No. 12-484

In the Supreme Court of the United States

UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER,
Petitioner,

v.

NAIEL NASSAR, M.D.,
Respondent.

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

Brief of the Washington Lawyers Committee for Civil Rights and Urban Affairs, the Employment Justice Center, and Employment Litigators as *Amici Curiae* in Support of Respondent

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Question Presented

This brief addresses the question whether the Court should decline to extend *Gross v. FBL Financial Services, Inc.*, 553 U.S. 474 (2008) to Title VII retaliation claims, on the ground that *Gross* was wrongly decided.

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Miscellaneous

Interest of *Amici*[1]

Amicus Washington Lawyers Committee for Civil Rights and Urban Affairs, a nonprofit public-interest organization, seeks to eradicate discrimination and to enforce the nation's civil rights laws and protect individuals' constitutional rights by providing legal assistance. In the Committee's forty-year history, its attorneys have represented thousands of persons who have alleged discrimination on the basis of race, gender, religion, national origin, color, disability, and age, in cases brought under federal and local civil-rights laws.

Amicus the Employment Justice Center (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the Washington, D.C. metropolitan area. EJC provides legal assistance on employment-law matters to low-wage workers and supports the local workers' rights movement, bringing together low-wage workers and advocates for the poor. At its weekly Workers' Rights Clinics, EJC serves approximately 1,300 workers each year, many of whom have suffered discrimination or retaliation in the workplace.

Amici Stephen C. Leckar, Julie Glass Martin-Korb, John F. Karl, Jr., Steven J. Silverberg, and Michael J. Hoare are attorneys whose practices have been devoted in substantial part to representing plaintiffs in employment discrimination cases. They and their clients have

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party, any party's counsel, or anybody other than *amici* or their counsel. However, a contribution toward printing costs is expected to be made by John R. Ates. Letters evidencing the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

an interest in having Title VII's retaliation provision be correctly interpreted as not requiring but-for causation.

Introduction and Summary of Argument

1. Petitioner argues that this case "should begin and end with the statutory text."[2] We agree.

However, we disagree with Petitioner about what the text means. That disagreement is not based on any difference between the statutory text here and the text at issue in *Gross*.[3] Rather, we respectfully submit that *Gross* was wrongly decided.

The holding in *Gross* rests on the premise that but-for causation is required by the use of the word *because* in the phrase "because of such individual's age."[4] But that premise was unjustified: the concept of but-for causation is not part of what the word *because* means. This is shown unmistakably by the evidence of how the word is actually used—evidence that we will present in detail.

Since *because* meant the same thing in 1964 that it means today, Title VII's prohibition against retaliation has always covered cases involving mixed motives. Even if one does not accept Respondent's argument that the retaliation provision is covered by the 1991 amendments to Title VII, those amendments did not eliminate the preexisting coverage of mixed-motive claims. The amendments could have had such an effect only if they operated as a partial repeal-by-implication. Such repeals are disfavored, and the amendments cannot reasonably be interpreted as having worked such a repeal.

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2. Pet. Br. 14.

3. *Gross v. FBL Financial Services, Inc.*, 553 U.S. 474 (2008).

4. 29 U.S.C. § 623(a)(1); *see Gross*, 553 U.S at 176–77.

The conclusion that but-for causation is unnecessary is not changed by Title VII's legislative history. Petitioner recognizes that the legislative history cannot modify Title VII's "plain statutory text."[5] And the one item that Petitioner offers from that history is inconclusive.

Similarly insufficient to overcome the clear text are Petitioner's warnings about the "jurisprudential morass" that would supposedly result if mixed-motive retaliation claims are allowed. Those warnings concern matters of policy, not of statutory interpretation. And even as a policy matter, the warnings make little sense given that the 1991 amendments to Title VII endorse and preserve mixed-motive liability in ordinary disparate-treatment cases. Regardless of how this case is decided, mixed-motive claims will continue to be brought. As a result, the ruling Petitioner seeks would do nothing to bring uniformity to the law of employment discrimination.

2. In addition to interpreting the word *because* incorrectly, *Gross* erred in its reliance on the tort law. At common law, but-for causation is required in connection with deciding whether the plaintiff's injury was caused by the defendant's actions—an issue rarely if ever in dispute in discrimination or retaliation cases. When the relevant inquiry focuses on the *reason* for the defendant's action rather than on the action's results, the common law does not require but-for causation.

In any event, even if but-for causation is thought to represent the starting point of analysis, it does not represent the ending point. The general requirement of but-for cause has exceptions, and one of those excep-

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5. Pet. Br. 21.

tions (relating to concurrent sufficient causes) applies to mixed-motive discrimination and retaliation claims.

3. For the reasons outlined above, and explained in more detail below, but-for causation is not an element of a Title VII claim for retaliation. Nor, we submit, can a defendant avoid a finding of liability by showing that it would have taken the same action even if it had not considered the impermissible reason. But that does not mean that the issue of but-for causation is irrelevant. It is relevant, however, to the issue of remedy, not liability.

Title VII gives courts discretion regarding the remedy to be awarded to a successful plaintiff. If the defendant shows that it would have taken the same adverse action even apart from the impermissible reason (i.e., if that reason was not a but-for cause of the action) the court can deny the plaintiff relief such as back pay, front pay, and reinstatement. This approach would avoid the possibility that plaintiffs in mixed-motive cases could wind up better off than they would have been had the employer not violated the law.

4. A decision extending *Gross* to Title VII's retaliation provision is not required by considerations of *stare decisis*. The Court need not decide now whether *Gross* itself should be overruled, because this case involves a different statute than the one at issue in *Gross*. Furthermore, considerations of *stare decisis* cut both ways, because Petitioner is in effect asking the Court to overrule *Price Waterhouse v. Hopkins*.[6] Faced with these competing invocations of precedent, the Court's priority should be to simply interpret the statute correctly.

The importance of getting the meaning right is amplified by the fact that the word *because* appears in many provisions of the United States Code. If *Gross*'s mis-

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

taken interpretation is held to be binding as a matter of *stare decisis*, it will affect the meaning of all those provisions, with results that might be drastic and unpredictable.

Finally, *Gross* has not engendered settled expectations about the meaning of Title VII's retaliation provision, so a refusal to extend *Gross* would not impair significant reliance interests. In contrast, *Gross* itself upset well-established expectations, and the result that we advocate would merely restore the pre-*Gross* status quo.

Our argument has not previously been advanced in this case. This case is similar in that respect to *Gross*, where the question the Court decided was raised for the first time in the respondent's brief on the merits. The Court there concluded that the respondent's argument was a "'subsidiary question fairly included'" in the question presented by the petitioner.[7] The same is true of the issues we raise here.

Indeed, those issues are even more clearly included in the question presented than was the issue decided in *Gross*. The Court there decided an issue that it regarded as a "threshold inquiry" that was necessary in order to reach the question on which *cert.* had been granted.[8] Here, on the other hand, our argument directly addresses the question presented: "Whether Title VII's retaliation provision … require[s] a plaintiff to prove but-for causation, or instead require[s] only proof that the employer had a mixed motive[.]"[9]

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7. 557 U.S. at 173 n.1 (quoting S. Ct. R. 14.1).

8. *Id.*

9. Cert. Pet. i.

Because of the short time allowed for Petitioner to file its reply brief, we are filing this brief on the same day as Respondent's brief, rather than a week later, as the Court's rules would allow.

Argument

I. But-for causation is not required by the use of the word *because*.

The essential component of the holding in *Gross* was the conclusion that but-for causation is required by the use in the Age Discrimination in Employment Act[10] of the word *because* in the phrase "because of such individual's age."[11] Although much of the decision dealt with the question whether interpretation of the ADEA was governed by caselaw under Title VII,[12] that discussion was not sufficient, on its own, to support the decision. Rather, as the Court explained, "[the] inquiry … must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim."[13]

The conclusion in *Gross* about the meaning of the ADEA's was mistaken. As is shown by evidence of the actual usage of *because* and *because of*, neither of them requires but-for causation.

A. Dictionary definitions of because *and* because of *are inconclusive.*

The Court in *Gross* relied on dictionary definitions of the expression *because of* as meaning "by reason of" or

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10. 29 U.S.C. §§ 621 *et seq*.

11. 557 U.S. at 176–77 (discussing 29 U.S.C. § 623(a)(1)).

12. 557 U.S. at 173–75, 178–79.

13. *Id.* at 175.

"on account of[.]"[14] But those definitions do not answer the question that was before the Court in *Gross* and that is before the Court again here.

The problem is that relying on dictionary definitions merely changes the issue from the meaning of *because of* to the meaning of *on account of* and *by reason of*. And if one looks up those phrases in the dictionary, one finds that they are defined as "because of"[15] or that one is defined in terms of the other.[16] Definitions of just the word *because* present the same problem, because they are essentially the same as definitions of *because of*.[17] The definitions that *Gross* relied on are therefore unhelpful in determining what kind of causation is entailed by the use of the word *because*.

To be sure, *Gross* did not rely only on the dictionary definitions. It also relied on cases that had interpreted

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14. *Gross*, 557 U.S. at 176 (citing Webster's Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); Random House Dictionary of the English Language 132 (1966).

