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## Mitigating the Impact of Title VII's New Retaliation Standard: The Americans with Disabilities Act After University of Texas Southwestern Medical Center v. Nassar

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MITIGATING THE IMPACT OF TITLE VII'S NEW  
 RETALIATION STANDARD: THE AMERICANS WITH  
 DISABILITIES ACT AFTER *UNIVERSITY OF TEXAS  
 SOUTHWESTERN MEDICAL CENTER V. NASSAR*

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## INTRODUCTION

The Supreme Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar* imposed a heightened standard of proof for causation in Title VII retaliation claims,<sup>1</sup> and there is a possibility that courts could import this standard into the Americans with Disabilities Act (ADA).<sup>2</sup> Although *Nassar*, on its face, is limited to Title VII, because the ADA and Title VII have similar statutory language and goals, and because of the expansive reasoning employed by the *Nassar* majority, it is easy to imagine that *Nassar* may impact the ADA. Any effect *Nassar* may have on the ADA should be prevented.

Title VII prohibits employment discrimination “because of” a protected status, that is, the employee’s race, color, sex, religion, or national origin.<sup>3</sup> Title VII also prohibits employer retaliation “because of” an employee’s participation in legal proceedings against or opposition to illegal employment practices.<sup>4</sup> Similar “because of” language in the ADA prohibits disability discrimination and retaliation against people with disabilities.<sup>5</sup>

The meaning of “because of” as it relates to the principles of causation is ambiguous. In *Nassar*, the Supreme Court interpreted the “because of” language in Title VII to require the application of a “but for” causation standard to retaliation claims even though the “because of” language in status-based discrimination claims uses a “motivating factor” standard.<sup>6</sup> “But for” causation is a traditional tort rule<sup>7</sup> that, for a retaliation claim, requires proof that the adverse employment action would not have occurred in the absence of the employer’s intent to retaliate.<sup>8</sup> The “but for” standard is generally understood to be substantially harder to prove than the

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1. 133 S. Ct. 2517, 2534 (2013) (establishing a “but-for” causation standard).

2. 42 U.S.C. § 12101 (2012).

3. *Id.* § 2003-2(a).

4. *Id.* § 2000e-3(a). For further discussion in greater detail, see *infra* Part I.A.

5. *Id.* §§ 12112(a), 12203(a).

6. *Id.* § 2000e-3(a); see *Nassar*, 133 S. Ct. at 2534.

7. *Nassar*, 133 S. Ct. at 2525.

8. *Id.* at 2528.

“motivating factor” standard,<sup>9</sup> which requires showing only that the employer’s improper motive was one factor, even if there were multiple factors in an adverse employment action.<sup>10</sup>

*Nassar* thus established a confusing paradigm in which the same actions by an employer will be analyzed differently if used to prove Title VII status-based discrimination as opposed to retaliation. The analysis may also vary if the retaliation was based on disability versus a Title VII protected status. Consider the following, greatly oversimplified hypothetical situation.<sup>11</sup>

Rosie has a disability. Though she occasionally shows up to work late, she is generally a good employee at the ABC Corporation. Rosie asks her male supervisor, Sam, to accommodate her disability. After making this request, she overhears Sam speaking with another male employee. Sam says, “The women in this company are so needy. Can you believe that Rosie asked me to accommodate her disability? This company would be much better without any women or people with disabilities.” Later, Rosie confronts Sam and says, “I heard what you said about women and people with disabilities in the workforce. I’m going to report you!” Several days later, Sam terminates Rosie’s employment, citing her tardiness as justification.

Rosie sues the ABC Corporation for discrimination because of sex under Title VII<sup>12</sup> and discrimination because of disability under the ADA.<sup>13</sup> She also claims retaliation under both Title VII and the ADA.<sup>14</sup> What result?

Courts would apply a “motivating factor” standard of causation to determine whether Sam’s actions were “because of” Rosie’s sex.<sup>15</sup> Most courts would apply the same “motivating factor” standard to Rosie’s disability discrimination claim as well.<sup>16</sup> In light of this standard, Rosie probably has a colorable claim for both her Title VII

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9. See, e.g., *id.* at 2526 (“[The motivating factor standard], of course, is a lessened causation standard.”).

10. 42 U.S.C. § 2000e-2(m); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

11. Although evidence of discrimination is rarely this clear, Rosie’s situation is intended to illustrate that, even with clear facts, *Nassar* greatly complicates employment discrimination litigation.

12. 42 U.S.C. § 2000e-2(a) (2012).

13. *Id.* § 12112(a).

14. *Id.* § 2000e-3(a); § 12203(a).

15. *Id.* § 2000e-2(m); *Price Waterhouse*, 490 U.S. at 241 (1989).

16. See *infra* note 187.

and ADA discrimination claims. Based on Sam's comments, she could reasonably argue that her sex and her disability were "motivating factors" in Sam's decision to discharge her.

In contrast, the results are less predictable for Rosie's retaliation claims. Under *Nassar's* new "but for" standard, Rosie may have difficulty proving that her termination would not have occurred in the absence of Sam's intent to retaliate. Furthermore, whether Rosie's ADA retaliation claim will receive the same judicial treatment as her Title VII retaliation claim turns on whether courts decide to import the "but for" standard that *Nassar* adopted into the ADA context. This Note considers that potential difference, arguing that the causation standard for proving retaliation under both Title VII and the ADA should be the same as that for proving status-based discrimination—namely, the "motivating factor" standard, not the "but for" standard the *Nassar* Court adopted.<sup>17</sup>

In addition to showing that the Supreme Court strayed from previous understandings of the precedent when it held in *Nassar* that Title VII retaliation plaintiffs are required to prove "but for" causation, this Note argues that the "but for" test should not be applied to retaliation claims in the context of other civil rights laws, with a particular focus on the Americans with Disabilities Act. Building on previous scholarship, this Note argues against the general application of a "but for" causation standard to discrimination claims of all kinds.<sup>18</sup> This Note carves out its own niche by suggesting several practical solutions to limit the potential negative effects of the *Nassar* holding. This Note is also the first to show how importing *Nassar's* "but for" causation standard into ADA retaliation claims would thwart the goals of the ADA. This is an important area of focus because the similarities between the ADA and Title VII might lead an impatient court or an unsophisticated advocate to

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17. 133 S. Ct. 2512, 2528 (2013).

18. See, e.g., S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 608-09 (2001) (pointing to differences between the ADA and Title VII); John D. Rue, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2705 (2003) (analyzing and critiquing the "but for" test). But see David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 908 (2010) (pointing out similarities between the ADA and Title VII).

improperly conflate the two and import *Nassar's* reasoning into an ADA claim, thereby unduly burdening an ADA plaintiff's civil rights. This Note contributes to the scholarship that recognizes the important differences between the ADA and Title VII,<sup>19</sup> and argues against a wholesale importation of Title VII doctrine into the ADA.

This Note will proceed in four parts. Part I will briefly discuss Title VII and the *Nassar* case. Part II will advance textual and public policy explanations for why the impact of the *Nassar* decision on future ADA cases should be mitigated, primarily arguing that it would be unjust and against public policy to entrench *Nassar's* flawed analysis by importing it into the ADA. Part III of this Note will propose two plausible and practical methods of mitigating the impact of the *Nassar* case on future ADA and Title VII cases: (1) abrogating the *Nassar* decision through legislative action or (2) judicially distinguishing *Nassar* from the ADA context, cabining its analysis to Title VII. Part IV will address potential counterarguments. By adopting this Note's proposals, courts and Congress would promote the principles of clarity, consistency, and justice in Title VII and the ADA.

## I. BACKGROUND

### A. Title VII Background

Title VII is one of eleven titles of the landmark Civil Rights Act of 1964.<sup>20</sup> Title VII prohibits discrimination by employers on the basis of race, color, religion, sex, or national origin.<sup>21</sup> Generally, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees" for a significant portion of the year.<sup>22</sup> In addition to prohibiting status-based discrimination, Title VII also prohibits retaliation, which it defines as discrimination against an employee because the employee

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19. See, e.g., Malloy, *supra* note 18, at 608-09.

