

## NOTE

### **AFTER UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR, ANOTHER CALL TO CONGRESS TO RESTORE TITLE VII'S PROTECTIONS**

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In *University of Texas Southwestern Medical Center v. Nassar*, the United States Supreme Court held that a “but-for” standard applies in cases alleging violations of Title VII of the Civil Rights Act of 1964’s antiretaliation provision. This imposes an onerous burden on plaintiffs alleging retaliation in contravention of Title VII. In fact, a similar burden was rejected during congressional debates 50 years ago prior to Title VII’s passage. While the Court adopted one plausible reading of the statute as amended in 1991, an alternative reading that applies Title VII in accord with Congress’s intent is also plausible. Therefore, this Note critiques the *Nassar* Court’s findings and calls upon Congress to restore Title VII’s protections. Congress has historically responded swiftly to Supreme Court decisions narrowing Title VII protections. Most relevantly, with the Civil Rights Act of 1991, Congress codified the lesser “motivating factor” standard and provided remedies whenever discriminatory animus is proven. In light of the result in *Nassar*, Congress must once again restore Title VII’s protections. Should Congress fail to do so, the current standard raises the potential for retaliatory animus to go unchecked—a result that severely undermines Title VII’s enforcement.

This Note offers two potential legislative solutions. First, Congress can build off recent efforts—some of which were successful—to explicitly provide for a “motivating factor” standard in cases alleging retaliation-based claims under Title VII. Alternatively, drawing on the Civil Rights Amendment Act of 1991, Congress can provide for limited relief—an injunctive order and attorney’s fees—where retaliatory animus is proven, but the employer demonstrates that the same decision would have been made regardless of the impermissible retaliation. By adopting either proposed solution, Congress can alleviate at least some of the concern that retaliation may go unpunished after *Nassar*.

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## INTRODUCTION

In *University of Texas Southwestern Medical Center v. Nassar*,<sup>1</sup> the United States Supreme Court held that Title VII’s antiretaliation provision requires that the retaliatory motive be the “but-for” cause of the adverse employment decision.<sup>2</sup> The Court’s decision is both

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

2. *Id.* at 2528.

surprising and unsurprising. A recent line of cases expanded the circumstances that give rise to causes of action alleging retaliation and the class of plaintiffs able to bring such claims.<sup>3</sup> The Court's decision in *Gross v. FBL Financial Services, Inc.*,<sup>4</sup> however, presented a similar statutory analysis in the Age Discrimination in Employment Act (ADEA) context, foreshadowing the logical underpinnings of *Nassar*.<sup>5</sup>

The *Nassar* decision makes retaliation-based claims difficult and costly to prove, perhaps foreclosing plaintiffs' ability to bring such suits.<sup>6</sup> Moreover, plaintiffs frequently bring claims based on both status-based and retaliation-based discrimination, which now require the application of different standards, raising the likelihood of jury confusion.<sup>7</sup> As the Court has recognized that Title VII's antiretaliation protections are critical to enforcement of the statute generally,<sup>8</sup> *Nassar*'s heavy burden may have deleterious consequences for Title VII's protections.<sup>9</sup>

Fifty years ago, Congress passed the Civil Rights Act of 1964, which has become "the nation's benchmark civil rights legislation."<sup>10</sup> Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating based on an individual's status relating to race, color, religion, sex, and national origin.<sup>11</sup> Moreover, Title VII prohibits retaliation, stating that an employer may not "discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a

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3. See *infra* Part II.B; see also Lawrence D. Rosenthal, *The Supreme Court's Interpretation of the Fair Labor Standards Act's Anti-Retaliation Provision in Kasten v. Saint-Gobain Performance Plastics Corporation: Putting Policy over Plain Language?*, 64 MERCER L. REV. 459, 463 (2013) (describing the breadth of Title VII's antiretaliation provision).

4. 557 U.S. 167 (2009).

5. See *infra* Part I.C.

6. See David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 934 (2010).

7. Compare 42 U.S.C. § 2000e-2(m) (2012) (requiring proof that status-based discrimination was a "motivating factor" in the employment decision), with *Nassar*, 133 S. Ct. at 2534 (requiring proof that retaliation-based discrimination was the "but-for" cause of the adverse employment decision).

8. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

9. See *infra* Part II.B.I.

10. *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEPARTMENT LAB., <http://www.dol.gov/oasam/programs/crc/civil-rights-act-1964.htm> (last visited Oct. 9, 2014).

11. § 2000e-2(a)(1) ("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 . . .").

charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”<sup>12</sup>

Part of the debate that surrounded Title VII prior to enactment was the causal standards and burdens created for litigation.<sup>13</sup> When Senator McClellan introduced an amendment to have “solely” inserted before “because of” in the provision prohibiting status-based discrimination, Senator Case argued that the change “would render [T]itle VII totally nugatory” because an action motivated by a single factor is rare.<sup>14</sup> Senator Case went on to express concern about the burden such a standard would place on plaintiffs: “[T]his 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.”<sup>15</sup> Although Senator McClellan’s amendment was rejected,<sup>16</sup> the Court’s decision in *Nassar* makes Senator Case’s concerns relevant once again.

The “but-for” causation standard without a shifting burden of proof—as required by the *Nassar* Court—simply does not apply well to employment discrimination cases.<sup>17</sup> The burden placed on the plaintiff is an onerous one.<sup>18</sup> As Senator Case commented during the debate on Title VII in 1964, “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.”<sup>19</sup> Indeed, members of the Court have noted that requiring the plaintiff to prove that one factor was the definitive cause of the employer’s action may be tantamount to declaring Title VII inapplicable to adverse employment decisions.<sup>20</sup> In effect, *Nassar* increases the possibility of unchecked discrimination because many plaintiffs will either not bring a case or will not be successful due to the Court’s “but-for” causation standard without a shifting burden of proof.<sup>21</sup>

12. *Id.* § 2000e-3(a). The first clause is commonly referred to as the “opposition clause” and the second is referred to as the “participation clause.” See *Crawford v. Metro. Gov’t of Nashville & David Cnty., Tenn.*, 555 U.S. 271, 274 (2009).

13. 110 CONG. REC. 2728, 13,837 (1964) (statements of Sen. McClellan and Sen. Case).

14. *Id.*

15. *Id.*

16. *Id.* at 13,838.

17. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2546–47 (2013) (Ginsburg, J., dissenting); Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 2.

18. Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 881 (2010).

19. 110 CONG. REC. 2728, 13,837 (1964) (statement of Sen. Case).

20. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 273 (1989) (O’Connor, J. concurring).

21. See Ivan E. Bodensteiner, *The Risk of Complaining – Retaliation*, 38 J.C. & U.L. 1, 36 (2011). Employers, who generally view complaints of discrimination

The purpose of this Note is not to cast the *Nassar* opinion in an entirely negative light. The Court quite reasonably points to the structure of the Civil Rights Act of 1991 (1991 Act)—which, among other things, amends Title VII’s status-based discrimination provision—and the fact that it does not explicitly include retaliation.<sup>22</sup> Rather, this Note seeks to point out the flaws in the *Nassar* decision to support an alternative reading of the statute that comports with Congress’s intent and a legislative response bolstering Title VII’s antiretaliation protections. The *Nassar* Court is on questionable ground by pointing to incomplete “textbook tort law” that the Court’s previous decisions have concluded is a poor fit in the employment discrimination context.<sup>23</sup> Although the Court makes a judicial efficiency argument, the standard for retaliation announced in *Nassar* is likely to generate confusion in cases alleging both status-based discrimination and retaliation.<sup>24</sup> Finally, in disregarding the Equal Employment Opportunity Commission’s (EEOC) Compliance Manual, the Court does not appropriately defer to the specialized agency, providing only cursory and unconvincing reasoning.<sup>25</sup>

The most efficacious solution is for Congress to respond as it did to *Price Waterhouse v. Hopkins*<sup>26</sup> when it passed the 1991 Act “to restore and strengthen civil rights laws that ban discrimination in employment.”<sup>27</sup> This Note offers two potential legislative solutions. First, Congress could provide a “motivating factor” standard by amending § 2000e-2(m) of the 1991 Act to explicitly include retaliation or by inserting a similar provision into the antiretaliation provision. Alternatively, Congress could include violations of § 2000e-3, which prohibits retaliation, in § 2000e-5(g)(2), allowing courts to award injunctive relief and attorney’s fees and costs if an impermissible retaliatory motive is proven.<sup>28</sup> By adopting either course, Congress would bolster the enforceability of Title VII’s antiretaliation provision.

