Id.*

75. *Id.* at 246.

76. *Id.* at 246 n.11.

77. *Id.* at 247.

78. *Id.* at 247 n.12. One can read this part of the Court's opinion as establishing two kinds of Title VII cases: pretext cases and mixed motive cases. *Id.* In the first step of a pretext case, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–53 (1981). For example, the plaintiff must prove she applied for an available position, she was qualified for that position, and the employer rejected her application under circumstances that raise an inference of illegal discrimination. *Id.* at 253 n.6. The prima facie case raises an inference of illegal discrimination because one presumes the rejection of the plaintiff's application is more likely than not based on impermissible factors. *Id.* at 254 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). This presumption, however, can be rebutted. *Id.* 254 n.7. The employer can rebut this presumption by articulating a legitimate, non-discriminatory reason for its decision. *Id.* at 254. This is a burden of production, not a burden of persuasion. *Id.* at 254–56. If the defendant carries this burden, the plaintiff is then required to prove that the reasons offered by the employer are pretextual. *Id.* at 256. The plaintiff can prove pretext by

To support its ruling, the Court reasoned it did not "traverse new ground."[79] In *Mt. Healthy City School District Board of Education v. Doyle*, the Court held once a plaintiff proves that an impermissible factor was a substantial factor or a motivating factor in an employer's adverse employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision had the impermissible factor not been a substantial factor or a motivating factor in the decision.[80]

The Court in *Price Waterhouse* read *Mt. Healthy* to mean that a plaintiff who proves that an impermissible reason was a substantial factor or a motivating factor in an employer's adverse employment decision likewise proves that the impermissible reason was a "but for" cause of the decision if the employer does not prove that it would have made the same decision in the absence of the impermissible reason.[81] When the *Price Waterhouse* Court held that an impermissible factor was a motivating factor in an employer's adverse employment decision, the Court meant that if one asked the employer at the time it made the decision what its reasons were for making the decision and it answered truthfully, it would say one of those reasons was an impermissible one.[82] And in Ms. Hopkins's case, if Price Waterhouse acted on the belief that a woman cannot be aggressive or she must not be aggressive, it acted on the basis of a sex stereotype, which means it acted because of sex.[83]

The Court held an employer can assert this affirmative defense by producing some objective evidence that it would have made the same employment decision had the impermissible motive played no role in that decision.[84] However, the employer cannot prevail in a mixed motive case

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direct or indirect evidence of discrimination. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973)). *Price Waterhouse* is, of course, a mixed motive case. 490 U.S. at 239–58.

79. *Price Waterhouse*, 490 U.S. at 248.

80. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

81. *Price Waterhouse*, 490 U.S. at 249 (first citing Hunter v. Underwood, 471 U.S. 222, 228 (1985); then citing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979); and then citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71, 271 n.21 (1977)). The Court also cited *NLRB v. Transportation Management Corp.* for the proposition that once an employer proves his or her employer made an adverse employment decision partly for an impermissible reason, the burden shifted to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of the impermissible reason. *Price Waterhouse*, 490 U.S. at 250–51 (citing NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983)).

82. *Price Waterhouse*, 490 U.S. at 250.

83. *Id.* The Court went on to say that "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they [match] the stereotype associated with their group." *Id.* at 251. When Congress enacted Title VII, it intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

84. *Id.* at 252.

simply by asserting that a permissible reason informed its decision if, at the time it made the decision, the permissible reason did not actually motivate it to make the decision.[85] Likewise, the employer cannot prevail by only offering proof that when it made the adverse employment decision, it did so in part for a permissible reason.[86] Instead, the employer must prove that the permissible reason by itself would have led to the same decision.[87]

The Supreme Court in *Price Waterhouse* reversed the district and circuit courts' rulings that an employer has to prove by clear and convincing evidence that it would have made the same decision in the absence of the impermissible reason.[88] It did so because Title VII cases are civil cases subject to the same rules of civil litigation that apply in other civil cases, and those rules include proof by a preponderance of the evidence rather than proof by clear and convincing evidence.[89] At bottom, the *Price Waterhouse* Court held that when a Title VII plaintiff proves his or her employer made an adverse employment decision motivated partly by an impermissible reason and partly by a permissible reason, the employer is liable unless it proves by a preponderance of the evidence that it would have made the same decision had the impermissible reason not played a role at all.[90]

However, the decision was not unanimous.[91] Justice William Brennan wrote a four-Justice plurality opinion joined by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens.[92] Justice Byron White wrote a concurrence only for himself,[93] as did Justice Sandra Day O'Connor.[94] Justice Anthony Kennedy wrote a dissent joined by Chief Justice William Rehnquist and Justice Antonin Scalia.[95]

The way Justice White saw the case, *Mt. Healthy City School District Board of Education v. Doyle*[96] outlined the proper approach to causation in a mixed motive employment discrimination case.[97] *Mt. Healthy* rejected a requirement that the plaintiff in a mixed motive case prove an impermissible factor was the sole reason the employer made an adverse

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 252–53.
89. *Id.*
90. *Id.* at 258.
91. *Id.* at 231, 258, 261, 279.
92. *See generally id.* at 231–58 (Brennan, Marshall, Blackmun, & Stevens, JJ., plurality opinion).
93. *See generally id.* at 258–61 (White, J., concurring).
94. *See generally id.* at 261–79 (O'Connor, J., concurring).
95. *See generally id.* at 279–95 (Kennedy, J., joined by Rehnquist, C.J., & Scalia, J., dissenting).
96. Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
97. *Price Waterhouse*, 490 U.S. at 258–59 (White, J., concurring).

employment decision.[98] Instead, the employee has to show that an impermissible factor was a motivating factor in the decision; if he or she makes that showing, the employer must show by a preponderance of the evidence that it would have made the same decision had the impermissible factor played no role at all.[99] As far as Justice White was concerned, because *Mt. Healthy* answered how a plaintiff has to prove causation in a mixed motive case, it was not necessary to get into a discussion of whether what *Mt. Healthy* held should be described as "but-for" causation or an affirmative defense.[100]

The district court found in Ms. Hopkins's case that Price Waterhouse made an adverse employment decision partly for permissible reasons and partly for impermissible reasons, which is the same finding the district court made in *Mt. Healthy*.[101] And just like the Court held in *Mt. Healthy* with respect to the plaintiff's burden of proof, the *Price Waterhouse* Court held that Ms. Hopkins did not have to prove that the impermissible reasons were "the only, principal, or true reason[s] for [Price Waterhouse's] [decision.]"[102] Instead, Ms. Hopkins had to show that an impermissible reason was a *substantial* factor in Price Waterhouse's decision to not admit her into the partnership.[103]

Justice White agreed with the plurality that Ms. Hopkins proved Price Waterhouse made the decision to not admit her into the partnership partly for impermissible reasons. He also agreed with the plurality that by having proved that, the burden of persuasion shifted to Price Waterhouse to prove by a preponderance of the evidence that had the impermissible reasons not played any role in its decision, it still would not have admitted Ms. Hopkins into the partnership.[104] He agreed with the plurality that its approach to causation in *Price Waterhouse* did not depart from or modify *Texas Department of Community Affairs v. Burdine*[105] or *McDonnell Douglas Corp. v. Green*.[106]

Burdine and *McDonnell Douglas* are pretext cases, and in such cases, the focus is on whether the impermissible reason or the permissible reason, but not both, is the true reason the employer made an adverse employment

98. *Mt. Healthy*, 429 U.S. at 285.
99. *Id.* at 287.
100. *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 259–60.
105. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248 (1981).
106. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

decision.[107] However, in mixed motive cases, an employer makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason, and the focus is on whether the impermissible reason was a substantial factor or a motivating factor in the decision.[108]

Justice White agreed with the plurality that the employer has to prove by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role. However, he read the plurality to require in most cases the employer adduce objective evidence that it would have made the same decision in the absence of the impermissible reason; on this point, he disagreed with the plurality.[109] In his view, in a mixed motive case, if a permissible reason provided ample grounds for the employer's adverse employment decision, and the employer testifies credibly that it would have made the same decision based solely on that permissible reason, that would satisfy the employer's burden of proof.[110]

Curiously, Justice White suggested that if the employer denies the allegation that it acted with an impermissible motive, but the factfinder finds that it acted with an impermissible motive and a permissible motive, the employer would not be liable under Title VII.[111] Justice Brennan found this suggestion "baffling."[112] Except for this "baffling" suggestion by Justice White, it is hard to detect any other difference in how Justice White would have decided this case from how the plurality decided the case.[113]

Justice O'Connor agreed with the plurality that because Ms. Hopkins proved that Price Waterhouse declined to admit her into the partnership partly because of sex stereotyping, a burden of persuasion shifted to Price Waterhouse to prove by a preponderance of the evidence that it would still have declined to admit Ms. Hopkins into the partnership had sex stereotyping played no role at all in its decision.[114] She further agreed with

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107. *See Price Waterhouse*, 490 U.S. at 260 (White, J., concurring) (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 n.5 (1983)).

108. *Id.* at 260 (White, J., concurring); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 n.2 (1977) (emphases added) ("[T]he burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a '*substantial factor*' or to put it in other words, that it was a '*motivating factor*' in the [employer's] decision not to rehire him . . . [H]aving carried that burden, . . . the [d]istrict [c]ourt should have gone on to determine whether the [employer] had shown by a preponderance of the evidence that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct.").

109. *Price Waterhouse*, 490 U.S. at 261 (White, J., concurring).

110. *Id.*

111. *Id.*

112. *Id.* at 252 n.14 (plurality opinion).

113. *Compare id.* at 239–42, 244–53, 258 (plurality opinion), *with id.* at 258–61 (White, J., concurring).

114. *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring).

the plurality that if an employer carries this burden, that is a complete defense to Title VII liability.[115] However, she disagreed with the plurality regarding how a Title VII plaintiff is required to prove causation, and she disagreed with the plurality and Justice White's characterization that the causation framework the Court announced was not a departure from *Texas Department of Community Affairs v. Burdine*[116] or *McDonnell Douglas Corp. v. Green*.[117] She viewed that departure, however, as justified in mixed motive cases.[118]

On the issue of proof of causation, in her view, Title VII's plain language suggests that the plaintiff must prove an impermissible reason is the "but-for" cause of an employer's adverse employment decision.[119] She did not think a Title VII plaintiff should be required to prove that any single factor played a definitive role in an employer's adverse employment decision, particularly in professional settings where decisions get made by collegial bodies employing largely subjective criteria.[120] To do so, she said, "may be tantamount to declaring Title VII inapplicable to such decisions."[121]

She said the plurality read the causation requirement out of Title VII and replaced it with an affirmative defense when it said that once a plaintiff proves that an employer made an adverse employment decision partly based on an impermissible reason, the burden of persuasion shifts to the employer to prove that it would have made the same decision even if the impermissible reason had played no role in the decision.[122] In her view, the burden of persuasion should not shift to the defendant unless the plaintiff proves by direct evidence that an impermissible reason was a substantial factor in the employer's adverse employment decision, and if the plaintiff makes such a showing, a factfinder can presume the impermissible reason made a difference in the outcome of the decision unless the employer offers proof to the contrary.[123] As for the employer's proof, Justice O'Connor said the employer has to prove by a preponderance of the evidence that it would have made the same decision in the absence of the impermissible reason, and in doing so, it does not have to isolate the sole cause of the decision; instead, it has to prove that

115. *Id.*

116. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–56 (1981).

117. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring).

118. *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring).

119. *Id.* at 262–63.

120. *Id.* at 273–74 (first citing Fields v. Clark Univ., 817 F.2d 931, 935–37 (1st Cir. 1987); and then citing Thompkins v. Morris Brown Coll., 752 F.2d 558, 563 (11th Cir. 1985)).

121. *Id.*

122. *Id.* at 275–76.

123. *Id.* at 276–77.

if one eliminates the impermissible reason from the equation, it had sufficient business reasons to make the same decision.[124] She went on to say that if the employer does not carry its burden of proof, a factfinder can rightly conclude that the employer made the adverse employment decision because of an impermissible reason and is liable under Title VII.[125]

Justice O'Connor's main point of disagreement with the plurality is her requirement that a plaintiff show by direct evidence that the employer relied in a substantial way on an impermissible reason when it made an adverse employment decision before shifting the burden of persuasion to the employer to prove it would have made the same decision had it not relied on the impermissible reason [126] She then outlined her view of how the presentation of evidence should proceed in a Title VII disparate treatment case.[127]

In her view, the plaintiff must establish a prima facie case of discrimination by showing, for example, that she is protected by Title VII,[128] that she was qualified for an employment opportunity, that the employer rejected her, and that after doing so, the employer continued to seek applicants with the same or similar qualifications.[129] The plaintiff should then produce direct evidence that the employer rejected her for an impermissible reason.[130] A burden of production then shifts to the

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124. *Id.*

125. *Id.* at 277.

126. *Id.* at 277–78.

127. *Id.* at 278–79; Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2(a)(1), (2). The law prohibits intentional discrimination, which is known as disparate treatment, as well disparate impact discrimination, which describes employment practices that are not intentionally discriminatory, but nevertheless have a disproportionately adverse effect on persons because of their race, color, religion, sex, or national origin. Ricci v. DeStefano, 557 U.S. 557, 577 (2009). Disparate treatment occurs when an employer intentionally "treat[s] [a] person less favorably than others because of [the person's] race, color, religion, sex, or national origin]." *Id.* at 577 (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988)). A disparate treatment plaintiff bears the burden of proving that the defendant intentionally discriminated against him or her on the basis of race, color, religion, sex, or national origin. *Id.*

128. Justice O'Connor wrote that a person must "[show] membership in a protected group." *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring). It would be more accurate to say that a person asserting a claim under Title VII must base his or her claim on a category that Title VII covers, i.e., race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1), (2). The phrase "membership in a protected group" perpetuates the false notion that Title VII only protects certain groups of people. The law protects every person from employment discrimination on the basis of race, color, religion, sex, or national origin, hence, every person is a "[member] [of] a protected group," and no persons are the "special favorite of the law." The Civil Rights Cases, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting) (the Civil War Amendments and Civil Rights Acts of 1875 did not make Blacks the special favorite of the laws, but instead sought to accomplish for Blacks what every state in the Union had done for whites, i.e., to secure and protect their rights as free persons and citizens; nothing more).

