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Free To Retaliate: A Plaintiff Must Show Retaliation Is The Only Motivation For An Employer's Retaliatory Action

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FREE TO RETALIATE: A PLAINTIFF MUST SHOW RETALIATION IS THE ONLY MOTIVATION FOR AN EMPLOYER'S RETALIATORY ACTION

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I. INTRODUCTION

University of Texas Southwestern Medical Center v. Nassar,[1] an employment discrimination case, was overshadowed in the media by other high-profile cases decided in the same three-day period.[2] But the Supreme Court's 5-4 decision in *Nassar* will significantly weaken workers' rights and protections against discrimination in the workplace.[3] An employee will have much more difficulty in obtaining redress for workplace discrimination and retaliation because the employee must now prove that *only* the desire to retaliate motivated the employer's action.[4] Even if the employer intended to

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1. 133 S. Ct. 2517 (2013).

2. The Supreme Court decided the *other* University of Texas case—an affirmative action case—on the same day (June 24, 2013) in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). In the next two days, the Supreme Court handed down decisions in the Voting Rights Act and same-sex marriage cases in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and *United States v. Windsor*, 133 S. Ct. 2675 (2013). A search of media coverage on the *Nassar* case results in a few articles in smaller, local publications as opposed to publications in *The Wall Street Journal*, *The New York Times*, and other more well-known print and online media for the aforementioned three cases.

3. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013).

4. *See id.* at 2525–26, 2534.

retaliate, the employer can avoid liability entirely by providing any other justification for taking a challenged employment action.[5]

Prohibition of employment discrimination on the basis of an individual's race, color, religion, sex, or national origin and prohibition of employer retaliation against an individual who has opposed or filed a claim of employment discrimination share a "symbiotic relationship."[6] But, the Supreme Court in *Nassar* has "drive[n] a wedge" between status-based discrimination and employer retaliation claims by ruling that they are distinct claims and that to prevail on a Title VII retaliation claim, a plaintiff must meet the high but-for causation standard.[7] *Nassar* establishes two separate causation standards for two claims that have been regarded as "twin safeguards in . . . 'mixed-motive' [employment discrimination] cases."[8]

This Comment argues that the Supreme Court's ruling in *Nassar* is at odds with Congress's intent behind its 1991 amendments to Title VII, and the Supreme Court's prior understanding of the relationship between Title VII's discrimination and retaliation prohibitions. Part II lists the provisions at issue in *Nassar* and provides an overview of the interchange between the Supreme Court and Congress in interpreting the appropriate causation standard for Title VII claims. Part III sets forth the facts and procedural posture of the case. Part IV discusses the Court's holding and its reasoning. Part V argues that the Court's reasoning in *Nassar* is flawed because it contradicts Congress's intent and diverges from Supreme Court precedent. Part VI concludes with the practical implications of the *Nassar* holding and challenges Congress to again restore Title VII's protections against discrimination in the workplace.

II. HISTORICAL BACKGROUND

Title VII of the Civil Rights Act of 1964 (the "1964 Act") prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.[9] Title VII also

5. *See id.*
6. *See id.* at 2537 (Ginsburg, J., dissenting).
7. *Id.* at 2535.
8. *Id.*
9. In 1964, Congress passed employment protections in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e (2006)).

prohibits retaliation by an employer against an employee who has opposed or filed a charge of employment discrimination.[10]

Section 2000e-2(a)(1) prohibits "status-based discrimination"—discrimination against an individual based on five listed characteristics.[11] It provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin.[12]

Section 2000e-3(a) prohibits employer retaliation providing:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *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.[13]

A quarter century after the passage of the 1964 Act, the Supreme Court in *Price Waterhouse v. Hopkins*[14] explained the causation standard necessary to establish a status-based discrimination claim under § 2000e-2(a).[15] Though there was no majority opinion, six justices agreed on the viability of a mixed-motive theory[16] "that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision."[17] Under the *Price Waterhouse* framework, if a plaintiff successfully established that

10. 42 U.S.C. § 2000e-3 (2006).

11. *Nassar*, 133 S. Ct. at 2522. The Court separates wrongful employer conduct under § 2000e into two categories. The first is status-based discrimination, and the second is employer retaliation. *Id.*

12. 42 U.S.C. § 2000e-2(a) (emphasis added).

13. 42 U.S.C. § 2000e-3(a) (emphasis added).

14. 490 U.S. 228 (1989).

15. *Id.* at 258 (defining "because of" in § 2000e-2(a)(1)).

16. *See id.* at 240–42.

17. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2526 (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring)).

race, color, religion, sex, or national origin motivated the employer, then the burden shifted to the employer to prove that it would have taken the same actions, even without a discrimination-based motivation. If the employer could successfully demonstrate this, the employer would avoid liability.[18]

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991 (the "1991 Act").[19] The 1991 Act added a new provision to Title VII codifying the mixed-motive theory, otherwise known as the motivating-factor causation standard of the *Price Waterhouse* framework.[20] The new provision, § 2000e-2(m), states: "[A]n 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."[21] Thus, Congress agreed with the *Price Waterhouse* holding that a plaintiff alleging a § 2000e-2(a) violation need not meet the but-for standard, which would require the employee to show that status-based discrimination was the *only* reason for the employer's challenged practice. Rather, a plaintiff need only meet the less stringent motivating-factor causation standard, by showing that status-based discrimination motivated the employer's practice.