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negatively, may view retaliation or the threat of retaliation “as an important means of discouraging complaints.” *Id.* at 37.

22. See *Nassar*, 133 S. Ct. at 2529; see also 42 U.S.C. § 2000e-2(m) (2012) (“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.”).

23. See *infra* Part II.A.2.

24. See *infra* Part II.A.3.

25. See *infra* Part II.A.4.

26. 490 U.S. 228 (1989).

27. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694.

28. See 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (“On a claim in which an individual proves a violation under section 2000e-2(m) of this title and [an employer] demonstrates that the [employer] would have taken the same action in the absence of the

Part I of this Note will discuss the background case law on the applicable burdens of proof in Title VII cases and cases alleging retaliation. Part II acknowledges that *Nassar* is not unreasonably decided based on a statutory structure analysis,<sup>29</sup> but it critiques the Court's other findings in favor of "but-for" causation without a shifting burden of proof.<sup>30</sup> This critique provides a basis for a legislative response by pointing to questionable reasoning and the purposes of Title VII's antiretaliation provision.<sup>31</sup> Further, Part II highlights the practical effects of the *Nassar* decision on future victims of retaliation.<sup>32</sup> Part II concludes by offering a legislative solution to provide for a shifting burden of proof in retaliation claims, drawing on past and current legislative efforts.<sup>33</sup>

### I. BACKGROUND CASES AND STATUTORY AMENDMENTS

This Part presents the relevant case law developments and statutory amendments underlying the *Nassar* decision. While announcing a lesser "motivating factor" standard, the Court allowed defendant-employers to avoid liability by showing that it would have made the same decision despite the impermissible consideration.<sup>34</sup> Congress responded in 1991 by codifying the "motivating factor" standard and providing injunctive relief and attorney's fees when a discriminatory animus is shown.<sup>35</sup> However, Congress did not provide specific language to demonstrate the scope of the amendment. This left open the specific statutory analysis employed by the Court in *Gross* and *Nassar*.<sup>36</sup>

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impermissible motivating factor, the court . . . may grant . . . 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 . . .").

29. An alternative—and quite reasonable—textual analysis focuses on the use of the phrase "unlawful employment practices" in § 2000e-2(m). *Id.* § 2000e-2(m). "Unlawful employment practices" includes both status-based and retaliation-based discrimination. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2542–43 (2013) (Ginsburg, J., dissenting).

30. *See infra* Part II.A.1–4.

31. *See infra* Part II.A.1–4.

32. *See infra* Part II.B.1.

33. *See infra* Part II.B.2.

34. *See infra* Part I.A.1.

35. *See infra* Part I.B.2.

36. *See infra* Part I.C.

*A. Development of the “Motivating Factor” Standard with a Shifting Burden in Retaliation and Title VII Status-Based Discrimination Cases*

In *Mt. Healthy City School District Board of Education v. Doyle*,<sup>37</sup> the Court implemented a burden-shifting framework based on a showing that the employer’s impermissible consideration of protected conduct was a “substantial factor” in the employment decision.<sup>38</sup> Subsequently, the Court applied this basic framework in *Price Waterhouse*, a case involving Title VII status-based discrimination.<sup>39</sup> Importantly, employers could escape liability by proving that the same decision would have been made regardless of the impermissible consideration.<sup>40</sup> Congress quickly responded by codifying the Court’s burden-shifting framework<sup>41</sup> and rejecting the possibility of unpunished discrimination.<sup>42</sup> While stating its intention for the revised Title VII to apply broadly, the new provisions refer explicitly only to status-based discrimination.<sup>43</sup> This drafting left open a narrow interpretation of the provisions’ applicability.

1. IN *MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE* AND *PRICE WATERHOUSE V. HOPKINS*, THE COURT DEVELOPED THE “MOTIVATING FACTOR” STANDARD

In *Mt. Healthy*, the Court decided what framework to apply when an employer retaliates against an employee based at least in part on the employee’s engagement in constitutionally protected conduct—speech in this case.<sup>44</sup> The Court determined that the initial burden lies with the plaintiff “to show that his conduct was constitutionally protected, and that this conduct was a ‘substantial factor,’ or put in other words, that it was a ‘motivating factor.’”<sup>45</sup> Once the plaintiff meets this burden, however, the defendant must be allowed the opportunity to show “by a preponderance of the evidence that it would have reached the same

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37. 429 U.S. 274 (1977).

38. *See id.* at 287; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

39. *Price Waterhouse*, 490 U.S. 228.

40. *Id.* at 242.

41. *See* 42 U.S.C. § 2000e-2(m) (2012).

42. *See id.* § 2000e-5(g)(2).

43. *See* H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.

44. *Mt. Healthy*, 429 U.S. at 287.

45. *Id.* Doyle met this burden by showing that the school board specifically referred to a radio station incident involving Doyle’s disclosure and criticism of the school’s new dress code for teachers in its decision not to rehire him. *Id.* at 283.

decision . . . even in the absence of the protected conduct.”<sup>46</sup> After developing the “motivating factor” standard in the context of retaliation based on constitutionally protected activity, the question remained how the standard would apply in other contexts—including Title VII.

The Court granted certiorari in *Price Waterhouse* to resolve a circuit split concerning the burden of proof in a suit alleging violations of Title VII where the employment decision resulted from a mixture of legitimate and illegitimate motives.<sup>47</sup> The plurality opinion relied on the legislative history and statutory purpose of Title VII in determining that “because of” as used in Title VII does not necessitate a “but-for” standard.<sup>48</sup> As noted in the congressional record, Congress specifically rejected the requirement that the adverse employment action result “solely” from the impermissible consideration.<sup>49</sup> The Court concluded:

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.<sup>50</sup>

The Court also recognized that Title VII preserves the employer’s freedom of choice.<sup>51</sup> In order to preserve this freedom, an employer is not to be held liable if it can prove that it would have made the same decision regardless of the improper consideration.<sup>52</sup> Drawing on *Mt. Healthy* and similar cases, the plurality referred to this as the employer’s “affirmative defense,” on which it can prevail and avoid liability if it convinces the factfinder by a preponderance of the evidence.<sup>53</sup>

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46. *Id.* at 287.

47. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989). Ann Hopkins, a senior manager with Price Waterhouse, was considered for partnership in 1982. *Id.* at 231. After neither offering nor denying her partnership, partners in Hopkins’ office refused to re-propose her candidacy, mostly citing her poor interpersonal skills. *Id.* at 231–32. However, some of the partners also objected to Hopkins’ lack of femininity, advising her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235.

48. *Id.* at 240.

49. *Id.* at 241 n.7 (citing 110 CONG. REC. 2728, 13,837 (1964)).

50. *Id.* at 241–42.

51. *Id.* at 242.

52. *Id.*

53. *Id.* at 246 (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983)).

The other opinions in *Price Waterhouse* reflected a splintered Court on the issue of burden-shifting in mixed-motives cases. Justice White concurred with the result, noting that *Mt. Healthy* controlled.<sup>54</sup> Also concurring with the result, Justice O'Connor articulated a framework where the burden shifts once the plaintiff proves by a preponderance of direct evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision.<sup>55</sup>

In his dissenting opinion, Justice Kennedy questioned the plurality's approach because it moved away from *Texas Department of Community Affairs v. Burdine*<sup>56</sup> (a Title VII case) and closer to *Mt. Healthy* (a First Amendment case).<sup>57</sup> Justice Kennedy also expressed judicial economy concerns, arguing that plaintiffs would ask for the *Price Waterhouse* framework even when not applicable.<sup>58</sup> In response to the Court's divided *Price Waterhouse* decision, Congress solidified the burdens of proof under Title VII and removed the possibility for an employer to fully escape liability where discrimination is proven.<sup>59</sup>

## 2. THE CIVIL RIGHTS ACT OF 1991

Two years after the Court's decision in *Price Waterhouse*, Congress passed the 1991 Act "to restore and strengthen civil rights laws that ban

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54. *Id.* at 258 (White, J., concurring). Justice White found it unnecessary "to get into semantic discussions on whether the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense on the part of the employer." *Id.* at 259 (White, J., concurring) (describing the difference between the plurality's affirmative defense and Justice O'Connor's "but-for" causation with a shifting burden); see also Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfilled Promise of the Civil Rights Act of 1991*, 58 *BUFF. L. REV.* 69, 90 (2010).