15. Webster's Third New International Dictionary 13 (1961) (defining *on account of* as "for the sake of : by reason of : because of"); *account, n.*, sense P1.d(c)(i), OED Online (Dec. 2012), http://tinyurl.com/OEDaccount (giving the relevant sense of *on account of* as "by reason of, because of"); Random House Dictionary of the English Language 10 (1967) (giving the relevant sense of *on account of* as "by reason of; because of"); *id.* at 1197 (defining *by reason of* as "on account of; because of").

16. *reason, n.1*, sense P3.b, OED Online (Dec. 2012), http://tinyurl.com/OEDreason (defining *by reason of* as *on account of*).

17. *E.g.*, Webster's Third New International Dictionary 194 (1961) ("since : for the reason that : on account of the cause that"); Random House Dictionary of the English Language 132 (1967) ("for the reason that; due to the fact that").

the expressions *by reason of* and *based on* to require but-for causation. The Court cited *Bridge v. Phoenix Bond & Indemnity Co.*, which it described as "recognizing that the phrase, 'by reason of,' requires at least a showing of 'but for' causation[,]"[18] and *Safeco Insurance Co. of America. v. Burr*, where the Court had said, "In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition."[19] (Since none of the dictionaries cited in *Gross* defined *because* as meaning "based on," *Safeco* was presumably cited as being analogous authority, not as being directly on point.)

Nowhere in *Bridge* or *Safeco* (or in *Holmes v. SIPC*,[20] which *Bridge* relied on) did the Court address the question of how the expressions *by reason of* and *based on* are actually used in ordinary speech. The analysis in *Safeco* was limited to the conclusory statement quoted above, and in *Bridge* and *Holmes* the notion that *by reason of* entails but-for causation was merely taken for granted without any discussion.

More importantly, the conclusions in *Bridge*, *Holmes*, and *Safeco* do not reflect the meaning of *by reason of* and *based on* as those expressions are actually used. As is shown below, the usage of these expressions—like the usage of *because*, *because of*, and *on account of*—shows that they do not entail but-for causation.[21]

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18. 553 U.S. 639, 653–54 (2008) (internal quotation marks omitted by the Court).

19. 551 U.S. 47, 63 (2007).

20. 503 U.S. 258, 265–66 (1992), *cited in Bridge*, 553 U.S. at 653.

21. In addition to relying on *Bridge*, *Safeco*, and *Holmes*, the Court cited *Hazen Paper Co. v. Biggins* for the proposition that an employee's claim "cannot succeed unless the employee's pro-

B. Evidence of actual usage shows that because *and* because of *do not require but-for causation.*

1. When a word used in a statute is not expressly defined, and the statute otherwise provides no "definitive clue" to what the word means, its meaning, "has to turn on the language as we normally speak it."[22] For "there is no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader."[23] Thus, "it is ordinary usage that, in the absence of contrary indication, governs our interpretation of texts."[24]

Consistent with these principles, this Court has in a number of recent cases focused, sometimes at considerable length, on how particular words or expressions are understood in everyday discourse.[25] But the Court in *Gross* did not undertake an examination of that sort. Had it done so—had it looked at how *because* and

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tected trait … had a determinative influence on the outcome[.]" 507 U.S. 604, 610 (1993) (cited in *Gross*, 557 U.S. at 176). *Hazen* did not deal with the issue of causation and it contains language supporting the viability of mixed-motive claims. *See Gross*, 557 U.S at 184 (Stevens, J., dissenting). More importantly for present purposes, the actual usage of *determinative*—like that of *because* and the other expressions mentioned in the text—shows that the word does not entail but-for causation. See page 15, below & Appendix F.

22. *Watson v. United States*, 552 U.S. 74, 79 (2007).

23. *Id.*

24. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

25. *E.g.*, *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1706–07 (2012); *Caraco Pharmaceutical Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012); *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1181–82 (2011); *Flores-Figueroa v. United States*, 556 U.S. 646, 650–52 (2009).

because of are actually used—it could not have concluded that the *because of* requires but-for causation.

This becomes clear when one considers the possibility of expressions such as those in example (1):

(1) a. because of X and also because of Y
b. not only because X but also because Y

Assuming that *Gross* was correct about the meaning of *because*, one would expect expressions like these to be used only when neither X nor Y was an independently sufficient cause of whatever the expression related to. If both X and Y were sufficient on their own to bring about the result, neither one of them would be a but-for cause. And in that event, the word *because* would (if *Gross* is correct) be inapt. After all, part of what it means to say that *because* entails but-for causation is that the word is not used in regard to situations where such cause does not exist.

The expectation arising from *Gross* is not borne out by how *because* and *because of* are actually used. Consider the following sentences, taken from judicial opinions rendered during the 12 years preceding the enactment of Title VII:

(2) "The two cases were consolidated for trial, and upon the first trial the jury returned verdicts in favor of all of the defendants, and upon appeal to this court the judgment was reversed because of an erroneous instruction on assumption of risk and also because the court erred in giving an instruction on contributory negligence."[26]

(3) "In *State v. Smith*, a conviction was reversed because of insufficiency of the indictment and also

26. *Dutcher v. Santa Rosa High Sch. Dist.*, 319 P.2d 14, 16 (Cal. Dist. Ct. App. 1957).

because the defendant was kept with irons on his feet during the trial."[27]

(4) "The learned president judge of the court below dismissed the appeal because of appellant's failure to file exceptions to the adjudication and also because he was satisfied, after a consideration of the merits of the appeal, that § 31 of the Law was complied with."[28]

In each of these examples, the court states two reasons for its action, each of which would be sufficient by itself to justify the action. In each example, neither of the reasons can be described as a but-for cause of the court's action. Yet in each example, the court says that it is acting *because of X and also because of Y*.

For someone who accepts *Gross*'s view of what *because* means, the examples above would be semantically anomalous. But they are in no way unusual. And the reason is that the use of the word *because* does not in fact entail but-for causation.[29]

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27. *Oregon v. Long*, 244 P.2d 1033, 1037 (Or. 1952) (citation omitted.

28. *State Bd. of Med. Educ. & Licensure v. Williams*, 94 A.2d 61, 62 (Pa. Super. Ct. 1953) (footnote omitted).

29. Title VII's retaliation provision differs from the provision at issue in *Gross* in that the provision here uses the word *because* whereas the provision in *Gross* uses the expression *because of*. Compare 29 U.S.C. § 623(a)(1) *with* 42 U.S.C. § 2000e-3(a). But that difference is of no moment. Dictionaries define *because* in terms virtually identical to those used to define *because of*. (See note 17, above.) Moreover, sentences using *because* can be reworded to instead use *because of*, with no change in meaning. Thus, Title VII's prohibition against discrimination against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], [etc.]" can be paraphrased as prohibiting discrimination "because of the employee's having opposed any practice [etc.]"

Additional examples proving this point are not hard to find. Dozens of them are provided in Appendix A. And in fact, examples can be found in opinions written by eight of the current members of this Court:

(5) **Chief Justice Roberts:** "This Court rejected that proposition, not only because it did not regard *Francis* as a new rule, but also because the state court did not 'plac[e] any limit on the issues that it will entertain in collateral proceedings.'"[30]

(6) **Justice Scalia:** "As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto."[31]

(7) **Justice Kennedy:** "We do not know anything about [Juror Z's] demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal."[32]

(8) **Justice Thomas:** "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race

30. *Danforth v. Minnesota*, 552 U.S. 264, 298 (2008) (Roberts, C.J., dissenting) (alteration in the original). See also Appendix A, ¶ 1; Appendix C, ¶¶ 1–3.

31. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2742 (2011). See also Appendix A, ¶¶ 2–5.

32. *Uttecht v. Brown*, 551 U.S. 1, 17-18 (2007).

relevant to the provision of burdens or benefits, it demeans us all."[33]

(9) **Justice Ginsburg:** "O'Hagan's charge that the misappropriation theory is too indefinite to permit the imposition of criminal liability thus fails not only because the theory is limited to those who breach a recognized duty. In addition, the statute's 'requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]' in circumstances such as O'Hagan's is unjust."[34]

(10) **Justice Breyer:** "The example is useful, not simply because as adapted it might show the importance of cross-examination (an importance no one doubts), but also because it can reveal the nature of the more general question before us."[35]

(11) **Justice Alito:** "Fitzgerald repeatedly emphasized in her briefs and at argument that she was entitled to [final] benefits not just because of the extensive delay, but also because of her indigency and the merits of her case."[36]

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33. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)). See also Appendix C, ¶ 4.

34. *United States v. O'Hagan*, 521 U.S. 642, 666 (1997) (Ginsburg, J.).

35. *Williams v. Illinois*, 132 S. Ct. 2221, 2246 (2012) (Breyer, J., concurring).

36. *Fitzgerald v. Apfel*, 148 F.3d 232, 235 (3d Cir. 1998). See also Appendix A, ¶¶ 6, 7.

(12) **Justice Sotomayor:** "Perhaps, under a generous reading of the State's briefing, the State meant to convey to the District Court that Buck's case was distinguishable from the others not only because he called Quijano as a witness, but also because he elicited race-related testimony."[37]

In some of the examples above and in Appendix A, it may not be absolutely clear that each *because*-phrase denotes a cause that would be sufficient on its own to bring about the result in question. While we believe that our examples are most naturally understood in that way, in some of the examples the *because*-phrases might be understood as referring to but-for causes. But that does not undermine our argument. We do not contend that it is impossible to use *because* in a phrase that refers to a but-for cause. On the contrary, examples of such phrases do exist.[38] But the interpretation of such phrases as involving but-for causation is an inference arising from the content of the phrase as a whole, not from the meaning of *because*. Thus, our argument does not assume that all uses of *because* fit into a particular mold.