129. *Price Waterhouse*, 490 U.S. at 279 (O'Connor, J., concurring) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

130. *Id.* at 278.

employer to articulate a legitimate, nondiscriminatory reason for its decision.[131] After receiving all of the evidence, the court should then decide whether the case should proceed as a *McDonnell Douglas*[132] and *Burdine*[133] pretext case or a *Price Waterhouse* mixed motive case.[134] If the plaintiff does not prove that the employer acted with a mixed motive, the case proceeds as a pretext case, with the plaintiff bearing the burden of persuasion on the ultimate issue of whether the employer made the adverse employment decision because of an impermissible reason.[135]

Justice O'Connor said her proposed framework should apply in all Title VII disparate treatment cases where the plaintiff asserts that an impermissible reason played a substantial role in the employer's adverse employment decision.[136] She viewed her proposed framework as an alteration of the allocation of the burden of proof the Court announced in *McDonnell Douglas*, which put her at odds with the plurality and with Justice White.[137] However, she did agree with the plurality and with Justice White that a Title VII plaintiff who proves that her employer made an adverse employment decision based on a mixed motive theory shifts a burden of persuasion to the employer to prove by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role in the decision. If the employer carries this burden, it faces no Title VII liability.[138]

Justice Kennedy wrote a dissent joined by Chief Justice Rehnquist and Justice Scalia.[139] Justice Kennedy, like Justice O'Connor, took exception to the plurality's causation analysis.[140] He did not think race, color, religion, sex, or national origin must be the sole cause of an employer's adverse employment decision in order to establish a Title VII violation. However, he considered this separate from the question of whether considering race, color, religion, sex, or national origin must be *a* cause of the decision.[141] In his view, an impermissible reason is a cause of

131. *Id.*

132. *McDonnell Douglas*, 411 U.S. at 802–03.

133. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–56 (1981).

134. *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring).

135. *Id.* at 278–79.

136. *Id.* at 279.

137. *Compare id.* at 279 (the plurality altered "the analytical framework set forth in *McDonnell Douglas*"), *with id.* at 248–50 (plurality opinion) ("In deciding as we do today, we do not traverse new ground."), *with id.* at 260 (White, J., concurring) ("I agree with Justice Brennan that applying [the plurality's] approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in [*Burdine*] and [*McDonnell Douglas*].").

138. *Price Waterhouse*, 490 U.S. at 279 (O'Connor, J., concurring); *id.* at 258 (plurality opinion); *id.* at 259–60 (White, J., concurring).

139. *See generally Price Waterhouse*, 490 U.S. at 279–95 (Kennedy, J., dissenting).

140. *Id.* at 284–85.

141. *Id.*

an adverse employment decision when, "either by itself or in combination with other factors, it made a difference to the decision."[142] He further stated that an impermissible reason does not have to be the sole reason for the decision in order to trigger Title VII liability, but it has to be a necessary part of the decision. [143]

Price Waterhouse was a 4–1–1–3 decision.[144] The plurality, Justice White, and Justice O'Connor agreed that if a Title VII plaintiff proves that her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision even if the impermissible reason had played no role in the decision.[145] These same Justices agreed that if the employer carries this burden, it faces no Title VII liability.[146]

The agreeing Justices splintered, however, on the question of how the plaintiff is required to prove that her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason.[147] The plurality said when a plaintiff proves an impermissible reason played a motivating part in the employer's adverse employment decision, the burden of persuasion shifts to the employer to prove it would have made the same decision in the absence of the impermissible reason.[148] Justice White said the burden of persuasion shifts to the employer when the plaintiff proves that an impermissible reason was a substantial factor in the employer's adverse employment decision.[149] Justice O'Connor also said the burden of persuasion shifts to the employer when the plaintiff proves that an impermissible reason was a substantial

142. *Id.* at 284.

143. *Id.* (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976)).

144. *Id.* at 231–58 (Brennan, Marshall, Blackmun, & Stevens, JJ., plurality opinion); *id.* at 258–61 (White, J., concurring); *id.* at 261–79 (O'Connor, J., concurring); *id.* at 279–95 (Kennedy, J., joined by Rehnquist, C.J., & Scalia, J., dissenting).

145. *Id.* at 258 (plurality opinion); i*d.* at 259–60 (White, J. concurring); *id.* at 261, 279 (O'Connor, J., concurring).

146. *Id.* at 258 (plurality opinion); *id.* at 259–60 (White, J. concurring); *id.* at 261, 279 (O'Connor, J., concurring).

147. *Id.* at 240–42 (plurality opinion); *id* at 259–60 (White, J. concurring); *id* at 261–66, 273–79 (O'Connor, J., concurring).

148. *Id.* at 258.

149. *Id.* at 259 (White, J., concurring). Justice White cited *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), as support for his view that the plaintiff has to prove an impermissible reason was a substantial factor in the employer's decision. *Price Waterhouse*, 490 U.S. at 258–59 (citing *Mt. Healthy*, 429 U.S. at 287). *Mt. Healthy* held, however, that the phrases "motivating factor" and "substantial factor" are synonymous. *Mt. Healthy*, 429 U.S. at 287 (emphasis added) ("[T]he burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a '*substantial factor*' *or to put it in other words, that it was a 'motivating factor'* in the [employer's] decision not to rehire him.").

factor in the employer's adverse employment decision, but she would require the plaintiff to prove this by direct evidence.[150]

Because *Price Waterhouse* was a 4–1–1–3 decision, and "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[151] In the aftermath of *Price Waterhouse*, the United States circuit courts divided on the question of whether Justice O'Connor's concurrence, which would have required a Title VII plaintiff to prove by direct evidence that her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason, was controlling.[152]

B. The Civil Rights Act of 1991

On November 21, 1991, Congress approved the Civil Rights Act of 1991 (1991 Act).[153] One of the reasons Congress enacted the 1991 Act was its view that a series of decisions of the Supreme Court of the United States "weakened the scope and effectiveness of civil rights protections[,] and legislation [was] necessary to provide additional protections against unlawful discrimination in employment."[154]

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150. *Price Waterhouse*, 490 U.S. at 276–79 (O'Connor, J., concurring).

151. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion)). For a comprehensive analysis of *Marks* and how to apply it see Ryan C. Williams, *Questioning* Marks*: Plurality Decisions Precedential Restraint*, 69 STAN. L. REV. 795 (2017).

152. The United States Courts of Appeals for the First, Fourth, Eighth, and Eleventh Circuits held that Justice O'Connor's concurrence was controlling, thus requiring the plaintiff to prove her mixed motive theory by direct evidence. Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995); Mohr v. Dustrol, Inc., 306 F.3d 636, 640–41 (8th Cir. 2002); Trotter v. Bd. of Trs., 91 F.3d 1449, 1453–54 (11th Cir. 1996). The United States Court of Appeals for the Ninth Circuit held otherwise, concluding that a plaintiff is not required to prove her mixed motive theory by direct evidence. Costa v. Desert Palace, Inc., 299 F.3d 838, 850, 853–54 (9th Cir. 2002) (en banc).

In *Gross v. FBL Financial Services, Inc.*, Justice John Paul Stevens wrote a dissent, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, where he opined that under *Marks*, 430 U.S. at 193, Justice White's concurrence rather than Justice O'Connor's was controlling because Justice White agreed with the plurality that the burden of persuasion shifts to the employer when the plaintiff proves that an impermissible reason was a substantial factor in the employer's adverse employment decision; thus, he provided a fifth vote for a single rationale explaining the result of the case. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 187–90 (2009) (Stevens, J., dissenting). Justice Stevens pointed out that Justice O'Connor's concurrence could not be controlling because she wrote only for herself in *Price Waterhouse*, and neither the plurality nor Justice White agreed with her direct evidence requirement, and consequently, the direct evidence requirement was not the narrowest ground on which five Justices agreed. *Id.* at 187–90.

153. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071-1100.

154. Pub. L. No. 102-166, §§ 2(2), 2(3), 3(4), 105 Stat. 1071 (1991). Congress specifically cited *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 642–79 (1989), as an example of a decision that

The 1991 Act codified the part of *Price Waterhouse* that garnered the assent of the plurality, Justice White, and Justice O'Connor, i.e., a plaintiff can establish a violation of Title VII by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[155]

The 1991 Act also overruled the part of *Price Waterhouse* that garnered the assent of these same Justices who held that an employer has a complete affirmative defense in cases where a plaintiff proves the employer acted with a mixed motive and the employer proves it would have made the same decision in the absence of an impermissible motive.[156]

Instead of giving an employer a complete affirmative defense to liability when it proves it would have made the same decision in the absence of the impermissible reason, the 1991 Act imposes liability on the employer, but limits the relief the plaintiff can receive.[157] Under the 1991 Act, an employer that proves it would have made the same adverse

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"weakened the scope and effectiveness of [f]ederal civil rights protections" Pub. L. No. 102-166 §§ 2(2), 2(3), 3(4), 105 Stat. 1071 (1991); *see also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104–05, 109–15, 127–32 (2009) (providing an empirical study of employment discrimination cases litigated in federal court between 1979 and 2006, which led the authors to conclude that "federal courts disfavor employment discrimination plaintiffs," and would-be-plaintiffs file fewer cases because of the "fear of judicial bias at the district court level and the appellate court level." The study showed that "[employment discrimination] cases [end] less favorably for plaintiffs than other kinds of cases, [and] [p]laintiffs who appeal their losses or [have to defend their victories on appeal] fare remarkably poorly in the circuit courts." Between 1979 and 2006, employment discrimination plaintiffs prevailed in 15% of cases, plaintiffs in other kind of cases prevailed in 51% of cases, and "appellate courts reversed plaintiffs' wins far more often than defendants' wins.")

155. Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)). Section 2000e-2(m) says:

> 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.

See also Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); *id.* at 258–60 (White, J., concurring); *id.* at 276–79 (O'Connor, J., concurring).

156. Pub. L. No. 102-166, § 107(b)(3), 105 Stat. 1075-1076 (1991) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). Section 2000e-5(g)(2)(B) says:

> 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; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

See also Price Waterhouse, 490 U.S. at 258 (1989) (plurality opinion); *id.* at 258–60 (White, J., concurring); *id.* at 276–79 (O'Connor, J., concurring).

157. Pub. L. No. 102-166, § 107(b)(3), 105 Stat. 1075-1076 (1991) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)).

employment decision in the absence of the impermissible reason is liable for declaratory relief, certain injunctive relief, and attorneys' fees and costs that are "directly attributable only to the pursuit of [the] [mixed motive] claim."[158] The employer is not, however, liable for damages, nor can it be ordered to admit, reinstate, hire, promote, or pay the plaintiff.[159]

In sum, the 1991 Act codified the holding of *Price Waterhouse* that a plaintiff can establish a violation of Title VII by "demonstrate[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[160] The 1991 Act overruled the part of *Price Waterhouse* that held if a plaintiff proves her employer made an adverse employment decision based on a mixed motive, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role in the decision, and if the employer carries this burden, the employer faces no Title VII liability.[161] The 1991 Act replaced this complete affirmative defense and replaced it with limited form of liability that does not include damages or an order to admit, reinstate, hire, promote, or pay the plaintiff.[162]

C. Desert Palace, Inc. v. Costa

In *Desert Palace, Inc. v. Costa*, the Supreme Court held that a Title VII plaintiff who asserts her employer acted with a mixed motive is not required to present direct evidence of that mixed motive in order to get a mixed motive jury instruction.[163] *Desert Palace* presented the Court with the first opportunity to decide what effect the 1991 Act had on jury instructions in mixed motive cases and whether Justice O'Connor's *Price Waterhouse* concurrence was controlling.[164]

Catharina Costa worked for Desert Palace as a warehouse worker and heavy equipment operator.[165] Desert Palace terminated Ms. Costa's employment after she got involved in a physical altercation with a

158. *Id.* (codified at 42 U.S.C. § 2000e-5(g)(2)(B)(i)).

159. *Id.* (codified at 42 U.S.C. § 2000e-5(g)(2)(B)(ii)).

160. Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)); *Price Waterhouse*, 490 U.S. at 258 (1989) (plurality opinion); *id.* at 258–60 (White, J., concurring); *id.* at 276–79 (O'Connor, J., concurring).

161. Pub. L. No. 102-166, § 107(b)(3), 105 Stat. 1075-1076 (1991) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)); *Price Waterhouse*, 490 U.S. at 258 (1989) (plurality opinion); *id.* at 258–60 (White, J., concurring); *id.* at 276–79 (O'Connor, J., concurring).

162. *See supra* note 159 and accompanying text.

163. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

164. *Id.* at 98.

165. *Id.* at 95.

coworker.[166] Ms. Costa sued Desert Palace for sex discrimination in the United States District Court for the District of Nevada.[167] Over Desert Palace's objection, the district court gave the jury a mixed motive instruction that said if it found that Ms. Costa's sex was a motivating factor in why Desert Palace treated her the way it did, it should find for Ms. Costa even if it found that Desert Palace was also motivated by a lawful reason.[168]

The jury returned a verdict for Ms. Costa, awarding her back pay, compensatory damages, and punitive damages.[169] Desert Palace appealed to the United States Court of Appeals for the Ninth Circuit, which vacated the district court decision and remanded the case, holding the district court should not have given the jury a mixed motive instruction because Ms. Costa failed to present direct evidence of sex discrimination.[170] The Ninth Circuit voted to rehear the case en banc.[171]

The en banc court reinstated the district court judgment, holding that Title VII's "motivating factor" section, 42 U.S.C. § 2000e-2(m), does not require a plaintiff asserting a mixed motive Title VII claim to prove her claim by direct evidence.[172] The en banc court declined "to get mired in the debate over whether Justice O'Connor's [*Price Waterhouse* concurrence] was controlling" because the 1991 Act resolved the question of whether a Title VII plaintiff who asserts a mixed motive claim has to prove her claim by direct evidence.[173] According to the en banc court, the 1991 Act allows a plaintiff to prove her mixed motive claim by direct or circumstantial evidence.[174] In light of this conclusion, the en banc court held that Ms. Costa did produce sufficient evidence to authorize a mixed motive jury instruction.[175] Desert Palace petitioned the Supreme Court to hear the case, and the Court agreed to do so.[176]

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166. *Id.* at 95–96.

167. *Id.* at 96.

168. *Id.* at 96–97 (citing Costa v. Desert Palace, Inc., 299 F.3d 838, 858 (9th Cir. 2002) (en banc)).

169. *Id.*at 90, 97.

170. Costa v. Desert Palace, Inc., 268 F.3d 882, 884–91 (9th Cir.), *reh'g en banc granted*, 274 F.3d 1306, 1306–07 (9th Cir. 2001).

171. *Costa*, 299 F.3d at 844 n.1 (9th Cir. 2002) (en banc). The opinion was 7-to-4, with Chief Judge Mary Schroeder and Judges Stephen Reinhardt, Barry Silverman, Susan Graber, Margaret McKeown, Raymond Fisher, and Richard Paez in the majority, and Judges Alex Kozinski, Ferdinand Fernandez, Andrew Kleinfeld, and Ronald Gould dissenting. *Costa*, 299 F.3d at 844–65 (majority opinion), 865–67 (dissenting opinion).

172. *Id.* at 853–54 (majority opinion).

173. *Id*. at 851.

174. *Id.* at 849, 855.

175. *Id.* at 858–59.