55. *Price Waterhouse*, 490 U.S. at 265, 276 (O'Connor, J., concurring). According to Justice O'Connor, the question for the Court was not the causation standard itself, but what allocation of the burden to prove causation best conforms with the intent of Congress and the purposes behind Title VII. *Id.* at 263 (O'Connor, J., concurring). Justice O'Connor's concurrence became the controlling opinion, providing for a shifting burden of proof that required direct evidence. Sherwyn & Heise, *supra* note 6, at 911.

56. 450 U.S. 248 (1981).

57. See *Price Waterhouse*, 490 U.S. at 286, 289–90 (Kennedy, J., dissenting). The critical difference is that *Burdine* held the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

58. See *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting). Justice Kennedy wrote the *Nassar* majority opinion, in which the Court expressed similar concern. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531 (2013); *infra* Part I.C.2.

59. See 42 U.S.C. § 2000e-2(m), -5(g)(2) (2012).

discrimination in employment.”<sup>60</sup> To achieve this goal, Congress strengthened existing protections and remedies to deter discrimination more effectively and to provide relief whenever discrimination is proven.<sup>61</sup> The 1991 Act overruled *Price Waterhouse*’s holding on employers’ ability to avoid liability but, importantly, did not overrule the “motivating factor” standard holding.<sup>62</sup>

The 1991 Act has two significant pieces for the purposes of this Note. First, § 2000e-2(m) codified the “motivating factor” test from *Price Waterhouse*.<sup>63</sup> Congress manifested approval of the test, noting the “decision is particularly profound because the factual situation at issue in *Price Waterhouse* is a common one.”<sup>64</sup> Importantly, Congress inserted this provision in the section prohibiting status-based discrimination, and it did not specifically mention retaliation.<sup>65</sup>

Second, the 1991 Act modified the *Price Waterhouse* framework by removing the defendant’s ability to escape liability completely by providing for limited remedies in § 2000e-5(g)(2).<sup>66</sup> The 1991 Act responded to *Price Waterhouse* by “reaffirming that any reliance on prejudice in making employment decisions is illegal.”<sup>67</sup> Allowing an employer to escape liability—as the Court held as a possibility in *Price Waterhouse*—“severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII.”<sup>68</sup> Similar to § 2000e-2(m), this

60. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.

61. *See id.* at 1.

62. *See* 137 CONG. REC. 28,638 (1991); Andrew Kenny, Comment, *The Meaning of “Because” in Employment Discrimination Law: Causation in Title VII Retaliation Cases After Gross*, 78 U. CHI. L. REV. 1031, 1058 (2011); *cf. Nassar*, 133 S. Ct. at 2534 (finding that the 1991 Act abrogates *Price Waterhouse* entirely).

63. § 2000e-2(m) (“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.”). Although Congress states that the consideration of race, color, religion, sex, or national origin is impermissible in any employment practice, the provision does not specifically refer to retaliation. *See id.*

64. H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

65. Section 2000e-3, titled “Other unlawful employment practices,” prohibits retaliation for opposing “any practice made an unlawful employment practice by this subchapter,” or for participating “in any manner in an investigation, proceeding, or hearing under this subchapter.” § 2000e-3. Congress did not insert a “motivating factor” provision similar to § 2000e-2(m) into § 2000e-3.

66. *Id.* § 2000e-5(g)(2); *see also Nassar*, 133 S. Ct. at 2526.

67. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695.

68. *Id.* at 18.

section applies explicitly only to status-based discrimination. No equivalent provision was included for retaliation-based claims.

*B. Liberal Application of Title VII's Antiretaliation Protections*

After Congress codified the “motivating factor” standard and strengthened Title VII’s remedial protections in the 1991 Act, the Court expanded the ability of plaintiffs to bring suits alleging retaliation. In a line of cases extending through the first decade of the twenty-first century, the Court found little trouble upholding the legitimacy of plaintiffs’ retaliation claims.<sup>69</sup> Although the cases do not pertain to the 1991 Act’s applicability to retaliation-based cases, the reasoning and broad statements of Title VII’s purpose of protecting employees may have reasonably led observers to believe that the Court was prepared to apply the 1991 Act’s framework to retaliation cases.

The Court expanded the class of plaintiffs permitted to bring retaliation claims by providing an expansive scope of factual circumstances that give rise to such claims. In *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>70</sup> the Court provided that a plaintiff may bring a retaliation-based claim where “a reasonable employee would have found the challenged action materially adverse.”<sup>71</sup> The Court decided the “materially adverse” standard was appropriate, noting, “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.”<sup>72</sup> Moreover, “any plaintiff with an interest arguably [sought] to be protected by the statutes” may bring a retaliation-based claim.<sup>73</sup>

In a subsequent case, the Court further expanded the scope of conduct giving rise to retaliation-based claims. Relying on the purpose of

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69. See James Concannon, *Reprisal Revisited: Gross v. FBL Financial Services, Inc. and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. C.L. & C.R. 43, 48 (2011).

70. 548 U.S. 53 (2006). White, a female employee who mostly operated heavy machinery for Burlington Northern, faced insulting and inappropriate remarks made by male coworkers on the job site. *Id.* at 58. White’s supervisor reassigned her to perform standard track laborer tasks soon after she complained about the remarks. *Id.* Thereafter, White’s relationship with her supervisors worsened, ultimately leading to her suspension based on alleged insubordination. *Id.*

71. *Id.* at 68. The Court defined “materially adverse” as an action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* (internal quotation marks omitted).

72. *Id.* at 67.

73. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (internal quotation marks omitted). Finding that the term “aggrieved” in Title VII incorporates the “zone of interests” test, the Court allowed a plaintiff, who was terminated after his fiancée filed a complaint with the EEOC, to proceed with a claim against the employer. *Id.*

Title VII—avoiding harm to employees who speak out against discriminatory practices—the Court held that to “oppose” under Title VII’s antiretaliation provision did not require active or consistent behavior on the part of the plaintiff against the employment practice.<sup>74</sup> The Court adopted this lower standard of opposition despite a split among the circuit courts in which some circuits held active and consistent behavior was required.<sup>75</sup> This expansive reading of Title VII’s antiretaliation provisions—coupled with the analysis in *Mt. Healthy*, *Price Waterhouse*, and the 1991 Act—perhaps suggested that the Court would apply the more plaintiff-friendly “motivating factor” standard in retaliation-based actions to maximize the statute’s protections.

*C. After Gross and Nassar, the “Motivating Factor” Standard Does Not Apply Unless Specifically Implemented By Congress*

Despite the expansion of plaintiffs’ rights through the 1991 Act and related case law discussed above, the Court has refused to apply liberally the “motivating factor” standard codified in the 1991 Act or to continue applying *Price Waterhouse*. Without a clear congressional provision—such as § 2000e-2(m)—courts are to apply a strict “but-for” causation standard with the burden entirely on the plaintiff to prove that the impermissible considerations caused the adverse employment decision.<sup>76</sup> In the process, the Court rehashed standards rejected in both *Price Waterhouse* and the 1991 Act.<sup>77</sup>

1. *GROSS V. FBL FINANCIAL SERVICES*

In *Gross*, the Court began to rein in employment cases by refusing to employ a burden-shifting framework.<sup>78</sup> The question before the Court was whether a plaintiff alleging age discrimination under the ADEA must present direct evidence of age discrimination to obtain a

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74. *Crawford v. Metro. Gov’t of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 277–79 (2009). During an interview, Crawford described several instances of sexually harassing behavior from her supervisor, who was under investigation based on complaints filed by others. *Id.* at 274.

75. *See id.* at 277–79. In *Crawford*, the Court reserved the Sixth Circuit’s rule requiring active and consistent opposition in favor of the more plaintiff-friendly formulation. *Id.* at 275.

76. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009) (describing the “but-for” standard as the default rule for civil litigation, absent congressional enactment to the contrary).

77. *See infra* Part I.C.1–2.

78. *Gross*, 557 U.S. at 174.