However, Congress did not agree with the *Price Waterhouse* burden-shifting framework, because the 1991 Act abrogated it with § 2000e-5(g)(2).[22] Under § 2000e-5(g)(2), if an employer can prove that it would have taken the same employment action regardless of the five traits, it can avoid monetary damages and a reinstatement order,[23] but not complete liability like it could under *Price Waterhouse*.

This was the state of the law when the Supreme Court jumped back into the fray with the *Nassar* decision.

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18. *See Nassar*, 133 S. Ct. at 2526.

19. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(m) (2006)).

20. 42 U.S.C. § 2000e-2(m).

21. *Id.*

22. *See id.* § 2000e-5(g)(2); *Nassar*, 133 S. Ct. at 2526 (citing Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 178 n.5 (2009)).

23. *Nassar*, 133 S. Ct. at 2526 (citing *Gross*, 557 U.S. at 178 n.5).

III. STATEMENT OF THE CASE

A. Facts

The University of Texas Southwestern Medical Center (the "University") trains medical, graduate, and health profession students, residents, and postdoctoral fellows.[24] The University has affiliation agreements with healthcare facilities, including Parkland Memorial Hospital (the "Hospital"), to give its students the opportunity to obtain clinical experience.[25] The Hospital's affiliation agreement with the University requires it to offer physician positions to the University's faculty members.[26]

Dr. Naiel Nassar "is a medical doctor of Middle Eastern descent who specializes in internal medicine and infectious diseases."[27] From 1995 to 1998 and from 2001 to 2006, he was a member of both the University's faculty and the Hospital's staff of physicians.[28] Dr. Phillip Keiser was Nassar's principal supervisor until 2004, when the Hospital hired Dr. Beth Levine as the University's Chair of Infectious Disease Medicine.[29] Keiser continued to directly supervise Nassar, but Levine became his ultimate superior.[30]

Nassar believed Levine was biased against him because of his Middle Eastern heritage.[31] Levine singled out Nassar; she questioned his productivity and work ethic and scrutinized his billing practices despite Keiser's assurances that Nassar worked very hard.[32] In 2005, Levine opposed hiring another Middle Eastern physician and commented in Keiser's presence that "Middle Easterners are lazy."[33] After the Hospital hired the other doctor, "Levine [commented], again in Keiser's presence, that the Hospital had 'hired another one.'"[34]

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24. *About UT Southwestern Facts and Figures*, UT SW. MED. CTR., http://www.utsouthwestern.edu/about-us/facts.html (last visited Nov. 9, 2013).

25. *Nassar*, 133 S. Ct. at 2523.

26. *Id.*

27. *Id.*

28. *Id.* at 2523–24. In 1998, Nassar left both positions to pursue additional medical education, but returned to his positions in 2001. *Id.* at 2523.

29. *Id.* at 2523; *id.* at 2535 (Ginsburg, J., dissenting).

30. *Id.* at 2523 (majority opinion).

31. *See id.*

32. *Id.* at 2535 (Ginsburg, J., dissenting); *id.* at 2523 (majority opinion).

33. *Id.* at 2536 (Ginsburg, J., dissenting).

34. *Id.*

Nassar met with Dr. Gregory Fitz, the University's Chair of Internal Medicine, numerous times regarding Levine's behavior and perceived harassment.[35] Levine's hostility and bias against him led Nassar to arrange with the Hospital to continue working at its clinic without also continuing as faculty at the University, in an effort to remove himself from Levine's supervision.[36] After negotiations, the Hospital verbally offered Nassar a staff position.[37]

Shortly after reaching this agreement, Nassar wrote a letter to Fitz and sent copies to others, resigning from his teaching position at the University.[38] In this letter, Nassar stated that the main reason for his resignation was Levine's continued harassment stemming from bias against Arabs and Muslims.[39] Fitz, shocked by the letter, told Keiser that Levine had been publicly humiliated and needed to be publicly exonerated.[40] Fitz opposed the Hospital's staff position offer to Nassar, arguing that this arrangement contradicted the Hospital and University's affiliation agreement requiring that staff members also be University faculty.[41] The Hospital withdrew its offer to employ Nassar.[42]

B. Procedural Posture

Nassar first filed a complaint with the Equal Employment Opportunity Commission (EEOC), which found "credible testimonial evidence that the University had retaliated against Nassar for his allegations of discrimination by Levine."[43] Nassar then filed suit in the United States District Court for the Northern District of Texas, alleging two Title VII violations. Nassar alleged that the University's discrimination against him on the basis of his race, religion, and national origin resulted in his constructive discharge—a status-based discrimination claim under § 2000e-2(a).[44] Second,

35. *Id.* at 2523 (majority opinion).
36. *See id.*
37. *Id.* at 2536 (Ginsburg, J., dissenting).
38. *Id.* at 2523–24 (majority opinion).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 2536 (Ginsburg, J., dissenting) (citations omitted) (internal quotation marks omitted).
44. *Id.* at 2524 (majority opinion).