20. 42 U.S.C. § 2000e.

21. *Id.* § 2000e-2(a).

22. *Id.* § 2000e(b). Notably, this definition excludes: Indian Tribes; some departments and agencies of the District of Columbia (per 5 U.S.C. § 2102); and private membership clubs, except labor organizations. *Id.* Although Title VII originally exempted federal employers, this exemption has since been abolished. *Id.* § 2000e-16.

opposed an employment practice made unlawful by Title VII or made a charge of unlawful employment practices.<sup>23</sup> The “because of” language has proven to be both important and contentious in the litigation history of Title VII.<sup>24</sup> In *Price Waterhouse v. Hopkins*, the Court decided that “because of” should be interpreted broadly to establish a “motivating factor” causation standard.<sup>25</sup>

In the *Price Waterhouse* decision, six Justices agreed that a plaintiff proves his or her claim of status-based discrimination if he or she can prove that discrimination was a “motivating factor” in the adverse employment decision that harmed the plaintiff, even if other factors also played a part.<sup>26</sup> However, the *Price Waterhouse* plurality also described an affirmative defense for employers. Once a plaintiff met the “motivating factor” standard, the burden of persuasion would shift to the employer to show that it would have acted the same way, regardless of its improper motive.<sup>27</sup> Under the *Price Waterhouse* decision, if an employer could prove this “same decision” defense, it was wholly absolved of liability.<sup>28</sup> Neither plaintiffs nor defendants were entirely satisfied by the *Price Waterhouse* decision. Although the “motivating factor” standard was a positive result for plaintiffs, the “same decision” defense was helpful for employers.

In response to *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991 (“1991 Amendments”), which, in part, abrogated the portion of *Price Waterhouse* that allowed the employer an absolute affirmative defense once a plaintiff had proved the existence of an impermissible “motivating factor.”<sup>29</sup> Congress replaced the absolute defense from *Price Waterhouse* with a quasi-affirmative defense, limiting remedies but maintaining liability.<sup>30</sup> After the 1991 Amendments, if an employer can prove that it would have taken the same actions regardless of motive, remedies are

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23. 42 U.S.C. § 2000e-3.

24. *E.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

25. 490 U.S. at 241-42.

26. *Id.*

27. *Id.* at 258.

28. *Id.*

29. *Gross*, 557 U.S. at 178 n.5.

30. 42 U.S.C. § 2000e-5(g)(2) (2012).



limited to declaratory and injunctive relief, as well as limited attorney's fees and costs.<sup>31</sup>

The 1991 Amendments also confirmed the validity of *Price Waterhouse's* "motivating factor" causation standard by inserting the following language into Title VII: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>32</sup> Congress inserted this text into the statutory section containing the status-based antidiscrimination provision, namely § 2000e-2.<sup>33</sup> Congress's decisions about where exactly to place this language within the text of Title VII would become very important when the question of Title VII causation standards for retaliation came before the Supreme Court in *Nassar*.<sup>34</sup>

### *B. Factual History of Nassar*

In 1995, Dr. Naiel Nassar, an internal medicine and infectious diseases specialist of Middle Eastern descent, was hired as both a faculty member at the University of Texas Southwestern Medical Center ("University") and a staff physician at the Parkland Memorial Hospital ("Hospital").<sup>35</sup> The affiliation agreement between the University and the Hospital required the Hospital to offer empty staff physician posts to University faculty members.<sup>36</sup> In 2004, Dr. Beth Levine was hired as the University's Chief of Infectious Diseases Medicine, which made her Dr. Nassar's ultimate, though not direct, supervisor.<sup>37</sup> Dr. Gregory Fitz, University Chair of Internal Medicine, was Dr. Levine's immediate supervisor.<sup>38</sup> Dr.

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31. *Id.* § 2000e-5(g)(2)(B).

32. *Id.* § 2000e-2(m).

33. *Id.*

34. See discussion *infra* Part I.D.

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

36. *Id.*

37. *Id.*

38. *Id.*

Nassar's allegations of discrimination and retaliation arose from Dr. Levine's and Dr. Fitz's actions.<sup>39</sup>

Dr. Nassar's complaint alleged that Dr. Levine held a bias against Dr. Nassar that manifested, among other ways, by undeserved scrutiny of his billing practices and productivity, as well as by Dr. Levine's statement, "Middle Easterners are lazy."<sup>40</sup> Due to this perceived bias, Dr. Nassar made arrangements with the Hospital to continue working at the Hospital without being on the University faculty, which would remove him from Dr. Levine's supervision.<sup>41</sup> In July 2006, Dr. Nassar resigned his faculty post.<sup>42</sup> Dr. Nassar sent a letter to Dr. Fitz explaining his reasons for departing from the University faculty, namely Dr. Levine's harassment.<sup>43</sup> In response, Dr. Fitz protested Dr. Nassar's employment offer from the Hospital, citing the affiliation agreement between the Hospital and the University.<sup>44</sup> After Dr. Fitz's protestations, the Hospital withdrew its offer to Dr. Nassar.<sup>45</sup> Nassar sued, claiming that the University discriminated against him on the basis of race and religion leading to constructive discharge.<sup>46</sup> Dr. Nassar also claimed that the University retaliated against him for complaining about Dr. Levine's national origin harassment.<sup>47</sup>

### *C. Procedural History*

At trial, the jury found for Dr. Nassar on both his status-based discrimination claim and his retaliation claim.<sup>48</sup> On appeal, the Fifth Circuit found insufficient evidence to support Dr. Nassar's constructive discharge claim, but affirmed the verdict on Dr. Nassar's retaliation claim under the theory that retaliation claims require proof merely that a retaliatory motive was a "motivating

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39. *Id.*

40. *Id.*

41. *Id.* at 2523-24.

42. *Id.*

43. *Id.* at 2524.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

factor” in the adverse employment decision, not the “but for” cause.<sup>49</sup> Thus, even if non-retaliatory factors—such as incorrect billing practices or low productivity—contributed to the University’s decision to interfere with Nassar’s offer from the Hospital, Dr. Nassar proved his case by showing that the retaliatory motive was a contributing factor.

#### *D. Supreme Court Decision*

The Supreme Court reversed the Fifth Circuit, holding in a hotly contested 5-4 decision:

Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test [“motivating factor” standard] stated in § 2000e-2(m) [of Title VII]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.<sup>50</sup>

To support its holding, the Court articulated a primary textual argument in three parts and two non-text-based arguments.

##### *1. Primary Textual Argument*

After framing the issue by invoking the basic principles of tort law that guided its decision, the Court embarked on a narrow textual analysis of Title VII’s § 2000e-2 (prohibiting status-based discrimination) and § 2000e-3 (prohibiting retaliation).<sup>51</sup> The Court’s textual analysis argued three main points.

First, after conceding that Title VII defines retaliation as an “unlawful employment practice,” the majority held that the application of the “motivating factor” standard to unlawful employment practices does not include retaliation.<sup>52</sup> The majority reached this conclusion by pointing out that the text immediately surrounding

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49. *Id.*

50. *Id.* at 2533.

51. *Id.* at 2524-25. Commentators have questioned the premise that tort principles apply to employment discrimination analyses. See *infra* Part II.A.1.