“motivating factor” standard jury instruction.<sup>79</sup> Rather than answering that question, the Court held that such a jury instruction is never available in an ADEA case.<sup>80</sup>

According to the Court, Title VII’s burden of persuasion was “materially different” than what the ADEA requires.<sup>81</sup> Decisions interpreting Title VII—namely, *Price Waterhouse* and *Desert Palace, Inc. v. Costa*<sup>82</sup>—were not binding.<sup>83</sup> Moreover, Congress amended Title VII by inserting the “motivating factor” provision; but it chose not to include a similar provision in the ADEA, which was also revised in 1991.<sup>84</sup> Therefore, the “motivating factor” standard was inapplicable to ADEA claims because Congress “is presumed to have acted intentionally” when it “amends one statutory provision but not another.”<sup>85</sup>

In setting the standard applicable to ADEA claims, the Court first looked to the dictionary definition of the words “because of.”<sup>86</sup> The Court concluded that “the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was *the* ‘reason’ that the employer decided to act.”<sup>87</sup> Under the plain “because of” language of the ADEA, the plaintiff must prove that age was the “but-for” cause of the employer’s decision.<sup>88</sup>

Perhaps more importantly, the Court held that “the plaintiff retains the burden of persuasion,” as opposed to a burden-shifting framework.<sup>89</sup> The Court noted that trial courts have found *Price Waterhouse*’s burden-shifting framework difficult to apply.<sup>90</sup> The result is that the burden of persuasion does not shift, even when a plaintiff proves that age

79. *Id.* at 169–70.

80. *Id.* at 170. The Court’s willingness to go beyond the issue presented by the case has been subjected to criticism elsewhere, so this Note will not discuss it in detail. *See, e.g.,* Concannon, *supra* note 69, at 69–70.

81. *Gross*, 557 U.S. at 173.

82. 539 U.S. 90 (2003). The Court held that plaintiffs alleging violations under Title VII need not present direct evidence of discrimination, which Justice O’Connor’s concurring opinion in *Price Waterhouse* required. *Id.* at 98–102.

83. *Gross*, 557 U.S. at 173.

84. *Id.* at 174.

85. *Id.*

86. *Id.* at 176.

87. *Id.* (emphasis added). Not even the *Price Waterhouse* dissent adopted this version of “because of” in employment discrimination statutes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 284 (1989) (Kennedy, J., dissenting) (arguing that “because of” in Title VII requires only that the protected trait “be a cause of the decision”); *see also* Brian S. Clarke, *The Gross Confusion Deep in the Heart of University of Texas Southwest Medical Center v. Nassar*, 4 CALIF. L. REV. CIRCUIT 75, 78–79 (2013).

88. *Gross*, 557 U.S. at 176.

89. *Id.* at 177.

90. *See id.* at 179.

was a motivating factor in the employer's decision.<sup>91</sup> Although the Court stated that different statutes must be treated differently, the reasoning in *Gross* signaled a "but-for" approach to causation standards in employment discrimination cases, unless the statutory language explicitly provides for the burden-shifting framework.

2. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

The Court's decision in *Gross* immediately raised questions as to the scope and application of its reasoning. Namely, did § 2000e-2(m)'s "motivating factor" standard or the "but-for" standard apply to retaliation-based claims under Title VII? Arguably, "any decision that is truly loyal to the Court's holding in *Gross* [would have found] that mixed-motive Title VII retaliation claims are no longer viable."<sup>92</sup> Not all courts agreed, however, and a circuit split developed concerning the applicability of *Gross* to retaliation claims brought under Title VII.<sup>93</sup>

*Nassar* answered the lingering questions as to the scope of the Court's reasoning in *Gross*. Dr. Nassar worked for the University of Texas Southwestern Medical Center (University) as a member of the faculty and as a staff physician at the Parkland Memorial Hospital (Hospital).<sup>94</sup> Dr. Nassar alleged that his supervisor, Dr. Levine, was biased against him due to his Middle Eastern religious and ethnic heritage.<sup>95</sup> Dr. Nassar resigned from his teaching position and wrote a letter to Dr. Levine's supervisor and others stating that harassment was the cause of his resignation.<sup>96</sup> Dr. Fitz, who supervised Dr. Levine, expressed concern that the letter publicly humiliated Dr. Levine.<sup>97</sup> When the Hospital offered Dr. Nassar a position to stay on as a staff physician, Dr. Fitz asserted that the offer was inconsistent with an agreement between the University and the Hospital.<sup>98</sup> The Hospital subsequently withdrew its offer.<sup>99</sup>

To apply the "but-for" standard, the Court first distinguished the two categories of claims brought under Title VII: status-based

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91. *Id.* at 180.

92. Concannon, *supra* note 69, at 45.

93. Compare *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (applying *Gross* to retaliation case), with *Smith v. Xerox*, 602 F.3d 320, 329 (5th Cir. 2010) (applying the *Price Waterhouse* framework to a retaliation case).

94. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013).

95. *Id.*

96. *Id.* at 2524.

97. *Id.*

98. *Id.*

99. *Id.*

discrimination and retaliation-based discrimination.<sup>100</sup> The *Nassar* Court defined the proper standard of causation for Title VII retaliation claims based on “textbook tort law,” which states that an action is not a cause of an event if that event would have occurred without it.<sup>101</sup> Moreover, due to the lack of any meaningful difference between “because” in the ADEA and in Title VII’s antiretaliation provision, the Court concluded that retaliation claims required proof that the retaliatory animus was the “but-for” cause of the adverse employment action, as age was in *Gross*.<sup>102</sup>

The Court emphasized the statutory structure developed by the 1991 Act. One of the key insights from *Gross*, according to the Court, was the significance of Congress’s structural choices made when adopting Title VII and when amending the law in 1991.<sup>103</sup> The 1991 Act inserted § 2000e-2(m) into the subsection that enumerates status-based discrimination—not the subsection on retaliation.<sup>104</sup> Moreover, § 2000e-2(m) does not specifically refer to retaliation.<sup>105</sup> According to the Court, this indicated Congress’s intent to confine the “motivating factor” standard to status-based discrimination claims.<sup>106</sup>

The Court also stressed the importance of “[t]he proper interpretation and implementation” of Title VII’s retaliation provision and its causation standard to “the fair and reasonable allocation of resources in the judicial and litigation systems.”<sup>107</sup> Reminiscent of his dissenting opinion in *Price Waterhouse*, Justice Kennedy, writing for the Court, expressed concern about the number of retaliation claims filed with the EEOC.<sup>108</sup> Further, Justice Kennedy noted the possibility of frivolous claims being filed if the Court were to adopt a lower causation standard.<sup>109</sup> The possible result was that such claims “would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment.”<sup>110</sup>

Finally, the *Nassar* majority rejected arguments not based on Title VII’s language or structure. The EEOC’s Compliance Manual provides that “the causation element of a retaliation claim is satisfied if ‘there is

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100. *Id.* at 2522.

101. *Id.* at 2525 (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

102. *Id.* at 2528.

103. *Id.*

104. *Id.* at 2529.

105. *Id.*

106. *Id.* at 2528.

107. *Id.* at 2531.

108. *Id.*

109. *Id.*

110. *Id.* at 2531–32.

credible direct evidence that retaliation was a motive for the challenged action.”<sup>111</sup> However, the Compliance Manual lacked the persuasive force necessary to require the Court’s deference.<sup>112</sup> The Court also rejected Dr. Nassar’s argument to apply *Price Waterhouse* for two reasons: (1) because the burden-shifting framework did not survive the 1991 Act and (2) because it would be inconsistent with *Gross*.<sup>113</sup>

## II. ANALYZING THE *NASSAR* DECISION AND ITS IMPLICATIONS

The *Nassar* decision is plainly contrary to the purposes of Title VII. It is difficult to criticize the Court’s statutory analysis, however, because § 2000e-2(m) does not explicitly include retaliation.<sup>114</sup> Although the result contradicts the clear intent of Title VII’s retaliation provision, “our law dictate[d] such an outcome.”<sup>115</sup>

However, the Court’s analysis failed to consider the clear intent of Title VII despite the existence of a plausible alternative reading of the statute.<sup>116</sup> Moreover, the Court’s findings based on “textbook tort law,”<sup>117</sup> allocation of judicial resources,<sup>118</sup> and the lack of deference to the EEOC<sup>119</sup> are not well founded. Finally, the Court failed to explain why the “motivating factor” analysis, required by *Mt. Healthy* and *Price Waterhouse*, does not apply to Title VII retaliation claims.

Following Supreme Court decisions that tend to decrease Title VII’s protections, Congress has historically responded by restoring the underlying intent and purposes of the statute.<sup>120</sup> To restore Title VII’s antiretaliation protections, Congress must explicitly include retaliation in § 2000e-2(m) or insert a similar provision into the antiretaliation section. Alternatively, Congress could focus on the remedies provision that

111. *Id.* at 2533 (quoting EEOC Compl. Man. (BNA) § 8-II(E)(1), 614:0007–614:0008 (2003)).

