Testimony of Associate Professor Helen Norton

University of Colorado School of Law

On H.R. 3721, the "Protecting Older Workers Against Discrimination Act"

before the United States House of Representatives' Committee on the Judiciary

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Thank you for the opportunity to join you today. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's employment discrimination enforcement efforts.

The Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*[1] significantly undermines older workers' ability to enforce their rights under the Age Discrimination in Employment Act (ADEA), and threatens to do the same for workers seeking to enforce their rights to be free from discrimination and retaliation under a wide range of other federal employment laws. H.R. 3721 responds by replacing the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII that more effectively furthers Congress' commitment to dismantling barriers to equal opportunity.

"Causation" and Federal Antidiscrimination Law

Current federal law prohibits job discrimination "because of" certain specified characteristics, such as race, color, sex, national origin, religion, age, genetic information, and disability.[2] The ADEA, for example, prohibits an employer from discriminating against any individual "because of such individual's age."[3] Federal employment laws also frequently include antiretaliation provisions that prohibit an employer from discriminating against an individual "because" that individual objected to potentially unlawful behavior, filed a charge of discrimination, or otherwise engaged in activity protected from retaliation under the statute.[4] These causation provisions thus require proof of a nexus or connection between the defendant's discriminatory behavior and the adverse employment action experienced by the plaintiff.

In many discrimination cases, the competing parties agree that a single factor "caused" an adverse employment decision, but vigorously disagree in identifying that factor. This is the case, for example, when the plaintiff contends that his employer discharged him "because of" his age, while the employer contends instead that it acted "because of" some nondiscriminatory reason

[1] 129 S. Ct. 2343 (2009).

[2] *See* 42 U.S.C. § 2000e-2 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101 et seq. (Americans with Disabilities Act); 42 U.S.C. § 2000ff-1(a) (Genetic Information Nondiscrimination Act).

[3] 29 U.S.C. § 623(a)(1).

[4] *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII) (prohibiting discrimination against an individual "because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter"); 29 U.S.C. §623(d) (ADEA) (same).

like performance. In such cases, the plaintiff bears the ultimate burden of persuading the fact-finder that the decision was made "because of" age.[5]

But employment decisions – like so many human decisions – are sometimes driven by multiple motives. "Mixed-motive" claims thus raise a challenging causation question: when multiple motives inform an employment decision – some of which are discriminatory and some of which are not -- under what circumstances should we conclude that the employer made such a decision "because of" discrimination in violation of federal law?

The Supreme Court first addressed this question in 1989 in *Price Waterhouse v. Hopkins*,[6] where six Justices interpreted Title VII's statutory language prohibiting job discrimination "because of" race, sex, color, religion and national origin to prohibit adverse employment actions motivated in whole or in part by the plaintiff's protected characteristic. In that case, more specifically, they concluded that a plaintiff who successfully proves that sex was a motivating or a substantial factor in an employment decision shifts the burden of persuasion to the employer, who may escape liability "only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[7]

Congress next addressed this issue, along with several others, with the enactment of the Civil Rights Act of 1991 and its series of amendments to Title VII. Agreeing with the *Price Waterhouse* Court that the defendant employer is in a better position than the plaintiff employee to reconstruct history and prove whether an employer who has been found to have engaged in discrimination would have taken the same action in a workplace uninfected by bias, Congress codified the *Price Waterhouse* burden-shifting framework, under which the burden of proof shifts to the employer when the plaintiff proves that discrimination based on a protected characteristic was a motivating factor in the employer's decision.

Expressing concern, however, that the *Price Waterhouse* rule still did not sufficiently deter employers from discrimination, Congress took a step further to provide additionally that a plaintiff has conclusively established the defendant's Title VII liability once he or she proves that race, sex, color, religion, or national origin was a motivating factor in the employer's decision,[8]

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[5] *See, e.g.*, Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143 (2000).

[6] 490 U.S. 228 (1989).

[7] *Id.* at 244-45 (plurality opinion); *see also id.* at 241 ("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. . . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of sex' and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account."); *id*. at 259-60 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring).