52. *Nassar*, 133 S. Ct. at 2528.

the “motivating factor” provision specifically addressed only the five protected statuses—race, color, religion, sex, and national origin—but does not specifically address retaliation.<sup>53</sup>

The Court further supported the argument that the unlawful employment practice of retaliation is separate from the unlawful employment practice of status-based discrimination by citing to *Gross v. FBL Financial Services*.<sup>54</sup> The Age Discrimination in Employment Act (ADEA) and Title VII both prohibit discrimination “because of” the respective statutes’ protected trait or traits.<sup>55</sup> In contrast to *Price Waterhouse*, the *Gross* Court interpreted the “because of” language in the ADEA to apply a “but for” causation standard.<sup>56</sup> The *Gross* Court found it significant that Title VII was amended to apply the “motivating factor” standard.<sup>57</sup> Unlike Title VII, the ADEA does not have an express “motivating factor” provision.<sup>58</sup> Based on this textual difference, the *Gross* Court refused to apply Title VII’s “motivating factor” standard to the ADEA.<sup>59</sup> The majority in *Nassar* found a parallel between the ADEA and Title VII’s anti-retaliation section, which lacks an express causation standard, in order to apply *Gross*’s “but for” standard to Title VII retaliation claims.<sup>60</sup>

Second, the majority argued that Congress intended to hold retaliation to a different standard than status-based discrimination by placing the 1991 Amendments’ “motivating factor” provision in a section that does not expressly mention retaliation.<sup>61</sup> Looking at the structure of Title VII, the majority found determinative the fact that the “motivating factor” provision could have been, but was not, placed in the anti-retaliation provision when Congress enacted the 1991 Amendments.<sup>62</sup>

Third, the majority found that the relevant precedent was inconclusive because previous cases looked at statutes without

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53. *Id.*

54. *Id.* at 2526-29 (discussing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

55. 29 U.S.C. § 623(a)(1) (2012); 42 U.S.C. § 2000e-2(a)(1) (2012).

56. 557 U.S. 167, 176 (2009).

57. *Id.* at 174.

58. *Id.*

59. *See id.* at 174-75.

60. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013).

61. *Id.* at 2529.

62. *See id.*

express anti-retaliation provisions.<sup>63</sup> The majority argued that interpretations of broadly worded antidiscrimination statutes to include retaliation are not determinative when a statute expressly prohibits retaliation.<sup>64</sup> The majority thereby justified applying a different causation standard to retaliation by distinguishing Title VII from the precedential cases on specificity.<sup>65</sup>

## 2. *Secondary Policy Arguments*

In the last part of its analysis, the majority strayed from arguments grounded in the text of Title VII and its underlying policies. First, the majority invoked the heavy caseloads of courts across the country, arguing that holding retaliation to the lessened “motivating factor” standard would open the floodgates of litigation and clog the courts with frivolous retaliation claims.<sup>66</sup>

Second, the Court dismissed the argument that the Equal Employment Opportunity Commission’s (EEOC) guidance rationales for applying a “motivating factor” causation standard should be given deference.<sup>67</sup> The Court principally argued that the EEOC failed to address the particular interplay of the status-based discrimination and anti-retaliation sections. For this reason the Court concluded that the EEOC guidance lacked the persuasive force required to receive deference.<sup>68</sup> With these arguments as justification, the Court reversed the Fifth Circuit and applied a heightened “but for” standard of causation to Title VII retaliation claims.

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63. *See id.* at 2529-31.

64. *See id.*

65. *See id.*

66. *Id.* at 2531.

67. *Id.* at 2533.

68. *Id.* at 2533; *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of such a[n agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

## II. THE IMPACT OF *NASSAR* SHOULD BE MITIGATED

The text, structure, and intent of Title VII counsel against the application of the “but for” standard to retaliation claims. Important public policy considerations, highlighted by the hypothetical with Rosie, similarly counsel against the “but for” standard. This Part will argue that the Supreme Court’s application of the “but for” analysis standard to Title VII retaliation claims in *Nassar* should be legislatively overruled or, at the very least, limited to the Title VII retaliation context to avoid negative effects extending to other civil rights laws, particularly the Americans with Disabilities Act.

### A. *The Court’s Reasoning in Nassar Strays from Previous Understandings of the Precedent*

There are three significant flaws in the *Nassar* Court’s reasoning: (1) employment discrimination is not a basic tort as the Court implied in *Nassar*;<sup>69</sup> (2) the Court’s treatment of *Gross* is unconvincing;<sup>70</sup> and (3) the Court abandons the well established common understanding that retaliation is just one type of discrimination,<sup>71</sup> which renders the Court’s reliance on the structural separation of the status-based antidiscrimination section and the anti-retaliation section of Title VII misplaced.

#### 1. *The Court’s Assumption that Discrimination Is a Tort Is Unfounded*

In *Nassar*, the Court assumed that analysis of Title VII claims should fundamentally follow the analysis in basic tort claims, which usually requires showing that the harm was but-for the defendant’s actions.<sup>72</sup> This, the Court argued, justified the use of the “but for”

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69. See *Nassar*, 133 S. Ct. at 2524-25.

70. *Id.* at 2526-27.

71. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (“Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subjected to differential treatment.”); *Discrimination by Type*, U.S. EEOC, <http://www.eeoc.gov/laws/types/index.cfm> [<http://perma.cc/KB5E-SCG2>] (listing retaliation as a type of discrimination).

72. *Nassar*, 133 S. Ct. at 2525 (citations omitted).

standard in Title VII retaliation claims, given that tort was “the background against which Congress legislated in enacting Title VII, and [tort rules] are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself.”<sup>73</sup>

The Court’s assumption ignored the fact that employment discrimination claims are not basic tort cases,<sup>74</sup> which is why specialized legislation has been passed to give substance to such claims.<sup>75</sup> Indeed, as Professor Charles Sullivan notes, “[d]iscrimination maps onto no obvious tort.... Statutes are, almost by definition, passed to meet shortcomings in the common law.”<sup>76</sup> Therefore, the Court’s foundational assumption that Title VII analysis cleanly corresponds with traditional tort doctrine is likely false<sup>77</sup> and immediately sets the Court’s entire analysis on shaky ground.

The Court fails to satisfactorily explain why the “but for” standard should still be considered “the default rule[] [Congress] is presumed to have incorporated” because there does exist an “indication to the contrary in the statute itself.”<sup>78</sup> Even if Congress did originally envision the “but for” test as the causation standard for Title VII, this original assumption was abrogated by the 1991

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73. *Id.*

74. Sandra Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013) (“Employment discrimination claims do not fit within any traditional tort and therefore do not align well with traditional articulations of proximate cause.”).

75. This is not to say that tort and civil rights are mutually exclusive, but antidiscrimination claims are fundamentally Commerce Clause constitutional claims, not tort claims. See 42 U.S.C. § 2000e(a) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce.”); see also Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2142 (2007) (stating that the “primary focus” of Title VII is “economic loss caused by a change in employment status”).

76. Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432 nn.1-2 (2012).

77. See Sandra Sperino, *The Tort Label* (working paper), available at <http://perma.cc/4S5E-QV4J>, at 2 (“The Court counterintuitively assumes that even though the discrimination statutes change the common law, at-will employment relationship, Congress meant to retain common law meanings for statutory words. This argument is facially problematic. It is made even more so by the fact that the Supreme Court did not interpret the ADEA or Title VII through a common law lens during the first three decades after their enactment.”).

78. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (“[Tort rules] are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself.”). The statute expressly includes the words “an unlawful practice is established when ... race, color, religion, sex, or national origin was a *motivating factor* for any employment practice.” 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

Amendments, when Congress added the “motivating factor” provision.<sup>79</sup> Furthermore, the fact that Congress passed the 1991 Amendments so soon after introducing the “motivating factor” standard in *Price Waterhouse* undermines the Court’s argument that “but for” causation is the “default rule[] [Congress] is presumed to have incorporated.”<sup>80</sup> If Congress assumed the “but for” standard applied, it would not have so quickly affirmed *Price Waterhouse*’s “motivating factor” standard.