112. The Court refused to defer to the EEOC’s interpretation for two reasons. First, the Court found that the interpretation does not adequately address the structural argument—namely, Congress’s failure to provide a similar provision in the section prohibiting retaliation. *Id.* at 2533. Second, the Court refuted the EEOC’s concern for unpunished retaliation by stating that the interpretation is circular. *Id.* at 2533–34

113. *Id.* at 2534.

114. See 42 U.S.C. § 2000e-2(m) (2012).

115. Kourtnei Mason, *Totally Mixed Up!: An Expansive View of Smith v. Xerox and Why Mixed-Motive Jury Instructions Should Not Be Applied in Title VII Retaliation Cases*, 38 S.U. L. REV. 345, 362 (2011).

116. See *infra* Part II.A.1.

117. See *infra* Part II.A.2.

118. See *infra* Part II.A.3.

119. See *infra* Part II.A.4.

120. See H.R. REP. NO. 102-40, pt. 2, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 694.

would make retaliation cases less costly for employees and more attractive for plaintiffs' attorneys.<sup>121</sup> By adopting either statutory amendment, Congress can restore the clear intent and purpose of Title VII's antiretaliation protections, which are critical to Title VII enforcement generally.<sup>122</sup>

### *A. Analyzing the Nassar Court's Findings*

This Subpart will analyze the *Nassar* Court's various justifications for not applying § 2000e-2(m) in retaliation cases. While the Court's analysis of the statutory framework is arguably correct, it is overly simplistic because it fails to account for legislative intent and the practical effects of the decision. Beyond the statutory framework argument, the Court's reasoning is ripe for criticism based on incompleteness, lack of persuasiveness, and lack of deference to the EEOC. This analysis supports the conclusion that Congress must once again take action to reaffirm Title VII's antiretaliation protections.

#### 1. THE COURT'S STATUTORY INTERPRETATION OVERLOOKS CONGRESS'S CLEAR INTENT AND SUMMARILY DISMISSES A PLAUSIBLE ALTERNATIVE READING OF THE STATUTE

As the Court correctly observed, the 1991 Act's provision codifying the *Price Waterhouse* burden-shifting framework does not mention retaliation, and the provision appears in the section prohibiting status-based discrimination.<sup>123</sup> After concluding that § 2000e-2(m) does not apply to retaliation claims, the Court cited *Gross* to define the standard.<sup>124</sup> The Court noted that the statutory language "must be read . . . the way Congress wrote it."<sup>125</sup>

In defense of its statutory analysis, the Court found three main flaws with the counterarguments offered by Dr. Nassar and the United States.<sup>126</sup> First, the counterarguments were inconsistent with the

121. *See infra* Part II.B.2.

122. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

123. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525–26 (2013).

124. *Id.*

125. *Id.* at 2527 (alteration in original) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 179 (2009)) (internal quotation marks omitted).

126. *Id.* at 2528. Dr. Nassar and the United States argued, in essence, 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—and not necessarily the but-for factor in—the challenged employment action; and (3) the Court has, as a matter of course,

provision's plain language, which specifically mentions only five of the seven prohibited discriminatory actions (i.e., race, color, religion, sex, and national origin, but not retaliation for opposing or participating in opposition to discriminatory practices).<sup>127</sup> Second, Dr. Nassar and the United States' statutory analysis was inconsistent with the overall design and structure of the statute.<sup>128</sup> Finally, the Court found that decisions interpreting bans on status-based discrimination as also prohibiting retaliation are not controlling.<sup>129</sup>

The problem with the Court's analysis and its defense against other possible analyses is that it does not account for Congress's intent that Title VII to apply broadly.<sup>130</sup> Section 2000e-2(m) broadly states that it is an "unlawful employment practice" if the employer is motivated by race, color, religion, sex, or national origin.<sup>131</sup> Retaliation is an employment practice.<sup>132</sup> Coupled with Congress's stated intent for the 1991 Act "to restore and strengthen" Title VII,<sup>133</sup> the word "any" in § 2000e-2(m) ought to include retaliation. As Justice Brennan advised in the *Price Waterhouse* plurality opinion, "We need not leave our common sense at the doorstep when we interpret a statute."<sup>134</sup>

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held that retaliation for complaining about race discrimination *is* discrimination based on race.

*Id.* (internal quotation marks omitted).

127. *Id.*

128. *Id.* at 2529. The Court writes, "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Id.* Status-based and retaliation-based discrimination are covered by different sections of Title VII. *See* 42 U.S.C. § 2000e-2 to -3 (2012). Thus, in the *Nassar* majority's view, Congress's decision to insert the "motivating factor" standard into § 2000e-2 (which prohibits status-based discrimination), as opposed to § 2000e-3 (which prohibits retaliation), was "deliberate," designed to limit a mixed-motive analysis. *See Nassar*, 133 S. Ct. at 2529.

129. *Nassar*, 133 S. Ct. at 2529–30. The Court differentiates between statutes that are phrased in "broad and general terms" and more specific statutes like Title VII. *Id.* at 2530. Because Title VII is written with specific language, it is "incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation." *Id.*

130. *See* 110 CONG. REC. 2728 (1964); *id.* at 13,837 (statement of Sen. Case); H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

131. 42 U.S.C. § 2000e-2(m).

132. *See id.* § 2000e-3(a) (stating that retaliation is an "unlawful employment practice"); *Nassar*, 133 S. Ct. at 2542–43 (Ginsburg, J., dissenting). Justice Ginsburg criticizes the Court's statutory analysis, noting that it "has seized on a provision, 2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation." *Id.* at 2535.

133. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694; *see also Nassar*, 133 S. Ct. at 2542–43 (Ginsburg, J., dissenting).

134. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

The Court disregarded precedent that treats status-based discrimination and retaliation claims according to the same standards.<sup>135</sup> While § 2000e-2(m) fails to explicitly include retaliation-based claims, Congress’s intent for § 2000e-2(m) to apply broadly is clear. The House Report on the 1991 Act explained that Congress endorsed the Eighth Circuit’s reasoning in *Bibbs v. Block*,<sup>136</sup> which applied a burden-shifting framework to retaliation claims.<sup>137</sup> These provisions are part of a “conceptually linked package” often brought in tandem,<sup>138</sup> which makes consistent standards critical to enforcement of Title VII.

The Court also rejected an argument to apply *Price Waterhouse* on two grounds: first, the *Price Waterhouse* framework did not survive the 1991 Act; and second, even if the framework were still available, it would be inconsistent with *Gross*.<sup>139</sup> Following the *Gross* opinion, Professor Michael C. Harper argued, “[t]here is no reasonable way to read the legislative history of the 1991 Act, as did Justice Thomas [in *Gross*], to empower the Court to ignore *both* the *Price Waterhouse* precedent and the legislatively formulated § 107 system [from the 1991 Act].”<sup>140</sup> Because *Nassar* analyzes Title VII as amended by the 1991 Act, Professor Harper’s argument is even stronger.<sup>141</sup> The 1991 Act did not touch the burden-shifting rationale from *Price Waterhouse*.<sup>142</sup> The Court does not explain how Congress “abrogated” that part of the opinion.<sup>143</sup>

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135. See *Nassar*, 133 S. Ct. at 2529–30 (asserting that the Court’s decisions treating bans on status-based discrimination as also prohibiting retaliation are not controlling). The Court argues that § 2000e-2(m) is unlike the broadly phrased antidiscrimination statutes in other cases. *Id.* at 2530. Further, the Court distinguishes between statutes that create a substantive ban on discrimination and § 2000e-2(m), which merely “establishes the causation standard for proving a violation defined elsewhere in Title VII.” *Id.*

136. 778 F.2d 1318 (8th Cir. 1985).

137. *Nassar*, 133 S. Ct. at 2539 (Ginsburg, J., dissenting) (citing H.R. REP. NO. 102-40, pt. I, 48 (1991)).

138. Kenny, *supra* note 62, at 1058.

139. *Nassar*, 133 S. Ct. at 2534.

140. Harper, *supra* note 54, at 108 (discussing the Court’s rejection of both the *Price Waterhouse* framework and the congressionally modified version in the 1991 Act in *Gross*). Section 107 of the 1991 Act codified *Price Waterhouse*’s “motivating factor” framework at § 2000e-2(m) and provided for limited remedies if discriminatory animus is shown at § 2000e-5(g)(2)(B). See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (1991) (codified as amended at 42 U.S.C. § 2000e-2(m), -5(g)(2) (2012)).

141. In *Gross*, the Court reasoned that different statutes must be treated differently. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 166, 173 (2009). Yet, the Court looked to *Gross* for guidance, despite the fact that the case interpreted the ADEA, not Title VII. See *Nassar*, 133 S. Ct. at 2528.