Nassar alleged that the University retaliated against him for complaining about Levine's conduct by preventing the Hospital from hiring him—a retaliation claim under § 2000e-3(a).[45]

At trial, the district court instructed the jury on the retaliation claim that Nassar needed only to prove that the University acted at least in part to retaliate.[46] The jury found for Nassar on both Title VII claims and awarded him $438,167.66 in backpay and over $3 million in compensatory damages.[47]

On appeal, the Court of Appeals for the Fifth Circuit affirmed in part and vacated in part.[48] The Fifth Circuit vacated the jury's verdict on constructive discharge, concluding that Nassar had not provided sufficient evidence to support his claim that Levine's discrimination resulted in his discharge.[49] However, it affirmed the jury's finding on the retaliation claim "on the theory that retaliation claims . . . like claims of status-based discrimination . . . require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its but-for cause."[50] The Fifth Circuit found that the evidence supported the jury's finding that Fitz's opposition to Nassar's employment was motivated in part by the desire to retaliate against Nassar for his complaints regarding Levine.[51]

The Fifth Circuit denied the University's petition for a rehearing and rehearing en banc.[52] The Supreme Court granted certiorari.[53] The issue before the Court was whether the mixed-motive causation standard applicable to § 2000e-2(a) claims was also applicable to § 2000e-3(a) retaliation claims.[54]

IV. THE COURT'S ANALYSIS

Considering the question of which causation standard is appropriate for a § 2000-e3(a) retaliation claim, Justice Kennedy, writing for the majority, concluded that "[t]he text, structure, and

45. *Id.*
46. *Id.* at 2536 (Ginsburg, J., dissenting).
47. *Id.*
48. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 456 (5th Cir. 2012).
49. *Id.* at 450.
50. *Nassar*, 133 S. Ct. at 2524 (majority opinion).
51. *Id.*
52. Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211 (5th Cir. 2012).
53. *Nassar*, 133 S. Ct. 2517.
54. *Id.* at 2522–23.

history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000-e3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."[55] The Court's opinion emphasized what it saw as a clear distinction between a discrimination claim and a retaliation claim under Title VII, labeling the first "status-based discrimination" and the second "employer retaliation."[56]

The Court began its analysis with a discussion of its holding in *Gross v. FBL Financial Services, Inc.*,[57] which interpreted "because of" in a provision of the Age Discrimination in Employment Act of 1967 (ADEA) as requiring a showing of but-for causation.[58] The Court used the reasoning of *Gross* to conclude that § 2000e-3(a) requires proof "that the desire to retaliate was the but-for cause of the challenged employment action."[59] The Court rejected the interpretation that § 2000e-3(a) requires only the motivating-factor causation standard, noting three major flaws in that interpretation[60] The Court also noted the implications of lessening the causation standard for retaliation claims.[61]

A. Gross v. FBL Financial Services, Inc. *Is Persuasive*

In reaching its conclusion that § 2000e-3(a) requires a plaintiff to meet the but-for causation standard, the Court began by discussing its conclusion and reasoning in *Gross* with respect to the issue of causation in the context of the ADEA.[62] The Court found that although *Gross* discussed a different statute and limited its judgment to the ADEA, *Gross* is not without "persuasive force" and "possess[es] significant parallels."[63]

55. *Id.* at 2534.

56. *Id.* at 2522. Justice Kennedy began, "This opinion discusses the causation rules for two categories of wrongful employer conduct prohibited by Title VII. The first type is called, for purposes of this opinion, status-based discrimination. . . . The second type of conduct is employer retaliation . . . ." *Id.*

57. 557 U.S. 167 (2009).

58. *Nassar*, 133 S. Ct. at 2527.

59. *Id.* at 2528.

60. *See infra* Part III.A.

61. *Nassar*, 133 S. Ct. at 2531–32

62. *Id.* at 2527.

63. *Id.* at 2527–28.

The Court in *Gross* considered whether the ADEA's text "authorizes a mixed-motives age discrimination claim."[64] Section 623(a) provides that "[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."[65]

The Court concluded that § 623(a) did not authorize mixed-motive claims.[66] It reached this conclusion by looking at the ordinary meaning of the text, noting that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[67] To determine the ordinary meaning of "because of," the Court looked to English dictionaries defining "because of" to mean "by reason of" or "on account of."[68] Given this understanding of the phrase, the ADEA provision in question meant that a plaintiff needed to prove that age was the "but-for" cause of the employer's adverse decision.[69]

In *Gross*, the Court declined to adopt the *Price Waterhouse* interpretation of causation, concluding that textual differences between Title VII and the ADEA prevented the application of *Price Waterhouse* to the ADEA.[70] The Court in *Gross* noted that though Congress made a number of changes to the ADEA in the 1991 Act, it did not add a clarification provision like it did to Title VII's new provision § 2000e-2(m).[71] Additionally, the *Gross* Court held that "it would not be proper to read *Price Waterhouse* as announcing a rule that applied to both statutes, despite their similar wording and contemporaneous enactment" because Congress's 1991 amendments to Title VII—the new provision setting forth the motivating factor standard[72] and the abrogation of the *Price Waterhouse*

64. *Gross*, 557 U.S. at 175.
65. 29 U.S.C. § 623(a) (2006) (emphasis added).
66. *Gross*, 557 U.S. at 175.
67. *Id.* (quoting Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).
68. *Id.* at 176.
69. *Id.*
70. *Id.* at 178 n.5.
71. *Id.* at 174–75.
72. 42 U.S.C. § 2000e-2(m) (2006).

burden-shifting framework—suggested that the motivating-factor standard did not flow "organically" from the text.[73] In other words, Congress would not have made these amendments if the text of Title VII could be read as setting such a standard. Since the meaning did not flow organically from the text, the *Gross* Court concluded that the standard could not be read into the ADEA because the ADEA did not contain a provision similar to § 2000e-2(m).