The Court’s conclusion that Title VII retaliation claims should be subject to the traditional tort “but for” causation standard is unpersuasive. Following this unconvincing employment-discrimination-is-a-tort argument, the Court next looked to the controversial *Gross* case for support.<sup>81</sup>

## 2. *The Court’s Reliance on Gross Is Unsound*

*Gross* examined the same question presented in *Price Waterhouse*, but in the ADEA context: what does “because of” mean?<sup>82</sup> As explained above,<sup>83</sup> in *Gross*, the Court declined to adopt the “motivating factor” interpretation endorsed by the *Price Waterhouse* plurality and instead adopted the “but for” causation test from Justice Kennedy’s dissent in *Price Waterhouse*.<sup>84</sup> The *Gross* Court explained, “[t]extual differences between Title VII and the ADEA ... prevent[ed] ... appl[ication] [of] *Price Waterhouse* ... to federal age discrimination claims [in *Gross*].”<sup>85</sup> The principal textual difference is the lack of the “motivating factor” language in the ADEA, which was added to Title VII in 1991.<sup>86</sup>

However, the foundation of the Court’s holding in *Nassar* appears to rely on the exact opposite conclusion:

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79. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m) (2012)). Of course, this is the principal question in *Nassar*: Does the “motivating factor” standard in § 2000e-2(m) also apply to § 2000e-3, or not? *Nassar*, 133 S. Ct. at 2525. As shown below, the answer to this should be yes, the “motivating factor” standard should apply to retaliation claims as well.

80. *Nassar*, 133 S. Ct. at 2525.

81. *See id.* at 2526-28.

82. *Id.* at 2527 (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 172 (2009)).

83. *See supra* text accompanying notes 56-63.

84. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 & n.2 (2009).

85. *Id.*

86. *See id.* at 174.



Given the lack of any meaningful textual difference between the text in this statute [Title VII's retaliation provision] and the one in *Gross* [the ADEA], the proper conclusion ... is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.<sup>87</sup>

In other words, the Court holds that because the retaliation section of Title VII contains the same “because of” language as the ADEA section at issue in *Gross*, unmodified by an express “motivating factor” provision, the *Gross* reasoning applies.

It is disingenuous to apply *Gross*'s restrictive reading of the ADEA back to a Title VII provision after *Gross* emphatically rejected the argument that Title VII interpretations apply to the ADEA.<sup>88</sup> Nearly identical “because of” language exists in both § 2000e-2 and § 2000e-3. Section 2000e-2(a) states: “It shall be an unlawful employment practice for an employer to ... discriminate against any individual ... *because of* such individual's race, color, religion, sex, or national origin.”<sup>89</sup> Section 2000e-3(a) states: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... *because* [the employee] has opposed any practice made an unlawful employment practice by this [title].”<sup>90</sup>

However diligently the Court attempts to distance itself from *Price Waterhouse*'s interpretation of “because of” in the Title VII context by relying on *Gross*, *Price Waterhouse* is valid and applicable to the issue in *Nassar*. *Price Waterhouse* concluded that “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ as does [Petitioner], is to misunderstand them.”<sup>91</sup> Therefore, the *Nassar* Court's finding of significance in the statutory location of the “motivating factor” standard<sup>92</sup> “misunderstand[s]”

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87. *Nassar*, 133 S. Ct. at 2528.

88. *See Gross*, 557 U.S. at 173-75.

89. 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

90. *Id.* § 2000e-3(a) (emphasis added).

91. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). In an accompanying footnote, the Court explained the misunderstanding by distinguishing *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), on the basis that a citation to the “but for” standard in *McDonald* merely held that proving “but for” causation was sufficient, not necessary. *Price Waterhouse*, 490 U.S. at 240 n.6.

92. *See Nassar*, 133 S. Ct. at 2527 (citing *Gross*, 557 U.S. at 178 n.5).

Congress's intent in codifying that language.<sup>93</sup> Supposing the absence of the 1991 Amendments' codification of the "motivating factor" language, the Court would presumably apply the same analysis interpreting § 2000e-2 to § 2000e-3 given the lack of any meaningful textual difference between the two sections.<sup>94</sup> It is therefore reasonable to conclude that the "motivating factor" standard in § 2000e-2 applies equally to § 2000e-3 because the fundamental analysis behind the interpretation of § 2000e-2 from *Price Waterhouse* contains language nearly identical to that in § 2000e-3.

When Congress affirmed the "motivating factor" standard in the 1991 Amendments, the proper construction of Title VII was not altered. Congress did nothing more than confirm that aspect of the Court's interpretation of the statute in *Price Waterhouse*. If Congress had intended to contradict the *Price Waterhouse* reasoning and apply different causation standards to retaliation and status-based discrimination, it would have done so explicitly. When, however, Congress chooses to preserve language that has been interpreted in case law, that choice implies an acceptance of those previous interpretations and imports them into the new legislation—here, the amended Title VII.<sup>95</sup> Therefore, it is more logical to assume that, when drafting and enacting the 1991 Amendments, Congress did not see the need to expressly confirm that courts should interpret "because of" consistently within Title VII.

Instead of justifying the application of *Gross*, as the *Nassar* Court argued,<sup>96</sup> *Price Waterhouse* and the 1991 Amendments invalidated *Gross*'s analysis to the circumstances in *Nassar*. The 1991 Amendments recognized and explicitly accepted *Price Waterhouse*'s interpretation of Title VII's "because of" language.<sup>97</sup> It is of no great

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93. See *Price Waterhouse*, 490 U.S. at 240.

94. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("The meaning ... of certain words or phrases may only become evident when placed in context.... It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'").

95. See *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context.").

96. See *Nassar*, 133 S. Ct. at 2527.

97. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m) (2012)) (adopting the same burden of proof standard—a "motivating factor"—from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

import that this was codified only in the same section of the statute that *Price Waterhouse* originally analyzed.<sup>98</sup> *Gross* should be distinguished because the *Gross* Court was comparing two different statutes, not two different sections of the same statute.

With the foundational bases of the Court's reasoning now undercut, all that remains is the majority's textual argument, which fails upon an examination of the relevant precedent.

### 3. *The Court's Textual Argument Is Incorrect*

The *Nassar* Court's textual argument was that the "motivating factor" language does not apply to the retaliation prohibition because retaliation is distinct from status-based discrimination.<sup>99</sup> With this strict interpretation, the *Nassar* decision strays from the time-honored understanding that courts must give liberal construction to civil rights statutes meant to provide broad and sweeping protections against discrimination.<sup>100</sup> Even when a retaliation prohibition is unarticulated in a statute, the Court has consistently construed antidiscrimination laws to afford higher protection against retaliation than it does in *Nassar*.<sup>101</sup>

In Title VII, however, Congress was presumably particularly concerned about retaliation because it went through the trouble of specifically articulating the prohibition in the statute.<sup>102</sup> As Justice Ginsburg stated in dissent, "[i]t is strange logic," to interpret Title VII's specific prohibition of retaliation in § 2000e-3(a) as weaker than unarticulated prohibitions of retaliation in more general civil rights laws that have been read in by the Court.<sup>103</sup>

The case of *Sullivan v. Little Hunting Park, Inc.*, provides one such example of the Court reading a protection against retaliation

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98. 42 U.S.C. § 2000e-2(m) (2012).

99. See *Nassar*, 133 S. Ct. at 2528-29.

100. See NATIONAL COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES, NO. 4, BROAD OR NARROW CONSTRUCTION OF THE ADA, 2-3 (2002), available at <http://perma.cc/A45E-Q6EQ> ("A clear tradition of American law is that civil rights laws and other remedial statutes are to be construed liberally to achieve their remedial purposes.... Strict interpretation is the exact opposite of the customary application of liberal or broad interpretation to civil rights laws.")

101. See *Nassar*, 133 S. Ct. at 2537-38 (listing cases).

102. 42 U.S.C. § 2000e-3(a).