In contrast, *Gross*'s interpretation of *because* treats the concept of but-for causation as if it were hard-wired

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37. *Buck v. Thaler*, 132 S. Ct. 32 (2011) (Sotomayor, J., dissenting from denial of *cert*.).

38. For example: "IEDA stated its view that because certificates of conformity apply to 'engine families and not to individual engines,' and because 'the engine family is defined by its physical characteristics,' 'all engines that have the same physical characteristics … are covered by the certificate of conformity issued to the engine family.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 424 (D.C. Cir. 2004) (citation omitted).

into the very meaning of the word; nothing in *Gross* suggests that the Court thought *because* was ambiguous. Nor did *Gross* point to anything in the statutory context requiring that *because* be read to require but-for causation. The interpretation in *Gross* therefore cannot be squared with evidence of actual usage.

2. As previously noted, *Gross* cited cases holding that but-for causation was required by the use of the expressions *by reason of* and *based on*.[39] Similarly, the dissent in *Price Waterhouse* supported its conclusion that but-for cause is required by citing a decision that had "described the relevant question as … whether the particular employment decision at issue was 'made *on the basis of*' an impermissible factor[.][40] And *Gross* relied on the statement in *Hazen Paper* that an employee's claim "cannot succeed unless the employee's protected trait … had a *determinative* influence on the outcome[.]"[41]

However, the evidence of how these expressions are actually used—like the evidence as to *because*—shows that they are not indicators of but-for causation. The same thing is true for *on account of*, which is included in the dictionary definitions cited by the Court in *Gross*. Examples proving these points are set out in Appendices B-F.

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39. See pages 7–8, above.

40. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (emphasis added) (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984)).

41. 507 U.S. at 610 (cited in *Gross*, 557 U.S. at 176) (emphasis added).

C. The original meaning of Title VII's retaliation provision was not narrowed by the 1991 amendments.

The meaning of the word *because* has not changed since Title VII was enacted in 1964. The examples we have provided of sentences using *because* are taken both from the periods 1941–1974 and 1988–2012. They therefore reflect what *because* meant in 1964 as well as what it means today). Thus, Title VII's retaliation provision—§ 704(a)[42]—has never required but-for causation.

Respondent argues that the 1991 amendments to Title VII[43] apply to § 704(a). But even if that argument is not accepted, the amendments certainly did not narrow that provision by imposing for the first time a requirement of but-for causation.

The 1991 amendments made no change to § 704(a). So the question is whether they narrowed § 704 by implication. Since any narrowing of § 704 would amount to a partial repeal, the controlling cases are those dealing with repeals by implication. And those decisions compel the conclusion that § 704(a) was unaffected by the 1991 amendments.

"While a later enacted statute … can sometimes operate to amend or even repeal an earlier statutory provision … repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest."[44] An implied repeal

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42. 42 U.S.C. § 2000e-3(a).

43. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)).

44. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks and citation omitted; alteration in the original).

will not be inferred "unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all."[45] Either the two statutes must be in "irreconcilable conflict" or the later statute must "cover[] the whole subject of the earlier one and [be] clearly intended as a substitute[.]"[46]

The 1991 amendments do not satisfy these strict standards. The amendments do not "expressly contradict" Title VII's retaliation provision, they are not in "irreconcilable conflict" with it, and they do not "cover[] the whole subject" of the retaliation provision such that they are "clearly intended as a substitute" for it.

Nor is Petitioner's interpretation of the retaliation provision "absolutely necessary … in order that [the] words [of the 1991 amendments] shall have any meaning at all."[47] The mixed-motive language added by the 1991 amendments is best seen, not as extending Title VII beyond its original scope, but as endorsing and codifying (with modifications) an interpretation that had emerged in a case (*Price Waterhouse*) in which there was no majority opinion. Indeed, the amendment has been widely regarded as doing just that.[48] Viewed that

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45. *Id.* (internal quotation marks and citation omitted; alteration in the original).

46. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks and citation omitted).

47. *Id.* (internal quotation marks and citation omitted; alteration in the original).

48. *See, e.g.*, *Palmquist v. Shinseki*, 689 F.3d 66, 72 (1st Cir. 2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 n.4 (3d Cir. 1995); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 522 (3d Cir. 1992); *Moreno v. Grand*

way, the purpose of the "motivating factor" language was not to change the law but to confirm and clarify what it already meant.[49]

We recognize that the Court in *Gross* arguably regarded the inclusion of the "motivating factor" language in the 1991 amendments as evidence that such claims had not previously been covered by Title VII, the theory being that if mixed-motive claims were already covered, the "motivating factor" language would have been unnecessary.[50] But that reasoning is incorrect in two respects. First, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[51] Second, the Court was operating on the erroneous assumption that but-for causation is required by the use of the word *because*.

Had the Court assumed instead that the original statute did not require but-for causation, it would most likely have reached a different conclusion regarding the

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Victoria Casino, 94 F. Supp. 2d 883, 900 (N.D. Ill. 2000); *Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1286 (D. Minn. 1995); *Crommie v. Cal. Pub. Utils. Comm'n*, 61 Empl. Prac. Dec. (CCH) ¶ 42,286, 1993 U.S. Dist. LEXIS 4714 at *2 (N.D. Cal. 1993).

49. *Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950) (when an agency seeks to eliminate dispute over its interpretation of a statute, a request for clarifying legislation does not amount to an admission that its interpretation was mistaken).

50. 557 U.S. at 178 n.5.

51. *Wright v. West*, 505 U.S. 277, 295 (1992) (indirectly quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). *See also Varity Corp. v. Howe*, 516 U.S. 489, 525 n.4 (1996) (Thomas, J., joined by O'Connor & Scalia, JJ., dissenting) (arguing that the enactment of an amendment does not shed light on the original statute's meaning) *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 (1977).

1991 amendments. In particular, it would presumably have seen the amendments' "motivating factor" language as a belt-and-suspenders measure that did not evidence any doubt about what Title VII originally meant. And in any event, the Court in *Gross* certainly did not suggest that its interpretation of *because* was "absolutely necessary … in order that [the] words [of the 1991 amendments should] have any meaning at all."[52] Nor did it conclude that the addition of the "motivating factor" language should be regarded as a partial repeal-by-implication of the original statute.

D. Departing from § 704(a)'s text is not justified by Title VII's legislative history or by Petitioner's warning of a "jurisprudential morass."

1. As other amici supporting Respondent will show, the legislative history of Title VII's enactment in 1964 supports the conclusion that retaliation claims under § 704(a) do not require but-for causation. But even if one disagrees with that conclusion, the legislative history provides no basis for departing from § 704(a)'s clear text.

Petitioner recognizes that Title VII's legislative history "could not modify the plain statutory text."[53] And beyond that, Petitioner tacitly concedes that the legislative history provides its position with no clear support: "In contrast to its clear statutory text," Petitioner

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52. *National Ass'n of Home Builders*, 551 U.S. at 662 (internal quotation marks and citation omitted; second alteration added).

53. *Id.* at 21 (citing *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011).

says, "Title VII's legislative history contains something for everyone[.]"[54]

The only piece of legislative history that Petitioner cites (the interpretive memorandum by Title VII's sponsors) is unilluminating.[55] In the excerpt quoted by Petitioner, the memorandum says that "the plaintiff, as in any civil case would have the burden of proving that discrimination had occurred."[56] But that truism does not advance Petitioner's argument, because it does not address the standard of causation against which the plaintiff's proof must be measured.

2. Petitioner devotes much of its brief to arguing that allowing mixed-motive claims amounts to bad policy.[57] But that argument should be addressed to Congress, not to this Court. In interpreting statutes, "[the Court's] task is to apply the text, not to improve on it."[58] So even if one agrees with Petitioner's policy argument, "[i]t is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think, perhaps along with some Members of Congress, is the preferred result."[59]

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54. Pet. Br. 20.

55. Pet. Br. 20 (citing 110 Cong. Rec. 7214 (April 4, 1964)).

56. 110 Cong. Rec. 7214.

57. Pet. Br. 24-35.

58. *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989). *See also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) (Thomas, J., concurring in the judgment) (quoting the language from *Pavelic & LeFlore* that is quoted in the text and adding, "When the text of the statute is clear, our interpretive inquiry ends.").

59. *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring in the judgment). *See also Smith v. United States*, 508 U.S. 223, 247, n.4 (1993) (Scalia, J., dissenting)

There is even greater cause than usual for honoring this principle here. It is common ground that the 1991 amendments endorsed the mixed-motive theory with respect to ordinary discrimination claims. That action represents a legislative judgment that mixed-motive claims will not create the difficulties that Petitioner warns against, or at least that whatever difficulties might arise from such claims are outweighed by the benefits of allowing the claims. Either way, the amendments express a policy that is hospitable to mixed-motive claims. And while Congress did not expressly endorse mixed-motive retaliation claims, neither did it eliminate the preexisting ability to bring such a claim under Title VII as originally drafted.