[8] *See, e.g.*, H.R. REP. NO. 102-40(I) at 47 (1991) ("If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes this fundamental principle."); H. R. REP. NO. 102-40 (II) at 18 (1991) ("[T]he Committee intends to restore the rule applied by the majority of circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability."); S. REP. NO. 315, 101st Cong., 2nd Sess. 48-49 (1990) (describing Congress' intent to replace the *Price Waterhouse* causation standard with one that better deters discrimination).

shifting the burden to the defendant at the remedies – rather than at the liability – stage.[9] Under this framework, an employer that then proves that it would have made the same decision even absent discrimination remains liable for a Title VII violation but can limit available remedies to declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs – thus relieving the employer from exposure for backpay, damages, or reinstatement.[10] This causation standard ensures that federal courts retain the power to enjoin the defendant's proven discrimination through declaratory and injunctive relief, thus ensuring equal employment opportunity in the future.

The 1991 Act's amendments with respect to Title VII causation, however, did not expressly apply to the ADEA. For the approximately twenty years between *Price Waterhouse* and *Gross*, lower courts uniformly interpreted the ADEA's causation standard as consistent with the *Price Waterhouse* Court's interpretation of the identical Title VII language at the time, thus permitting a plaintiff who proves that age was a motivating factor in an employer's decision to establish liability unless the employer can prove that it would have made the same decision in a workplace free from age discrimination.[11]

The Damaging Consequences of the Supreme Court's Decision in *Gross v. FBL Financial Services, Inc.*

The Supreme Court's 5-4 decision in *Gross v. FBL Financial Services, Inc.*[12] brought a dramatic – and unwelcome – change to this landscape. There the plaintiff, Jack Gross, alleged that he had been illegally demoted because of his age after his employer reassigned him from his longstanding position as claims administrations director to the position of claims project coordinator, and transferred many of his previous responsibilities to a younger employee placed in the newly-created position of claims administration manager. At trial, his lawyers requested

[9] In other words, Congress adopted the *Price Waterhouse* burden-shifting framework, but modified it to ensure that some remedies still remain available to the plaintiff when both parties satisfy their burdens of persuasion under that framework. Under *Price Waterhouse*, if the plaintiff proves that sex was a motivating factor in the employer's decision *and* the employer proves that it would have made the same decision even if it had not engaged in sex discrimination, the employer is not liable for a Title VII violation and no remedies are available. Under the Civil Rights Act of 1991, if the plaintiff proves that sex was a motivating factor in the employer's decision *and* the employer proves that it would have made the same decision even if it had not engaged in sex discrimination, the employer *has* violated Title VII and the plaintiff is entitled to limited relief as described above. Under either framework, if the employer fails to prove that it would have made the same decision absent sex discrimination once the plaintiff has proved that sex was a motivating factor, the employer is liable for the full range of Title VII remedies.

[10] *See* 42 U.S.C. § 2000e-2(m) (providing that "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-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations under § 2000e-2(m) when the defendant proves that it would have taken the same action in the absence of the impermissible motivating factor).

[11] For examples of lower courts' application of the *Price Waterhouse* causation standard to the ADEA in the years before *Gross*, *see* Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000); Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171 (2nd Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3rd Cir. 1995); EEOC v. Warfield-Rohr Casket Co., 364 F. 3d 160 (4th Cir. 2004); Rachid v. Jack in the Box, Inc., 376 F. 3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F. 3d 564 (6th Cir. 2003); Visser v. Packer Engineering Assocs., Inc., 924 F.2d 655 (7th Cir. 1991); Hutson v. McDonnell Douglas Corp., 63 F. 3d 771 (8th Cir. 1995); Lewis v. YMCA, 208 F.3d 1303 (11th Cir. 2000).