176. Desert Palace, Inc. v. Costa, 537 U.S. 1099, 1099 (2003).

Desert Palace said that on its face, § 2000e-2(m) does not require a Title VII plaintiff to "demonstrate" by direct evidence that race, color, religion, sex, or national origin was a motivating factor in the adverse employment decision.[177] The 1991 Act created 42 U.S.C. § 2000e-2(m), which says "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."[178] Additionally, the 1991 Act defined "demonstrate" to mean "mee[t] the burdens of production and persuasion";[179] in the Court's view, if Congress intended the word "demonstrate" to require a party to meet his or her burden of production and burden of persuasion by direct evidence or some other heightened evidentiary showing, it would have included language explicitly saying that in § 2000e(m).[180]

Ultimately, the Court held that a Title VII plaintiff is entitled to a mixed motive jury instruction if she presents sufficient evidence that a reasonable juror could find by a preponderance of the evidence that her employer's adverse employment decision was motivated by an impermissible reason, and she can prove this by circumstantial or direct evidence.[181] Because the Court decided the case based on the statutory text of the 1991 Act alone, it did not address the question of whether Justice O'Connor's *Price Waterhouse* concurrence was controlling.[182]

The Court in *Desert Palace* was unanimous and included Justice O'Connor, who recognized that the 1991 Act does not require a plaintiff to prove a mixed motive theory solely by direct evidence[183] She joined the Court's opinion, but she wrote a concurrence only for herself where she said that prior to the enactment of the 1991 Act, the burden of persuasion only shifted to the employer when a Title VII plaintiff asserting disparate treatment based on the employer's mixed motive demonstrated by direct evidence that an impermissible factor played a substantial role in the employer's adverse employment decision.[184] She conceded, however, that

177. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003).

178. Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991).

179. Pub. L. No. 102-166, § 104, 105 Stat. 1074 (1991) (codified at 42 U.S.C. § 2000e(m)); *Desert Palace*, 539 U.S. at 99 (citing 42 U.S.C. § 2000e(m)).

180. *Desert Palace*, 539 U.S. at 99.

181. *Id.* at 101–02.

182. *Id.* at 98–02.

183. *Id.*

184. *Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring)). No other Justice joined Justice O'Connor's *Price Waterhouse* concurrence. She did, however, agree with the plurality and with Justice White that if a Title VII plaintiff proves her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason, the burden of persuasion shifts

the 1991 Act codified a different rule for Title VII mixed motive cases, and that rule does not require the plaintiff to prove her mixed motive theory by direct evidence.[185]

At bottom, *Desert Palace* established the rule that a Title VII plaintiff who asserts her employer acted with a mixed motive when it made an adverse employment decision can prove her case with direct or circumstantial evidence.[186]

D. Gross v. FBL Financial Services, Inc.

Six years after *Desert Palace*, the Court decided *Gross v. FBL Financial Services, Inc.*, and held that the ADEA [187] does not recognize a mixed motive theory.[188] The question presented in *Gross* was whether a plaintiff asserting a claim under the ADEA must present direct evidence of age discrimination in order to obtain a mixed motive jury instruction.[189] Although *Gross* is an ADEA case, the language of the ADEA was "'derived *in haec verba* from Title VII'," and the Court has "long recognized that [its] interpretations of Title VII's language apply 'with equal force in the [ADEA]'."[190]

In 2003, when Jack Gross was fifty-four years old, his employer, FBL Financial Group, Inc. (FBL), reassigned him and transferred a number of his job responsibilities to a person who used to be his subordinate and who was in her early forties.[191] Mr. Gross deemed this a demotion, so he sued FBL in the United States District Court for the Southern District of Iowa[192] under the ADEA, which prohibits an employer from making an adverse employment decision because of an

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to the employer to prove by a preponderance of the evidence that it would have made the same decision even if the impermissible reason had played no role in the decision, which provided six votes for this conclusion. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 261, 279 (O'Connor, J., concurring). These same Justices provided six votes for the conclusion that if the employer carries this burden, it faces no Title VII liability. *Id.* at 258 (plurality opinion); *id* at 259–60 (White, J. concurring); *id.* at 261, 279 (O'Connor, J., concurring). No other Justice, however, agreed with Justice O'Connor's conclusion that the burden of persuasion should only shift to the employer when a Title VII plaintiff asserting disparate treatment based on the employer's mixed motive demonstrates by direct evidence that an impermissible factor played a substantial role in the employer's adverse employment decision. *Id.* at 261, 276–79 (O'Connor, J., concurring).

185. *Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring).

186. *Id.* at 101–02 (majority opinion).

187. 29 U.S.C. §§ 621–34.

188. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 169–70 (2009).

189. *Id.* at 169–70.

190. *Id.* at 183 (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

191. *Id.* at 170 (majority opinion).

192. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 356 (8th Cir. 2008).

employee's age.[193] During his trial, Mr. Gross introduced evidence that FBL reassigned him partly because of his age.[194] FBL asserted it reassigned Mr. Gross as part of a corporate restructuring and that his new assignment better suited his skill set.[195]

Mr. Gross requested an instruction that allowed the jury to find FBL liable if he proved by a preponderance of the evidence that age was a motivating factor in FBL's decision to demote him.[196] FBL objected to this instruction, but the district court overruled its objection.[197] The court further instructed the jury that age constitutes a motivating factor if it played a role in FBL's decision to demote Mr. Gross.[198] Finally, the court instructed the jury to find in favor of FBL if it proved by a preponderance of the evidence that it would have demoted Mr. Gross even if age had played no role in its decision.[199] The jury returned a verdict for Mr. Gross in the amount of $46,945.[200]

FBL appealed to the United States Court of Appeals for the Eighth Circuit and argued that the district court erroneously instructed the jury, and the Eighth Circuit agreed.[201] In the Eighth Circuit's opinion, Justice O'Connor's *Price Waterhouse* concurrence was controlling; therefore, Mr. Gross had to present direct evidence that his age was a motivating factor in FBL's decision to demote him, and only if he presented such evidence would the burden of persuasion shift to FBL to prove that it would have made the same decision had it not considered his age at all.[202] Based on this analysis, the Eighth Circuit concluded that the district court erroneously instructed the jury because the instructions allowed the burden of persuasion to shift to FBL based on circumstantial evidence rather than direct evidence.[203] Mr. Gross conceded that he did not present direct evidence of age discrimination, and therefore, the Eighth Circuit held that the district court should not have given the jury a mixed motive instruction.[204] The Eighth Circuit further held that because Mr. Gross did not present direct evidence that age was a motivating factor in FBL's decision to demote him, the district court should have instructed the jury

193. *Gross*, 557 U.S. at 170 (citing 29 U.S.C. § 623(a)).
194. *Id.*
195. *Id.*
196. *Id.* 170–71.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 360 (8th Cir. 2008).
202. *Id.* at 359.
203. *Id.* at 360.
204. *Id.*

to return a verdict for him only if he "proved that age was *the* determining factor in FBL's employment action."[205]

Mr. Gross then filed a petition for a writ of certiorari in the Supreme Court of the United States seeking an answer to the question of whether a plaintiff who asserts a claim under the ADEA must present direct evidence of age discrimination in order to obtain a mixed motive jury instruction.[206] Before reaching this question, however, the Court said it had to decide if the burden of persuasion ever shifts to the employer in a mixed motive ADEA case.[207] The Court began by recounting that the *Price Waterhouse* plurality, Justice White, and Justice O'Connor agreed that when a Title VII plaintiff proves that an impermissible reason was a motivating factor or a substantial factor in her employer's adverse employment decision, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role in the decision, and if the employer carries this burden, it faces no liability.[208]

Next, the Court recounted that in *Desert Palace v. Costa*, the Court recognized that the 1991 Act codified the plurality, Justice White, and Justice O'Connor's *Price Waterhouse* agreement that when a Title VII plaintiff proves that an impermissible reason was a motivating factor or a substantial factor in her employer's adverse employment decision, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role in the decision.[209] *Desert Palace* also recognized that the 1991 Act eliminated the complete affirmative defense the plurality, Justice White, and Justice O'Connor established in *Price Waterhouse* and replaced it with a limited affirmative defense that limits an employer's liability if it proves it would have made the same decision had an impermissible reason played no role in its decision.[210]

Desert Palace, however, was a Title VII case, and in *Gross*, the Court made a point of saying that it had never held that the burden shifting framework that *Price Waterhouse* announced and that the 1991 Act

205. *Id.* (emphasis added).

206. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

207. *Id.*

208. *Id.* at 173–74 (first citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); then citing *id* at 258–60 (White, J., concurring); and then citing *id.* at 276–79 (O'Connor, J., concurring)).

209. *Id.* at 174 (first citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003); then citing 42 U.S.C. § 2000e-2(m); and then citing 42 U.S.C. § 2000e-5(g)(2)(B)).

210. *Id.* at 174 (first citing *Desert Palace*, 539 U.S. at 94–95; then citing 42 U.S.C. § 2000e-2(m); and then citing 42 U.S.C. § 2000e-5(g)(2(B)).

codified applied to ADEA cases.[211] When Congress enacted the 1991 Act, it amended Title VII to codify the mixed motive theory and to provide employers with a limited affirmative defense. It also amended the ADEA, but it did not add the mixed motive theory to the ADEA.[212] The *Gross* Court said it could not ignore the fact that the 1991 Act amended Title VII to codify the mixed motive theory, but it did not do the same for the ADEA even though the 1991 Act amended both Title VII and the ADEA.[213] Moreover, *Desert Palace* and *Price Waterhouse* are Title VII cases, and therefore, the *Gross* Court concluded that Title VII cases do not govern the interpretation of the ADEA.[214] *Gross* then turned to the text of the ADEA to determine whether it authorizes a mixed motive claim.[215]

The relevant provision of the ADEA says, "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[216] *Gross* interpreted this language to mean that an employer violates the ADEA when age is *the* reason rather than *a* reason it makes an adverse employment decision.[217] This means that an ADEA

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211. *Id.* Justice Stevens dissented in *Gross*, and one of the reasons he did was that in his view, the Court should have interpreted the ADEA in the same way it interpreted Title VII because the language of the ADEA was "'derived *in haec verba* from Title VII'," and the Court had "long recognized that [its] interpretations of Title VII's language apply 'with equal force in the [ADEA]'." *Id.* at 183 (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). Justice Thomas offered three responses to Justice Stevens's argument on this point. *Id.* at 174 n.2 (majority opinion). First, "the Court's approach to interpreting the ADEA in light of Title VII ha[d] not been uniform" as evidenced by *General Dynamics Land Systems., Inc. v. Cline*, where the Court declined to interpret the phrase "because of . . . age" in the ADEA to prohibit discrimination against all ages notwithstanding the fact that the Court had previously interpreted the phrase "because of . . . race [or] sex" in Title VII to prohibit discrimination against persons of all races and sexes. *Id.* (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 592 n.5 (2004)). Second, it remained an open question whether the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973), framework for Title VII pretext cases applied in ADEA cases. *Gross*, 557 U.S. at 174 n.2. Third, the textual differences between Title VII and the ADEA demanded that the Court not apply *Price Waterhouse* and *Desert Palace* to the ADEA. *Id.*

212. *Gross*, 557 U.S. at 174 (first citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B); then citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1079 (1991) (codified at 29 U.S.C. § 626(e)); and then citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 302, 105 Stat. 1088 (1991)).

213. *Id.* 174–75 (2009) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

214. *Id.* at 175.

215. *Id.*

216. *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1)).

217. *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). The part of *Biggins* the Court cited says, "Whatever the employer's decision[-]making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played *a* role in that process and had *a* determinative influence on the outcome." *Biggins*, 507 U.S. at 610 (emphases added). The Court also cited dictionary definitions of "because of." *Gross*, 557 U.S. at 176 (first citing 1 *Webster's Third New International Dictionary* 194 (1966) (because of means by reason of or on account of); then citing 1

disparate treatment plaintiff "must prove that age was *the* 'but-for' cause of" her employer's adverse employment decision.[218] Regardless of whether an ADEA disparate treatment plaintiff asserts that her employer acted with a mixed motive or a single motive, her burden of persuasion is the same, i.e., she has to prove by a preponderance of the evidence that age was "*the* 'but-for' cause" of her employer's adverse employment decision.[219] She can, however, prove this by direct or circumstantial evidence.[220] And even if she does prove by direct or circumstantial evidence that age was *the* but for cause of her employer's adverse employment decision, the burden of persuasion does not shift to the employer to prove it would have made the same decision had age not played a role in its decision because the 1991 Act did not add a mixed motive provision to the ADEA like it did to Title VII.[221]

Ultimately, the Court held that a mixed motive instruction is "never proper in an ADEA case" because the text of the ADEA, unlike the text of Title VII, does not provide for a mixed motive theory, which means the burden of persuasion does not shift to the employer to prove that it would have made the same decision had age not factored into its decision.[222] The Court's holding did not answer the question of whether an ADEA plaintiff has to "present direct, rather than circumstantial, evidence . . . that age was the 'but for' cause of the . . . [adverse employment decision]" in order "to obtain a *burden-shifting* instruction."[223] The Court did say, however, that "[t]here is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the 'but-for' cause of their employer's adverse action . . . and [the Court] [implies] none."[224]

Oxford English Dictionary 746 (1933) (because of means by reason of or on account of); and then citing *The Random House Dictionary of the English Language* 132 (1966) (because means by reason or on account)).

218. *Gross*, 557 U.S. at 176 (first citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 652–55 (2008); then citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 n.14 (2007); and then citing R. PAGE KEETON & WILLIAM L. PROSSER, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

219. *Id.* at 177–78 (citing Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 141–43 (2000)).

220. *Id.* at 177–78 n.4.

221. *Id.* at 173–75, 177–78 n.4.

222. *Id.* at 170.

223. *Id.* at 178 n.4 (emphasis added).

224. *Id.* (citing 29 U.S.C. § 623(a)). The Court did, however, imply that if a plaintiff does present circumstantial evidence that her age was the but for cause of her employer's adverse employment decision, she can obtain a burden shifting instruction. *Id.* ("'Congress has been unequivocal when imposing heightened proof requirements' in other statutory contexts, including in other subsections of Title 29, when it has seen fit." (quoting Desert Palace v. Costa, 539 U.S. 90, 99 (2003)); *see also id.* (first citing 25 U.S.C. § 2504(b)(2)(B) (requiring proof by clear and convincing evidence); and then citing 29 U.S.C. § 722(a)(2)(A) (requiring proof by clear and convincing evidence)).