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

into a broadly worded antidiscrimination statute.<sup>104</sup> In *Sullivan*, the Court found a protection against retaliation in 42 U.S.C. § 1982,<sup>105</sup> which simply states that “[a]ll citizens ... shall have the same right ... as is enjoyed by white citizens ... to ... property.”<sup>106</sup> The Court reasoned that “[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, ... from which § 1982 was derived.”<sup>107</sup>

The Court similarly held in *Jackson v. Birmingham Board of Education*, a Title IX case, “Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subjected to differential treatment.”<sup>108</sup> As a result, “it is not only appropriate but also realistic to presume that Congress expected its enactment [of Title IX] to be interpreted in conformity with [*Sullivan*].”<sup>109</sup> Thus, based on *Sullivan*, the Court decided that a narrow construction of Title IX would be inconsistent with the intent of that statute, and a proscription of retaliation was read into Title IX.<sup>110</sup>

The Court further confirmed that retaliation is simply a form of discrimination by reading into the ADEA a prohibition on retaliation in *Gomez-Perez v. Potter*.<sup>111</sup> In *Gomez-Perez*, the Court explained, “What *Jackson* said about the relationship between *Sullivan* and the enactment of Title IX can be said as well about the relationship between *Sullivan* and the enactment of the ADEA.”<sup>112</sup>

Finally, in *CBOCS West, Inc. v. Humphries*, the Court held that retaliation for race discrimination constitutes discrimination based on race under 42 U.S.C. § 1981.<sup>113</sup> In its reasoning for expanding the principle to § 1981 that it had been developing through *Sullivan*, *Jackson*, and *Gomez-Perez*, the Court explained that “[w]hile the

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104. 396 U.S. 229 (1969).

105. *Id.* at 237.

106. 42 U.S.C. § 1982.

107. *Sullivan*, 396 U.S. at 237 (citation omitted).

108. 544 U.S. 167, 173-74 (2005).

109. *Id.* at 176 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)).

110. *See id.*

111. 553 U.S. 474 (2008).

112. *Id.* at 485.

113. 553 U.S. 442 (2008).

*Sullivan* decision interpreted § 1982, our precedents have long construed §§ 1981 and 1982 similarly.”<sup>114</sup>

Assuming the Court was earnest in its conclusions in *Sullivan*, *Jackson*, *Gomez-Perez*, and *CBOCS*, retaliation would be proscribed by § 2000e-2's prohibition of discrimination in “any employment practice,”<sup>115</sup> even if § 2000e-3 did not exist. Thus, the structural separation of the express prohibition on retaliation and the “motivating factor” language is not determinative,<sup>116</sup> especially considering the intent of the 1991 Amendments that added the “motivating factor” standard to strengthen Title VII's protections against discrimination.<sup>117</sup>

The *Nassar* Court's attempt to distinguish the *Sullivan-Jackson-Gomez-Perez-CBOCS* line of cases was unpersuasive. The Court wrote: “[T]he laws at issue in ... *Jackson*, and *Gómez-Pérez* were broad, general bars on discrimination.... [W]hen Congress' treatment of the subject of prohibited discrimination was both broad and brief, its omission of any specific discussion of retaliation was unremarkable.”<sup>118</sup> *Nassar* gave no convincing reasons to explain why an express prohibition of retaliation is remarkable or to justify why such an express prohibition should provide less protection against retaliation than an implied prohibition.<sup>119</sup>

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114. *Id.* at 447.

115. 42 U.S.C. § 2000e-2(m) (2012).

116. Statutory structure and language is important to consider, but it is rarely dispositive. When a bill is drafted, it must go through several committees, which will often alter language to broker political compromises. See *Schoolhouse Rock!: I'm Just a Bill* (ABC television broadcast Mar. 27, 1976). Also, lobbying groups, who want specific wordings or interpretations beneficial to their immediate interests, heavily influence the text of statutes. See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 423 (1988). Thus, it is unwise to place anything more than an easily rebutted presumption that a statute's text is *sine qua non* of the legislature's intent.

117. The 1991 Amendments were intended to provide additional protections against discrimination and respond to a number of Court decisions that cut back on the scope and effectiveness of Title VII. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.) (“[T]o amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws.”); see also John M. Husband & Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881, 881 (1992) (“The motivation for the 1991 legislation was to reverse five U.S. Supreme Court decisions handed down in 1989 ... [and] two decisions from the 1991 Supreme Court term.”).

118. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013).

119. See *id.* at 2541 (Ginsburg, J., dissenting) (“It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII,

Title VII's express retaliation provision is not evidence that Congress intended to treat retaliation on the basis of race, color, religion, sex, or national origin differently than retaliation under a broadly worded anti-discrimination statute.<sup>120</sup> Such a conclusion would be illogical, considering the purpose of anti-discrimination civil rights laws—to eradicate discrimination prophylactically.<sup>121</sup> To the contrary, if any inference is to be drawn from Congress's distinct prohibition of retaliation in Title VII, it should be that Congress was expressing its conclusion that retaliation because of race, color, religion, sex, or national origin in the workplace is especially offensive. Since the Court applied the same standard to both status-based discrimination and retaliation in other statutes, the same should apply to Title VII.

### *B. Public Policy Arguments*

When policy considerations are realistically analyzed, it becomes more evident that *Nassar* may have unintended negative effects. First, like Rosie from the hypothetical in this Note's Introduction, plaintiffs who allege both Title VII status-based discrimination and Title VII retaliation, or a mixture of Title VII and ADA claims, will feel the impact of *Nassar* most acutely. The *Nassar* “but for” standard will limit employers' exposure to liability at the expense of plaintiffs like Rosie. Second, the Court's “floodgates of litigation” argument was unpersuasive.<sup>122</sup> Third, the Court's argument that the application of a “motivating factor” standard would legitimize frivolous claims of retaliation was similarly unpersuasive.<sup>123</sup>

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Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation.”).

120. 42 U.S.C. § 2000e-2(a)(1); *see* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (rejecting a “mechanical reading” of § 1981's statutory language).

121. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (recognizing that anti-retaliation provisions are essential to securing “a workplace where individuals are not discriminated against”).

122. *See Nassar*, 133 S. Ct. at 2531.

123. *See id.* at 2532.

1. *“But for” Causation Will Allow Retaliation in Many Circumstances*

The *Nassar* decision places plaintiffs like Rosie from the introductory hypothetical in a confusing situation. The same actions on the part of Sam led to both of Rosie’s claims. As Part I.A above explains, Rosie must prove that her sex and disability statuses were “motivating factors” in Sam’s decision to fire her.<sup>124</sup> However, after *Nassar*, if she is to prevail on her retaliation claim, she must prove that her statement to Sam was the “but for” cause of her termination.<sup>125</sup> This, confusingly, establishes two standards that she must apply to the same factual scenario.<sup>126</sup>

A real world application of “but for” causation to retaliation claims will allow retaliation to occur unpunished in many cases, which “undermine[s] the effectiveness ... and conflict[s] with the language and purpose of the anti-retaliation provisions.”<sup>127</sup> The “but for” standard after *Nassar* establishes the de facto requirement that a plaintiff prove that a retaliatory motive was the *sole* reason for his or her adverse employment action. This directly contradicts Congress’s clear intent in enacting the “because of” language, having specifically considered and rejected “solely’ ... ‘because of’” language.<sup>128</sup> For example, the new “but for” test for retaliation will effectively allow employers to discriminate with impunity against employees whose employment is about to be terminated, or in similar circumstances that are likely to arise.<sup>129</sup> Assume that the hypothetical Rosie’s poor attendance records put her at risk of termination. Although this legitimate reason for Rosie’s dismissal exists, Sam’s retaliatory motive that arose following Rosie’s confrontation was clearly a “motivating factor,” but not necessarily the “but for” cause of her termination. Notwithstanding Sam’s

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124. See discussion *supra* Part I.A.

125. *Nassar*, 133 S. Ct. at 2528.

126. See *id.* at 2535 (Ginsburg, J., dissenting).

127. Peter M. Panken, *Retaliation Update: Don’t Get Mad, Don’t Get Even, Just Be Savvy*, SH014 ALI-ABA 973, 1053 (July 25-27, 2002).

128. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 n.7 (1989) (citing 110 Cong. Rec. 2728, 13,837 (1964)).

129. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (“[I]t would be destructive of this purpose of the antiretaliation provision [to maintain access to remedies] for an employer to be able to retaliate with impunity against an entire class of acts under Title VII.”).



motive to retaliate, Rosie may still have been terminated. This necessarily denies Rosie the ability to prove retaliation under the new *Nassar* “but for” standard.<sup>130</sup> In this situation, Rosie would effectively be forced to prove that Sam’s retaliatory motive was the one and only factor in Sam’s decision to terminate her.