Since mixed-motive claims will continue to be brought regardless of what the Court does here, a ruling for Petitioner would unavoidably leave open the possibility that differing causation standards will govern different claims in a given case. While Petitioner's interpretation would result in the same standard being applied to both ADEA claims and Title VII retaliation claims, it would also mean that in Title VII cases alleging both retaliation and ordinary discrimination, each claim would be subject to a different standard. So Petitioner's interpretation would impose uniformity in some areas only at the cost of eliminating it elsewhere.

II. *Gross* drew the wrong conclusion from tort law.

At the end of the discussion in *Gross* of the ADEA's text, the Court quoted the statement in *Prosser and*

("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in.").

Keeton on the Law of Torts that "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it[.]"[60] The dissent in *Price Waterhouse* had similarly relied on tort law to support its conclusion that Title VII required but-for causation.[61] But both the *Gross* majority and the *Price Waterhouse* dissent drew the wrong conclusion from the common law. Contrary to both opinions, common-law rules of causation do not justify requiring but-for causation in discrimination cases.

A. The common law does not require but-for causation with regard to issues of mixed or multiple motivations.

In cases where but-for causation is required, the question is whether the injury was caused by the defendant's *action* or *failure to act*.[62] This is reflected in the language that *Gross* quoted from *Prosser and Keeton on the Law of Torts*: "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it[.]"[63] In a discrimination case, it is typically undisputed that the plaintiff's injury was caused by the defendant's action. Indeed, it is hard to imagine how a plaintiff could claim to have been discriminated against unless the employer's action was the but-for cause of his or her injury.

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60. *Gross*, 557 U.S. at 1777 (quoting W. Keeton et al., Prosser and Keeton on the Law of Torts 265 (5th ed. 1984)).

61. *Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting).

62. *See, e.g.,* Restatement (2d) of Torts §§ 431, 432.

63. *Gross*, 557 U.S. at 1777 (quoting Prosser and Keeton on the Law of Torts, *supra*, at 265).

What is really at issue in retaliation and disparate-treatment cases is not the *results* of the defendant's action but the *reasons* for that action—a factor that is usually irrelevant to tort liability. And in the case of the few torts in which liability does depend on the defendant's reasons or motivations, the but-for standard is not applied in resolving questions of mixed motivation.

For example, a defendant may be held liable for malicious prosecution if he acted "primarily for a purpose other than that of bringing an offender to justice" or of "securing the proper adjudication of the claim on which [the civil proceedings] are based."[64] Similarly, one can be held liable for tortious interference with contract "if [he] acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition."[65] Claims such as these are more closely analogous to discrimination claims than are the kinds of claims (such as negligence) to which the but-for standard is most often applied.[66]

In other areas in which an actor's motivation is relevant, but-for causation is similarly inapposite. Under the doctrine of *respondeat superior*, employee's actions are imputable to the employer it they were motivated "to any appreciable extent" by "the purpose

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64. Restatement (2d) of Torts §§ 668, 676.

65. Restatement (2d) of Torts § 766, comment j

66. To be sure, the but-for standard may be relevant to a claim for malicious prosecution or tortious interference if there is a dispute about whether the plaintiff's injury was in fact caused by the defendant's conduct. Note that the same question is involved in connection with the requirement of but-for causation in RICO cases. *See Bridge*, 553 U.S. at 653-54. As a result, *Bridge* does not really support the holding in *Gross*.

of serving the master's business[.]"[67] And for the purposes of deciding whether a police checkpoint violates the Fourth Amendment, the threshold question is whether its "primary purpose was to detect evidence of ordinary criminal wrongdoing."[68]

While we do not suggest that the Court adopt a primary-reason test here, the discussion above shows that where liability depends on an actor's reasons or motivations, questions of mixed or multiple motive are resolved without reference to the standard of but-for causation.

B. Mixed-motive claims involve multiple sufficient causes, to which the requirement of but-for causation does not apply.

Even if one regards but-for causation as the default rule, it would still be inappropriate to require but-for causation in cases of mixed-motive retaliation. Such cases would come within one of the common law's exceptions to the general requirement of but-for cause: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."[69] Applying this principle to cases of mixed-

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67. Restatement (2d) of Agency § 236, comment b.

68. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000). *See also Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

69. Restatement (2d) of Torts § 432(2). *See also* Restatement (3d) of Torts: Liability for Physical and Emotional Harm § 27 ("If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual

motive retaliation makes perfect sense: The defendant's impermissible reason corresponds to the "force … operating … because of the actor's negligence," and the permissible reason to the "force … operating … not because of any misconduct on his part[.]"

The rationale for the concurrent cause exception is that where two individually-sufficient causes are at work, neither of them is a but-for cause, so if the plaintiff had to show but-for causation, both wrongdoers would escape liability.[70] If but-for causation were to be required in discrimination and retaliation cases, a similar situation could arise. If an employer discriminated against an employee on multiple unlawful bases, none of those bases on its own would be a but-for cause of the adverse action. If liability for discrimination on each basis required but-for causation, the defendant would avoid liability completely, because the plaintiff would be unable to show that any one discriminatory basis was a necessary cause of his injury. While that would be absurd, it would be the necessary consequence of interpreting the statutes to require but-for causation. And it would be impossible to avoid that result while remaining true to the fair meaning of the statutory text. Although it would make sense as a policy matter to interpret the statutes to require the plaintiff to show only that impermissible discrimination *of some sort* was a but-for cause of the adverse action, doing so would require going beyond the reasonable meaning of the text.

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cause of the harm."); Prosser and Keeton on the Law of Torts, *supra*, at 266–68.

70. *See, e.g.*, Restatement (3d) of Torts: Liability for Physical and Emotional Harm § 27, comment c; Prosser and Keeton on the Law of Torts, *supra*, at 266–67.

This hypothetical is not far-fetched. In *Hazen Paper*, the Court referred to the possibility of "dual liability under ERISA and the ADEA where the decision to fire the employee was motivated by both the employee's age and by his pension status."[71] But at least one case has extended *Gross* to the ERISA provision that prohibits firing employees in order to prevent their pensions from vesting.[72] And on appeal from that decision the Seventh Circuit said that "but-for causation is probably required." So unless the Court corrects the error made in *Gross*, the scenario we have described could well become a reality.

III. While but-for causation is not an element of liability, it is relevant to selecting the appropriate remedy in a given case.

So far we have not addressed the *Price Waterhouse* burden-shifting framework. For the reasons we will set out, we would submit that the most appropriate course that is consistent with the statutory text would be to retain the framework, but with the same modification that was made by the 1991 amendments. The employer would still be entitled to show that it would have taken the same action even if it had not considered the impermissible factor, but such a showing would go the question of remedy, not liability.

The dissent in *Price Waterhouse* criticized the plurality opinion for saying that while Title VII did not require the plaintiff to prove but-for causation, the

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71. 507 U.S. at 613.

72. *Nauman v. Abbott Labs.*, 49 Employee Benefits Cas. (BNA) 2052, 2010 U.S. Dist. LEXIS 95483 at *4-5 (N.D. Ill. 2010) (interpreting 29 U.S.C. § 1140), *aff'd without resolution of this issue*, 669 F.3d 854 (7th Cir. 2012).

defendant could assert as an "affirmative defense" that the impermissible reason was not a but-for cause of its action.[73] The dissent argued that this was internally inconsistent and unsupported by Title VII's language.[74] Those criticisms were justified. We therefore do not argue in favor of the affirmative defense to liability that was established by *Price Waterhouse*.

Nevertheless, the defendant should still be entitled to show that it would have taken the same action even if it had not considered the impermissible reason, but with that proof being relevant to the issue of remedy, not liability. This approach represents a logical extension of *McKennon v. Nashville Banner Publishing Co.*,[75] where the Court followed a similar approach with regard to after-acquired evidence.

McKennon was an ADEA case that reached the Court in a posture requiring the Court to assume that the plaintiff had been fired solely because of her age. The *Price Waterhouse* affirmative defense was therefore irrelevant. During the plaintiff's deposition, the employer had learned of misconduct by the plaintiff that would have provided independent grounds to fire for her if it had been known at the time. The Court held that this belatedly-discovered wrongdoing did not provide the defendant with a defense, but it did affect the relief the plaintiff could obtain.[76] In particular, the Court held that the plaintiff could not obtain reinstatement or front pay: "It would be both inequitable and pointless to order the reinstatement of someone the employer would

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73. *Price Waterhouse*, 490 U.S. at 285-86 (Kennedy, J., dissenting).

74. *Id.*

75. 513 U.S. 352 (1995).

76. *Id.* at 360-62.

have terminated, and will terminate, in any event and upon lawful grounds."[77] In addition, the plaintiff would not be entitled to back pay for the period after the employer had discovered her misconduct.[78]

This holding combines a recognition of remedial discretion under the ADEA with a direction as to how that discretion should be exercised. The remedial provision of Title VII is similar to the ADEA's,[79] and *McKennon* has been held to apply to Title VII.[80] As a result, the remedial discretion recognized by *McKennon* provides a basis on which the burden-shifting framework of *Price Waterhouse* can be retained in modified form. Under this approach, if the defendant shows that it would have taken the same action even without considering the improper reason, the plaintiff would have established that the employer had violated the law but would not be entitled to relief.

This yields an end result similar to what would happen under *Price Waterhouse*, but it does so in a way that is not subject to the criticisms of the *Price Waterhouse* dissent. Because the employer's showing would no

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77. *Id.* at 362.