[12] 129 S. Ct. 2343 (2009).

and received jury instructions consistent with *Price Waterhouse* and nearly 20 years of case law under the ADEA. Applying those instructions, the jury concluded that Mr. Gross had proved that his age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. The jury thus found that Mr. Gross had established an ADEA violation, and awarded him approximately $47,000 in lost compensation. The Supreme Court, however, vacated Mr. Gross' award. Departing from twenty years of precedent, it articulated a brand-new causation standard that significantly narrows the scope of protections available to older workers under the ADEA.[13]

The *Gross* Court first characterized Congress' 1991 decision to amend Title VII's causation standard – but not that of the ADEA – as evidence that Congress intended the two statutes to provide different levels of protection against discrimination.[14] Next, after suggesting that *Price Waterhouse* was wrongly decided,[15] the *Gross* Court limited *Price Waterhouse* in any event as applicable only to Title VII and its language at the time.[16] The *Gross* Court then insisted upon a new interpretation of the ADEA's identical causation language, holding that the burden of persuasion never shifts to the defendant even after the plaintiff proves that age was a motivating factor in an adverse employment decision. Under the *Gross* Court's new causation rule – a causation standard rejected both by the *Price Waterhouse* Court[17] and by Congress in the Civil Rights Act of 1991 -- the burden of persuasion always remains on the plaintiff not only to prove that age motivated the decision, but also to prove that age was the "but-for" cause of the decision: "The burden of persuasion does not shift to the employer to show that it would have

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[13] For additional discussion of the *Gross* decision and its implications, *see* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc. *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 263-73 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399 (2009).

[14] *See Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

[15] *See id.* at 2351-52 ("[I]t is far from clear that the Court would have taken the same approach were it to consider the question today in the first instance.").

[16] *See id.* at 2352 ("Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.").

[17] Indeed, the *Price Waterhouse* Court explicitly rejected such a "but-for" standard when interpreting Title VII's parallel prohibition of job discrimination "because of" sex:

> We take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for' causation . . . is to misunderstand them. But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs [in Title VII] in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made.*

Price Waterhouse, 490 U.S. at 240-41 (plurality opinion) (emphasis in original).

taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[18]

As numerous lower courts have observed, *Gross* thus erects substantial new barriers in the path of older workers seeking to enforce their right to be free from discrimination under the ADEA.[19] The Second Circuit, for example, explained *Gross* as imposing "a more stringent causation standard" on plaintiffs than that under *Price Waterhouse*[20] and another federal court described *Gross* "as elevating the quantum of causation required under the ADEA."[21] Indeed, as Mr. Gross's own case makes clear, the Court's new rule can strip discrimination plaintiffs of hard-fought victories.[22]

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[18] *Gross*, 129 S. Ct. at 2352.

[19] *See, e.g.*, Baker v. Silver Oak Senior Living Management Co., 581 F.3d 684, 689-90 (8th Cir. 2009) (describing the "motivating factor" causation standard under Missouri state antidiscrimination law as "less demanding" for age discrimination plaintiffs than that under the ADEA after *Gross*); Dudley v. Lake Ozark Fire Protection Dist., 2010 WL 1992188 at *5 (W.D. Mo. 2010) (same); Mojica v. El Conquistador Resort and Golden Door Spa, 2010 WL 1992575 at *1 (D. Puerto Rico 2010) (observing that *Gross* "in some aspects raised the standard for proving an ADEA claim").

[20] Bolmer v. Olviera, 594 F.3d 134, 148-49 (2nd Cir. 2010)

[21] Fuller v. Seagate Technology, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009). Moreover, some lower courts have relied on *Gross* to narrow the protections available for older workers even more dramatically. For example, some have misinterpreted the Court's requirement that the plaintiff prove that age was the but-for cause of the adverse employment action to mean that the plaintiff must prove that age was the *sole* reason for the adverse action. *See, e.g.*, Whitaker v. Tennessee Valley Authority Bd. Of Directors, 2010 WL 1493899 *9 (M.D. Tenn. 2010) ("Here, plaintiff has not presented a jury question on whether his age was the *sole* reason for his non-selection. . . . Post-*Gross*, it is incongruous to posit such alternate theories because the very presentation of different reasons for an action suggests that age was not the *sole* reason for the action.") (emphasis in original); Culver v. Birmingham Bd. of Education, 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009) ("*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old was the ***only*** or the *but for* reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was ***any*** other proscribed motive involved.") (emphasis in original); Wardlaw v City of Philadelphia, 2009 WL 2461890 at *7 (E.D. Pa. 2009) ("The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for discrimination. Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination and retaliation she alleges to have experienced. . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination.").