The Court in *Nassar* concluded that because "Title VII's anti-retaliation provision, which is set forth in § 2000e-3(a), appears in a section separate from Title ban on status-based discrimination," and because the anti-relation provision is textually similar to the ADEA provision considered in *Gross*, the "proper conclusion . . . is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[74]

B. The Court's Assessment of Flaws in Nassar *and the United States' Argument*

> Nassar and the United States' main argument was that (1) retaliation is defined by the statute to be an unlawful employment practice; (2) § 2000e-2(m) allows unlawful employment practices to be proved based on a showing that race, color, religion, sex, or national origin was a motivating factor for—but not necessarily the but-for factor in—the challenged employment action; and (3) the Court has . . . held that retaliation for complaining about race discrimination *is* discrimination based on race.[75]

The Supreme Court rejected this argument and noted three major problems with the interpretation that the motivating-factor standard applies to retaliation claims: (1) such a reading is inconsistent with the provision's plain language;[76] (2) such a reading is inconsistent with the design and structure of Title VII;[77] and (3) the Court's preceding decisions interpreting federal

73. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (citing *Gross*, 557 U.S. at 178 n.5).

74. *Id.* at 2528.

75. *Id.* (citations omitted) (internal quotation marks omitted).

76. *Id.*

77. *Id.* at 2529.

antidiscrimination laws as treating "status-based discrimination as also prohibiting retaliation"[78] do not apply to statutes as "precise, complex, and exhaustive as Title VII."[79]

1. Plain Language of § 2000e-2(m) and Section 107 of the 1991 Act

The Court concluded that interpreting § 2000e-3(a) as requiring the motivating-factor standard is inconsistent with the plain language § 2000e-2(m).[80] According to the Court, the plain language of § 2000e-2(m) and section 107 of the 1991 Act, which created it, indicate Congress's intention that the motivating-factor causation standard not extend to all unlawful employment practices defined by Title VII.[81]

The Court stated that § 2000e-2(m) only addresses status-based discrimination because the provision begins by referring to "unlawful employment practices," but then only specifies actions based on the employee's status—race, color, religion, sex, or national origin.[82] Because the provision only refers to the unlawful employment practice of discriminating on the basis of the five characteristics but not to retaliation claims, the Court concluded that "given this clear language," Congress intended to limit the provision's coverage to only discrimination under § 2000e-2(a) and not retaliation claims under § 2000e-3(a).[83] "[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."[84]

The Court also noted, the fact that a different portion of the 1991 Act "contains an express reference to all unlawful employment actions, reinforces the conclusion that Congress acted deliberately when it omitted retaliation claims from § 2000e-2(m)."[85] For example, section 109 of the 1991 Act exempts employers in foreign countries from complying with §§ 2000e-2 and 2000e-3 if doing so

78. *Id.*
79. *Id.* at 2530.
80. *Id.* at 2528.
81. *Id.*
82. *Id.* "An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2006).
83. *Nassar*, 133 S. Ct. at 2528.
84. *Id.*
85. *Id.* at 2529.

would cause the employer to violate the laws of the country where the workplace is located.[86] Section 109 references both discrimination and retaliation sections by explicitly listing "section 703 or 704," which correspond to the sections prohibiting status-based discrimination and retaliatory employer actions in the Civil Rights Act of 1964.[87]

The Court noted that section 109 indicates that Congress understood what language was necessary to reference all unlawful employment practices under Title VII, so if Congress had intended to "make the motivating-factor standard applicable to all Title VII claims," then it would have used the same language in section 107 of the 1991 Act.[88] However, section 107 only provides that it will amend section 703 (codified in § 2000e-2) of the Civil Rights Act of 1964, but makes no reference to section 704 (codified in § 2000e-3).[89]

2. Structure and Design of Title VII

The Court found that applying the motivating-factor standard to Title VII retaliation claims would also be inconsistent "with the design and structure of the statute as a whole."[90] First, the Court found the placement of § 2000e-2(m) significant and indicative of Congress's intentions.[91] Second, the Court found the complexity of Title VII distinguished it from other broad discrimination statutes, and thus the Court's holding in *Nassar* did not contradict prior Supreme Court interpretations of retaliation claims.[92]

a. Placement of § 2000e-2(m)

The Court found it significant that Congress inserted the motivating-factor provision in § 2000e-2, the same subsection that prohibits status-based discrimination.[93] To the Court, this particular placement of the new provision, codifying the motivating-factor

86. Civil Rights Act of 1991 § 109, 42 U.S.C. §§ 2000e, 12111 (2006).
87. *Id.*
88. *Nassar*, 133 S. Ct. at 2529.
89. Civil Rights Act of 1991 § 107, 42 U.S.C. §§ 2000e-2, 2000e-5(g) (2006).
90. *Nassar*, 133 S. Ct. at 2529.
91. *Id.*
92. *Id.* at 2529–30.
93. *Id.*

causation standard as applied to status-based discrimination claims, indicates Congress's intention to only apply this standard to § 2000e-2 discrimination claims.

b. Default interpretations of antidiscrimination laws do not apply to Title VII

The Court did not reject Nassar and the United States' argument that previous Supreme Court decisions interpreting antidiscrimination laws have generally treated prohibitions of status-based discrimination as also prohibiting retaliation.[94] But the Court rejected the argument that these prior cases support the interpretation that the motivating-factor standard applies to retaliation claims. It concluded that because Title VII "is a detailed statutory scheme," those cases did not control the issue in *Nassar*.[95]