Gross said five times that the plaintiff in an ADEA disparate treatment case has to prove that age was *the* but for cause of her employer's adverse employment decision, and it said once that she has to prove that age was *the* reason for that decision.[225] One can read this to mean a plaintiff in an ADEA case has to prove that age was the sole reason or the exclusive reason her employer made an adverse employment decision.[226]

Gross was a 5–4 decision.[227] Justice Clarence Thomas wrote the majority opinion and was joined by Chief Justice John Roberts, Jr. and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito, Jr.[228] Justice John Paul Stevens wrote a dissent joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer,[229] and Justice Breyer wrote a dissent joined by Justices Souter and Ginsburg.[230]

The way Justice Stevens saw it, "[t]he most natural reading of '[because of]'" means employers are barred from making adverse employment decisions "motivated in whole or in part by the age of the employee."[231] He first addressed the majority's conclusion that the ADEA's prohibition on employment discrimination "because of" a person's age requires a plaintiff to prove that her employer made an adverse employment decision solely or exclusively because of her age.[232] He based this conclusion on *Price Waterhouse* and the 1991 Act.[233] In *Price Waterhouse*, the plurality and Justice White agreed that when an employer makes an adverse employment with a mixed motive, that employer made a decision "because of" an impermissible reason, which differs from the type of "but for" causation the *Gross* majority required

225. *Id.* at 176 (*the* reason; *the* but for cause), 177 (*the* but for cause), 177 n.4 (*the* but for cause), 178 (*the* but for cause), 180 (*the* but for cause) (emphases added).

226. *Id.* The dissenting Justices in *Gross* thought the majority equated "because of" with "solely because of" or "exclusively because of" and did not agree that proving an employer made an adverse employment decision "because of" a person's age means the plaintiff has to prove that the employer acted "solely because of" or "exclusively because of" the plaintiff's age. *Id.* at 183 n.4 (Stevens, J., dissenting) (explaining that the dictionaries the majority cited do not define "because of" to mean "solely by reason of" or "exclusively on account of," and moreover, the *Price Waterhouse* plurality rejected a reading of the "because of" language in Title VII to mean "solely because of" or "exclusively because of," and instead, read that language to mean an employer was "motivated by" an impermissible reason when it made an adverse employment decision.).

227. *Id.* at 168–80 (Thomas, J., joined by Roberts, C.J., Scalia, Kennedy & Alito, JJ.); *id.* at 180–90 (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting); *id.* at 190–92 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).

228. *Id.* at 168–80 (majority opinion)

229. *Id.* at 180–90 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

230. *Id.* at 190–92 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).

231. *Id.* at 180 (Stevens, J., dissenting).

232. *Id.*

233. *Id.* (first citing Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989); and then citing 42 U.S.C. § 2000e-2(a)(1)).

ADEA cases.[234] Additionally, the 1991 Act codified *Price Waterhouse*'s interpretation of the "because of" language in Title VII when it defined an unlawful employment practice to include an employer making an adverse employment decision based on mixed motives.[235]

According to Justice Stevens, when Congress passed the 1991 Act, it emphasized "that the motivating-factor test was consistent with its original intent in enacting Title VII" because when Congress enacted Title VII, it "intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions," which means "*any* reliance on [an impermissible reason] in making employment decisions is illegal."[236]

Thus, in Justice Stevens's view, the "because of" language in the ADEA means the same thing the "because of" language means in Title VII.[237] Justice Stevens also would have answered the question on which the Court granted certiorari, and that is whether an ADEA plaintiff is required to present direct evidence of age discrimination in order to obtain a mixed motive jury instruction.[238] He would have answered "no" to that question because in his view, *Desert Palace v. Costa* settled the direct evidence debate when the Court held that a plaintiff is not limited to direct evidence only in meeting her burden of proof in a mixed motive Title VII case.[239]

The direct evidence versus circumstantial evidence debate stemmed from Justice O'Connor's *Price Waterhouse* concurrence where she, and she alone, said a Title VII disparate treatment plaintiff asserting a mixed motive theory has to prove her theory by direct evidence only.[240] Because *Price Waterhouse* was decided by a "fragmented Court," the holding of the case is the "position taken by those [Justices] who concurred in the judgment on the narrowest grounds."[241] Justice Stevens wrote that Justice White's concurrence rather than Justice O'Connor's was controlling because Justice White agreed with the plurality that the burden of persuasion shifts to the employer when the plaintiff proves that an impermissible reason was a substantial factor in the employer's adverse

234. *Price Waterhouse*, 490 U.S. at 241 (plurality opinion); *id.* at 260 (White, J., concurring).

235. *Gross*, 537 U.S. at 185 (Stevens, J., dissenting) (citing 42 U.S.C. § 2000e-2(m)).

236. *Id.* at 187 (first quoting H.R. Rep. No. 102-40, pt. 2, at 2, 17 (1991); then quoting H.R. Rep. No. 102-40, pt. 1, at 45 (1991); and then quoting S. Rep. No. 101-315, at 6, 22 (1990)) (emphases added).

237. *Id.* at 183–85.

238. *Id.* at 187–88.

239. *Id.* at 187–88 (citing Desert Palace v. Costa, 539 U.S. 90, 101–02 (2003)).

240. Price Waterhouse v. Hopkins, 490 U.S. 228, 276–77 (1989) (O'Connor, J., concurring).

241. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, & Stevens, JJ., plurality opinion)).

employment decision, and thus, he provided a fifth vote for a single rationale explaining the result of the case.[242]

He also pointed out that Justice O'Connor's concurrence could not be controlling because she wrote only for herself in *Price Waterhouse*, and neither the plurality nor Justice White agreed with her direct evidence requirement; consequently, the direct evidence requirement was not the narrowest ground on which five Justices agreed.[243] According to Justice Stevens, any questions remaining after *Price Waterhouse* regarding direct evidence versus circumstantial evidence were put to rest in *Desert Palace* when the Court held that a plaintiff is not limited to direct evidence only in meeting her burden of proof in a mixed motive Title VII case.[244]

Ultimately, *Gross* held that there is no mixed motive theory available under the ADEA, which means a plaintiff cannot pursue an age discrimination claim under the ADEA if her employer made an adverse employment decision partly for age-related reasons and partly for non-age-related reasons.[245] And if she proves her employer acted for age an age related reason, she has to prove that age was *the* reason for the adverse decision, not just *a* reason.[246]

E. University of Texas Southwestern Medical Center v. Nassar

Four years after deciding *Gross* and twenty-four years after deciding *Price Waterhouse*, the Court decided *University of Texas Southwestern Medical Center v. Nassar* and held that Title VII's mixed motive theory does not apply to retaliation claims.[247] *Nassar* involved the interplay between two sections of Title VII: 42 U.S.C. § 2000e-2(a),[248] which prohibits an employer from discriminating against an employee because of race, color, religion, sex, or national origin; and 42 U.S.C. § 2000e-

242. *Gross*, 557 U.S. at 187–90 (Stevens, J., dissenting).
243. *Id.*
244. *Id.* at 187–88 (Stevens, J., dissenting) (citing *Desert Palace*, 539 U.S. at 101–02).
245. *Id.* at 169–70, 173–75, 178, 180 (majority opinion).
246. *Id.* at 176–78, 180 (emphases added).
247. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).
248. Section 2000e-2(a) provides in full:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which (sic) would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

3(a),[249] which prohibits an employer from retaliating against an employee because the employee opposed, complained about, or sought remedies for discrimination prohibited by § 2000e-2(a).[250] Section 2000e-2(a) prohibits what the Court describes as "status" discrimination, while § 2000e-3(a) prohibits what the Court describes as "retaliation" discrimination.[251]

In the aftermath the 1991 Act, a Title VII plaintiff who asserts a § 2000e-2(a) status claim can proceed under two theories: one, that her employer made an adverse employment decision "because of" race, color, religion, sex, or national origin;[252] or two, that her employer made an adverse employment decision "motivated by" race, color, religion, sex, or national origin.[253] When a Title VII plaintiff proceeds under the "because of" theory, she has to prove that the causal link between her employer's adverse employment decision and her injury is so close that her injury would not have occurred "but for" her employer's discriminatory motive.[254] The Court describes this as "but for causation," and the implication from *Gross* is proving "but for causation" requires proving that the employer acted "solely because of" an impermissible reason.[255]

When a Title VII plaintiff proceeds under the "motivating factor" theory, she does not need to prove that her injury would not have occurred "but for" her employer's discriminatory motive; rather, she only needs to prove that her employer's adverse employment decision was "motivated by" a discriminatory motive.[256] The Court describes this as a "lessened causation standard," which means a Title VII plaintiff can obtain some

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249. Section 2000e-3(a) provides in full:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

250. *Nassar*, 570 U.S. at 342.

251. *Id.*

252. 42 U.S.C. § 2000e-2(a).

253. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

254. *Nassar*, 570 U.S. at 343.

255. *Id.*; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–78, 180 (2009). *Gross* said five times that the plaintiff in an ADEA disparate treatment case has to prove that age was *the* but for cause of her employer's adverse employment decision, and it said once that she has to prove that age was *the* reason for that decision. *Gross*, 557 U.S. at 176 (*the* reason; *the* but for cause), 177 (*the* but for cause), 177 n.4 (*the* but for cause), 178 (*the* but for cause), 180 (*the* but for cause) (emphases added).

256. *Nassar*, 570 U.S. at 343 (first citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and then citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)).

relief, albeit limited,[257] if she proves that her employer acted partly for an impermissible reason and partly for a permissible reason, and her employer proves that it would have made the same decision had the impermissible reason played no role at all.[258]

In *Nassar*, the Court held that this "lessened causation standard" does not apply to a § 2000e-3(a) retaliation claim.[259] In 1995, Dr. Naiel Nassar, a medical doctor, went to work for the University of Texas Southwestern Medical Center, which is an academic institution within the University of Texas system.[260] He served as a member of the university's faculty and as a staff physician at the medical center until 1998, when he left to obtain additional medical education.[261] In 2001, Dr. Nassar returned to work as a member of the faculty and as a staff physician.[262] Dr. Nassar, who is Middle Eastern, complained that his supervisor, Dr. Beth Levine, discriminated against him on the basis of his religion and national origin as evidenced in part by a comment she made that "Middle Easterners are lazy."[263]

In 2006, Dr. Nassar resigned his faculty position and sent a letter to Dr. Gregory Fitz, the university's Chair of Internal Medicine who also served as Dr. Levine's supervisor, stating that he resigned because of Dr. Levine's harassment, which he claimed, "'stem[med] from . . . religious, racial[,] and cultural bias against Arabs and Muslims.'"[264] Dr. Levine reacted negatively to Dr. Nassar's written accusations against Dr. Levine; in fact, he thought those accusations "publicly humiliated" her, and he felt that it was "very important that she be publicly exonerated."[265]

In the midst of this, the medical center offered Dr. Nassar a position as a staff physician, but when Dr. Fitz learned of this offer, he objected on the ground that all staff physicians had to be members of the university's faculty in accordance with an agreement between the medical center and the university.[266] The medical center then revoked its offer to Dr. Nassar, and he filed a Title VII case against the medical center in the United States District Court for the Northern District of Texas asserting that Dr. Levine

257. A prevailing plaintiff in a mixed-motive case can obtain declaratory relief, certain injunctive relief, and attorneys' fees and costs that are "directly attributable only to the pursuit of [the] [mixed motive] claim"; however, her employer is not liable for damages, nor can it be ordered to admit, reinstate, hire, promote, or pay the plaintiff. 42 U.S.C. § 2000e-5(g)(2)(B).

258. *Nassar*, 570 U.S. at 343.

259. *Id.*

260. *Id.* at 343–44.

261. *Id.* at 344.

262. *Id.*

263. *Id.* (quoting Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 450 (5th Cir. 2012)).

264. *Id.* (quoting *Nassar*, 674 F.3d at 451).

265. *Id.* at 344–45.

266. *Id.* at 343–45.

engaged in racial and religious harassment in violation of § 2000e-2(a) that resulted in his being constructively discharged from his faculty position, and that Dr. Fitz engaged in retaliation discrimination against him in violation of § 2000e-3(a) when he encouraged the medical center to revoke its offer of employment because he complained about Dr. Levine.[267]

A jury returned a verdict for Dr. Nassar on both his § 2000e-2(a) status claim and his § 2000e-3(a) retaliation claim and awarded him $438,167.66 in back pay and benefits and $3,187,500 in compensatory damages.[268] Dr. Nassar and the medical center each appealed to the United States Court of Appeals for the Fifth Circuit.[269] The Fifth Circuit vacated Dr. Nassar's constructive discharge award, finding that he did not present sufficient evidence to support it.[270] The court affirmed his retaliation award, finding that Dr. Nassar presented sufficient evidence that Dr. Fitz was partly motivated by retaliation when he encouraged the medical center to revoke its offer of employment.[271] The court also found that a Title VII plaintiff asserting a § 2000e-3(a) retaliation claim only has to prove that retaliation was a motivating factor in the employer's adverse employment decision.[272]

The medical center filed a petition for rehearing and a petition for rehearing en banc.[273] The Fifth Circuit denied both petitions, with nine judges voting against rehearing the case en banc and six judges voting in favor of rehearing the case en banc.[274] Four of the six judges who voted to rehear the case en banc joined a dissent that reasoned that the motivating factor theory does not apply to § 2000e-3(a) retaliation claims. Instead, Title VII plaintiffs asserting § 2000e-3(a) retaliation claims must prove that retaliation was the sole reason for an adverse employment decision.[275]

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267. Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08–CV–1337–B, 2010 WL 3000877, at *1 (N.D. Tex. July 27, 2010), *vacated and remanded by* Nassar v. Univ. of Tex. Sw. Med. Ctr., 537 F. App'x 525, 525 (5th Cir. 2013) (per curiam).

268. *Id.* at *1. The district court reduced the compensatory damage award to $300,000 in accordance with 42 U.S.C. § 1981a(b)(3)(D), which caps compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses at $300,000 if the employer has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year.

269. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 452 (5th Cir. 2012), *vacated and remanded by Nassar*, 570 U.S. at 362–63.

270. *Nassar*, 674 F.3d at 453.

271. *Id.* at 454.

272. *Id.*

273. Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211, 211 (5th Cir. 2012) (per curiam).

274. *Id.* Judges Eugene Davis, Carl Stewart, James Dennis, Edward Prado, Jennifer Elrod, Leslie Southwick, Catharina Haynes, James Graves, Jr., and Stephen Higginson voted against rehearing the case en banc. *Id.* Chief Judge Edith Jones and Judges E. Grady Jolly, Jerry Smith, Emilio Garza, Edith Clement, and Priscilla Owen voted in favor of rehearing the case en banc. *Id.*

275. *Id.* at 211, 212–14 (Smith, J. joined by Jones, C.J., Jolly & Clement, JJ., dissenting).