The *Nassar* Court unconvincingly dismissed the problem demonstrated by Rosie’s situation, which is similar to the situation Dr. Nassar faced. The Court reasoned, “If it were proper to apply the motivating-factor standard to respondent’s retaliation claim, the University might well be subject to liability on account of Dr. Fitz’s [poor motives], even if it could also be shown that the terms of the affiliation agreement precluded ... hiring.”<sup>131</sup> This argument attempts to revive *Price Waterhouse*’s absolute “same decision” defense that was clearly rejected by the 1991 Amendments.<sup>132</sup>

In part, *Price Waterhouse* decided that if an employer could prove that it would have taken the same action against the employee notwithstanding the employer’s improper discriminatory motive, it was absolved of all liability.<sup>133</sup> Congress clearly abrogated this section of *Price Waterhouse* in the 1991 Amendments.<sup>134</sup> In the place of a complete elimination of liability with proof of the “same decision” defense, Congress enacted a limited remedies structure.<sup>135</sup> The remedies are limited to declaratory and injunctive relief, as well as limited attorney’s fees and costs; courts may not award damages or order admission, reinstatement, hiring, promotion, or payment if the employer proves that it would have made the same decision notwithstanding a discriminatory motive.<sup>136</sup>

This limited remedies structure is fair and effective. It strikes a careful and equitable balance between the right to an adequate remedy for victims of discrimination, and the rights of employers to avoid overcompensating plaintiffs. It may be true that if the “motivating factor” standard were applied without the limited

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130. See Rue, *supra* note 18, at 2681 (“An action is not a ‘but for’ cause of an injury if the injury would have come about regardless of the action.”).

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

132. Civil Rights Act of 1991, Pub. L. 102-166, § 107(b), 105 Stat. 1071, 1075-76 (2012) (codified at 42 U.S.C. § 2000e-5(g) (2012)).

133. *Price Waterhouse*, 490 U.S. at 242.

134. See Civil Rights Act of 1991 § 107(b).

135. 42 U.S.C. § 2000e-5(g) (2012).

136. *Id.*



remedies structure, plaintiffs would receive a financial windfall. However, in light of the limited remedies, implementing the “but for” standard in retaliation claims will simply award a windfall to defendants. Most importantly, the limited remedy structure is statutorily required.<sup>137</sup> The majority in *Nassar* failed to justify its attempt to revive, in the retaliation context, this expressly abrogated holding from *Price Waterhouse*.

Although the Court attempted to maneuver around Title VII’s established limited liability structure, the statute explicitly dismisses the Court’s concern that an employer might still be subject to liability after raising the “same decision” defense. The mere existence of a retaliatory motive subjects the employer to liability and allows a remedy to the affected employee.<sup>138</sup>

## 2. *The Court Justified Its Holding with an Unconvincing and Irrelevant Slippery Slope Argument*

The *Nassar* Court invoked the goal of fewer retaliation cases on courts’ dockets as a guiding principle behind its decision.<sup>139</sup> The Court argued that the application of the “motivating factor” standard to retaliation claims would open the floodgates of litigation.<sup>140</sup> Even setting aside the fact that this argument is generally understood to be a red herring and unnecessary alarmism,<sup>141</sup> the prediction is also incorrect.<sup>142</sup> Although raw statistics do show a moderate increase in retaliation claims since the last time this

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137. *Id.*

138. *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (explaining the “primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.”); *see also Price Waterhouse*, 490 U.S. at 241 (“Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.”).

139. *See* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531-32 (2013).

140. *See id.*

141. *See* Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation”*, 6 U. PA. J. CONST. L. 377, 378 (2003) (“[I]n almost all situations, the fear of increased litigation is not a valid judicial argument.”). Judge Richard Posner has “considered the effects of the caseload rise on federal judges,” and has concluded that judges that “mingl[e] ... caseload and substantive concerns ... compromise the perceived legitimacy of their role.” *Id.* at 390, 395.

142. *See id.* at 379 (“[F]loodgates arguments ... are not accompanied by an analysis tending to demonstrate that a certain judicial decision would, in fact, lead to a high amount of new federal court litigation.”).

“floodgates” argument was made,<sup>143</sup> retaliation claims were already on a steady rise.<sup>144</sup> This rise in claims is easily attributable to a moderate increase in employees asserting their rights; it is not evidence of a great number of people suddenly trying to game the system.<sup>145</sup> In other words, instead of asking why are there so many discrimination claims, the question should be why so few.<sup>146</sup> Empirical data suggest antidiscrimination legislation is woefully underutilized.<sup>147</sup> This rise in the number of employees asserting their rights is undoubtedly a positive step towards a just society; law and policy should encourage the robust enforcement of civil rights, not the reduction of civil rights protections that the *Nassar* decision effects.

Furthermore, the Court’s fundamental alteration of the retaliation standard itself will likely have the result of an uptick in retaliation claims, as people across the country will be forced to litigate to redefine the boundaries of this new doctrine.<sup>148</sup> As Justice Ginsburg’s dissent emphatically pointed out, this was stable ground before.<sup>149</sup> Now, after *Nassar*, plaintiffs will need to learn exactly which facts will satisfy “but for” causation and, most applicably to this Note, litigation will be necessary to define *Nassar*’s impact on other statutes, such as the Americans with Disabilities Act.

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143. Scholars and the public responded with the same “floodgates” argument when *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was decided.

144. See, e.g., Kelsey C. Crew, *Clearing the Air or Muddying the Waters? The Effect of Burlington Northern on Title VII Retaliation Litigation*, 58 LAB. L.J. 96, 108 (2007).

145. Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 665 (2005) (“[T]he dramatic rise of employment discrimination claiming that occurred in the 1990s can be attributed to a relatively small increase in the rate of claiming by aggrieved individuals.”).

146. See *id.*

147. See *id.*

148. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2537-38 (2013) (Ginsburg, J., dissenting).

149. *Id.* at 2537 (“[T]his Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation.”).

3. *The Realities of Civil Rights Litigation Demonstrate that a “Motivating Factor” Standard Would not Legitimize Frivolous Claims*

The Court ignored the unfortunate reality of civil rights litigation when it implied that loosening the causation standard for retaliation would legitimize frivolous claims and result in windfalls for plaintiffs.<sup>150</sup> In fact, it is extraordinarily rare for victims of retaliation to receive a remedy.<sup>151</sup> Even for straightforward retaliation claims, the procedural barriers often frustrate potential plaintiffs or set their claims up for failure.<sup>152</sup> For example, internal remedies must be exhausted before filing a claim with the EEOC, otherwise the employee risks allowing the employer an affirmative defense to liability for damages.<sup>153</sup> If the employer’s internal processes do not “operate to deflect employees from pursuing their claims,” employees must then file a formal complaint with the EEOC before pursuing litigation in a court.<sup>154</sup> Employees may pursue litigation themselves only after the EEOC has completed an investigation, determined that there is or is not reasonable cause, attempted informal resolution, and decided whether to bring a civil suit of its own. If the EEOC chooses not to bring suit itself, but determines the claim is valid, it must issue a “right to sue letter” to the aggrieved person.<sup>155</sup> This complex process will likely dissuade most, if not all, charging parties with truly frivolous claims from continuing with their suit. The *Nassar* Court ignored the fact that, even if an employee manages to successfully navigate the EEOC process, he or she faces the overwhelming statistical likelihood that he or she will lose in court.<sup>156</sup>

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150. See *Nassar*, 133 S. Ct. at 2532.

151. See Nielson & Nelson, *supra* note 145, at 668 (discussing how victims of discrimination “are often reluctant to complain,” and that “[t]hose who do complain seldom succeed”).