The Court acknowledged that its cases have interpreted Congress's enactment of broadly phrased antidiscrimination statutes as demonstrating Congress's intent to prohibit retaliation against those who oppose or report the type of discrimination at issue.[96] However, the Court concluded these cases did not control its decision because Title VII is a very "precise, complex, and exhaustive" statute.[97] Applying "the default rules that apply only when Congress writes a broad and undifferentiated statute" would improperly adopt an incorrect interpretation.[98]

Additionally, to further support its argument that it would be improper to apply the Court's default interpretation of antidiscrimination statutes, the Court noted Congress's enactment of the Americans with Disabilities Act of 1990 (ADA), which included an express anti-retaliation provision.[99] Congress enacted the ADA a year before crafting 1991 Act amendments to Title VII.[100] Therefore,

94. *Id.*
95. *Id.* at 2530.
96. *Id.* at 2530. *E.g.*, CBOCS West, Inc. v. Humphries, 553 U.S. 452, 452–53 (2008) (holding that 42 U.S.C. § 1981, which states that all persons shall have equal rights under the law, not only prohibits racial discrimination but also retaliation against those who oppose it); Gómez-Pérez v. Potter, 553 U.S. 474 (2008) (finding a bar on retaliation in the federal-employee provisions of the ADEA).
97. *Nassar*, 133 S. Ct. at 2530.
98. *Id.* at 2530–31.
99. *Id.* at 2531.
100. *Id.*

because Congress knew how to craft express anti-retaliation provisions, not including such language in the 1991 Act's Title VII amendments indicated Congress's intent to exclude relation claims from the motivating-factor causation standard.[101]

C. Repercussions of Lessening the Causation Standard

The Court warned of a number of practical consequences that would result from applying the motivating-factor standard to § 2000e-3(a) retaliation claims.

First, the Court noted that the number of retaliation claims filed with the EEOC doubled from around 16,000 to over 31,000 over a fifteen-year period.[102] Concerned with the number of retaliation claims, the Court stressed that "proper interpretation . . . of § 2000e-3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[103]

Additionally, the Court cautioned that applying the motivating-factor causation standard could contribute to the filing of frivolous claims.[104] For example, an employee who knows his or her employer is about to cause a change in employment status (for instance, firing for poor work performance, transferring assignments or locations) could make an unfounded claim of discrimination based on race, color, religion, sex, or national origin.[105] Once the employment change occurs, the employee could file a retaliation claim.[106] In the eyes of the Court, applying the motivating-factor causation standard would make it more difficult to dismiss frivolous claims.[107]

V. DISCUSSION

The Court's discussion of the number of discrimination and, in particular, retaliation claims filed with the EEOC, and its concern with frivolous claims, may reveal the Court's true motivation behind

101. *Id.*
102. *Id.* (citing *Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited June 20, 2013)).
103. *Id.*
104. *Id.* at 2531–32.
105. *Id.* at 2532.
106. *Id.*
107. *Id.*

its employer-friendly *Nassar* holding. Though the Court used textual and structural arguments to support its interpretation of congressional intent, its holding contradicts Congress's stated purposes of Title VII and subsequent amendments enacted via the 1991 Act. The Court's holding also diverges from a line of preceding Supreme Court cases. Lastly, the Court's reasoning about the text and structure of Title VII is flawed because these same textual and structural arguments could also be interpreted to support a different conclusion—namely, that the mixed-motive standard does apply to retaliation claims.

A. The Nassar *Holding Contradicts Congressional Intent*

The Court looked to the 1991 Act's text and, in the Court's words, "the structure" of Title VII to conclude that Congress intended to distinguish retaliation claims from status-based discrimination claims and to require a higher standard for these claims.

Congress passed the 1991 Act in part to respond to the Supreme Court's decision in *Price Waterhouse*.[108] Specifically, the purpose of the 1991 Act was to "restor[e] the civil rights protections that were dramatically limited by recent Supreme Court decisions"[109] and to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[110]

The 1991 Act restored and strengthened Title VII protections and remedies by eliminating the *Price Waterhouse* burden shifting, which allowed an employer to avoid liability entirely, and by creating § 2000(m), which codified the motivating-factor causation standard.[111] Congress did not disagree with the Court's adoption of a causation standard that was less stringent than the but-for standard, but Congress thought allowing an employer the ability to escape

108. H.R. Rep. No. 102-40(I), at 45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 [hereinafter House Report Part I].

109. H.R. Rep. No. 102-40(II), at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694 [hereinafter House Report Part II].

110. *Id.*

111. *See* Civil Rights Act of 1991 § 107, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g) (2006).

112. *See id.*

liability under the *Price Waterhouse* framework limited Title VII protections.[112]

The Court's holding in *Nassar* contradicts Congress's stated goals in passing the 1991 Act because it once again weakens Title VII protections, particularly against employer retaliation. The Court's interpretation is that, despite Congress's stated intentions to strengthen and restore, Congress really intended to require plaintiffs to meet a stringent but-for causation standard allowing an employer the ability to avoid liability on retaliation claims. Under the Court's interpretation, an employer can retaliate against an employee for making a discrimination claim and face no liability if it can provide any other additional reason for taking the retaliatory action.[113]

But, Congress found *Price Waterhouse* "inadequately protective" because its burden-shifting framework allowed an employer to avoid liability.[114] Thus, given the legislative history of the 1991 Act, the Court's interpretation makes little sense.