The Supreme Court granted the medical center's petition for certiorari to decide whether a Title VII plaintiff who asserts a § 2000e-3(a) retaliation claim has to prove that her employer made an adverse employment decision solely because of retaliation.[276]

The Court recapitulated its efforts to define what it means to discriminate against a person "because of" a prohibited reason, which meant starting with *Price Waterhouse* and the six Justices who agreed that a Title VII plaintiff could prevail on a § 2000e-2(a) status claim if she proves that her employer made an adverse employment decision with a mixed motive.[277] The Court then turned to the 1991 Act, which codified part of *Price Waterhouse* at 42 U.S.C. § 2000e-2(m), which says, "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."[278] *Nassar* described § 2000e-2(m) as a "lessened causation standard" for § 2000e-2(a) status discrimination.[279]

Next, the Court turned to *Gross*, which held that the ADEA's language prohibiting discrimination "because of" a person's age means that an ADEA plaintiff has to prove that age was *the* reason her employer discriminated against her, which the Court described as proof of "but for" causation.[280] *Gross* rejected applying a § 2000e-2(m) "lessened causation standard" to ADEA claims because the 1991 Act amended both Title VII and the ADEA, but the 1991 Act did not add a provision like § 2000e-2(m) to the ADEA.[281] And finally, despite the fact that the "because of" language in Title VII is the same as the "because of" in the ADEA, *Gross* did not rely on Title VII cases in interpreting the ADEA because the 1991 Act's codification of part of *Price Waterhouse* and its overruling of part of that same case, ". . . indicated that the motivating factor standard was not an organic part of Title VII and thus could not be read into the ADEA."[282]

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276. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013).

277. *Id.* at 348 (first citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); then citing *id.* at 259 (White, J. concurring); and then citing *id.* at 276 (O'Connor, J., concurring)).

278. Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991).

279. *Nassar*, 570 U.S. at 348. *Nassar* also pointed out that the 1991 Act overruled the part of *Price Waterhouse* where the plurality, Justice White, and Justice O'Connor agreed that if a Title VII plaintiff proves that her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason, the employer could defeat the plaintiff's claim if it proves by a preponderance of the evidence that it would have made the same decision had the impermissible reason played no role in the decision. *Id.* (citing 42 U.S.C. § 2000e-5(g)(2)(B)).

280. *Id.* at 349–50 (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)).

281. *Id.* at 350–51 (citing *Gross*, 557 U.S. at 174–75 n.2, 177 n.3, 179).

282. *Id.* (citing *Gross*, 557 U.S. at 178 n.5).

The *Nassar* Court held that because § 2000e-3(a)'s language is not meaningfully different from the language in 29 U.S.C. § 623(a)(1), which is the ADEA's prohibition on age discrimination,[283] a plaintiff pressing a § 2000e-3(a) claim has to prove the same thing a plaintiff pressing an ADEA claim has to prove, i.e., she has to prove that "but for" an impermissible reason, her employer would not have discriminated against her, and proving "but for" causation means proving the impermissible reason was *the* reason for the discrimination.[284]After recounting its interpretive history of the "because of" language in 42 U.S.C. § 2000e-2(a), which is Title VII's status discrimination provision, and the "because of" language in the ADEA, the Court turned to what the "because of" language in 42 U.S.C. § 2000e-3(a), Title VII's anti-retaliation provision, means.[285]

Nassar further held that 42 U.S.C. § 2000e-2(m), the 1991 Act's amendment to Title VII that codified *Price Waterhouse*'s "motivating factor" theory, does not apply to § 2000e-3(a) retaliation discrimination, but rather, it applies only to § 2000e-2(a) status discrimination.[286] The Court reached this conclusion by first finding that, the text of § 2000e-2(m) makes it an unlawful employment practice to discriminate on the basis of race, color, religion, sex, and national origin, which indicates Congress's intent to limit the motivating factor theory to § 2000e-2(a) status discrimination only;[287] and second, the text of § 2000e-2(m) does not say anything about retaliation discrimination, and therefore, it would be improper to apply § 2000e-2(m)'s motivating factor theory to § 2000e-3(a) retaliation claims.[288] The Court further supported this conclusion by noting that the 1991 Act added § 2000e-2(m) to § 2000e-2, which contains Title VII's prohibition on status discrimination, and the title of the section of the 1991 Act that created § 2000e-2(m) referenced status discrimination only and not retaliation.[289] In sum, according to *Nassar*, the 1991 Act enacted a "lessened causation standard" for § 2000e-2(a) status discrimination, but it did not do so for § 2000e-3(a) retaliation

283. *Compare* 42 U.S.C. § 2000e-3(a) (making it unlawful for an employer to discriminate against an employee "because" she opposed an unlawful employment practice or made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing with respect to an unlawful employment practice), *with* 29 U.S.C. § 623(a)(1) (making it unlawful for an employer to take an adverse employment action against an employee "because of" the employee's age).

284. *Nassar*, 570 U.S. at 352 (citing *Gross* 557 U.S. at 176).

285. *Id.* at 351–52.

286. *Id.* at 352–53.

287. *Id.*

288. *Id.* (first citing Sebelius v. Cloer, 569 U.S. 369, 378 (2013); and then citing Gardner v. Collins, 27 U.S. (2 Pet.) 58, 93 (1829)).

289. *Id.* at 353 (citing Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991)).

discrimination, despite the opportunity Congress had to enact the same standard for both.[290]

Before *Nassar*, the Court read prohibitions on status discrimination in other anti-discrimination statutes to also prohibit retaliation discrimination even though those statutes did not contain an explicit anti-retaliation provision. Thus, the Court had to explain why it interpreted those statutes to prohibit something the text of those statutes did not mention, yet it read Title VII, which does include an explicit anti-retaliation provision, in such a parsimonious fashion.[291] The Court's answer to this question was Title VII is a "precise, complex, and exhaustive" statute, and thus it is not appropriate to interpret it as broadly as the Court had interpreted other anti-discrimination statutes that contained "broad, general bars on discrimination."[292] Put another way, when Congress enacts a statutory prohibition on discrimination in a broad and brief fashion, reading an anti-retaliation provision into that statutory prohibition is acceptable.[293] Conversely, when Congress enacts a detailed anti-discrimination statute like Title VII, it is not acceptable to expand § 2000e-2(m)'s motivating factor theory beyond § 2000e-2(a) status discrimination claims because if Congress intended § 2000e-2(m)'s motivating factor theory to apply to § 2000e-3(a) retaliation discrimination claims, it would have enacted statutory text to do so.[294]

Based on this reasoning, *Nassar* held that § 2000e-2(m)'s motiving factor theory applies only to § 2000e-2(a) status discrimination claims, and while the Court had previously read a prohibition on retaliation in broadly worded anti-discrimination statutes, Title VII's "detailed structure" made it inappropriate to read it just as broadly. Thus, a Title VII

290. *Id.* at 357.

291. *Id.* at 354–55 (first citing Gómez-Pérez v. Potter, 553 U.S. 474, 479, 487 (2008) (29 U.S.C. § 633a(a), which prohibits age discrimination against federal employees who are at least forty years old, does not have an anti-retaliation provision in it, but the Court nevertheless found that it does prohibit retaliation against a person who opposes age discrimination against those employees); then citing CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445, 452–53 (2008) (42 U.S.C. § 1981, which prohibits racial discrimination in contracting, does not have an anti-retaliation provision in it, but the Court nevertheless found that it does prohibit retaliation against a person who opposes racial discrimination in contracting); then citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173, 179 (2005) (20 U.S.C. § 1681(a), which prohibits sex discrimination in any education program or activity receiving federal financial assistance, does not have an anti-retaliation provision in it, but the Court nevertheless found that it does prohibit retaliation against a person who opposes sex discrimination in any education program or activity receiving federal financial assistance); and then citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235 n.3, 237 (1969) (42 U.S.C. § 1982, which prohibits racial discrimination in real and personal property transactions, does not have an anti-retaliation provision in it, but the Court nevertheless found that it does prohibit retaliation against a person who opposes racial discrimination in real and personal property transactions)).

292. *Id.* at 355–56.

293. *Id.* at 355–57.

294. *Id.*

plaintiff who asserts a § 2000e-3(a) retaliation claim must prove that retaliation was *the* reason her employer discriminated against her.[295] *Nassar* said three times that a Title VII plaintiff who presses a § 2000e-3(a) retaliation claim has to prove that retaliation was *the* but for cause of the adverse employment act, and it said once that retaliation has to be *the* reason for the adverse employment act.[296]

Nassar was a 5–4 decision.[297] Justice Anthony Kennedy wrote the majority opinion joined by Chief Justice John Roberts, Jr. and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, Jr.[298] Justice Ruth Bader Ginsburg wrote a dissent joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.[299]

In Justice Ginsburg's view, § 2000e-2(m)'s motivating factor provision applies to "'any employment practice,'" including retaliatory practices.[300] In response to the majority's reasoning that Congress intended to limit § 2000e-2(m)'s reach to § 2000e-2(a) status claims only, Justice Ginsburg pointed out that when Congress enacted § 2000e-2(m), it created an entirely new provision in Title VII, and "did not tie [§ 2000e-2(m)] specifically to §§ 2000e-2(a) [through] 2000e-2(d), which [taken together, prohibit] discrimination 'because of' race, color, religion, [sex], or national origin."[301] She also took issue with the Court importing its reasoning from *Gross*,[302] an ADEA case, into *Nassar*, a Title VII case.[303] In *Gross*, the Court declined to interpret the ADEA's prohibition against discrimination "because of" a person's age the same way it interpreted Title VII's prohibition against discrimination "because of" a person's race, color, religion, sex, or national origin because the ADEA and Title VII are materially different.[304] *Gross*, according to Justice Ginsburg, "took pains to distinguish ADEA claims from Title VII claims," yet in *Nassar*, a Title VII case, the Court found the ". . . holding and analysis of [*Gross*,] [an ADEA case] . . . instructive."[305]

The employer prevailed in *Gross* because the ADEA does not impose liability on an employer who makes an adverse employment decision

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295. *Id.* at 359–60, 362–63.

296. *Id.* at 343 (*the* but for cause), 348 (*the* but for cause), 350 (*the* reason), 352 (*the* but for cause) (emphases added).

297. *Id.* at 340–63 (Kennedy, J., joined by Roberts, C.J., Scalia, Thomas, & Alito, JJ., majority opinion); *id.* at 363–86 (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting).

298. *Id.* at 340–63 (majority opinion).

299. *Id.* at 363–86 (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting).

300. *Id.* at 372.

301. *Id.* at 372.

302. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 167–92 (2009).

303. *Nassar*, 570 U.S. at 380–81 (Ginsburg, J., dissenting).

304. *Gross*, 557 U.S. at 175 n.2.

305. *Nassar*, 570 U.S. at 380–81 (Ginsburg, J., dissenting).

partly because of age and partly because of some non-age reason because, unlike Title VII, the ADEA does not have a mixed motive provision.[306] Put another way, the ADEA's prohibition against age discrimination is too different from Title VII's prohibition against discrimination because of race, color, religion, sex, or national origin to interpret the two provisions in a like fashion.[307] The employer also prevailed in *Nassar* because according to the majority, "there is no 'meaningful textual difference' between the ADEA's use of [the word] 'because' and" Title VII's use of the word "because" in § 2000e-3(a).[308] Justice Ginsburg described this seeming contradiction as "heads the employer wins, tails the employee loses[.]"[309]

She also pointed out that there is a principle of statutory interpretation that says "identical phrases [that] appear in the same statute [should] ordinarily bear a consistent meaning[,]" and according to that principle, § 2000e-3(a)—Title VII's anti-retaliation provision—should have the same causation standard as § 2000e-2(a)—Title VII's prohibition against status discrimination—and because § 2000e-2(a) recognizes mixed motive claims, so should § 2000e-3(a).[310]

Justice Ginsburg found the Court's conclusion that the phrase "because of" requires proof of "but for" causation unconvincing and inconsistent with tort principles of causation.[311] According to tort principles of causation, when a defendant causes harm and does so for more than one reason, requiring the party the defendant harmed to prove "but for" causation is not proper.[312] When multiple factors cause an injury, and each factor standing alone would cause the same injury, modern tort law allows a plaintiff to recover if she can show that either factor caused her injury.[313] The *Nassar* majority, however, held that if a Title VII plaintiff asserts that her employer retaliated against her partly for an impermissible reason and partly for a permissible reason, she cannot recover; a result that same majority described as "textbook tort law."[314]

Justice Ginsburg objected to the majority's framing of its holding as "textbook tort law" because requiring "but for" causation when an

306. *Gross*, 557 U.S. at 169, 173–80.

307. *Nassar*, 570 U.S. at 381 (Ginsburg, J., dissenting).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 380–81, 383–85.

312. *Id.* at 383 (first citing 1 Restatement (Third) of Torts § 27 cmt. a, at 385 (Am. L. Inst. 2005) (there is "near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist"); then citing Restatement of Torts § 9, cmt. b, at 18 (Am. L. Inst. 1934) ("legal cause is a cause that is a 'substantial' factor in bringing about the harm")).

313. *Id.* at 383 (citing 1 Restatement (Third) of Torts § 27 at 376–77 (Am. L. Inst. 2005)).

314. *Id.* at 346–47 (majority opinion).

employer acts for multiple reasons can "demand the impossible . . . [because it forces a finder of fact] . . . to probe into a purely fanciful and unknowable state of affairs."[315] When evaluating why an employer that acted with a mixed motive did what it did, one has to "engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different."[316] Justice Ginsburg concluded her dissent by reminding the Court that the eighty-eighth Congress "rejected an amendment that would have placed the word 'solely' before 'because of'" in what became Title VII's prohibition against discrimination "because of" race, color, religion, sex, or national origin.[317]

Ultimately, *Nassar* held there is no mixed motive theory available for Title VII retaliation claims, which means a plaintiff whose employer retaliated against her and did so with a mixed motive cannot obtain relief under Title VII.[318]

F. Comcast Corp. v. National Ass'n of African American-Owned Media

Title VII and the ADEA are not the only anti-discrimination statutes in which issues of causation arise. Section 1981 of Title 42 prohibits race discrimination in contracting, and in *Comcast Corp. v. National Ass'n of African American-Owned Media*, the Court held that a § 1981 plaintiff must prove that race discrimination was "but for" cause of an adverse contracting decision.[319] Byron Allen, the black American owner of Entertainment Studios Network (ESN), wanted Comcast, one of the largest cable television operators in the United States of America, to carry ESN's content.[320] Comcast refused, stating there was not enough demand for ESN's content, that there was not enough bandwidth to carry ESN's content, and that Comcast preferred content that ESN did not offer.[321]

ESN sued Comcast in the United States District Court for the Central District of California, asserting that Comcast discriminated against media companies completely owned by black Americans.[322] ESN sued under 42 U.S.C. § 1981(a), which guarantees "[a]ll persons . . . the same right . . . to

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315. *Id.* at 385 (Ginsburg, J., dissenting) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956))).

316. *Id.* (quoting *Price Waterhouse*, 490 U.S. at 264 (O'Connor, J., concurring) (quoting Malone, *supra* note 315, at 67)).

317. *Id.* at 385 (Ginsburg, J., dissenting) (citing 110 Cong. Rec. 2728, 13837–38 (1964)).

318. *Id.* at 352–60, 362–63.

319. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1009–21 (2020).

320. *Id.* at 1013.

321. *Id.*

322. *Id.*; Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., No. 2:15-cv-01239-TJH-MAN, 2016 WL 11652073, at *1 (C.D. Cal. Oct. 5, 2016).

make and enforce contracts . . . as is enjoyed by white citizens."[323] ESN conceded that Comcast articulated legitimate business reasons for refusing to carry ESN's content, but asserted these reasons were a pretext to curry "favor with the Federal Communications Commission."[324] The district court dismissed ESN's complaint, finding the complaint did not state a plausible claim that "but for" racially discriminatory reasons, Comcast would have agreed to carry ESN's content.[325]

The United States Court of Appeals for the Ninth Circuit reversed the district court, finding that at the pleading stage, a § 1981(a) plaintiff does not have to plead facts demonstrating that "but for" racial discrimination, he or she would not have been harmed. Rather, if the plaintiff shows that discrimination played "any role" in his or her being harmed, he or she has plausibly stated a claim under § 1981(a).[326]

This contradicted a prior United States Court of Appeals for the Seventh Circuit opinion, which held that a § 1981 plaintiff has to prove that "but for" racial discrimination, he or she would not have been harmed.[327] The Supreme Court agreed to hear *Comcast* in order to resolve the circuit split on the question of whether a § 1981 plaintiff has to prove "but for" racial discrimination, or whether he or she can instead prove that racial discrimination was a "motivating factor" in the act that resulted in harm.[328]

Comcast invoked *Nassar*'s language that "[i]t is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong must prove

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323. *Comcast*, 140 S. Ct. at 1013. Section 1981 provides in full:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

324. *Comcast*, 140 S. Ct. at 1013.

325. *Id.*; *Comcast*, 2016 WL 11652073, at *1.

326. *Comcast*, 140 S. Ct. at 1013; Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc., 915 F.3d 617, 626 (9th Cir. 2019); Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., 743 F. App'x 106, 106–07 (9th Cir. 2018).

327. Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262–63 (7th Cir. 1990).

328. *Comcast*, 140 S. Ct. at 1014.

but-for causation."[329] Section 1981, like Title VII with respect to retaliation claims, and like the ADEA, has this same requirement, which means a § 1981 plaintiff has to prove that "but for" racial discrimination, he or she would not have been harmed.[330] *Comcast* supported this conclusion by adverting to a "neighboring section" to § 1981 that allowed the criminal "prosecution of anyone who 'depriv[es]' a person of 'any right' protected by the substantive provisions of the Civil Rights Act of 1866 'on account of' that person's prior 'condition of slavery' or 'by reason of' that person's 'color or race.'"[331] To prove a violation of this neighboring section, the government had to prove that the defendant acted "on account of" or "by reason of" a person's race, which *Comcast* said requires proof of "but for" causation.[332]

Also, when the Court inferred "a private cause of action under § 1981," it described the law as "'affording a federal remedy against discrimination . . . *on the basis of* race,'" which is language *Comcast* described as "strongly suggestive of a but-for causation standard."[333] In *General Building Contractors Ass'n v. Pennsylvania*,[334] the Court said that § 1981 prohibits discrimination "because of" race, which *Comcast* said is language associated with "but for" causation.[335]

The same congressional act that enacted 42 U.S.C. § 1981 also enacted 42 U.S.C. § 1982 which says, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[336] Among other things, § 1982 prohibits denying a person the opportunity to acquire property "because of" race.[337] Because § 1981 and § 1982 use "nearly identical language" and share a common origin and purpose, the Court has interpreted both statutes similarly, and because the Court has interpreted § 1982 to require "but for" causation, the *Comcast* Court said the same is required for § 1981.[338]

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329. *Id.* (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

330. *Id.* (first citing *Nassar*, 570 U.S. at 346–47 (Title VII retaliation); and then citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (ADEA)).

331. *Id.* at 1015 (quoting Civil Rights Act of 1866, § 2, 14 Stat. 27 (1866)) (alteration in original).

332. *Id.* (citing *Gross*, 557 U.S. at 176–77).

333. *Id.* at 1016 (citing Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975)).

334. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 388 (1982).

335. *Comcast*, 140 S. Ct. at 1016 (first quoting *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388; and then citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).

336. *Id.*

337. *Id.* at 1016–17 (first citing Buchanan v. Warley, 245 U.S. 60, 78–79 (1917); then citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419 (1968); and then citing *Runyon v. McCrary*, 427 U.S. 160, 170–71 (1976)).

338. *Id.* at 1017.

ESN urged the Court to recognize a cause of action under § 1981 if a plaintiff demonstrates that the defendant acted with a mixed motive.[339] Put another way, ESN wanted the Court to take the "'motivating factor' causation test found in Title VII" and apply it to § 1981.[340] The Court rejected ESN's argument for two reasons.[341] First, the text of § 1981 does not include a motivating factor provision like the text of Title VII does.[342] Second, in 1991, Congress amended Title VII and § 1981, and in so doing, it added the motivating factor language to Title VII, but it did not add the same or similar language to § 1981.[343] When Congress amends one statute using certain language and another statute using different language, the Court assumes the different language implies a difference in meaning.[344]

ESN next argued that § 1981(b)'s prohibition on racial discrimination in contracting includes prohibiting racial discrimination in the "making" of contracts, which ESN asserted "guarantees not only the right to equivalent contractual *outcomes* (a contract with the same final terms), but also the right to an equivalent contracting *process* (no extra hurdles on the road to securing that contract)."[345] In light of this, ESN argued that "a motivating factor causation test fits more logically than the traditional but-for test."[346]

Comcast responded that § 1981 only prohibits racially discriminatory outcomes, which it said is the right to contract, the right to sue, the right to be a party, and the right to give evidence.[347] In light of this, Comcast argued, § 1981 "focus[es] on contractual *outcomes* (not processes) [and therefore] is more consistent with the traditional but-for test of causation."[348]

The Court did not decide whether § 1981 prohibits racial discrimination in contracting outcomes only, or whether § 1981 also

339. *Id.* at 1014.

340. *Id.* at 1017–18.

341. *Id.*

342. *Id.* at 1017. Title VII's motivating factor language is codified at 42 U.S.C. § 2000e-2(m). Congress enacted § 2000e-2(m) as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991).

343. *Comcast*, 140 S. Ct. at 1017–18. When Congress amended § 1981 as part of the Civil Rights Act of 1991, it added what is now codified at 42 U.S.C. § 1981(b) and 42 U.S.C. § 1981(c). Pub. L. No. 102-166, § 101, 105 Stat. 1071-1072 (1991).

344. *Comcast*, 140 S. Ct. at 1018 (first citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174-75 (2009); and then citing Russello v. United States, 464 U.S. 16, 23 (1983)).

345. *Id.*

346. *Id.*

347. *Id.* The United States appeared in the case in support of Comcast and made this argument. *Id.* at 1012, 1018. The United States went so far as to argue that an "employer could 'refus[e] to consider applications' [for employment] from black applicants " and not violate § 1981. *Id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment).

348. *Id.* at 1018 (majority opinion).

prohibits racial discrimination in contracting processes too, because the question of whether a § 1981 plaintiff is deprived of a right is distinct from whether a § 1981 plaintiff has established causation, and *Comcast* held that a § 1981 plaintiff has to establish "but for" causation.[349]

Justice Neil Gorsuch wrote the opinion in *Comcast*.[350] Chief Justice John Roberts, Jr., Justices Clarence Thomas, Stephen Breyer, Samuel Alito, Jr., Sonia Sotomayor, Elena Kagan, and Brett Kavanaugh joined the opinion in full.[351] Justice Ruth Bader Ginsburg joined the opinion except for the sole footnote in the opinion.[352]

Justice Ginsburg agreed that a § 1981 plaintiff has to prove "but for" racial discrimination.[353] She wrote separately to address Comcast's argument that § 1981 only prohibits racial discrimination in contracting outcomes and does not apply to racial discrimination in the contracting process.[354] If Comcast's view were established law, according to Justice Ginsburg, "a lender would not violate § 1981 [if it] require[ed] prospective borrowers to provide one reference letter if they are white and five if they are black."[355] Likewise, an employer would not violate § 1981 if it "reimburse[ed] expenses for white interviewees but require[ed] black applicants to pay their own way."[356] The United States agreed with Comcast's arguments, and went so far as to argue that an employer would not violate § 1981 even if it "'refus[ed] to consider applications' from

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349. *Id.* at 1018 n.*, 1019.

350. *Id.* at 1012.

351. *Id.*

352. *Id.*; *id.* at 1019–21 (Ginsburg, J., concurring in part and concurring in the judgment). The sole footnote in the majority opinion says:

> The concurrence proceeds to offer a view on the nature of the right, while correctly noting that the Court reserves the question for another day. We reserve the question because "we are a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 [] (2005), and do not normally strain to address issues that are less than fully briefed and that the district and appellate courts have had no opportunity to consider. Such restraint is particularly appropriate here, where addressing the issue is entirely unnecessary to our resolution of the case.

Id. at 1018. n.*.

353. *Id.* at 1019–20 (Ginsburg, J., concurring in part and concurring in the judgment). Justice Ginsburg reminded the Court that she had previously posited "that a strict but-for causation standard is ill suited to discrimination cases and [is] inconsistent with tort principles." *Id.* at 1019–20 n.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 383–85 (2013) (Ginsburg, J., dissenting)). She did concede, however, that *Nassar* established "but for" causation "as a 'default rul[e]'" in federal anti-discrimination statutes. *Id.* at 1019–20 n.* (citing *Nassar*, 570 U.S. at 347).

354. *Id.* at 1019–21.

355. *Id.* at 1020.

356. *Id.*

black applicants at all."[357] Justice Ginsburg said this view could not "be squared with the statute" because the "equal 'right . . . to make . . . contracts' . . . is an empty promise" if one does not have an "equal opportunit[y] to present or receive offers and negotiate over terms."[358]

She also said that § 1981 "covers the entirety of the contracting process"
as reflected in § 1981(b) defining the phrase "'make and enforce contracts' to 'includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'"[359] Congress added § 1981(b) to § 1981 in the 1991 Act in order to prohibit racial discrimination in "all phases and incidents of the contractual relationship."[360]

Justice Ginsburg warned the Court that Comcast's argument that § 1981 does not prohibit racial discrimination in the contract formation process was an "invit[ation]" for the Court to repeat the error it made in *Patterson v. McClean Credit Union* when it held that "the right to 'make' a contract 'extend[ed] only to the formation of a contract,' and the right to 'enforce' it encompassed only 'access to legal process.'"[361] *Patterson* also held that § 1981 does not apply to conduct that occurs after the contract is formed, which meant § 1981 did not apply to racial harassment that occurred after the formation of an employment contract.[362]

Congress overruled *Patterson* in the 1991 Act when it amended § 1981 by adding § 1981(b).[363] As a result of the 1991 Act's amendment to § 1981, racial discrimination that occurs after the formation of a contract violates § 1981 "because the right to 'make and enforce' a contract includes the manner in which the contract is carried out[,]" and in Justice Ginsburg's view, that same principle should apply to racial discrimination in the process of making the contract.[364] Justice Ginsburg concluded her concurrence by saying that if Comcast did engage in racial discrimination

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357. *Id.* at 1018; *id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment) (citing Brief for United States as Amicus Curiae Supporting Petitioner at 21, *Comcast*, 140 S. Ct. at 1009 (No. 18-1171), 2019 WL 3889653).

358. *Id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment)

359. *Id.* (alteration in original) ((quoting 42 U.S.C. § 1981(b)).

360. *Id.* (first quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 302 (1994); and then quoting H.R. Rep. No. 102-40, pt. 2, at 37 (1991)).

361. *Id.* at 1020–21 (alteration in original) (quoting Patterson v. McClean Credit Union, 491 U.S. 164, 176–78, 181 (1989)).

362. *Id.* at 1021 (quoting *Patterson*, 491 U.S. at 178–79).

363. *Id.* at 1021 (citing CBOCS W., Inc. v. Humphries, 553 U.S. 442, 450 (2008)). When Congress amended § 1981 as part of the Civil Rights Act of 1991, it added what is now codified at 42 U.S.C. § 1981(b) and 42 U.S.C. § 1981(c). Pub. L. No. 102-166, § 101, 105 Stat. 1071-1072 (1991).

364. *Comcast*, 140 S. Ct. at 1021 (Ginsburg, J., concurring in part and concurring in the judgment).

during the contract formation process, it should not "escape liability," but because the Court reserved the issue of whether § 1981 prohibits racial discrimination during the contract formation process "for consideration on remand," she joined the Court's opinion.[365]

At this point, it might be helpful to recapitulate the Court's "because of," "motivating factor," and "but for" causation analyses from *Price Waterhouse v. Hopkins* in 1989[366] through *Comcast* in 2020.[367]

In *Price Waterhouse*, six Justices agreed that if a Title VII plaintiff proves by a preponderance of the evidence that her employer made a mixed motive adverse employment decision, the burden of persuasion shifts to the employer to prove by preponderance of the evidence that the employer would have made the same decision had the impermissible reason played no role in its adverse employment decision.[368]

The 1991 Act codified this aspect of *Price Waterhouse* and added 42 U.S.C. § 2000e-2(m),[369] which is Title VII's "motivating factor" provision, and 42 U.S.C. § 2000e-2(g)(2)(B), which is Title VII's provision that grants limited declaratory relief and limited injunctive relief to a plaintiff who proves her employer made an adverse employment decision partly for an impermissible reason and partly for a permissible reason, but her employer also proves the employer would have made the same decision had the impermissible reason played no role in its decision.[370]

In *Desert Palace, Inc. v. Costa*, the Court held a Title VII plaintiff who asserts her employer acted with a mixed motive can prove her case with direct evidence or with circumstantial evidence.[371]

In *Gross v. FBL Financial Services, Inc.*, the Court held that the ADEA does not recognize a mixed motive theory, which means a plaintiff cannot pursue an age discrimination claim under the ADEA if her employer made an adverse employment decision partly for age-related reasons and partly for non-age-related reasons.[372] Under the ADEA, a plaintiff has to prove that age was *the* reason for an adverse employment decision, not simply *a* reason.[373]

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365. *Id.*

366. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

367. *Comcast*, 140 S. Ct. at 1009.

368. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 261, 279 (O'Connor, J., concurring).

369. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991).

370. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b)(3), 105 Stat. 1075-1076 (1991).

371. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003).

372. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 169–70, 173–75, 177–78, 180 (2009).

373. *Id.* at 176–78, 180.