[22] At trial, Mr. Gross's lawyers requested and received the *Price Waterhouse* motivating factor instruction. A jury then applied those instructions to conclude that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately $47,000 in lost compensation. On appeal, the defendant employer challenged the trial judge's decision to use the *Price Waterhouse* instruction, arguing that such a motivating factor instruction is appropriate only when the plaintiff has direct evidence of discrimination and that Mr. Gross did not have such evidence. The Eighth Circuit agreed, ruling against Mr. Gross *not* because he could not satisfy the *Price Waterhouse* standard – in fact he did -- but instead because it found that the *Price Waterhouse* motivating-factor instruction is only available in cases when the plaintiff has direct evidence of age discrimination (e.g., where the employer acknowledges its discrimination, which of course is very rare). The Supreme Court granted certiorari to decide whether a plaintiff must present direct evidence of age discrimination to obtain a motivating factor instruction under the ADEA or whether instead circumstantial evidence could suffice – an issue that had divided the lower courts. The Court's ultimate decision in *Gross*, however, failed to address this question and instead vacated Mr. Gross's jury verdict under its brand-new causation standard.

Moreover, the *Gross* rule undermines Congress' efforts to stop and deter workplace discrimination by permitting an employer under some circumstances entirely to escape liability for a workplace infected by bias, with no incentive to refrain from similar discrimination in the future. Consider the following example: An older worker applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them to be less energetic, less creative, and generally less productive. Suppose too that the employer ultimately hires another applicant who was arguably even more qualified for the position than the plaintiff. Under the *Gross* Court's new rule, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject her,[23] the employer will escape ADEA liability altogether unless the plaintiff can also prove that the employer would not have taken the adverse action if it had been free of age discrimination. Unless the plaintiff can prove this hypothetical negative, the *Gross* rule thus permits an employer completely to avoid liability for its proven discrimination – indeed, even when the plaintiff has "smoking gun" evidence that discrimination played a role in its decision.

The *Gross* decision threatens workers' rights to be free from discrimination and retaliation in a wide range of other contexts as well. Lower courts now increasingly understand *Gross* to mean that the motivating factor framework is *never* available to plaintiffs under federal antidiscrimination and antiretaliation statutes unless and until Congress expressly provides otherwise.[24] The Seventh Circuit, for example, describes *Gross* as holding that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[25]

For this reason, lower courts now apply *Gross* to a growing number of federal antidiscrimination and antiretaliation statutes in addition to the ADEA, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the additional burden of proving that such discrimination was the "but-for" cause of the decision. Examples include cases alleging job discrimination because of disability in violation of the

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[23] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

[24] Indeed, the *Gross* Court signaled its unwillingness to interpret other statutes in a manner consistent with the *Price Waterhouse* Court's interpretation of identical causation language, thus destabilizing the longstanding expectation that Congress incorporated the same language in different antidiscrimination laws because it intended consistent interpretation of those laws. *See Gross*, 129 S. Ct. at 2349 ("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.'") (citation omitted).

[25] Fairley v. Andrews, 578 F. 3d 518, 525-26 (7th Cir. 2009); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963 (7th Cir. 2010) (emphasizing "the import of explicit statutory language rendering an employer liable for employment decisions that were motivated in part by a forbidden consideration but which the employer still would have made in the absence of that proscribed motive. In the absence of such language, the limited remedies that Title VII otherwise makes available to plaintiffs in such cases . . . are foreclosed."); Serafinn v. Local 722, Int'l Brotherhood of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) (holding that, after *Gross*, "[m]ixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act's authorization of claims that an improper consideration was 'a motivating factor' for the contested action.").