142. See Harper, *supra* note 54, at 107–08.

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

2. THE COURT'S "TEXTBOOK TORT LAW" IS ACTUALLY  
NOT ALL THAT TEXTBOOK

In support of its holding, the Court cited the *Restatement of Torts* and *Prosser and Keeton on the Law of Torts* as the background sources for "textbook tort law."<sup>144</sup> The Court noted "the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes."<sup>145</sup> After noting this exception, the Court failed to explain why it did not apply in a case like *Nassar*, where an employer has multiple sufficient causes—either legitimately enforcing contractual terms relating to the employment or illegitimately acting with retaliatory animus<sup>146</sup>—for terminating an employee.

*Nassar* "rehashe[d] arguments rightly rejected in *Price Waterhouse*," which show a disconnect between the "but-for" standard and common law tort doctrines.<sup>147</sup> Consider the California Supreme Court's rationale in *Summers v. Tice*,<sup>148</sup> the landmark decision on multiple sufficient proximate causes.<sup>149</sup> Where two sufficient causes exist, the burden shifts to the defendant to prove that its actions were not the "but-for" cause of the plaintiff's injury.<sup>150</sup> This rule is part of "textbook tort law."<sup>151</sup> Yet, the *Nassar* majority does not explain why it is inapplicable here.<sup>152</sup>

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144. *Id.* at 2525.

145. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27, cmt. b (2010)).

146. *See id.* at 2524–25 (describing both the agreement between the University and the Hospital that provided legitimate grounds for Dr. Nassar's termination and Dr. Nassar's assertions of retaliation arising from previous comments regarding racial and religious discrimination).

147. *Id.* at 2546 (Ginsburg, J., dissenting).

148. 199 P.2d 1 (Cal. 1948).

149. *Id.*

150. *Id.* at 3–5. Fairness motivated the California Supreme Court in its landmark opinion. *Id.* at 3. The California court stated, "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to the defendants becomes manifest." *Id.* at 4.

151. *See* MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES 367–69 (Foundation Press 9th ed. 2011).

152. One potential danger is that courts can apply a "but-for" standard as a guise for making policy decisions. *See* Sperino, *supra* note 17, at 3 ("The notoriously flexible and inconsistent theoretical underpinnings of proximate cause make it likely that courts purporting to import proximate cause will actually be making relatively unguided policy decisions. They will use the broad idea of proximate cause as a framework for discussion, selectively quoting available sources to reach a particular outcome.").

In the employment discrimination context, mixed motives are common.<sup>153</sup> Mixed motives means the employer had multiple sufficient causes for the employment decision—either the employee was providing inadequate service or the employer impermissibly discriminated against the employee.<sup>154</sup> For example, in *Nassar*, Dr. Fitz may have simply enforced the agreement between the Hospital and the University.<sup>155</sup> Or he may have intended to retaliate against Dr. Nassar for writing the letter outlining Dr. Levine’s discrimination.<sup>156</sup> Moreover, similar to multiple defendant cases like *Summers*, the employer is in a far better position to offer evidence as to the basis of the termination.<sup>157</sup>

Considerations like these motivated the decision to keep “solely” out of the original 1964 Act and to codify *Price Waterhouse* in the 1991 Act.<sup>158</sup> The Court expanded the availability of retaliation-based claims because such claims are critical to enforcement of Title VII.<sup>159</sup> Yet, *Nassar* makes such claims incredibly difficult to win because it imposes a “but-for” standard without a shifting burden—a standard that rarely matches the decision maker’s behavior.<sup>160</sup>

### 3. OVERSTATED CONCERN FOR ALLOCATION OF JUDICIAL RESOURCES

Whether the Court’s “but-for” standard will actually lead to a more efficient expenditure of judicial resources is questionable. Consider a plaintiff who is alleging both status-based and retaliation-based discrimination. Creating different standards for the antidiscrimination provision and the antiretaliation provision will make for complicated instructions to juries.<sup>161</sup> Justice Ginsburg rightfully expressed concern for

153. See H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

154. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1671–72 (1996).

155. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523–24 (2013).

156. See *id.*

157. Estlund, *supra* note 154, at 1670. The employer establishes workplace rules and policies and keeps records of employees’ performance, placing it in the best “position to defend as ‘just’ the discharge of an employee who violates the rules and to defend against Title VII liability.” *Id.* at 1686. Most—perhaps nearly all—employees have at least one negative mark on their employment record. See *id.* at 1670. If the employer keeps detailed records, therefore, it can defeat a retaliation-based claim by pointing to the indiscretion as a factor in the employment decision. See *id.*

158. See H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711; 110 CONG. REC. 2728, 13,837 (1964).

159. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–69 (2006).

160. See 110 CONG. REC. 2728, 13,837 (1964) (statement of Sen. Case).

161. *Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting). Here, Justice Ginsburg is arguing based on what Professor Anita S. Krishnakumar calls “The Anti-Messiness Principle.” Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory*

trial judges and jurors who now must deal with the differing causation standards for status-based discrimination versus retaliation for complaining of status-based discrimination.<sup>162</sup>

The Court's concern for judicial resources is not wholly unfounded, however. Following the Court's expansion of Title VII's antiretaliation clause, employees have filed an increasing number of claims with the EEOC alleging retaliation.<sup>163</sup> Yet, ensuring enforcement motivated the Court in cases that liberally applied Title VII.<sup>164</sup> Given this underlying consideration, it seems strange that the Court suddenly became concerned with the potential ramifications of plaintiffs bringing retaliation cases.

As long as the EEOC continues to play a gate-keeping role to prevent frivolous claims from expending the federal judiciary's resources, the *Nassar* Court's concern is mistaken. Approximately one fifth of the 100,000 cases filed with the EEOC make it to federal court.<sup>165</sup> Even if the EEOC became inundated with complaints, this is not the Court's concern. The EEOC could seek more resources and personnel to handle the incoming complaints. Moreover, the EEOC has already implemented procedures to resolve claims efficiently.<sup>166</sup> Rather than allowing this potential scenario to play out, the Court over-corrected by making all retaliation claims much more difficult to maintain.

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*Interpretation*, 87 NOTRE DAME L. REV. 1465, 1466 (2012). As Krishnakumar points out, "At times, an opposing opinion even has argued that the interpretation chosen by the anti-messiness-invoking opinion will itself be messy to implement." *Id.* at 1467.

162. See *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting).

163. Sue Ann Mota & Erin Elisabeth Waldman, *Employers Beware: Retaliation Prohibited by the Court in Crawford v. Metropolitan Government of Nashville, CBOCS West, Inc. v. Humphries, and Gomez-Perez v. Potter*, 33 HAMLINE L. REV. 1, 16–17 (2010); see also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001) (explaining that the number of complaints filed with the EEOC have increased significantly since the early 1990s when Congress passed the Americans with Disabilities Act and the Civil Rights Act of 1991).

164. E.g., *Burlington*, 548 U.S. at 67.

165. Selmi, *supra* note 163, at 557–58. Of the cases filed in federal courts, however, only about 2.4 percent make it to trial. Barrett S. Moore, *Shifting the Burden: Genuine Disputes and Employment Discrimination Standards of Proof*, 35 U. ARK. LITTLE ROCK L. REV. 113, 116 (2012). Therefore, out of the 100,000 cases filed with the EEOC annually, approximately only 480 go to trial each year. See *id.*

166. See, e.g., *Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/mediation/> (last visited Oct. 10, 2014) (emphasizing the fairness and efficiency of resolving disputes through mediation).

4. THE *NASSAR* COURT'S DISREGARD FOR THE EEOC'S READING OF § 2000E-2(M) DOES NOT LEND PROPER DEFERENCE TO THE AGENCY

As the specialized agency charged with investigating workplace discrimination,<sup>167</sup> the EEOC's interpretation of Title VII deserves deference.<sup>168</sup> The Court's treatment of the EEOC's Compliance Manual was cursory and unsatisfactory. The *Nassar* Court refused to defer to the EEOC's Compliance Manual because the "explanations lack the persuasive force that is a necessary precondition to deference under *Skidmore*."<sup>169</sup> The Court provided minimal explanation of why the EEOC's interpretation is unpersuasive.