152. See, e.g., *id.* at 685-86 (“Employees who do not take advantage of their employer’s complaint process when they think they have been subjected to discrimination allow an affirmative defense for the employer.... [Internal complaint] offices may be more a symbolic signal that the corporation is complying with the law than an internal structure that actually produces good results for complaining employees.”).

153. See *id.* at 685-86; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

154. See Nielson & Nelson, *supra* note 145, at 686.

155. See 42 U.S.C. § 2000e-5(b), (f)(1) (2012).

156. See Equal Employment Opportunity Commission, *Retaliation-Based Charges FY 1997-FY 2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> [http://perma.

The Court also ignored that the same windfall-for-plaintiffs argument it made has been firmly rejected, albeit in the Americans with Disabilities Act context.<sup>157</sup> Professor Ruth Colker, in her extensive study of ADA case outcomes, found that, instead of being a windfall for plaintiffs, ADA plaintiffs overwhelmingly lose their suits.<sup>158</sup> Though the comparison between ADA cases and Title VII data is not perfect,<sup>159</sup> they are comparable enough to significantly undermine this aspect of the Court's reasoning.<sup>160</sup> It is unlikely that using the "motivating factor" causation standard would so drastically flip the data from a windfall for defendants to a windfall for plaintiffs.

Thus, far from being a legitimizing and windfall-creating standard, a "motivating factor" standard will only modestly increase allegations and plaintiff victories. This represents only a marginal increase of people asserting their rights. It is highly likely that countless examples of retaliation will still go unreported and unremedied.<sup>161</sup> With this in mind, this Note now turns to a forward-looking discussion on what can be done to mitigate *Nassar's* potential negative impact and to help more aggrieved employees find justice, at least in the ADA context.

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cc/NN73-ZQBY] (last visited Sept. 12, 2014) [hereinafter EEOC 1997-2013]; Equal Employment Opportunity Commission, *Retaliation-Based Charges FY 1992-FY 1996*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation-a.cfm> [<http://perma.cc/GH67-CZDN>] (last visited Sept. 12, 2014) [hereinafter EEOC 1992-1996].

157. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531 (2013) ("In addition lessening the causation standard could also contribute to the filing of frivolous claims."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 (1999) ("A senior editor at *Reader's Digest* asserted that plaintiffs 'have used the ADA to trigger an avalanche of frivolous suits clogging federal courts.'").

158. See Colker, *supra* note 157, at 99-100 (explaining that, "contrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases.... These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly").

159. See *id.* at 100 n.10.

160. See *id.* ("Employment discrimination cases, which are most analogous to the ADA cases studied ... were found to have a success rate of 22%").

161. See Nielson & Nelson, *supra* note 145, at 668 (discussing that victims of discrimination "are often reluctant to complain").

### III. PROPOSED METHODS OF MITIGATING *NASSAR*

The preceding Part showed that *Nassar* strayed from previous understandings of Title VII and that the effects of the decision should therefore be mitigated. This Part examines what can be done to address the problems with *Nassar*, especially as they relate to the Americans with Disabilities Act. Following an explanation of why *Nassar*'s reasoning is especially invalid in the ADA context, this Part presents two possible solutions to the *Nassar*'s failings.<sup>162</sup> These solutions are presented in descending order of efficacy, but in ascending order of possibility: (1) abrogate *Nassar* through new legislation and (2) distinguish the case to minimize its applicability to the ADA.

#### A. *Abrogate Nassar Through New Legislation*

Because the *Nassar* ruling is simply a restrictive interpretation of a federal statute, Congress should pass abrogating legislation to reverse it. Similarly, the EEOC could promulgate new regulations that specifically address its interpretive failings as the *Nassar* Court saw them.

##### 1. *New Civil Rights Laws Amendments*

The most effective solution to the threat that *Nassar* poses for civil rights enforcement is to amend Title VII and the Americans with Disabilities Act—and other civil rights statutes as well—to clarify that the “motivating factor” standard applies in retaliation claims.

In the aftermath of *Nassar*, Congress should once again pass an amendments act to restore Title VII to its intended effectiveness.<sup>163</sup>

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162. This Note will not address the argument that *Nassar* should simply be overturned because it is exceedingly unlikely that such will occur. Statistically, the Court very seldom directly overturns itself; this has happened only a handful of times in the history of the Court. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 224-44 tbl. 2-17 (5th ed. 2012).

163. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting) (“Today’s misguided judgment ... should prompt yet another Civil Rights Restoration Act.”); Michael C. Harper, *The Causation Standard in Federal Employment Law*:

This could be accomplished as simply as modeling a new sub-section in § 2000e-3 based on § 2000e-2(m). This subsection could read: “Retaliation is established when the complaining party demonstrates that discrimination for making charges, testifying, assisting, or participating in enforcement proceedings was a motivating factor for any employment practice, even though other factors also motivated the practice.” Although more elegant solutions exist,<sup>164</sup> the transposition of previously considered and duly enacted language from one section to another is least likely to require expending substantial amounts of precious political capital.<sup>165</sup>

Congress has similarly amended the ADA in response to the Supreme Court’s overly restrictive interpretations of the statute.<sup>166</sup> In response to overly restrictive interpretations of the definition of disability, Congress passed amendments to the ADA in 2008 to reassert its intent and prevent the Court from further weakening the ADA.<sup>167</sup> As suggested above for Title VII, Congress could simply add language to both the status-based antidiscrimination section

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Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991, 58 BUFF. L. REV. 69, 70-71 (2010) (“Congress might consider clarifying the applicability of a contributing or ‘motivating’ factor causation standard to the various anti-retaliation provisions in all federal employment statutes.”).

164. For example, restructuring the statute so that status-based discrimination and retaliation are both in one section should remove any doubt that retaliation should be treated the same as status-based discrimination. See Harper, *supra* note 163, at 70-71. But see William R. Corbett, *Calling on Congress: Take a Page from Parliament’s Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 142-43 (2013) (criticizing the “approach of simply fixing what it considers errant decisions” and proposing a comprehensive reform law).

165. For a law to pass in Congress, the least controversial approach is necessary because today’s Congress is the most polarized in history, and commentators point out that many in Congress “show[] little interest in the plight of victims of job discrimination.” Jeffrey Toobin, *Will Ginsburg’s Ledbetter Play Work Twice?*, NEW YORKER (June 25, 2013), <http://www.newyorker.com/online/blogs/comment/2013/06/ruth-bader-ginsburg-ledbetter-play.html> [<http://perma.cc/4TW2-VPGL>]; see also Dylan Matthews, *It’s Official: The 112th Congress Was the Most Polarized Ever*, WASH. POST WONKBLOG (Jan. 17, 2013, 11:07 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/> [<http://perma.cc/5AWM-SETN>].

166. See, e.g., ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(5), 122 Stat. 3553, 3554 (2012) (stating that the purpose of the Act was to reject the reasoning in several Supreme Court cases).

167. *Id.*

and the anti-retaliation section, stating that retaliation under the ADA is to be proved by a “motivating factor” standard.<sup>168</sup>

Though passing an abrogating civil rights amendment act is the most effective and straightforward means of minimizing *Nassar*’s impact on both Title VII and the ADA, in the current political climate, the reality of this proposed legislation passing is far from certain.<sup>169</sup> On the other hand, in response to another recent Supreme Court decision about the Voting Rights Act,<sup>170</sup> Congress quickly responded by scheduling hearings and considering methods of mitigating the impact of that decision.<sup>171</sup> This could indicate the willingness of Congress to come together in response to the *Nassar* decision as well. It remains to be seen how, if at all, Congress will respond to *Nassar*.

## 2. New Regulations

*Nassar* could also be addressed, in the ADA context at least, by promulgating new EEOC regulations that define “motivating factor” as the retaliation causation standard. This would be a practical fix that would not require the direct involvement of the divided Congress.<sup>172</sup>

Although the Court attacked the EEOC regulations, the *Nassar* decision did leave some room for the possibility of regulatory deference in the future, if different circumstances existed.<sup>173</sup> The *Nassar* Court ultimately rejected deference to the Title VII regulations, citing a lack of persuasive force required under the *Skidmore* deference standard, which requires administrative agencies to show consideration, persuasiveness, validity, and consistency before

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168. Incidentally, a well-drafted amendment could resolve the underlying circuit split on the issue of which causation standard applies in ADA claims. *See infra* note 187.