In *University of Texas Southwestern Medical Center v. Nassar*, the Court held Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), does not recognize a mixed motive theory, which means a plaintiff cannot pursue a retaliation claim under Title VII if her employer retaliated against her partly for retaliatory reasons and partly for non-retaliatory reasons.[374] *Nassar* described Title VII's motivating factor provision, 42 U.S.C. § 2000e-2(m), as having a "lessened causation standard" than the "but for" causation standard required by Title VII's anti-retaliation provision, which means under Title VII's anti-retaliation provision, a plaintiff has to prove that retaliation was *the* reason for an adverse employment decision, not simply *a* reason.[375]

And in *Comcast Corp. v. National Ass'n of African American-Owned Media*, the Court held that 42 U.S.C. § 1981 does not recognize a mixed motive theory, which means a plaintiff cannot pursue a § 1981 discrimination claim if the defendant made an adverse contracting decision partly for racially discriminatory reasons and partly for non-discriminatory reasons.[376] Under § 1981, a plaintiff has to prove that racial discrimination was *the* reason for an adverse contracting decision, not simply *a* reason.[377]

II. *BOSTOCK V. CLAYTON COUNTY*

In *Bostock v. Clayton County*, the Supreme Court consolidated three cases in order to decide whether Title VII's prohibition on sex discrimination makes it illegal to terminate a person's employment for being gay or transgender.[378]

In the first case, Gerald Bostock worked as a child welfare advocate for Clayton County, Georgia.[379] After ten years of employment, Mr. Bostock started participating in a gay recreational softball league. Shortly thereafter, his employer terminated his employment "for conduct 'unbecoming' a county employee."[380] Mr. Bostock sued his employer for sex discrimination under Title VII in the United States District Court for the Northern District of Georgia, which dismissed his case for failure to state a claim for which relief can be granted.[381] Mr. Bostock appealed to

374. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352–60, 362–63 (2013).

375. *Id.* at 348–52, 357.

376. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014–19 (2020).

377. *Id.*

378. Bostock v. Clayton County, 140 S. Ct. 1731, 1737–38 (2020).

379. *Id.*

380. *Id.*

381. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964 (11th Cir. 2018) (per curiam).

the United States Court of Appeals for the Eleventh Circuit, and that court affirmed the district court's dismissal of his case.[382]

In the second case, Donald Zarda worked for Altitude Express in the State of New York as a skydiving instructor.[383] When Mr. Zarda disclosed that he was gay, Altitude Express terminated his employment.[384] He sued Altitude Express for sex discrimination under New York state law and for sex discrimination under Title VII in the United States District Court for the Eastern District of New York.[385] The district court dismissed Mr. Zarda's Title VII sex discrimination claim and the state law sex discrimination claim proceeded to trial, but the jury returned a verdict in favor of Altitude Express.[386] Mr. Zarda appealed the dismissal of his Title VII sex discrimination claim to the United States Court of Appeals for the Second Circuit, and a panel of that court affirmed the district court's dismissal of his Title VII sex discrimination claim.[387]

The Second Circuit voted to rehear the case en banc to reconsider its precedents holding that Title VII's prohibition on sex discrimination does not include discrimination based on sexual orientation.[388] The en banc court overruled its precedent and held that Title VII's prohibition on sex discrimination prohibits discrimination based on sexual orientation.[389]

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382. *Id.* at 964–65.

383. *Bostock*, 140 S. Ct. at 1738.

384. *Id.*

385. Zarda v. Altitude Express, 855 F.3d 76, 79–84 (2d Cir. 2017) (per curiam), *reh'g en banc granted*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc).

386. *Id.* at 79–80. Mr. Zarda died before the trial, and Melissa Zarda and William Allen Moore, Jr., co-independent executors of Mr. Zarda's estate, replaced him as the plaintiff in his case. *Id.* at 79 n.1.

387. *Id.* at 81–84.

388. *Zarda* 883 F.3d at 108. The cases the Second Circuit reconsidered are Dawson v. Bumble & Bumble, 398 F.3d 211, 217–23 (2d Cir. 2005), and Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000). *Zarda*, 883 F.3d at 108. The en banc judges were Chief Judge Robert A. Katzmann and Judges Dennis G. Jacobs, José Alberto Cabranes, Rosemary S. Pooler, Robert David Sack, Reena Raggi, Peter W. Hall, Debra Ann Livingston, Gerard E. Lynch, Denny Chin, Raymond Joseph Lohier, Jr., Susan Laura Carney, and Christopher Fitzgerald Droney. *Id.* at 106.

389. *Zarda*, 883 F.3d at 108, 111–32. The decision was not unanimous; in fact, it was far from it. *Id.* at 106. Chief Judge Katzmann wrote the majority opinion, and Judges Hall, Chin, Carney, and Droney joined that opinion in full. *Id.* Judge Jacobs joined Parts I and III.B.3 and wrote a concurring opinion. *Id.* at 132–35 (Jacobs, J., concurring).
Judge Pooler joined all but part II.B.1.b. *Id.* at 106.
Judge Sack joined Parts I, II.A, II.B.3, and II.C and wrote a concurring opinion. *Id.* at 135–36 (Sack, J., concurring).
Judge Lohier joined Parts I, II.A, and II.B.1.a and wrote a concurring opinion. *Id.* at 136–37 (Lohier, J., concurring).
Judge Cabranes concurred in the judgment only. *Id.* at 135 (Cabranes, J., concurring in the judgment).
Judge Lynch wrote a dissent that Judge Livingston joined as to Parts I, II, and III. *Id.* at 137–67 (Lynch & Livingston, JJ., dissenting).
Judge Livingston wrote a dissent. Id. at 167–69 (Livingston, J., dissenting).
Judge Raggi wrote a dissent. *Id.* at 169 (Raggi, J., dissenting).

In the third case, Aimee Stephens worked for R.G. & G.R. Harris Funeral Homes (Harris) in Garden City, Michigan.[390] When Ms. Stephens started working for Harris, she "presented as male[,] but two years [later,] . . . she [started receiving] treatment for despair and loneliness[, and] [u]ltimately, clinicians diagnosed her with gender dysphoria and recommended that she [start] living as a [female]."[391] Four years after that recommendation, "Ms. Stephens wrote a letter to . . . [Harris, stating] that she planned to 'live and work full-time as a [female]'."[392] Harris then terminated her employment.[393]

The Equal Employment Opportunity Commission (EEOC) sued[394] Harris in the United States District Court for the Eastern District of Michigan, asserting that Harris's termination of Ms. Stephens for being transgender constituted sex discrimination prohibited by Title VII.[395] The district court dismissed that claim.[396] The EEOC appealed the case to the United States Court of Appeals for the Sixth Circuit, and that court reversed the district court, finding that Title VII's prohibition on sex discrimination prohibits discrimination against a person for being transgender.[397]

The Supreme Court granted certiorari in order to resolve the circuit split on the question of whether Title VII's prohibition on sex discrimination makes it illegal to terminate a person's employment for being gay or transgender.[398] In answering this ultimate question, the Court had to decide the scope of what it means to discriminate "because of" sex.[399] None of the three cases in *Bostock* involved what the Court in *Nassar* called the "lessened causation standard" that applies in Title VII mixed motive cases where a plaintiff can obtain limited relief if she proves that her employer acted partly for an impermissible reason and partly for

390. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

391. *Id.*

392. *Id.*

393. *Id.*

394. Title VII authorizes the EEOC to bring a civil action against a non-governmental party. 42 U.S.C. § 2000e-5(f)(1). The aggrieved person has the right to intervene in such a case. *Id.* Ms. Stephens intervened in the case when it reached the United States Court of Appeals for the Sixth Circuit because of her "concern that changes in policy priorities within the [federal] government might prevent the EEOC from fully representing [her] interests in [the] case." EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 570 (6th Cir. 2018). Ms. Stephens died before the Supreme Court decided *Bostock*. *Bostock*, 140 S. Ct. at 1738.

395. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840–70 (E.D. Mich. 2016).

396. *Id.* at 840–42.

397. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 571–600.

398. *Bostock*, 140 S. Ct. at 1738.

399. *Id.* at 1739.

a permissible reason, and her employer proves that it would have made the same decision had the impermissible reason played no role at all.[400]

In *University of Texas Southwestern Medical Center v. Nassar* and *Gross v. FBL Financial Services, Inc.*, the Court said the language in Title VII that prohibits employers from making adverse employment decisions "because of . . . race, color, religion, sex, or national origin"[401] means employers cannot make such decisions "by reason of" or "on account of" race, color, religion, sex, or national origin, which means a Title VII plaintiff who asserts that her employer discriminated against her "because of" a reason that Title VII prohibits must prove that "but for" the employer acting for a prohibited reason, she would not have been harmed.[402]

Bostock described "but for" causation as "a sweeping standard . . . [because] [o]ften, events have multiple but-for causes."[403] For example, if a driver runs a red light and another driver fails to use a turn signal at an intersection and the drivers collide, both drivers are a "but for" cause of the collision.[404] And according to *Bostock*,

> [w]hen it comes to Title VII, . . . the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its [adverse] employment decision.[405] So long as the plaintiff's sex [or race, color, religion, or national origin,] was one but-for cause of that decision, that is enough to trigger the law.[406]

Congress could have written Title VII in a way to require a plaintiff to prove that her employer made an adverse employment decision "solely because of" or "primarily because of" a reason prohibited by Title VII, but that is not the law Congress wrote.[407] In fact, in the 1991 Act, Congress

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400. *Id.* at 1739–40; Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013).

401. 42 U.S.C. § 2000e-2(a).

402. *Nassar*, 570 U.S. at 346, 350; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

403. *Bostock*, 140 S. Ct. at 1739. In *Ford Motor Co. v. Montana Eighth Judicial District Court*, Justice Gorsuch, the author of the majority opinion in *Bostock*, wrote, "As every first year law student learns, a but-for causation test isn't the most demanding. At a high level of abstraction, one might say any event in the world would not have happened 'but for' events far and long removed." Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring in the judgment). In *Welch v. State*, the Alabama Court of Criminal Appeals held that "but for" causation is "too imprecise for a rule of causation" in criminal cases where proof beyond a reasonable doubt is required and illustrated the point by saying, "Mankind might still be in Eden, but for Adam's biting an apple." Welch v. State, 235 So. 2d 906, 907 (Ala. Crim. App. 1970).

404. *Bostock*, 140 S. Ct. at 1739 (citing Burrage v. United States, 571 U.S. 204, 211–12 (2014)).

405. *Id.*

406. *Id.* (first citing *Burrage*, 571 U.S. at 211–12; and then citing *Nassar*, 570 U.S. at 350).

407. *Id.* (citing 11 U.S.C. § 525 and 16 U.S.C. § 511 as examples of statutes where Congress used the phrase "solely because of," and citing 22 U.S.C. § 2688 as an example of a statute where Congress used the phrase "primarily because of"). Use of the phrase "'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law." *Id.*

amended Title VII to add § 2000e-2(m), its "motivating factor" provision, which does not require proof of "but for" causation, but instead has a "lessened causation standard."[408] The addition of § 2000e-2(m), however, does not mean that a plaintiff who relies instead on § 2000e-2(a) and its requirement of proof of "but for" causation has to prove that her employer made an adverse employment decision "solely because of" or "primarily because of" a reason prohibited by Title VII.[409] As long as the plaintiff proves that her employer made the adverse employment decision for a reason that is prohibited by Title VII and that reason is a "but for" reason, it does not matter that other reasons also played a role in the decision.[410]

Bostock contrasted the "but for" causation requirement of § 2000e-2(a) with the "lessened causation" standard of § 2000e-2(m) to make the point that Title VII provides two paths to relief."[411] One path is § 2000e-2(a), which requires proof of "but for" causation, and the other path is § 2000e-2(m), which requires a "lessened causation standard."[412] However, *Bostock* made a point of saying that "nothing in [its] analysis depends on the motivating factor test [from § 2000e-2(m)]."[413] *Bostock*'s statement that "the traditional but-for causation standard [does not] mean[] [that] a defendant can[] avoid liability just by citing some *other* factor that contributed to [the adverse employment act]" appears to be a recognition of what United States Senator Clifford Philip Case, Jr., of New Jersey said during the debate on Title VII: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[414]

Bostock also appears to recognize that Title VII authorizes two mixed motive theories, one under § 2000e-2(a) and one under § 2000e-2(m).[415] If an employer makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason, and the employee pursues a claim under § 2000e-2(a), the employee can prevail if she proves that "but for" the impermissible reason, the employer would

408. *Id.* at 1739–40 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (1991)). On February 10, 1964, the United States House of Representatives rejected a proposed amendment that would have placed the word "solely" before the phrase "because of," and the United States Senate rejected the proposed amendment on June 15, 1964. 110 Cong. Rec. 2728, 13837–38 (1964).

409. *Bostock*, 140 S. Ct. at 1739–40.

410. *Id.* at 1739 (first citing *Burrage*, 571 U.S. at 211–12; and then citing *Nassar*, 570 U.S. at 350).

411. *Id.* at 1739–40.

412. *Id.*

413. *Id.* at 1740.

414. 110 CONG. REC. 13837 (1964).

415. *Bostock*, 140 S. Ct. at 1739–40.

not have made the adverse employment decision.[416] This requires that the employee to prove the impermissible reason was *decisive*, which means if one removes the impermissible reason from the decision making process, the ultimate decision would change.[417]

On the other hand, if an employer makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason, and the employee pursues a claim under § 2000e-2(m), the employee does not need to prove that "but for" the impermissible reason, the employer would not have made the adverse employment decision. Rather, she just has to prove that the employer was motivated by the impermissible reason when it made the decision.[418] Under this latter mixed motive theory, the employee does not need to prove that the impermissible reason was *decisive*, only that it played *a part* in the adverse employment decision.[419]

The "multiple but-for cause"[420] language from *Bostock* differs from the language the Court used in *Nassar* and *Gross*, which rejected the availability of a mixed motive or motivating factor theory in Title VII retaliation cases and ADEA cases respectively, and both of which said a combined ten times that plaintiffs in Title VII retaliation cases and ADEA cases have to prove that an impermissible reason was "the but for cause" or "the reason" their employers made adverse employment decisions.[421] *Nassar*'s and *Gross*'s rejections of the mixed motive or motivating factor theory in Title VII retaliation cases and ADEA cases respectively, coupled with both cases' use of the definite article "the" rather than the indefinite article "a" in describing what proving "but for" causation entails, suggest that those two decisions intended to require the plaintiff to prove that an impermissible reason was the "sole" or "primary" reason the employer made an adverse employment decision.[422] Justice Ginsburg, who wrote a dissent in *Nassar* that Justices Breyer, Sotomayor, and Kagan joined, and Justice Stevens, who wrote a dissent in *Gross* that Justices Souter,

416. *Id.*

417. *Id.* at 1739 ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

418. *Id.* at 1739–40.

419. *Id.*

420. *Id.* at 1739.

421. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343, 348, 350, 352 (2013) (using phrases like *the* but for cause; *the* reason; and *the* but for cause) (emphases added); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77, 177 n.4, 178, 180 (2009) (using phrases like *the* reason and *the* but for cause) (emphases added).