78. *Id.*

79. *Compare* 29 U.S.C. § 626(b) ("'the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter") *with* 42 U.S.C. § 2000e-5(g) ("the court may … order such affirmative action as may be appropriate").

80. *E.g.*, *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995); *Wehr v. Ryan's Family Steak Houses, Inc.,* 49 F.3d 1150, 1153 (6th Cir.1995); *Manard v. Fort Howard Corp.,* 47 F.3d 1067, 1067 (10th Cir. 1995); *Churchill v. Texas Dep't of Crim. Justice*, No. 4:11-cv-2458, 2012 U.S. Dist. LEXIS 133108, at *7–8 (S.D. Tex. Sept. 14, 2012).

longer be relevant to the issue of liability, the internal inconsistency in *Price Waterhouse* would no longer exist. And the employer's right to make that showing would now be anchored in Title VII's text—specifically, in its remedial provision.

This approach is also consistent with the original mixed-motives case—*Mt. Healthy City School District Board of Education v. Doyle*[81]—which relied on what are best regarded as remedial considerations:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing … The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[82]

The approach we advocate would also have the benefit of aligning the rules governing mixed-motive retaliation claims with those governing other mixed-motive claims under the 1991 amendments. This would simplify Title VII litigation by eliminating any complications that would arise if different types of claims were governed by differing standards.

It is true that the plurality in *Price Waterhouse* considered and rejected the idea of treating the employer's showing as a matter relevant to remedy as opposed to liability.[83] But *Price Waterhouse* predated *McKennon*,

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81. 429 U.S. 274 (1977).

82. *Id.* at 285.

83. 490 U.S. at 244 n.10.

and the plurality might well have reached a different conclusion on this point had *McKennon* been decided first. And in any event, the controlling case on this point should be the unanimous and more recent decision in *McKennon* rather than the earlier split decision in *Price Waterhouse*.

IV. Extending *Gross* to other statutes is not justified by considerations of *stare decisis*.

Although our argument will obviously raise concerns about *stare decisis*, those concerns should not prevent the Court from giving effect to the fair meaning of the statutory text. To begin with, the force of *stare decisis* here is diminished by the fact that this case involves a statute different from the one at issue in *Gross*. While it is ordinarily preferable to "achieve a uniform interpretation of similar statutory language,"[84] the decision in *John R. Sand & Gravel Co. v. United States* suggests that it can be acceptable to have "different interpretations of different, but similarly worded, statutes[.]"[85]

Furthermore, *stare decisis* cuts both ways here. *Gross* did not overrule *Price Waterhouse*, but Petitioner seeks a decision that would render *Price Waterhouse* a dead letter. So unless the Court holds that this case is distinguishable from *Gross*, it will have no choice to depart from one precedent or the other. That being so, the Court's first priority should be to get the meaning of the statute right.

What is at stake here is not just the interpretation of Title VII's retaliation, or even of other discrimination

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84. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

85. 552 U.S. 130, 139 (2008). *Cf. id.* at 145–46 (Ginsburg, J., dissenting) (noting this aspect of the decision).

statutes with similar wording. The word *because* appears in many sections of the United States Code.[86] If the Court holds the mistaken interpretation in *Gross* to be binding as a matter of *stare decisis*, it will in effect be holding, sight-unseen, that every one of those provisions requires but-for causation—for if *Gross* is *stare decisis* as to the meaning of *because* in Title VII's retaliation provision, it is *stare decisis* on that point in every federal statute where the word is used. Carving *Gross*'s misinterpretation into stone could therefore have drastic and unforeseeable consequences.[87]

The conclusion that *Gross* should not be treated as binding is further supported by the fact that Court's conclusion about the meaning of *because* was made without both sides of the issue having been fully briefed. Although respondent and its *amici* argued that but-for causation was required by the use of *because*, the petitioner did not address those arguments in its reply brief, and the issue did not come up during oral argument.[88] As a result the Court was deprived of a complete adversarial airing of the issue.

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86. House of Representatives, Office of Law Revision Counsel, *Search the United States Code*, http://tinyurl.com/USCbecause (accessed March 31, 2013).

87. In contrast, a holding that *because* does not by definition entail but-for causation would leave open the possibility that a particular provision in which *because* is used does require but-for causation. The appropriate focus would be on the provision as a whole, together with the usual indicia of statutory meaning, not on the meaning of a single word in isolation.

88. Resp. Br. 19–20, *Gross* (No. 08-441); Br. of Nat'l Fed. of Ind. Business Small Business Legal Ctr. and Soc'y for Human Resource Mgmt. 13–14, *Gross*; Pet. Reply Br. 17-25, *Gross*; Tr. of Oral Argument 3–18, 56–58, *Gross*.

Finally, *Gross* has not given rise to expectations that would be upset by a refusal to extend its holding to Title VII retaliation cases. Whatever expectations might have arisen about the meaning and scope of the ADEA, no such expectations have arisen regarding other statutes. Almost from the moment *Gross* was decided, there was uncertainty as to whether its holding should apply to statutes such as Title VII. In *Gross*'s immediate aftermath, a number of district courts regarded themselves as still being bound by circuit precedent applying the *Price Waterhouse* framework to retaliation claims,[89] and within less than a year after *Gross* a circuit split had arisen.[90]

In contrast, *Gross* itself did upend settled expectations. Every circuit that had considered the issue (nine in all) had held *Price Waterhouse* to apply to the ADEA.[91] Indeed, the respondent in *Gross* began from the premise that *Price Waterhouse* applied to the ADEA and asked that *Price Waterhouse* be overruled "with respect to its application to the ADEA."[92] It was also well established that *Price Waterhouse* applied to Title

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89. *Barney v. Consol. Edison Co.*, No. CV-99-823, 2009 U.S. Dist. LEXIS 127178, at *31 n.15 (E.D.N.Y. Sept. 30, 2009); *Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 200 (D. Conn. 2009).

90. *See* Cert. Pet. 11–18.

91. *See Gross*, 557 U.S. at 184 n.5 (Stevens, J., dissenting) (collecting cases).

92. Resp. Br. 26, *Gross* (No. 08-441). *See also id.* at 2 ("Unless the Court overrules *Price Waterhouse*, it, and not *Desert Palace, Inc. v. Costa* still governs under the ADEA.") (citation omitted); *id.* at 30-31 n.22 (noting that although this Court had never expressly held *Price Waterhouse* to apply to the ADEA, "[t]here is … nothing in the text of the ADEA now and the text of Title VII at the time of *Price Waterhouse* that would justify different treatment").

VII retaliation cases.[93] Thus, refusing to extend *Gross* would merely make it clear that the law governing such claims remains the same as it was before *Gross*.

Conclusion

The decision below should be affirmed.

Respectfully submitted,

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93. *E.g.*, *Medlock v. Ortho Biotech*, 164 F.3d 545, 550–51, 552–53 (10th Cir. 1999); *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 202–03 (D.C. Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 682–85 (1st Cir. 1996); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 893 (7th Cir. 1996); *Riess v. Dalton*, 845 F. Supp. 742, 745 (S.D. Cal. 1993).

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APPENDICES

Appendices

Appendix A
Additional Examples: *because*

1. "The Intervenor Group should not be confused with the intervenors in this appeal … who appear in support of the Commission. We use the label 'Intervenor Group' because that is what was used in the orders under review, and because the parties themselves continue to use that shorthand before us." *PSC of Ky. v. FERC*, 397 F.3d 1004, 1007 n.1 (D.C. Cir. 2005) (Roberts, J.).

2. "I think it preferable to give 'specify' this meaning not only because here it is more natural, but also because the alternative is to read the statute as leaving it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders, even though registration of pre-Act offenders was (as the Court acknowledges) what the statute sought to achieve." *Reynolds v. United States*, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting).

3. "It seems very unlikely that anyone would intentionally wait to sue later rather than sooner—not only because the prospective defendant may die or dissolve, but also because prejudgment interest is normally not awarded, and the staleness of evidence generally harms the party with the burden of proof." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 896 (1988) (Scalia, J., concurring).

4. "Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations." *Verizon Com-*

munications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (Scalia, J.).

5. "Even this lone case is weak authority, not only because it comes from a minor court, but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege." *City of Boerne v. Flores*, 521 U.S. 507, 543 (1997) (footnote omitted) (Scalia, J.).

6. "But for PHA's payment to Truesdell's landlord of the $464 deficiency in tenant rent, Truesdell would have been ineligible for continued Section 8 housing. Thus, his success on the first claim was significant, not only because it rectified the deficiency, but also because it allowed him continued eligibility for Section 8 housing." *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (Alito, J.).

7. "The fact that the labels for such drugs allow IV push is striking—both because vesicants are much more dangerous than Phenergan, and also because they are so frequently extravasated." *Wyeth v. Levine*, 555 U.S. 555, 628 (2009) (Alito, J.,dissenting) (citation omitted).

8. "Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." *Attorney General's Manual on the Administrative Procedure Act* 14 (1947).

9. "Motion for summary judgment under Rule 56 is Denied because genuine issues of fact remain and

because the motion is improper." *Bass v. Harbor Light Marina, Inc.*, 372 F. Supp. 786, 794 (D.S.C. 1974).