B. Supreme Court Precedent

The Court's distinction between status-based discrimination and retaliation claims diverges from a line of Supreme Court cases that have recognized the "close connection between discrimination and retaliation for complaining about discrimination."[115] Although the Court in *Nassar* did not disagree with precedent regarding discrimination and retaliation, it concluded that those prior decisions were not controlling because Title VII is unlike the statutes considered in those preceding cases.[116] But, in reality Title VII is not so different from those other antidiscrimination statutes.

In a line of decisions prior to *Nassar*, the Supreme Court held that a ban on discrimination encompasses retaliation because the enforcement of antidiscrimination depends on those who are willing to speak against, bear witness to, or file complaints of

112. *See id.*

113. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2544 (2013) (Ginsburg, J., dissenting) ("The Court's but-for causation standard does not mean that the plaintiff has failed to prove she was subjected to unlawful retaliation. It does mean, however, that proof of a retaliatory motive alone yields no victory for the plaintiff.").

114. *See id.* at 2538.

115. *See id.* at 2537.

116. *Id.* at 2530 (majority opinion).

discrimination.[117] The Court has long understood prohibitions against discrimination as also prohibiting retaliation for complaining of or speaking against discrimination.[118] In fact, the Court has held that "retaliation in response to a complaint about [proscribed] discrimination *is* 'discrimination' 'on the basis of [the characteristic Congress sought to immunize against adverse employment action] . . . .'"[119]

In *Nassar*, the Court attempted to distinguish Title VII from other antidiscrimination statutes by noting that it is a "detailed statutory scheme" because it "enumerates specific unlawful employment practices,"[120] "defines key terms,"[121] "exempts certain types of employers,"[122] and "creates an administrative agency."[123] However, the ADEA also contains provisions that proscribe retaliation, as well as provisions that set out specific prohibited employer practices.[124] Indeed, some provisions of the ADEA are broad while others are specific and detailed, and yet the Court still interpreted the federal-sector provision of the ADEA prohibiting discrimination based on age[125] to also bar retaliation.[126] Like the

117. *Id.* at 2337 (Ginsburg, J., dissenting) (citing Burlington N. & S.F.R. Co. v. White, 548 U.S. 53, 63 (2006)).

118. The Court held that 42 U.S.C. § 1982, which provides that all citizens of the United States have the same property rights, protected "a white man who suffered retaliation after complaining of discrimination against his black tenant." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). In the context of sex discrimination, the Court has held that "[r]etaliation against a person because [he] has complained of sex discrimination . . . is another form of intentional sex discrimination." *Nassar*, 133 S. Ct. at 2537 (Ginsburg, J., dissenting) (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005)) (internal citations omitted). The Court held that "the federal-sector provision of the [ADEA . . .] barring discrimination 'based on age,' also proscribes retaliation." *Id.* at 2538 (Ginsburg, J., dissenting) (citing Gómez-Pérez v. Potter, 553 U.S. 474, 479–91 (2008). The Court has also held that retaliation for race discrimination constitutes discrimination under 42 U.S.C. § 1981, which provides that all persons within the jurisdiction of the United States should have equal rights. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 447–57 (2008).

119. *Jackson*, 544 U.S. at 179 n.3 (emphasis added).

120. *Nassar*, 133 S. Ct. at 2530. The Court cited § 2000e-2(a)(1), (b), (c)(1), (d) (which prohibits "status-based discrimination by employers, employment agencies, labor organizations, and training programs respectively"), § 2000e-3(a) (which prohibits "retaliation for opposing, or making or supporting a complaint about, unlawful employment actions"), and § 2000e-3(b) (which prohibits "advertising a preference for applicants of a particular race, color, religion, sex, or national origin"). *Id.*

121. *Id.* (citing 42 U.S.C. § 2000e (2006)).

122. *Id.* (citing § 2000e-1).

123. *Id.* (citing §§ 2000e-5, 2000e-12).

124. 29 U.S.C. § 623(a), (d) (2006).

125. 28 U.S.C. § 633(a) (2006).

ADEA, Title VII is detailed in some provisions, but it also contains broad and general provisions.[127]

Not only is Title VII not distinguishable from other antidiscrimination statutes simply because it contains some specifications, but the Court's reasoning leads to the conclusion that "when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant to have *less* force than the protection available when the statute does not mention retaliation."[128] This conclusion suggests that when Congress takes more time to write a specific statute, it means that Congress intended these statutes to offer *less* protection then broadly written statutes.[129] Additionally, this conclusion makes even less sense given that Congress intended to strengthen Title VII protections.

C. Flaws in the Court's Textual and Structural Arguments

The Court supported its reasoning and holding with textual and structural arguments, but these arguments are flawed in a number of ways. In fact, the very same text and structural aspects of Title VII that the Court cites to support its argument also support the conclusion that the mixed-motive standard, not the but-for standard, applies to retaliation claims.

1. The Court Used *Gross*'s Limited Holding to Interpret Title VII

The Court looked to its *Gross* holding to interpret the meaning of "because" in § 2000e-3(a), but by finding that *Gross* is persuasive, the Court ignored that *Gross* limited its interpretation to only the ADEA.[130] Even more importantly, the Court also ignored that *Gross* distinguished the ADEA and Title VII.