422. *Nassar*, 570 U.S. at 343, 348, 350, 352; *Gross*, 557 U.S. at 176, 177 n.4, 178, 180.

Ginsburg, and Breyer joined, all thought that was precisely what those decisions required.[423]

Bostock, however, is fairly clear a plaintiff's proof of "but for" causation is not as onerous as *Nassar* and *Gross* suggest it is; instead of having to prove that an impermissible reason was the "sole" or "primary" reason the employer made an adverse employment decision, the plaintiff has to show that an impermissible reason was "*a* but for" reason, not "*the* but for" reason.[424] There are several passages from *Bostock* that support this view.[425]

In stating that Title VII protects males and females from sex discrimination equally, the Court used the following hypothetical:

> So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual *in part* because of sex. Instead of avoiding Title VII exposure, this employer doubles it.[426]

The Court also said that the ordinary public meaning of Title VII's language at the time of its adoption announced the following "straightforward rule":

> An employer violates Title VII when it intentionally fires an individual employee based *in part* on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same

423. *Nassar*, 570 U.S. at 385 (Ginsburg, J., dissenting) (citing 110 Cong. Rec. 2728, 13837–38 (1964)) ("When Title VII was enacted, Congress considered and rejected an amendment that would have placed the word 'solely' before 'because of [the complainant's] race, color, religion, sex, or national origin.' Senator Case, a prime sponsor of Title VII, commented that a 'sole cause' standard would render the Act 'totally nugatory.' Life does not shape up that way, the Senator suggested, commenting '[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.'") (internal citations omitted); *Gross*, 557 U.S. at 183 n.4 (Stevens, J., dissenting) ("We were no doubt aware that dictionaries define 'because of' as 'by reason of' or 'on account of.' Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define 'because of' as 'solely by reason of' or 'exclusively on account of.' In *Price Waterhouse*, we recognized that the words 'because of' do not mean 'solely because of,' and we held that the inquiry 'commanded by the words' of the statute was whether gender was a motivating factor in the employment decision." (internal citations omitted)).

424. *Bostock*, 140 S. Ct. at 1739 (first citing Burrage v. United States, 571 U.S. 204, 211–12 (2014); and then citing *Nassar*, 570 U.S. at 350) ("When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.").

425. *Id.* at 1741–46, 1748.

426. *Id.* at 1741 (second emphasis added).

> when compared to men as a group. If the employer intentionally relies *in part* on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.[427]

"[I]f an employer intentionally relies *in part* on an individual employee's sex when" making an adverse employment decision, that employer violates Title VII.[428] For example, if an employer has two employees, one male and one female, and both employees are attracted to men, if the employer terminates the employment of the male "for no other reason other than the fact that he is attracted to men," the employer treats the male employee differently than the female employee based *in part* on the male employee's sex, and reliance on that employee's sex is a "but for" cause of the termination.[429] And it does not matter in this example that the employer considered other factors in the decision to terminate the male employee.[430] To further illustrate this point, consider an employer that terminates the employment of any male employee who is a fan of the "wrong" sports team.[431] That employer terminated the employment of male employees "'because of sex'" if the employer would not have terminated the employment of female employees who are fans of the same sports team.[432]

The same holds true for an employer that terminates the employment of an employee because the employee is gay or transgender.[433] In that case, the employee's "sex and something else (the sex to which the [employee] is attracted or [the sex] with which the [employee] identifies)" are in play, but the employer would still violate Title VII if "but for" the employee's sex, the employer would not have terminated the employee's employment.[434] If an employer terminates the employment of a female employee and a male employee because both defy traditional sex stereotypes, that employer had doubled its Title VII liability, and the same holds true if that same employer terminates the employment of both employees for being gay or transgender.[435] At bottom, if an employer takes an adverse employment action against an employee because that employee is gay or transgender, that employer intentionally discriminates against

427. *Id.* (emphases added).
428. *Id.* (emphasis added).
429. *Id.*
430. *Id.* at 1742.
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.* at 1742–43.

that employee "*in part* because of sex," and that is prohibited by Title VII.[436]

Bostock is not the only Supreme Court case that used language suggesting that an employer that makes an adverse employment decision partly for an impermissible reason and partly for a permissible reason made that decision "because of" the impermissible reason if the impermissible reason was decisive.[437]

In *Phillips v. Martin Marietta Corp.*, the employer did not hire women with young children but did hire men with young children and argued that it did not engage in sex discrimination because it relied on being the parent of young children as part of the reason for its employment policy.[438] The Court rejected the employer's argument because "an employer [that] discriminates intentionally against [a person] . . . *in part* because of sex" nevertheless violates Title VII.[439] Sex was not the only reason the employer did not hire women with young children, "or maybe even the main [reason], but [sex] was one but-for cause[,] and that was enough" to run afoul of Title VII.[440]

In *Los Angeles Department of Water and Power v. Manhart*, the employer required female employees to make larger contributions to their pension plans than male employees made to their pension plans because, on average, women on live longer than men, which made funding female employees' pension plans more expensive than funding male employees' pension plans.[441] Notwithstanding the actuarial accuracy of the average life expectancy of women compared to the average life expectancy of men, the Court still found that the employer violated Title VII because "[a]n employer's intentional discrimination on the basis of sex is not more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables."[442]

Turning back to *Bostock*, when an employer takes an adverse employment action against an employee because that employee is gay or transgender, that employer "necessarily and intentionally discriminates

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436. *Id.* at 1743 (citing Zarda v. Altitude Express, Inc., 883 F.3d 100, 135 (2d Cir. 2018) (Cabranes, J., concurring in the judgment)) ("This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination 'because of . . . sex.' . . . [S]exual orientation is a function of his sex. Discrimination . . . because of . . . sexual orientation therefore is discrimination because of his sex, and is prohibited by Title VII. That should be the end of the analysis.").

437. *Id.* (first citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707–08, 711 (1978); and then citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 542–44 (1971) (per curiam)).

438. *Phillips*, 400 U.S. at 544.

439. *Bostock*, 140 S. Ct. at 1743.

440. *Id.* at 1745.

441. *Manhart*, 435 U.S. at 704–05.

442. *Bostock*, 140 S. Ct. at 1743 (citing *Manhart*, 435 U.S. at 708).

against that [employee] *in part* because of sex[,]" and violates Title VII in the process.[443] And *Bostock* said that "the [employee's] sex need not be the *sole or primary cause* of the employer's adverse action."[444] This is the case even if another factor, "such as the sex the [employee] is attracted to or presents as[,] might also be at work, or even *play a more important role* in the employer's decision."[445] An employer that takes an adverse employment action against an employee *in part* because that employee is gay or transgender violates Title VII's prohibition on sex discrimination even if that employer takes the same adverse employment action against all of its male gay or transgender employees and all of its female gay or transgender employees.[446]

Liability under Title VII does not "turn[] on the employer's . . . further intentions (or motivations) for its conduct beyond sex discrimination."[447] It is not possible for an employer to discriminate against a person for being gay or transgender without discriminating *in part* because of that person's sex.[448] *Bostock* stated explicitly that Title VII does not require that a plaintiff prove that race, color, religion, sex, or national origin was the *sole or primary* reason for an employer's adverse employment decision.[449]

And because a result can have more than one "but for" cause, if race, color, religion, sex, or national origin is decisive in an employer's adverse employment decision, that employer is liable under Title VII even if other factors besides race, color, religion, sex, or national origin contributed to the adverse employment decision."[450]

Bostock said eight times that if an employer considers sex in making an adverse employment decision, and the ultimate decision would have been different had sex not been considered, sex is a "but for" cause of that decision even if the employer considered other factors too in making the decision.[451] *Bostock* said ten times that an employer violates Title VII if it intentionally takes an adverse employment action against an employee in

443. *Id.* at 1744.
444. *Id.* (emphasis added).
445. *Id.* (emphasis added).
446. *See id.*
447. *Id.* at 1745–46.
448. *Id.* at 1746.
449. *Id.* at 1748.
450. *Id.*
451. *Id.* at 1739, 1741–46, 1748 (using phrases like *other* factor; *further* intention or motivation; *another* factor; *not the only* factor; *further* intentions or motivations; *other* factors; *two* but-for factors, and; *different* factors) (emphases added).

part based on sex.[452] And *Bostock* said five times that sex does not have to be the sole or primary reason for the adverse employment decision.[453]

Bostock's bottom line is taking an adverse employment action against an employee because that employee is gay or transgender violates Title VII's prohibition against sex discrimination, even if other factors played a role in that action and even if all female gay and transgender employees and all male gay and transgender employees are subjected to the same adverse action.[454] And to the extent *Nassar* can be read to require plaintiffs in ADEA and Title VII retaliation cases respectively to prove an impermissible reason was the sole or primary reason for their employers' adverse employment decisions, that reading is no longer operative in light of *Bostock*.[455]

Bostock was a 6-to-3 decision.[456] Justice Neil Gorsuch wrote the majority opinion, and Chief Justice John Roberts, Jr. and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined it.[457] Justice Samuel Alito, Jr. wrote a dissent that Justice Clarence Thomas joined.[458] Justice Brett Kavanaugh wrote a dissent for himself only.[459]

Justice Alito thought what the Court did was legislation, not judicial interpretation of a statute.[460] In his view, when Congress enacted Title VII, the prohibition on sex discrimination did not include sexual orientation or gender identity.[461] Additionally, since 1975, members of Congress introduced bills to add sexual orientation to race, color, religion, sex, and national origin as a prohibited basis upon which to make an adverse employment decision, and none of those bills passed both houses of Congress. According to Justice Alito, this means Congress knew that Title VII as originally enacted did not cover discrimination based on sexual orientation or gender identity, and the repeated rejection of attempts to

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452. *Id.* at 1741, 1743–44, 1746, (using phrases like *in part* because of sex; *in part* on sex; *in part* on an individual employee's sex; *in part* on the employee's sex; *in part* because of sex; *in part* because of that individual's sex; *in part* because of an applicant's sex, and; *in part* because of the affected individuals' sex) (emphases added).

453. *Id.* at 1739, 1744–45, 1748 (stating that Congress did not add "solely" or "primarily" before "because of"; sex need not be the sole or primary cause; sex was not the only factor or the main factor, but is was one but-for cause; Title VII does not require that sex be the sole or primary reason; and sex does not have to be the sole or primary cause for Title VII liability to follow).

454. *Id.* at 1739–46, 1748, 1754.

455. *Id.*

456. *Id.* at 1736.

457. *Id.* at 1737–54.

458. *Id.* at 1754 (Alito, J., dissenting).

459. *Id.* at 1822 (Kavanaugh, J., dissenting).

460. *Id.* at 1754 (Alito, J., dissenting). He also considered the Court's discussion of causation "*beside the point*" and "*so much smoke*." *Id.* at 1757, 1775.

461. *Id.* at 1754–55.

amend Title VII to include discrimination on those bases means Congress did not intend Title VII to prohibit discrimination on those bases.[462]

He pointed out that in 1964, the year Congress enacted Title VII,[463] dictionaries from that time period defined "sex" to mean male or female, not sexual orientation or gender identity.[464] He said "[t]he same is true of current definitions[.]"[465] When Congress enacted Title VII, "the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were 'homosexual.'"[466]

He commented on the *far-reaching consequences* of "interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity[.]"[467] He provided an illustrative list of vexing issues he thought the Court failed to adequately address and described its failure to address those issues as "irresponsible."[468] He cited over 100 federal statutes that "prohibit discrimination because of sex[,]" and posited that it would have been better to provide Congress with the opportunity to "consider competing interests and . . . [find] a way of accommodating at least some of them."[469] The Court's intervention, in his view, "greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution."[470] He concluded his dissent with a warning that the Court's decision would "threaten freedom of religion, freedom of speech, and personal privacy and safety."[471]

Justice Kavanaugh faulted the Court for interpreting Title VII's textual prohibition on sex discrimination literally rather than according to

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462. *Id.* at 1754–56.

463. Congress enacted Title VII on July 2, 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §§ 701-716, 78 Stat. 241, 253-266 (1964). What is now codified at 42 U.S.C. §§ 2000e-2, 2000e-3, 2000e-5, and 2000e-6 went into effect on July 2, 1964; however, the remainder of the law went into effect on July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §§ 716(a), 716(b), 78 Stat. 241, 266 (1964).

464. *Bostock*, 140 S. Ct. at 1756–57 (Alito, J., dissenting). Justice Alito attached an appendix to his dissent that he denominated Appendix A that consisted of "the full definitions of 'sex' in the unabridged dictionaries in use in the 1960s." *Id.* at 1756, 1784–89 (Alito, J., dissenting).

465. *Id.* at 1765–66. Justice Alito attached an appendix to his dissent that he denominated Appendix B that consisted of "current definitions of 'sex'[.]" *Id.* at 1766, 1790–91.

466. *Id.* at 1758–59. Justice Alito attached an appendix to his dissent that he denominated Appendix D that consisted of a list of United States military forms that require a person to disclose whether he or she is gay. *Id.* at 1759, 1796–1822.

467. *Id.* at 1778.

468. *Id.* at 1778–84.

469. *Id.* at 1778. Justice Alito attached an appendix to his dissent that he denominated Appendix C that consisted of a list of federal statutes that prohibit discrimination because of sex. *Id.* at 1778, 1791–96.

470. *Id.* at 1778.

471. *Id.*

the text's ordinary meaning, and according to that ordinary meaning, discriminating against a person for being gay or transgender is not discrimination because of sex.[472] He also chided for Court for usurping Congress by "judicially rewriting" Title VII and short circuiting the legislative process that appeared to be on its way to codifying protections for gay and transgender persons against discrimination.[473]

Ultimately, *Bostock* held that discriminating against a person for being gay or transgender is sex discrimination, and as far as Title VII is concerned, an employer that does so is liable even if other reasons informed the decision and even if sex was not the sole or primary reason for the decision.[474]

CONCLUSION

After *Bostock*, there are now two mixed motive theories available under Title VII: one where the impermissible motive was decisive, in which case the plaintiff can prove "but for" causation and is eligible for the full panoply of Title VII remedies, and one where the impermissible motive was not decisive, in which case the plaintiff cannot prove "but for" causation but is eligible for a limited form of declaratory and injunctive relief.[475]

Before *Bostock*, if an employer acted with a mixed motive, the plaintiff's Title VII case was channeled into the motivating factor theory and the limited remedies that theory provides.[476] After *Bostock*, it is now easier for a plaintiff whose employer acted with a mixed motive to prove "but for" causation and receive the full panoply of Title VII remedies.[477]

472. *Id.* at 1822–33 (Kavanaugh, J., dissenting).
473. *Id.* at 1833–37.
474. *Id.* at 1739–46, 1748, 1754 (majority opinion).
475. *Id.*
476. Univ. Of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343, 348, 350–52, 357 (2013).
477. *Bostock*, 140 S. Ct. at 1739–46, 1748, 1754.