10. "Further, the motion to reopen the case and to hear further evidence is denied, because it does not meet the standards for granting of such motions, and because the additional evidence is not material under the findings and conclusions of this case. Rule 60(b) F. R. Civ. P." *Nat'l Indem. Co. v. Harper*, 295 F. Supp. 749, 757 (W.D. Mo. 1969).

11. "A claim for future institutional care of Jehu Evans is denied because of its speculative nature and because there is nothing in the Record to indicate the value of such services." *Evans v. Pa. R. Co.*, 154 F. Supp. 14, 26 (D. Del. 1957).

12. "Here, the exemption is denied because B.B.C. was not organized and operated exclusively for educational purposes and because part of its net earnings inured to the benefit of private shareholders or individuals." *Carter v. Comm'r*, T.C. Memo 1958-166 (1958).

13. "Motion of Architectural Products Company and Binswanger Glass Company for partial remand ... is denied because movants are not parties to this appeal and because jurisdiction of the issues on the interpleader filed by Nabholz Construction Corporation is not vested in this court by the present appeal." *Bleidt v. 555, Inc.*, 485 S.W.2d 721, 723 (Ark. 1972).

14. "Because of the failure to show that there was no lack of diligence by defendant, and because the newly discovered evidence is certainly not conclusive on the question of the defendants' personal liability, we hold that the presumption in favor of the decree has not been overcome." *Ulrich v. Glyptis*, 224 N.E.2d 581, 586-87 (Ill. App. Ct. 1967) (citation omitted).

15. "His conviction is reversed and a new trial is granted, because it was prejudicial error to retry him on the previously dismissed counts and because prejudicial cross-examination of him was conducted with respect to specific facts of other crimes and wrongful acts committed by him which were similar in various details to the crimes for which he was on trial." *New York v. Reingold*, 353 N.Y.S.2d 978 (App. Div. 1974) (headnote).

16. "Judgment on a general verdict for plaintiff is reversed and a new trial is granted, because of prejudicial errors in the receipt of evidence and because of serious deficiencies in the court's instructions to the jury." *Jasinski v. N.Y. Central R.R.*, 250 N.Y.S.2d 942 (App. Div. 1964) (headnote).

17. "Appellant asserts that the judgment should be reversed because, as a matter of law, his letters were not 'outrageous' or 'beyond all reasonable bounds of decency,' and because there was no evidence that Greene suffered any mental distress as a result of the letters." *Moore v. Greene*, 431 F.2d 584, 591 (9th Cir. 1970).

18. "[D]efendant's brief, in addition to answering plaintiff's argument with regard to misuse, asserted that the judgment of the district court should be affirmed because the patent is invalid and because of other alleged misuses of it by plaintiff." *Tinnerman Prods., Inc. v. George K. Garrett Co.*, 292 F.2d 137, 138 (3d Cir. 1961).

19. "[P]laintiff is here insisting that the judgment should be reversed because the case was not one for summary judgment but for trial, and because, if the case was one for summary judgment, the judgment should have been for plaintiff." *Mfrs. Cas. Ins. Co. v.*

Martin-Lebreton Ins. Agency, 242 F.2d 951, 952 (5th Cir. 1957).

20. "They contend that the referee's order should be reversed because the evidence does not support certain findings of fact and also because the referee, in certain respects, failed to comply with the provisions of the Bankruptcy Act." *In re Graco, Inc.*, 249 F. Supp. 405, 406 (D. Conn. 1965).

21. "[The defendant] has appealed, claiming that the judgment of conviction should be reversed because certain evidence was erroneously admitted and because of the insufficiency of the evidence to support the verdict." *Fuller v. Alaska*, 437 P.2d 772, 773 (Alaska 1968).

22. "Defendant contends that his conviction should be reversed because the court erred in refusing to grant him a continuance to procure a material witness and because he was entrapped into committing the offense charged." *Arizona v. Cotton*, 443 P.2d 404, 405 (Ariz. 1968).

23. "Through his attorney, the defendant contends that the judgment should be reversed because of the insufficiency of the evidence to establish an intent to defraud and because he was not granted a speedy trial." *California v. Davis*, 176 Cal. App. 2d 80, 84 (1959).

24. "He contends that the conviction should be reversed because there was an unlawful search and seizure and because the identity of the informer was not disclosed." *Illinois v. Miller*, 216 N.E.2d 793, 794 (Ill. 1966).

25. "Appellant argues that the judgment of the trial court should be reversed because he should not have been required to attach a copy of the proceedings of the

City Council and because the actions of the Mayor and Aldermen should have been construed to be in effect, an appointment by the Aldermen." *People ex rel. Skonberg v. Paxton*, 211 N.E.2d 591, 593 (Ill. App. Ct. 1965).

26. "Defendants now contend that the order should be reversed because there was no notice of the appointment of a receiver, and because the order did not comply with the statute providing for a bond to the adverse parties insuring the payment of any damages they might sustain by reason of the appointment and acts of the receiver in case the appointment were to be revoked or set aside." *Frerk v. Frerk*, 188 N.E.2d 773, 775 (Ill. App. Ct. 1963).

27. "The judgment should be reversed because the verdicts are against the weight of the evidence and also because of errors in the trial court's instruction to the jury and in receiving evidence." *Crossett v. Natali*, 297 N.Y.S.2d 200, 201 (App. Div. 1969).

28. "We have reviewed the evidence and find that it was sufficient to support the decree denying relief to appellant and dismissing his bill because of laches in seeking relief, and also because the issue of fraud was not adequately supported by proof." *Barrett v. Bean*, 147 So. 2d 820, 821 (Ala. 1962).

29. "We are of opinion, therefore, that the decree granting the permanent mandatory injunction was laid in error and must be reversed not only because of the absence of necessary parties defendant but also because the case was not ready for submission except on the application for temporary injunction." *Methvin v. Haynes*, 46 So. 2d 815, 820 (Ala. 1950).

30. "A rehearing in this case was granted, primarily because of its public importance and also because of an

error in our original opinion relative to the legislative history of R.S. 38:1071, subd. B." *Louisiana ex rel. Bd. of Comm'rs v. Bergeron*, 106 So. 2d 295, 304 (La. 1958).

31. "Thereupon the insurance company denied liability because of the failure of the assured to aid in securing evidence and also because of the false reports previously made." *Leach v. Fisher*, 74 N.W.2d 881, 885 (Mich. 1956).

32. "The School District applied to the Department of Licenses and Inspections for a permit to construct the school plant, which was denied because of the above failures to comply with the zoning provisions, and also because a school was not a permitted use within the districts wherein the property was located." *Sch. Dist. v. Zoning Bd. of Adjustment*, 207 A.2d 864, 866 (Pa. 1965).

33. "We reverse because of the failure in proof of misrepresentations and also because of the waiver of the asserted misrepresentations." *Prudential Ins. Co. v. Barden*, 424 F.2d 1006, 1006 (4th Cir. 1970).

34. "In this case, we are compelled to affirm not only because of *Wilson v. Gray,* but also because of our decision in *Symons v. Klinger.*" *Poole v. Fitzharris*, 396 F.2d 544, 546 (9th Cir. 1968) (citation omitted).

35. "In *Taub* the Rule 23 motion was denied not only because of the delay in bringing on the motion but also because of other inappropriate conduct on the part of counsel." *Zolotnitzky v. Yablok*, No. 67 Civ. 4185, Fed. Sec. L. Rep. (CCH) ¶ 94,513, 1974 U.S. Dist. LEXIS 9234 at *7 (S.D.N.Y. March 29, 1974) (citation omitted).

36. "The closing scheduled for April 20, 1966 never took place because of the trading suspension and also because in the meantime a lawsuit had been started by

one claiming that it had a contract of purchase with Crofoot." *SEC v. Great Am. Indus.*, 259 F. Supp. 99, 108 (S.D.N.Y. 1966).

37. "[T]he court finds as a matter of fact that the defendants have been seriously prejudiced by plaintiff's failure to file suit until August 30, 1968, four years and eleven months after the alleged accident occurred, because of their inability to locate certain witnesses, because other witnesses have now forgotten important facts, and also because of the extensive, complicated, and confusing medical treatment administered the plaintiff, over which they had no control." *La Lande v. Gulf Oil Corp.*, 317 F. Supp. 692, 696 (W.D. La. 1970).

38. "Burnett testified that he made no effort to locate Smith when these vacancies occurred because he did not know where to find him and also because he thought that Smith was working elsewhere.'" *F. W. Poe Mfg. Co. v. NLRB*, 119 F.2d 45, 47 (4th Cir. 1941) (internal quotation marks omitted).

39. "Under the evidence herein, the distinction between stove and light naphtha and fuel oils seems obvious because of several indisputable factors." *Porter v. Tankar Gas, Inc.*, 68 F. Supp. 103, 109 (D. Minn. 1946).

40. "At this point the question arises whether this is a proper case for the application of the doctrine of *Gaidry Motors v. Brannon, Ky*. Because of many factors pointed out so clearly in the dissenting opinion in that case, the decision in the *Gaidry Motors* case must be narrowly confined." *Armour v. Haskins*, 275 S.W.2d 580, 583 (Ky. 1955) (citation omitted).

41. "[In *Atkinson v. New Britain Machinery Co.*,] as the court stated, the contract on its face appeared to be terminable on a month-to-month basis. However, be-

cause of numerous other reasons clearly set forth by the court, the contract was correctly held to be a term contract, from year to year." *Summers v. Ralston Purina Co.*, 69 So. 2d 858, 863 (Ala. 1954).