In *Gross*, the Court interpreted "because of"[131] to mean a requirement of the but-for standard.[132] The Court in *Gross*

126. Gómez-Pérez v. Potter, 553 U.S. 474, 479–91 (2008).

127. Section 2000e-2(a) bans all discrimination based on race, color, religion, sex, or national origin. Although the provision lists characteristics, the ban is a general ban on any discrimination based on these factors.

128. *Nassar*, 133 S. Ct. at 2541 (Ginsburg, J., dissenting).

129. *See id.*

130. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–78 (2009).

131. "It 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,

acknowledged that, in *Price Waterhouse*, it interpreted "because of" in § 2000e-2(a) as requiring only the motivating-factor standard.[133] To reach its conclusion that "because of" in the ADEA required the but-for standard, the Court in *Gross* distinguished the ADEA from Title VII.[134] It noted that the interpretation of a Title VII provision and its causation standard could not be read into a different statute, such as the ADEA.[135] The *Gross* Court specifically cautioned that "when conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[136] Therefore, the Court looked only to the text of § 623(a) in the ADEA.[137]

Despite this limitation and the distinction between the ADEA and Title VII in *Gross*, the *Nassar* Court found *Gross* persuasive in interpreting a Title VII provision.[138] In 2009, the Court read "because of" in § 623(a) of the ADEA to require the but-for causation standard by distinguishing it from "because of" in § 2000e-2(a) of Title VII. In 2013, the Court found that "because" in § 2000e-3(a) requires a plaintiff to meet the but-for causation standard, because there is no "meaningful textual difference" between the use of "because" in the two statutes and because the two statutes are, in fact, similar.[139]

Essentially, according to the Court's reasoning, "because" in the ADEA requires the but-for standard because it is different from Title VII, and "because" in § 2000e-3(a) of Title VII requires the but-for standard because it is no different from the text of the ADEA.

2. The Court Read Different Meanings into the Same Word in the Same Statute

The Court's textual argument is flawed because the Court's interpretation contradicts a general principle of statutory interpretation—that "identical phrases appearing in the same

terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (2006).

132. *Gross*, 557 U.S. at 176.
133. *Id.* at 171.
134. *Id.* at 174–75.
135. *Id.* at 174.
136. *Id.* (internal quotation marks omitted).
137. *Id.* at 175–76.
138. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527–28 (2013).
139. *Id.* at 2528.

statute . . . ordinarily bear a consistent meaning."[140] The Court read the same word, "because," in different provisions of the same statute to have different meanings. "Because of" in § 2000e-2(a) is read to require a plaintiff to meet the mixed-motive standard, while "because" in § 2000e-3(a) is read to require a plaintiff to meet the but-for standard. Thus, the Court has read two different meanings into two textually similar words appearing in the same statute in contradiction of a general rule of statutory interpretation.

3. The New Provision's Placement in the 1991 Act

The Court reasoned that Congress intended the mixed-motive causation standard to only apply to status-based discrimination claims because Congress placed the new provision in § 2000e-2. However, this reasoning is flawed because the Court's conclusion is based on the idea that § 2000e-2 only contains provisions concerning the prohibition against status-based discrimination.

Section 2000e-2 "does not deal exclusively with discrimination based on protected characteristics."[141] Rather, it contains provisions that expand beyond application to just status-based discrimination. Section 2000e-2 contains fourteen sub-provisions covering other issues, such as training programs,[142] national security,[143] and members of the Communist Party.[144] In particular, § 2000e-2(g) states that "it shall not be an unlawful employment practice for an employer . . . to refuse to hire" or "to discharge any individual from any position . . . if" the position "is subject to any requirement imposed in the interest of the national security of the United States" and "the individual fails to fulfill that requirement."[145] Section 2000e-2(g) not only identifies status-based discrimination; it refers to unlawful employment practices in general.[146]

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140. *Id.* at 2545 (Ginsburg, J., dissenting) (citing Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)).

141. *Id.* at 2543.

142. 42 U.S.C. § 2000e-2(d) (2006).

143. *Id.* § 2000e-2(g).

144. *Id.* § 2000e-2(f).

145. *Id.* § 2000e-2(g)(1)–(2).

146. *Id.* § 2000e-2(g).

Because the Court disregards provisions like § 2000e-2(g) that apply to both status-based discrimination and retaliation claims, the Court's reasoning that the placement of § 2000e-2(m) supports its holding is flawed.

VI. CONCLUSION

The Supreme Court's decision in *Nassar* will make it much more difficult for employees to bring and succeed on Title VII retaliation claims. "[T]he ban on discrimination and the ban on retaliation against a discrimination complainant have traveled together."[147] But now, these two claims must meet very different standards. The *Nassar* holding will have a number of practical implications on Title VII lawsuits.

A. Difficulty in Seeking Protection Under Title VII

Plaintiffs bringing a Title VII retaliation claim will have a harder time prevailing because they must now meet the but-for standard. But, the true implication of the *Nassar* decision extends beyond the difficulties of prevailing in a retaliation claim. Like the plaintiff in *Nassar*, plaintiffs may simply lose the protections of Title VII.