Americans with Disabilities Act,[26] job discrimination because of protected speech under 42 U.S.C. § 1983,[27] interference with pension rights in violation of ERISA,[28] and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.[29]

In these contexts, too, the *Gross* rule has deprived plaintiffs of victory. Consider the experience of Dr. LilliAnn Williams-Jackson, a public school guidance counselor who alleged a violation of the Jury Systems Improvement Act and successfully proved that her jury service was a motivating factor in her employer's decision to cut her position. The trial court nonetheless rejected Dr. Williams-Jackson's claim in light of the new and more stringent causation standard under *Gross*:

> This is a close case of mixed motives leading to the decision to "excess" Dr. Jackson from [the school] and one in which Dr. Jackson's credibility is distinctly superior to her former principal. Nonetheless, the Court concludes that Dr. Jackson has not carried her burden to prove that her jury service "was the 'but-for' cause of the challenged employment action."
> . . .

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[26] Serwatka v. Rockwell Automation, Inc. 591 F.3d 957, 961 (7th Cir. 2010). Note that the ADA, properly construed, authorizes mixed motive claims consistent with the standards identified in the Civil Rights Act of 1991. The ADA's enforcement provisions specifically incorporate the powers, remedies and procedures of Title VII, including the Title VII provision authorizing certain remedies where the plaintiff has proven that discrimination was a motivating factor in an employment decision. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment."). Thus, Congress clearly envisioned that relief would be available for mixed motive discrimination under the ADA, just as it is available under Title VII. In addition, in amendments to the ADA in 2008, Congress changed the Act's employment provisions to bar discrimination "on the basis of disability" rather than "because of" disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a) (codified at 42 U.S.C. § 12112(a)). This change to the ADA's causation language was intended to align the ADA even more clearly with Title VII. *See, e.g.*, Senate Statement of Managers for Pub. L. No. 110-325; H. REP. NO. 110-730 (I), at 6 (2008). Despite these indications of congressional intent in both the original ADA and the ADA Amendments Act, the Seventh Circuit, as noted above, relied on *Gross* to conclude that the original ADA does not permit such claims because the ADA's employment title does not directly mirror Title VII's explicit scheme concerning mixed motive claims. The court noted, however, that it was not deciding whether the ADA Amendments Act of 2008 necessitated a different result, since the amendments did not control the case before it. *Serwatka*, 591 F.3d at 962 n.1.

[27] *E.g.*, Fairley v. Andrews, 578 F. 3d 518, 525-26 (7th Cir. 2009).

[28] *See* Nauman v. Abbott Laboratories, CA 04-7199 (N.D. Ill. April 22, 2010) (observing that, in light of *Gross*, "plaintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants' implementation of the spin and attendant policies. The court agrees with defendants that the *Gross* line of cases stands for the proposition that, unless a statute such as Title VII of the Civil Rights Act specifically provides for liability in a 'mixed motive' case, the prohibited motivation must be the motivating factor, rather than simply a motivating factor.") (citation omitted).

[29] Williams v. District of Columbia, 646 F. Supp. 2d. 103, 109 (D.D.C. 2009). Other courts have speculated about the application of the *Gross* standard to still other federal laws providing important employment protections, such as 42 U.S.C. § 1981 and the Family and Medical Leave Act. *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 187 (3rd Cir. 2009) (Jordan, J., concurring) ("[I]t seems quite possible that, given the broad language chosen by the Supreme Court in *Gross*, a critical re-examination of our [section 1981] precedent may be in order."); Crouch v. J.C. Penney Corp., Inc., 337 Fed. Appx. 399, 402 n.1 (in the context of an FMLA case, noting that "[t]he Supreme Court's recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework") (citation omitted).

> [U]nder *Gross*, Dr. Jackson must prove by a preponderance of the evidence that she was "excessed" "by reason of" her jury service -- that is, that jury service was the "but-for" cause of the decision to excess her. The Court has no doubt that Dr. Jackson's jury service was *a* motivating factor behind [the principal's] acceptance of the loss of a guidance counselor, who otherwise is of particular assistance to a principal in dealing with behavior and other student problems. What is lacking is any evidence that her jury service was "the 'but-for' cause" of the decision. . . ."[30]

Under the *Gross* standard, Dr Williams-Jackson receives nothing, and her employer remains unsanctioned even though it was proven to have punished her for her jury service.[31]