42. "While we recognize the liberalization of the discovery rules relating to shareholders established by the *Hobart* case, we do not think it applicable to the instant case because of several distinguishing factors." *Nat'l Auto. & Cas. Ins. Co. v. Payne*, 261 Cal. App. 2d 403, 410 (1968) (citation omitted).

Appendix B
Additional Examples: *by reason of*

1. "We start with the proposition that in a federal, criminal case the requirement of unanimity applies not only by reason of F. R. Crim. P., Rule 31(a), but also by reason of the Sixth Amendment." *United States v. Morris*, 612 F.2d 483, 488-89 (10th Cir. 1979) (footnotes omitted).

2. "According to plaintiff, this Court has subject matter jurisdiction not only by reason of diversity of citizenship, but also under the federal statute which invests district courts with original jurisdiction over non-jury civil actions brought against a foreign state." *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 109 F.R.D. 692, 693 (S.D.N.Y. 1986).

3. "'An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.'" *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991) (quoting from jury instructions).

4. "The State Board's conclusion that the local board had sustained its burden of proving Rowley's inefficiency is defective not only by reason of its failure to have considered the hearing transcript but also because it made no findings of fact in support thereof." *Rowley v. Bd. of Educ.*, 205 N.J. Super. 65, 76, 500 A.2d 37, 42 (App. Div. 1985).

5. "[P]laintiffs are parties to the GCA not only by reason of their membership in the NYSA, but also as direct signatories." *Korea Shipping Corp. v. New York*

Shipping Ass'n–Int'l Longshoremen's Ass'n Pension Trust, 880 F.2d 1531, 1534 (2d Cir. 1989).

6. "Bear Stearns contends that the jury's award represents a miscarriage of justice, and that, not only by reason of its size, but by the allegedly new legal duties this determination would place on all securities dealers if the verdict were allowed to stand, the case has generated 'shock and attention in the brokerage and legal communities.'" *De Kwiatkowski v. Bear Stearns & Co.*, 126 F. Supp. 2d 672, 677 (S.D.N.Y. 2000).

7. "Accordingly, given this prior deposition testimony, this theory fails not only by reason of its prior contradiction but its inherent unbelievability." *Flug v. Carag*, No. 93 Civ. 1591 (RO), 1999 U.S. Dist. LEXIS 16799 at *8-9 (S.D.N.Y. Oct. 26, 1999).

8. "This item of evidence possesses significance not only by reason of the manner in which it was signed, but also by reason of the nature of its subject matter." *Farmers & Merchs. Bank v. Kirk*, 332 P.2d 131, 132 (Cal. Dist. Ct. App. 1958).

9. "At the time counsel for plaintiffs undertook the representation of the plaintiffs, they undoubtedly knew that Texaco would vigorously defend this action, not only by reason of the monetary claims but also by reason of the effect on Texaco's marketing practices in at least the Spokane area." *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 265 (E.D. Wash. 1986).

10. "[The district court] rejected any notion that the provisions for relief from penalties in the Bankruptcy Tax Act could have any application, not only by reason of the fact that the Tax Act was not in effect at the time of the inception of the *Benson* case, but also by reason of the fact that it applied only to penalties and not express-

ly to interest." *In re Irvin*, 95 B.R. 1014, 1019 (Bankr. W.D. Mo. 1989) (citation omitted).

11. "The publication of this lecture seems justified not only by reason of the special distinction of Professor Thayer, but also by reason of the light which it throws upon the attitude of his generation of teachers towards the aims and methods of legal education." Mark DeWolfe Howe, *Preliminary Note, The First Law School Lecture of James Bradley Thayer*, 2 J. Legal Educ. 1, 1 (1949).

12. "In fact, as recognized in *Schakner*, an issue can be beyond the scope of arbitration not only by reason of language in the arbitration agreement but also by reason of a prior adjudication." *Peregrine Fin. Group v. Ambuehl*, 722 N.E.2d 723, 727 (Ill. App. Ct. 1999).

13. "The judge charged the jury in general terms (among other things) that each defendant could be found guilty on each indictment against him not only by reason of his own individual acts but also by reason of his participation with one or more of the other defendants in a joint venture." *Massachusetts v. Savoy*, 488 N.E.2d 31, 32 (Mass. App. Ct. 1986).

Appendix C
Additional Examples: *based on*

1. "Based not only on common sense but also his experience as a narcotics officer and his previous work in the neighborhood, Officer Devlin concluded that what happened on that street corner was probably a drug transaction." *Pennsylvania v. Dunlap*, 555 U.S. 964, 967 (2008) (Roberts, C.J., dissenting from the denial of *cert*.).

2. "Resisting this point, the dissent rejects the expert testimony that problems with the IV administration of sodium thiopental would be obvious, testimony based not only on the pain that would result from injecting the first drug into tissue rather than the vein, but also on the swelling that would occur." *Baze v. Rees*, 553 U.S. 35, 60 n.6 (2008) (Roberts, C.J.) (citations omitted).

3. "The Court's holding is not only based on a misreading of our retroactivity cases, but also on a misunderstanding of the nature of retroactivity generally." *Danforth v. Minnesota*, 552 U.S. 264, 303 (2008) (Roberts, C.J., dissenting).

4. "*Russell* cannot be so easily dismissed. Our holding in that case was based not only on the text of § 409, but also on 'the statutory provisions defining the duties of a fiduciary, and the provisions defining the rights of a beneficiary.'" *Varity Corp. v. Howe*, 516 U.S. 489, 523 (1996) (Thomas, J. dissenting).

5. "What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been overappropriated, claims based not only on present uses but

on projected additional uses as well." *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945).

6. "The Trial Judge stated clearly that his evaluation of credibility was based not only on what the Court felt was a misrepresentation but on demeanor and all other factors which might influence a trier of fact in judging credibility." *Somlo v. United States*, 416 F.2d 640, 643 (7th Cir. 1969).

7. "[The witness's] awareness of the situation was based not only on reliable information but concretely upon his own investigation as well." *Matthews v. United States*, 407 F.2d 1371, 1378 (5th Cir. 1969).

8. "Such conclusion is based not only on our finding that the State of Alabama's objections to the regulation issued by the Secretary are without merit but also upon our finding that the Secretary in issuing such regulation was clearly acting within its rule-making power conferred upon it by statute." *Gardner v. Alabama*, 385 F.2d 804, 817 n.8 (5th Cir. 1967).

9. "These regulations contain tables of fire-resistive assemblies which are to a considerable extent not only based on fire texts, but in most instances on several years of field experience." Ralph E. Carlson, *The Fire Marshal's Point of View on Fire Tests*, American Society for Testing and Materials, Symposium on Fire Test Methods (1962) 121, 129 (1963), *available at* http://tinyurl.com/FireMrshl (last accessed March 20, 2013).

10. "Affirming the trial judge's admission of the testimony, the Wisconsin Supreme Court said it was modifying its rule to recognize the 'realities of modern medical practice' under which a physician 'makes his diagnosis based not only on his objective findings made on examination, but also with due regard to the state-

ments made by the patient both as to his history and as to his subjective complaints.'" *Evidence … medical testimony*, 50 ABA J. 777, 777 (Aug. 1964), *available at* http://tinyurl.com/ABAJnl (last accessed March 20, 2013).

11. "Similarly, conflict may occur within the juvenile court clinical teams where only the psychiatrist may submit reports to the court, which are, however, based not only on his own findings but also on those of his team members." R.G. Andry, *The Problem of Teamwork: Some Contributions from Social Psychology*, 1 Tadeusz Grygier et al., eds., Criminology in Transition: Essays in Honour of Hermann Mannheim 127, 129 (1965), available at http://tinyurl.com/RGAndry (last accessed March 20, 2013).

12. "The Federation has long supported the plan which calls for managerial control of installations using dangerous amounts of fissionable material. Its support of this plan is based not only on narrow technical problems of atomic energy but especially on broader arguments of human motivation." Robert E. Marshak, *Present State of the UN Negotiations on Atomic Energy*, 4 Bulletin of the Atomic Scientists No. 1 at 2, 2 (Jan. 1948), *available at* http://tinyurl.com/Marshak (last accessed march 20, 2013).

Appendix D
Additional Examples: *on the basis of*

1. "Under the Guidelines, a defendant convicted of conspiracy may be sentenced not only on the basis of his own conduct, but also on the basis of the 'conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.'" *United States v. Garcia*, 909 F.2d 1346, 1349 (9th Cir. 1990) (quoting U.S.S.G. § 1B1.3 cmt. n.1).

2. "Fundamentally, Barnette was not entitled to the information contained on the disputed documents, not only on the basis of privilege but also because the reasons for the prosecutors' strikes were fully aired in open court and on the record during voir dire." *United States v. Barnette*, 644 F.3d 192, 210 n.* (4th Cir. 2011).

3. "Here, the district court made the determination of reasonableness on the basis of not only the presumptive validity of market forces, but also the affidavits of the parties which assured the court that rates had been negotiated, supporting documentation had been reviewed and pertinent questions asked." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 775 (7th Cir. 2010).

4. "In the habeas proceeding, Hall attacked his conviction not only on the basis of the evidentiary use of the fruits of the search, but also on the basis that his confession, used at the trial, was coerced and inadmissible." *Hall v. Warden, Md. Penitentiary*, 364 F.2d 495, 496 n.6 (4th Cir. 1966).