In its Compliance Manual, the EEOC noted, "Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation."<sup>170</sup> In line with Congress's intention "to restore and strengthen" Title VII, the EEOC interpreted § 2000e-2(m) to apply to the antiretaliation provision as well.<sup>171</sup> Therefore, the *Nassar* Court adopted a statutory framework specifically rejected by the EEOC.<sup>172</sup>

The Court dismissed the EEOC's first rationale in support of applying a "motivating factor" standard because "the manual's discussion fails to address the particular interplay among the status-based discrimination provision (§ 2000e-2(a)), the antiretaliation provision (§ 2000e-3(a)), and the motivating factor provision (§ 2000e-2(m))."<sup>173</sup>

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167. *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 10, 2014) ("The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.").

168. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (concluding that the rulings, interpretations, and opinions of administrative agencies, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

169. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

170. EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

171. *See* H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.A.N. 694, 694; EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

172. *Nassar*, 133 S. Ct. at 2543–44 (Ginsburg, J. dissenting).

173. *Id.* at 2533.

Further, the Court remarked that the Compliance Manual's discussion of causation standards is "generic."<sup>174</sup>

In its interpretation of § 2000e-2(m), the EEOC is not simply restating the statute. Rather, the EEOC drew on the judiciary's treatment of status-based and retaliation-based claims and applied it to the new statutory provision.<sup>175</sup> In light of Congress's intent to strengthen Title VII after *Price Waterhouse* by codifying a "motivating factor" standard,<sup>176</sup> and in light of Congress's history of applying the same standard to status-based discrimination and retaliation,<sup>177</sup> the EEOC's interpretation is generic only in that it is straightforward and based on routine practice.

The EEOC also stated that § 2000e-2(m) applies to retaliation-based claims because otherwise proven retaliation may go unpunished, undermining the purpose of the antiretaliation provision.<sup>178</sup> According to the Court, the EEOC's logic is circular.<sup>179</sup> The EEOC's interpretation assumes that the plaintiff proves retaliation, but the question before the Court was what causal relationship proves retaliation.<sup>180</sup>

The EEOC's second argument is not circular because the plaintiff would have to show that retaliation was a factor under the "motivating factor" test if § 2000e-2(m) were applied.<sup>181</sup> A plaintiff may not be able to show that retaliatory animus was the "but-for" cause of the adverse employment decision. However, this plaintiff may be able to show that the employer was in some part motivated by such animus. After *Nassar*, if the plaintiff shows retaliation but the employer shows that the same decision would have been made regardless, the plaintiff is left without a remedy, despite the presence of retaliation.<sup>182</sup> This approach "permits proven retaliation to go unpunished."<sup>183</sup>

The Court's finding is unsatisfactory because it does not address the circumstances common in mixed-motive cases—where an employee can

174. *Id.* (citing *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149–50 (2008)). In *Kentucky Retirement Systems v. EEOC*, the Court held that the EEOC's interpretation was not entitled to deference because it merely restated the terms of the statute. 554 U.S. at 149.

175. EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

176. See H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711; 42 U.S.C. § 2000e-2(m) (2012).

177. EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

178. *Id.*

179. *Nassar*, 133 S. Ct. at 2533–34.

180. *Id.*

181. See § 2000e-2(m).

182. See *id.* § 2000e-5(g)(2). Applying the *Nassar* Court's statutory analysis, § 2000e-5(g)(2) does not explicitly include claims under Title VII's antiretaliation provision. See *Nassar*, 133 S. Ct. at 2523.

183. EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45; see also *Nassar*, 133 S. Ct. at 2544 (Ginsburg, J., dissenting).

show retaliation was a factor but cannot show that it was the sole or “but-for” cause of the adverse employment action.<sup>184</sup> In 1964, and again in 1991, Congress refused to create a standard that would allow a prohibited employment practice to go unpunished.<sup>185</sup> Based on Congress’s clear intent to remove the possibility of unpunished prohibited employment practices, the EEOC reasonably concluded that § 2000e-2(m)’s “motivating factor” standard applies to retaliation.<sup>186</sup> In light of the reasonableness of and support for the EEOC’s interpretation, the Court was wrong to reject it.

*B. Looking Ahead: The Impact of Nassar in Future  
Retaliation Cases and a Solution*

The *Nassar* decision has the potential to affect Title VII litigation immensely as plaintiffs face the difficult burden of proving that retaliation was the “but-for” reason for the adverse employment action. Plaintiffs are unlikely to have the requisite information to satisfy this burden.<sup>187</sup> Congress must reassert its condemnation of discriminatory practices and make clear that the “motivating factor” standard codified in § 2000e-2(m) applies to retaliation cases or provide for reasonable remedies where retaliatory animus is proven.<sup>188</sup>

I. IMPACT ON LITIGATION: INCREASING THE POSSIBILITY OF  
UNCHECKED RETALIATORY ANIMUS

The most significant impact on plaintiffs alleging retaliation is the extent of proof required. Rare is the case where a plaintiff can show that retaliation was the “but-for” cause of the employment action.<sup>189</sup> More likely, the employee will be able to show that retaliation based on the employee’s complaint relating to a “protected trait was a necessary element of the set of reasons on which the employer relied in making its decision.”<sup>190</sup> Requiring plaintiffs to prove that the illegitimate reason was *the* reason for the adverse employment decision imposes a monumental barrier.

184. See 110 CONG. REC. 2728, 13,837 (1964).

185. See *id.*; H.R. REP. NO. 102-40, pt. 2, at 18 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 711.

186. See EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

187. See *supra* note 157.

188. See *infra* Part II.B.2.

189. See 110 CONG. REC. 13,837 (1964) (statement of Sen. Case).

190. Clarke, *supra* note 87, at 81 (describing the basic standard that seven of the nine justices in *Price Waterhouse* agreed created liability under Title VII).

“Textbook tort law”—at least as stated by the *Nassar* Court—simply does not translate well to the area of employment discrimination law.<sup>191</sup> In the common mixed-motives case,<sup>192</sup> an employee stands little chance against an employer who is reasonably diligent in documenting her imperfections.<sup>193</sup> Applying a “motivating factor” standard better comports with the human decision-making process in retaliation cases where the decision maker considers numerous factors before coming to a resolution.<sup>194</sup> While the exact effect remains to be seen, *Nassar* may significantly reduce the ability of employees to bring lawsuits against their employers who have engaged in retaliatory conduct motivated by discriminatory animus.

Moreover, the availability of certain jury instructions has a significant effect on litigation. In cases where the judge instructs the jury on the “motivating factor” standard, plaintiffs “were significantly more likely to receive litigation costs and attorney fees than plaintiffs in cases” where the judge instructed the jury on pretext.<sup>195</sup> By eliminating the possibility of a “motivating factor” instruction in retaliation cases, *Nassar* creates a greater risk for plaintiffs’ attorneys.<sup>196</sup> Failure to satisfy the difficult “but-for” standard means that the client may be forced to pay the attorney’s fees despite a showing of retaliatory animus. Although plaintiffs’ attorneys may still request a “motivating factor” instruction in status-based discrimination cases, the lack of protection from retaliation may lead to fewer employees coming forward with such claims.<sup>197</sup>

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191. The type of harm alleged in employment discrimination cases “makes it problematic to map traditional proximate cause onto discrimination.” Sperino, *supra* note 17, at 37.

192. See H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711.

193. Estlund, *supra* note 154, at 1670.

194. See Jessica M. Scales, Comment, *Tipping the Balance Back: An Argument for the Mixed Motive Theory Under the ADEA*, 30 ST. LOUIS U. PUB. L. REV. 229, 253–54 (2010).

195. Sherwyn & Heise, *supra* note 6, at 903.

196. *Id.* at 903–04. Sherwyn and Heise note that “[o]ne potential consequence is that plaintiff lawyers may shy away from ADEA cases” after *Gross* because fee shifting is less certain. *Id.* The possibility of fewer legitimate retaliation-based claims illustrates the necessity of a provision similar to § 2000e-5(g)(2) to apply in such cases. In effect, § 2000e-5(g)(2) allows the plaintiff’s attorneys to bring suit, lose the case, but still be compensated by the defendant as opposed to the client-employee if discriminatory animus is proven. See 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

197. Bodensteiner, *supra* 21, at 36.

## 2. LEGISLATIVE SOLUTION

As in 1991, Congress must act again “to restore and strengthen civil rights laws that ban discrimination in employment.”<sup>198</sup> *Nassar* illustrates the same type of mixed-motives factual situation that made *Price Waterhouse* “particularly profound.”<sup>199</sup> Congressional action is necessary to “reaffirm[] that any reliance on prejudice in making employment decisions is illegal.”<sup>200</sup> Contrary to the *Nassar* Court’s finding, an employer acting with retaliatory motives can escape liability, which has the potential to undermine protections against this unlawful employment practice.<sup>201</sup> Congress can draw on previous reform attempts that followed *Gross* and recent provisions that implemented a “motivating factor” standard, though an act akin to the 1991 Act seems increasingly unlikely.