The Seventh Circuit similarly applied the *Gross* rule in an Americans with Disabilities Act case to strip a plaintiff of relief that she had been awarded by the trial court.[32] There the jury concluded that the plaintiff had proven that defendant fired her based on its perception that she had a disability, and also found that the defendant still would have fired her absent her perceived disability. Applying Title VII's motivating factor causation standard to the ADA,[33] the district court then awarded the plaintiff declaratory and injunctive relief along with some of her attorney's fees and costs (for a total of approximately $30,000). The employer appealed this award of partial costs, fees, declaratory, and injunctive relief, arguing that the *Gross* causation rule should apply instead. The Seventh Circuit agreed, applying *Gross* to leave the plaintiff with nothing:

> [The plaintiff] did not show that her perceived disability was a but-for cause of her discharge. Although the jury agreed with her that [the employer's] perception of her limitations contributed to the discharge, it also found that [the employer] would have terminated [the plaintiff] notwithstanding the improper consideration of her (perceived) disability. Relief is therefore not available to her under the ADA, and [the employer] was entitled to judgment in its favor. . . . .[I]n view of the Court's intervening decision in *Gross*, it is clear that the district court's decision to award [the plaintiff] declaratory and injunctive relief along with a portion of her attorney's fees and costs cannot be sustained.[34]

Once again, the *Gross* rule left the plaintiff with nothing, and her employer remains unsanctioned even though it was proven to have discriminated against her based on disability.

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[30] Williams, 646 F. Supp. 2d. at 103, 109 (quoting *Gross*).

[31] In contrast, under H.R. 3721, Dr. Williams-Jackson would have been entitled at a minimum to injunctive and declaratory relief and partial attorney's fees and costs, plus the possibility of additional relief (such as backpay and reinstatement) if the employer could not bear its burden of proving that it would have demoted her regardless of her jury service.

[32] Serwatka v. Rockwell Automation, Inc., 591 F.3d 957(7th Cir. 2010).

[33] The ADA's enforcement provisions specifically incorporate the powers, remedies and procedures of Title VII, including the Title VII provision authorizing certain remedies where the plaintiff has proven mixed motive discrimination. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment.").

[34] *Serwatka*, 591 F.3d at 963-64.

In short, requiring the plaintiff to bear the burden of proving that age (or some other protected characteristic) was the "but-for" cause of an action requires him or her to prove that the employer would have not taken the same adverse action if it had not engaged in age discrimination. Requiring the plaintiff to bear the burden of proving what the employer would or would not have done in such an imaginary scenario is especially difficult after the fact, as the defendant is in a better position than the plaintiff to show how it would have acted in such a hypothetical situation. Justice Breyer's observation in his *Gross* dissent anticipates plaintiffs' challenges under *Gross*:

> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.[35]

<u>H.R. 3721 Would Replace the *Gross* Standard with a Uniform Standard that Furthers Congress' Interest in Preventing and Deterring Job Discrimination and Retaliation</u>

H.R. 3721 – the "Protecting Older Workers Against Discrimination Act" – responds by applying the standard adopted by Congress with respect to Title VII in the Civil Right Act of 1991 to make clear that a plaintiff establishes an unlawful employment practice under the ADEA (and other federal antidiscrimination and antiretaliation statutes) by proving that age (or other protected characteristic) was a motivating factor for an employment decision.[36] The burden of proof then shifts to the employer to establish that it still would have taken the same action absent its discrimination. If the employer then satisfies this burden, it can substantially reduce the plaintiff's relief, but cannot escape liability altogether.

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[35] *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting); *see also id.* (explaining that *Price Waterhouse* permitted the employer an affirmative defense to liability, "not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation.") (emphasis in original).

[36] H.R. 3721, § 3 ("[A] plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that . . . an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice.").