5. "When, as here, a statute does not require that a particular kind of rule making be on a record made after a public hearing, the Commission is not confined to evi-

dence presented in some formal manner. It may act not only on the basis of the comments received in response to its notice of rule making, but also upon the basis of information available in its own files, and upon the knowledge and expertise of the agency." *Cal. Citizens Band Ass'n v. United States*, 375 F.2d 43, 54 (9th Cir. 1967).

6. "Thus, Davidoff is likely to succeed in its trademark infringement claim not only on the basis of CVS's interference with Davidoff's quality control, but because CVS is selling under Davidoff's mark goods that are materially different from Davidoff's genuine trademarked product." *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 246 (2d Cir. 2009).

7. "An alien may be eligible for asylum not only on the basis of persecution by a governmental group, but also on the basis of persecution by non-governmental group that the government cannot control." *Domingo-Francisco v. U.S. Att'y Gen.*, 322 Fed. Appx. 849, 850 (11th Cir. 2009).

8. "We also observe that Mr. Schwimmer in his earlier deposition testimony believed the advertisements were run not only on the basis of what the advertising agent told him, but also because he assumed Sonam would not otherwise have issued the credit." *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 45 (2d Cir. 1980).

9. "In *Merriam v. Kunzig*, we recognized that an unsuccessful bidder for a government contract had standing to challenge an adverse procurement decision, not only on the basis of his own rights but those of the public as well." *Sea-Land Serv., Inc. v. Brown*, 600 F.2d 429, 432 (3d Cir. 1979) (citation omitted).

10. "At trial, Clark challenged the 117 patent not only on the basis of invalidating activity under 35 U.S.C. § 102(b), but also on the basis of obviousness as that term is defined by 35 U.S.C. § 103." *Clark Equip. Co. v. Keller*, 570 F.2d 778, 796 (8th Cir. 1978).

11. "*Robinson* and *Gustafson* permit the search of the *person* incident to a custodial arrest not only on the basis of possible subjective fear of the arresting officer, but on well-established principles governing a search incident to lawful arrest." *United States v. Stevens*, 509 F.2d 683, 689 n.7 (8th Cir. 1975).

12. "We conclude that an oral agreement for charter of a ship, such as involved in this case, is not sufficient to allow the Government to recover in a damage action for breach of contract. The applicable statute and regulations require a written agreement. We reach this conclusion not only on the basis of the statute and regulations, but also on two additional factors. " *United States v. Am. Renaissance Lines, Inc.*, 494 F.2d 1059, 1067 (D.C. Cir. 1974).

Appendix E
Additional Examples: *on account of*

1. "Quiktrip has adopted the position that the plaintiff was terminated not only on account of the lost checks, but also for the loss of approximately $ 150.00 on December 19, 1989. Therefore, Quiktrip maintains that plaintiff's grievance would have been denied notwithstanding that the checks were found." *Ruiz v. Quiktrip Corp.*, Civil Action No. 91-2483-EEO, 1993 U.S. Dist. LEXIS 7587, at *7 (D. Kan. May 28, 1993).

2. "Courts will, of course, reconsider a decided case not only on account of newly discovered evidence and to correct a clear error or prevent manifest injustice—which grounds we have just commented upon—but also on account of an intervening change in controlling law." *LiButti v. United States*, 178 F.3d 114, 119 (2d Cir. 1999).

3. "We have held that persecution 'on account of' political opinion includes persecution not only on account of political opinions that the petitioner actually holds, but also on account of opinions that the persecutor falsely attributes to the petitioner" *Canas-Segovia v. INS*, 902 F.2d 717, 729 (9th Cir. 1990) (Leavy, J., concurring specially).

4. "Further, the evidence of bad acts toward the victim is relevant to the existence of the 'heinous, atrocious, or cruel' aggravating circumstance because it tended to show the victim feared her husband and endured psychological torment during the attack, not only on account of the danger to her own life but also that to the life of her son, who tried to stop his father's attack." *North Carolina v. Syriani*, 428 S.E.2d 118, 143-44 (N.C. 1993).

5. "In passing, Azcarate's brief asserts that he was persecuted not only on account of his political opinion, but also on account of his membership in a particular social group" *Azcarate v. U.S. Att'y Gen.*, 221 Fed. Appx. 932, 937 n.2 (11th Cir. 2007).

6. "Coastal argues that expedition is essential not only on account of FOIA's mandate but because without access to the documents, Coastal will be prejudiced in the DOE enforcement proceedings." *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 982 (3d Cir. 1981).

7. "And [the witness]was damaging to Yarbrough not only on account of the Bussey jailhouse conversation, but also because he testified to the payment of money to Yarbrough in Calvin Davis' van." *Yarbrough v. Warden, Mansfield Corr. Inst.*, Case No. 3:08-cv-123, 2009 U.S. Dist. LEXIS 131356, at *68-69 (S.D. Ohio Dec. 28, 2009).

8. "Generally speaking, track structure may be retired not only on account of physical exhaustion from use but also due to obsolescence stemming from technological advances or the abandonment of a particular line." *Chesapeake & Ohio R.R. Co. v. Comm'r*, 64 T.C. 352, 359 (1975).

9. "Judge Coxe found that the defendants' 1929 code was to a substantial extent copied from the 1912 code of Hartfield. He reached this conclusion not only because of a large number of substantially identical phrases that are in the two codes and certain sequences of phrases which he thought significant but also on account of a considerable number of common errors." *Hartfield v. Peterson*, 91 F.2d 998, 999 (2d Cir. 1937).

10. "In the case at bar, causation has not been established. This is true not only on account of the considerable number of past employers of the decedent, engaged in the same operations where he was exposed to the same hypothetical dangers, without any clear showing that he contracted this disease while at National Cabinet Company but, even more importantly, for the reason that without any scientific evidence of causation there is likewise an absence of any statistical basis for opinion based on *post hoc, ergo propter hoc*, as claimant's physician admits, and as is clearly apparent." *Miller v. Nat'l Cabinet Co.*, 168 N.E.2d 811, 817 (N.Y. 1960).

11. "The passage which has been quoted from Wigmore is important not only on account of his authority and clarity, but also for the reason that it was followed in *People* v. *Del Vermo* (*supra*)." *New York v. Marks*, 160 N.E.2d 26, 28 (N.Y. 1959).

12. "It is then urged that plaintiff was entitled to go to the jury not only on account of the inference of negligence arising from the application of res ipsa loquitur but on the failure of defendant to warn plaintiff of the hidden peril and also on the inference of negligence that might arise from the facts and circumstances." *Terrell v. First Nat'l Bank & Trust Co.*, 226 P.2d 431, 436 (Okla. 1950).

13. "The majority's decision, in effect, to overrule *Young* is particularly troublesome, not only on account of its sua sponte character, but also because the parties incorporated *Young*'s definition of 'paying quantities' into their contract." *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 282 (Pa. 2012) (citation omitted).

14. "[The witness] was evidently prejudiced against Plaintiff not only on account of her attempt to foreclose his mortgage, but because he lost most of Elliott's business when she took charge." *Young v. Levy*, 32 S.E.2d 889 (S.C. 1945).

Appendix F
Additional Examples: *determinative*

1. "Furthermore, in the regulatory scheme applicable to this case, the Defendant's ultimate decision to deny certification as a DBE must be upheld if the decision can be sustained on any of the three determinative issues of contribution, independence, or control." *Shearin Constr. v. Mineta*, 232 F. Supp. 2d 608, 615 (E.D. Va. 2002).

2. "Even in its final opinion it relied upon one ground that we consider utterly insubstantial …. Since we regard the Commission's principal justification, which we validate below, to have been independently determinative, reliance upon this erroneous ground does not require remand for reconsideration." *De Perez v. FCC*, 738 F.2d 1304, 1309 n.6 (D.C. Cir. 1984).

3. "Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct …." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).

4. "The Court sees two independently determinative flaws in the Government's election to predicate its request on the SCA, rather than on a probable cause warrant under Fed. R. Crim. P. 41 …." *In re Application of the United States for an Order Directing Provider of Elec. Communication Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585, 601 (W.D. Pa. 2008).

5. "*Russ* differs factually from the case at bar in several determinative ways and is, therefore, distinguishable." *Bondarenko v. Astrue*, 129 Soc. Sec. Rep. Service 866 (M.D. Fla. 2008).

6. "We have not detailed the merits of Ms. Shen's claims for relief from removal because this petition for review involves two determinative procedural flaws." *Yingwei Shen v. Holder*, 370 Fed. Appx. 915, 916-17 (10th Cir. 2010).

7. "Several determinative factors existed in *Resorts* that do not exist in the instant case." *Air Cargo, Inc. Litig. Trust v. i2 Techs., Inc.* (*In re Air Cargo, Inc.*), 401 B.R. 178, 187 (Bankr. D. Md. 2008).

8. "We accordingly hereby certify the following two determinative questions of law to the Supreme Court of Texas. We note that either of these questions could be determinative of the outcome of this appeal, but that if one question is answered in the affirmative, the other will no longer be determinative of the instant appeal." *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739, 751 (5th Cir. 2011).

9. "The district court erred in relying on *Evans* and its progeny. These cases are inapposite in two determinative respects." *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326-27 (9th Cir. 1991) (citation omitted).