Following *Gross*, Senator Thomas Harkin and Representative George Miller introduced the first version of the Protecting Older Workers Against Discrimination Act (POWADA).<sup>202</sup> The POWADA bill died in the Senate Health, Education, Labor, and Pensions Committee and in the House Committee on Education and the Workforce.<sup>203</sup> Yet, the findings and purposes of the POWADA bill are a good example of legislation to restore Title VII protections for victims of retaliation.<sup>204</sup>

Specifically, the bill’s sponsors were troubled that the Court “interpreted Congress’ failure to amend any statute other than title VII . . . to mean that Congress intended to disallow [the application of

198. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694. The *Nassar* dissent calls for “yet another Civil Rights Restoration Act.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting).

199. H.R. REP. NO. 102-40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.

200. *Id.* at 2.

201. *See id.* at 18.

202. Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (2009); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009). Twenty-four cosponsors joined Senator Harkin in supporting the POWADA bill in 2009. GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/s1756> (last visited Oct. 13, 2014). Forty-five cosponsors joined Representative Miller. GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr3721> (last visited Oct. 13, 2014).

203. GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/s1756> (last visited Oct. 13, 2014); GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr3721> (last visited Oct. 13, 2014). On March 13, 2012, sixteen cosponsors, including ten Democrats and six Republicans, joined Senator Harkin in re-introducing POWADA in the Senate. GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s2189> (last visited Oct. 13, 2014). However, the bill again died in committee. *Id.*

204. For example, the 2012 Senate bill explicitly states, “Congress disagrees with the Supreme Court’s interpretation, in *Gross*.” Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. § 2(a)(4) (2012).

the ‘motivating factor’ framework to] claims under other statutes.’<sup>205</sup> The bill also took exception to the fact that the Court “declined to apply the Supreme Court’s ruling in *Price Waterhouse v. Hopkins*, a part of which was subsequently approved by Congress.”<sup>206</sup> The bill rejected the *Gross* Court’s interpretation of “causation language and standards, including the words ‘because of,’” as a departure from established precedent.<sup>207</sup> In sum, the bill found that “Congress must restore and reaffirm established causation standards and methods of proof to ensure victims of unlawful discrimination and retaliation are able to enforce their rights.”<sup>208</sup>

On July 30, 2013, Senator Harkin and Representative Miller reintroduced POWADA once again.<sup>209</sup> The latest version would amend § 2000e-2(m) to refer specifically to Title VII’s antiretaliation provision.<sup>210</sup> Although the bill does not specifically mention the *Nassar* decision, the proposed amendment reverses the Court’s statutory framework analysis.<sup>211</sup> In the specific context of Title VII antiretaliation, this solution is ideal.<sup>212</sup> However, support seems to be waning based on the number of senators and representatives cosponsoring the 2009 and 2012 POWADA efforts, though this does not account for changes to the composition of the Senate and the House of Representatives between Congresses.<sup>213</sup>

Along with an apparently decreasing level of support for POWADA, Congress’s current “gridlock” poses a significant impediment

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205. S. 2189, 112th Cong. § 2(a)(4)(A).

206. *Id.* § 2(a)(4)(B).

207. *Id.* § 2(a)(4)(C) (citation omitted).

208. *Id.* § 2(a)(7).

209. Protecting Older Workers Against Discrimination Act, S. 1391, 113th Cong. (2013); Protecting Older Workers Against Discrimination Act, H.R. 2852, 113th Cong. (2013). According to govtrack.us, the bill has only a one to two percent chance of being enacted. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1391> (last visited Oct. 13, 2014); GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2852> (last visited Oct. 13, 2014).

210. H.R. 2852, 113th Cong. § 3(b)(1).

211. The bill explicitly rejects the Court’s reasoning in *Gross*, however. *Id.* § 2(b)(2).

212. While solving the specific problem at issue in Title VII, the amendment does not apply broadly to statutes with similar “because of” language. *See* H.R. 2852, 113th Cong. § 2(a)(1)–(2).

213. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1391> (last visited Oct. 13, 2014); GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2852> (last visited Oct. 13, 2014). Only 7 Senators and 27 Representatives have joined the 2013 bill as cosponsors; 24 Senators and 45 representatives cosponsored the 2009 bill. *Id.*; *see also supra* notes 202–03.

to enacting this solution.<sup>214</sup> Moreover, based on the two previous failed POWADA attempts, it seems the bill has little chance of being enacted.<sup>215</sup> On the other hand, Congress can draw on a couple of recent amendments that implemented a “motivating factor” standard. In the Whistleblower Protection Enhancement Act of 2012, Congress provided for a “motivating factor” standard in cases where a federal employee alleges whistleblower retaliation by the employing agency.<sup>216</sup> Congress also recently amended the Federal Railroad Safety Act to prohibit employers from discriminating “against an employee if such discrimination is due, in whole or in part” to the employee’s exercise of workplace protections.<sup>217</sup> Nevertheless, it seems unlikely that Congress will enact such a provision for employees alleging Title VII retaliation-based discrimination.

Although a more comprehensive restoration of Title VII’s antiretaliation provision seems unlikely, Congress can take a smaller step to ease the burden on plaintiffs. Under § 2000e-5(g)(2), courts may grant attorney’s fees and costs despite proof that the defendant would have taken the same action in the absence of the discriminatory animus.<sup>218</sup> Indeed, this same remedies scheme has been proposed in all five POWADA efforts.<sup>219</sup>

The benefits of providing attorney’s fees where retaliatory animus is shown are twofold. First, the EEOC’s concerns of discriminatory animus

214. See generally Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1102 (defining congressional gridlock as “the failure by Congress to make substantive policy decisions”).

215. See *supra* note 202–03, 209 and accompanying text.

216. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 106, 126 Stat. 1465, 1468–69 (codified as amended at 5 U.S.C. § 1215(a)(3) (2012)). A whistleblower must demonstrate that the protected disclosure was a “significant motivating factor” in the adverse action. *Id.* Moreover, where whistleblower retaliation is proven, the employing agency is liable for the federal employee’s attorney’s fees. *Id.* § 107 (codified as amended at 5 U.S.C. § 1204(m)(1)).

217. Federal Railroad Safety Act, 49 U.S.C. § 20109(a) (2012). The previous version of the act—like Title VII’s antiretaliation provision—prohibited discrimination “because” of an employee’s exercise of such protections. 49 U.S.C. § 20109(a) (2006), amended by 49 U.S.C. § 20109(a) (2012).

218. 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (“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 . . . may grant . . . attorney’s fees and costs . . .”).

219. Protecting Older Workers Against Discrimination Act, S. 1391, 113th Cong. (2013); Protecting Older Workers Against Discrimination Act, H.R. 2852, 113th Cong. § 3(a)(2)(A)(iv) (2013); Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. § 3(a)(2)(A)(iv) (2012); Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. § 3 (2009); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009).

going unpunished are somewhat relieved.<sup>220</sup> Although the defendant will not be forced to pay damages, the plaintiff, who was subjected to proven retaliation, will not be left to pay the attorney's fees and costs. The second benefit follows from the first. If attorneys and plaintiffs know that the court may grant costs and attorney's fees once any impermissible factor is shown, a cost impediment to litigation is removed.

#### CONCLUSION

Admittedly, the *Nassar* Court adopts a plausible reading of the statute by distinguishing between status-based and retaliation-based discrimination, which are governed by separate sections of Title VII. However, this is not the only plausible reading, as the 1991 Act applies broadly to all "unlawful employment practice[s]." <sup>221</sup> Therefore, *Nassar's* disregard for the intent and purpose of Title VII's antiretaliation provision is troubling. It is now significantly more difficult to win such cases, increasing the possibility of unchecked discriminatory animus. Given the unfortunate state of the congressional action—particularly a lack thereof—a solution like the 1991 Act is unlikely. The ongoing attempts to reform the standard are encouraging, however. If this attempt fails, Congress could pursue a more limited track by clarifying that the remedies provision inserted in 1991 (§ 2000e-5(g)(2)) applies to retaliation cases.

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220. See generally EEOC Compl. Man. (BNA), *supra* note 111, § 8-II(E)(1), 614:0008, n.45.

221. § 2000e-2(m).