H.R. 3721 thus rejects the *Gross* Court's unreasonable demand that a plaintiff who successfully proves that discrimination did in fact motivate the decision must bear the additional burden of proving that some other factor was NOT in the defendant's mind – i.e., that some nondiscriminatory factor was *not* the but-for cause of the adverse employment decision. H.R. 3721's burden-shifting framework instead appropriately recognizes and responds to employers' and employees' asymmetric access to information about the employer's state of mind. Indeed, this approach tracks that in other areas of the law, where defendants' greater access to information that is key to proving or disproving an element of a particular claim commonly triggers burden-shifting.[37] Such burden-shifting is especially appropriate, moreover, when the defendant's wrongdoing – here, its discriminatory consideration of protected status or activity in its decisionmaking – has created uncertainty in determining the but-for cause of the actual employment decision.

Furthermore, as Congress recognized in the Civil Rights Act of 1991, this approach -- which shifts the burden of proof to the employer to limit remedies[38] rather than entirely to defeat liability -- best prevents and deters future discrimination by ensuring that employers proven to have engaged in discrimination cannot completely escape liability for their actions.[39] Indeed, this approach enables federal courts to retain judicial power to order and monitor correction of a employer's proven discriminatory conduct in the form of declaratory and certain injunctive relief. For an illustration, consider our earlier example of an older worker who is rejected for a job opportunity because of invidious age discrimination but who nonetheless would not have been hired for a nondiscriminatory reason as well. H.R. 3721 would provide a tool for remedying such proven discrimination by empowering the federal court to enjoin the employer from engaging in such discrimination in the future, thus serving the important deterrent functions of antidiscrimination law while leaving employers free to make decisions based on ability or any other nondiscriminatory factor.[40]

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[37] *See* Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE 105 (3d ed. 2003) (describing the appropriateness of shifting the burden of proof to the defendant on a contested issue when the defendant has greater access to evidence probative of that issue).

[38] Section 3 of H.R. 3721 makes clear that once the plaintiff proves that the employer engaged in discrimination and thus violated federal law, the employer may still substantially limit the available remedies by showing that it would have made the same decision in a discrimination-free environment. If the employer satisfies that burden, it will be liable only for declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs, and a court may not order the hiring, reinstatement, or promotion of the individual, nor the payment of backpay to the individual.

[39] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (identifying Title VII's "primary purpose" as "prophylactic" in removing barriers that have operated to limit equal employment opportunity).

[40] Note too that the availability of limited attorney's fees and costs encourages individuals to act as private attorneys general in the public interest to vindicate Congress' commitment to equal employment opportunity. *See* City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in §1988 over and above the value of a civil rights remedy to a particular plaintiff. . . .'") (citations omitted); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) ("If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they

In enacting the Civil Rights Act of 1991, Congress wisely clarified the causation standard to be applied to Title VII and its prohibition of discrimination because of race, color, sex, religion, and national origin. H.R. 3721 would apply the same causation standard – proven workable under Title VII after nearly two decades in operation -- to other federal laws that prohibit discrimination because of age and other protected characteristics. Ensuring that the standard for proving unlawful disparate treatment under the ADEA (and other antidiscrimination and antiretaliation laws) tracks that available under Title VII – as H.R. 3721 would do – not only codifies the standard that most effectively furthers Congress' commitment to equal opportunity, but also offers great practical value by establishing a principle of uniformity. Such a consistent approach to causation is especially helpful in cases involving claims under multiple statutes – such as an older African-American plaintiff who brings claims under both Title VII and the ADEA – by ensuring that courts, litigants, and jurors will proceed under the same "motivating factor" instruction for all claims.[41]

H.R. 3721 Also Clarifies Federal Antidiscrimination Law in Other Important Ways

H.R. 3721 also addresses an important question left unanswered by the Supreme Court's opinion in *Gross.* The *Gross* Court actually granted certiorari to decide an issue that had divided lower courts: whether a plaintiff must present direct evidence of age discrimination to obtain a motivating factor instruction under the ADEA or whether instead circumstantial evidence could suffice.[42] The Court's ultimate decision in *Gross*, however, failed to address this question and instead decided a very different matter, articulating a brand-new causation standard that significantly undercut protections for older workers without the benefit of full briefing by the parties or development by the lower courts.[43]

H.R. 3721 provides valuable clarification of the law by finally answering the question that the *Gross* Court failed to address, making clear that plaintiffs seeking to prove discrimination in violation of the ADEA (or other federal antidiscrimination or antiretaliation law) "may rely on any type or form of admissible circumstantial or direct evidence" to prove their claims.[44] H.R. 3721's standard thus tracks that under Title VII, as confirmed by a

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know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.").