Nassar brought two Title VII claims: (1) a claim that the University discriminated against him on the basis of his race, religion, and national origin, which resulted in his constructive discharge, and (2) a claim that the University retaliated against him after he made a discrimination claim, by preventing his employment at the Hospital.[148] The jury found for him on both claims.[149] The Fifth Circuit vacated the jury's verdict on the constructive discharge claim because Nassar did not present sufficient evidence that discrimination led to his discharge.[150] This left Nassar only a retaliation claim. In *Nassar*, the Supreme Court remanded the case to the Fifth Circuit for proceedings consistent with its holding.[151] On remand, the Fifth Circuit vacated the district court's judgment in its entirety and remanded for proceedings consistent with the Supreme

147. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2535 (2013) (Ginsburg, J., dissenting).

148. *Nassar*, 133 S. Ct. at 2525 (majority opinion).

149. *Id.*

150. *Id.*

151. *Id.* at 2534.

Court's *Nassar* holding.[152] Because the University can argue that Fitz prevented Nassar's employment at the Hospital because of the hospital affiliation agreement, Nassar will likely lose in his case against the University.

Nassar's experience illustrates a situation where an employee has, in fact, experienced discrimination on the basis of race and religion, but is left without relief under Title VII as a result of *Gross*. Keiser testified to Levine's statements regarding Nassar and Middle Easterners.[153] If an employee takes steps to extricate himself from a discriminatory situation, as Nassar did, that employee cannot attribute loss of employment to an employer's discriminatory behavior. Nassar notified Fitz and others about Levine's behavior in a letter and terminated his faculty position. If an employer acts against the employee for complaining about and removing himself from a discriminatory environment, that employee, like Nassar, will only have a retaliation claim under Title VII. The *Nassar* holding will leave employees like Nassar with no remedy, for an employer acting against an employee is not liable so long as the employer can provide any justification (besides the desire to retaliate) for taking a retaliatory action. Under § 2000e-3(a), post-*Nassar*, an employer, even if it has discriminated on the basis of status and retaliated against an employee, can escape liability by providing evidence of any other motivation for a retaliatory action. Requiring plaintiffs to prove that retaliation is the but-for (i.e., only) reason for an employment action leaves employees unprotected under Title VII.

B. Possible Jury Confusion

The Court states that there is a clear textual and conceptual distinction between discrimination and retaliation claims,[154] but in reality the two claims are not so clearly separated. Like in *Nassar*, an employee's claims could stem from the same series of actions and experiences that ultimately culminate in an employer's retaliatory action. In such a situation, it may be difficult for a jury to clearly

152. Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 11-10338, 2013 WL 3943554, at *1 (5th Cir. Aug. 1, 2013).

153. *See supra* note 33, Part III.A.

154. *Nassar*, 133 S. Ct. at 2532.

differentiate between the two claims and apply separate causation standards.[155]

In *Nassar*, both of the plaintiff's claims ultimately derived from his experiences with Levine's behavior.[156] Nassar's discrimination claim was based on Levine's racial and religious bias, and Nassar's retaliation claim was based on the idea that Fitz blocked his employment at the Hospital in part to publicly exonerate Levine from Nassar's complaints of discrimination.[157]

The Court may have anticipated concern about jury confusion, evidenced by its attempt to differentiate Nassar's two claims.[158] The Court presented the status-based discrimination and retaliation claims as two separate legal claims, and it also attempted to present the two claims as factually distinct.[159] According to the Court, the wrongdoer of Nassar's status-based discrimination claim was Levine, and this claim required a showing of Levine's race- and religion-motivated harassment and bias.[160] The wrongdoer in Nassar's retaliation claim was Fitz, and this claim required Nassar to establish Fitz's retaliatory behavior.[161] As such, according to the Court, these claims were treated separately at trial and on appeal.[162]

However, it is unclear whether juries *will* really treat these claims as separate at trial. Furthermore, it is unclear whether the jury in Nassar's case did treat his two claims as distinct. The fact that the jury returned separate verdicts for each claim does not alone support the Court's conclusion that the jury considered the two claims separately.[163] Status-based discrimination claims and retaliation claims in situations like Nassar's—where the discriminatory behavior of one University employee is closely intertwined with the retaliatory behavior of another University employee—may not be as distinct as the Court suggested.

As Justice Ginsburg noted in her dissent, "trial judges . . . will be obliged to charge discrete causation standards when a claim of

155. *See id.* at 2535 (Ginsburg, J., dissenting).
156. *See id.* at 2523–24 (majority opinion).
157. *See id.*
158. *Id.* at 2532.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

[status-based] discrimination . . . is coupled with a claim of [retaliation]. And jurors will puzzle over the rhyme or reason for the dual standards."[164]

C. A Challenge to Congress

The Court in *Nassar* seemed more concerned with the increasing number of retaliation claims filed with the EEOC than with actual congressional intent, Supreme Court precedent, and reasoning based on statutory text and structure.[165] However, despite its problematic and flawed reasoning, the Court has ruled and its decision is binding on lower courts.

As it stands, the only remedy to the Supreme Court's interpretation of the causation standard of § 2000e-3(a) is congressional action. In 1991, Congress responded to the Court's *Price Waterhouse* decision by passing amendments in the 1991 Act. It is once again in Congress's hands, in the aftermath of a Supreme Court interpretation weakening employees' workplace-discrimination protections, to strengthen and restore remedies and protections under Title VII.

164. *Id.* at 2535 (Ginsburg, J., dissenting).

165. *See id.* at 2531 (majority opinion); *see also supra* Part V (arguing that the Court's reasoning in *Nassar* is flawed).