[41] *See Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) ("Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."). The same is true for a wide variety of case involving multiple claims – for example, those alleging violations of both Title VII and 42 U.S.C. 1981, or those alleging violations of Title VII's antiretaliation protections as well as its antidiscrimination provision.

[42] *Id.* at 2348 (majority opinion). Indeed, the Supreme Court has twice granted certiorari on this question whether the motivating factor framework is available only upon a heightened evidentiary showing: in *Desert Palace v. Costa* (with respect to Title VII) and in *Gross* (with respect to the ADEA). Lower courts' division on this issue has been driven largely by the questions created by Justice O'Connor's concurring opinion in *Price Waterhouse* that suggested the importance of direct evidence to a plaintiff's ability to bring a mixed-motive claim under antidiscrimination law. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

[43] *See Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting) ("[T]he Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.").

[44] H.R. 3721, § 3.

unanimous Supreme Court in *Desert Palace, Inc. v. Costa*.[45] As the Court observed in that case, "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'"[46] Indeed, circumstantial evidence -- which can take a variety of forms, including decisionmakers' remarks suggesting animus or hostility based on protected status, differential comparative treatment, statistical evidence, suspicious timing, and evidence that the employer's testimony is not credible -- is of enormous value in discrimination cases and elsewhere. Moreover, as a practical matter, direct evidence is quite rare in discrimination cases, as employers who engage in discrimination rarely confess their bias. By codifying the traditional legal rule permitting plaintiffs to rely on any available probative evidence -- circumstantial as well as direct -- to establish that discrimination was a motivating factor in an employment decision, H.R. 3721 again not only ensures uniformity in the standards to be applied to federal antidiscrimination laws, but provides the standard that most effectively advances the purposes of such laws.

Finally, H.R. 3721 addresses an additional ambiguity created by the *Gross* Court's suggestion that the application of the Supreme Court's familiar *McDonnell Douglas*[47] evidentiary framework outside the context of Title VII remains an open question.[48] By making clear that the *McDonnell Douglas* framework remains available for disparate treatment claims under the ADEA and other federal laws that prohibit job discrimination and retaliation,[49] H.R. 3721 would eliminate any confusion on this issue.[50]

In sum, H.R. 3721 responds to the *Gross* Court's significant narrowing of workers' rights under the ADEA, along with the decision's potential to do the same for a wide range of other federal antidiscrimination and antiretaliation laws. By replacing the causation rule articulated by the *Gross* Court with the causation standard long in place under Title VII, H.R. 3721 more effectively furthers Congress' efforts to remove and deter barriers to equal opportunity.

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[45] 539 U.S. 90 (2003).

[46] *Id.* at 100 (citation omitted); *see also id*. (noting also that "we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.").

[47] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that the plaintiff's demonstration of a prima facie case under Title VII creates a presumption that the defendant employer unlawfully discriminated against the plaintiff, and thus shifts the burden of production to the defendant to articulate a legitimate nondiscriminatory reason for its action, although the burden of persuasion remains on the plaintiff to prove that discrimination was the real reason).

[48] *Gross*, 129 S. Ct. at 2349 n.2 ("[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in Title VII cases is appropriate in the ADEA context.") (citation omitted).

[49] H.R. 3721, § 3.

[50] *See, e.g.*, Geiger v. Tower Automotive, 579 F.3d 614, 622 (6th Cir. 2009) ("The Supreme Court [in *Gross*] expressly declined to decide whether the *McDonnell Douglas* test applies to the ADEA."); Bell v. Raytheon, Co., 2009 WL 2365454 at *4 (N.D. Tex. 2009) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell Douglas* approach should be applied in ADEA cases."); Holowecki v. Federal Express Corp., 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (observing that "whether *Gross*, by implication, also eliminates the *McDonnell Douglas b*urden-shifting framework in ADEA cases was left open by the Court").