169. *See supra* note 165.

170. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

171. *See* Alexei Koseff, *Former Voting Rights Act Provision Gets Hearing in Senate*, L.A. TIMES (Jul. 17, 2013), <http://articles.latimes.com/2013/jul/17/nation/la-na-voting-rights-20130718> [<http://perma.cc/M4MU-ZCCX>]; Justin Sink, *House to Hold Hearing on Voting Rights Act*, THE HILL (Jul. 16, 2013, 12:01 PM), <http://thehill.com/blogs/blog-briefing-room/news/311215-house-to-hold-first-voting-rights-act-hearing-after-supreme-court-ruling> [<http://perma.cc/PMJ4-ZQDT>].

172. *See* 5 U.S.C. §§ 553, 801 (2012) (providing executive agencies the ability to promulgate interpretive rules of statutes without Congressional approval).

173. *See* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533-34 (2013).



courts will defer to agency interpretations.<sup>174</sup> However, if these setbacks are addressed in EEOC regulations for Title I of the ADA, deference should be given to the new regulatory interpretations.<sup>175</sup>

The Court faulted the EEOC Compliance Manual for Title VII for concluding that “the causation element of a retaliation claim is satisfied if ‘there is credible direct evidence that retaliation was a motive for the challenged action,’ regardless of whether there is also ‘[e]vidence as to [a] legitimate motive.’”<sup>176</sup> The Manual presents the fact that there is a division of authority among the courts on this issue, but concludes that “[c]ourts have long held that the evidentiary framework for proving [status-based] discrimination ... also applies to claims of discrimination based on retaliation.”<sup>177</sup> The *Nassar* Court faulted the EEOC Manual for presenting this rationale without addressing “the particular interplay among the status-based discrimination provision (§ 2000e-2(a)), the antiretaliation provision (§ 2000e-3(a)), and the motivating-factor provision (§ 2000e-2(m)).”<sup>178</sup> The Court found that this failure destroyed the EEOC Manual’s credibility.<sup>179</sup>

The Court’s analysis left open, though, the possibility that the EEOC could modify its regulations for the ADA to augment the persuasive force of those explanations, thereby creating a stronger argument for *Skidmore* deference in possible future litigation.<sup>180</sup> Amending ADA regulations would likely be a less confusing task

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174. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

175. *See id.*

176. *Nassar*, 133 S. Ct. at 2533-34 (citing 2 EEOC COMPLIANCE MANUAL § 8-II(E)(1), at 614:0007-614:0008 (2003)).

177. 2 EEOC COMPLIANCE MANUAL § 8-II(E)(1) (2003).

178. *Nassar*, 133 S. Ct. at 2533.

179. *Id.* If the EEOC addresses the Court’s concerns in the Title VII regulations, it is possible that the Court will then find *Skidmore* deference is appropriate, but this Note focuses on the more likely finding of *Skidmore* deference in the ADA Title I regulations.

180. The other elements of *Skidmore*, not expressly at issue here, are thoroughness, validity, and consistency. 323 U.S. 140. Though the “validity of reasoning” element likely faces a minor set back from the *Nassar* decision itself, the United States, through the Department of Justice, has consistently argued that the “motivating factor” standard applies throughout the ADA, which satisfies the consistency element. *See, e.g.*, United States Brief as Amicus Curiae Supporting Plaintiffs’ Motion to Reconsider the Jury Instructions at 3, *Zamora-Quezada v. HealthTexas Med. Grp. of San Antonio*, 34 F. Supp. 2d 433 (1998) (No. SA-97-CA-726-FB).



than addressing the “unique statutory interplay” in the Title VII regulations, which is complicated by the 1991 Amendments’ addition of the “motivating factor” standard to the antidiscrimination section, but not to the anti-retaliation section. The particular “statutory interplay” in Title VII is not present in the ADA, as there is no statutory imposition of a specific causation standard anywhere in the ADA.<sup>181</sup> Thus, the *Skidmore* element of consideration in the ADA context is more easily met than in the Title VII context. However, the EEOC would be remiss not to further bolster its case for *Skidmore* persuasiveness in the new ADA regulations by citing cases in the majority of circuits that apply the “motivating factor” standard<sup>182</sup> and by addressing the particular factors that make this standard especially appropriate in ADA cases. A strong argument could be made for *Skidmore* deference in the EEOC’s new regulations for the ADA if the preceding suggestions are followed.

*B. Distinguish Nassar from the ADA Because the ADA Is a Fundamentally Different Law than Title VII*

Though legislative or regulatory solutions are attractive, the most practical way to effectively mitigate the impact of the *Nassar* decision on the ADA is to tightly cabin its analysis to the specific facts of the case, thereby narrowing the broadly worded holding.

Expansion of *Nassar*’s flawed Title VII analysis into ADA jurisprudence is a rational concern from even a casual reading of the *Nassar* opinion. In part, this concern derives from the similarities between Title VII and the ADA. In fact, the ADA adopts Title VII’s powers, remedies, and procedures as its own for Title I of the ADA.<sup>183</sup> The ADA is further similar to Title VII because it includes discrete statutory language prohibiting retaliation: “No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter.”<sup>184</sup>

No definitive interpretation of this provision currently exists. The accompanying regulations implementing this provision of the ADA

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181. See Americans with Disabilities Act, 42 U.S.C. §§ 12101-03, 12111-17, 12131-34, 12141-50, 12161-65, 12181-89, 12201-13 (2012).

182. See *infra* note 187.

183. 42 U.S.C. § 12117(a).

184. *Id.* § 12203.

merely repeat the statutory language.<sup>185</sup> The interpretive guidance appendix to the regulations and the technical assistance manual accompanying Title I similarly prove to be unhelpful.<sup>186</sup>

The courts, too, provide only limited guidance. The circuits are split as to which standard applies to ADA retaliation claims, though the majority of circuits appear to apply the “motivating factor” standard.<sup>187</sup> At least two courts have had the “opportunity to apply *Nassar* to ADA retaliation claims,” and done so,<sup>188</sup> or predicted that a higher court will do so.<sup>189</sup> This is cause for concern that *Nassar*'s flawed reasoning will be categorically imported into the ADA's jurisprudence to address the lack of a definitive interpretation of the ADA's retaliation prohibition.<sup>190</sup> This would be improper.

Even though the ADA and Title VII share several textual and structural features, it is important to note that there are important differences between the statutes. The source of disability discrimination is fundamentally different from race, color, religion, sex, and

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185. 29 C.F.R. § 1630.12 (2013) (“It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.”).

186. See generally Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (2013).

187. The First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits follow the motivating factor standard, whereas the Second, Fourth, and Sixth Circuits use the “but for” test. See, e.g., *Black v. City of Honolulu*, 512 F. App'x 666, 669 (9th Cir. 2013); *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1180 (7th Cir. 2013); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1278 (11th Cir. 2008); *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008); *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003); *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003); *Heiman v. United Parcel Serv., Inc.*, 12 F. App'x 656, 664 (10th Cir. 2001); *Butler v. Exxon Mobil Corp.*, 838 F. Supp. 2d 473, 495 (M.D. La. 2012); *Nuskey v. Hochberg*, 730 F. Supp. 2d 1, 5 (D.D.C. 2010); *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 63 (D. Me. 1996), *aff'd*, 105 F.3d 12 (1st Cir. 1997); *Cromer v. Perdue Farms, Inc.*, 900 F. Supp. 795, 801 (M.D.N.C. 1994), *aff'd*, 65 F.3d 166 (4th Cir. 1995).

188. *Doan v. San Ramon Valley Sch. Dist.*, No. C 13-03866 CRB, 2014 WL 296861, at \*3 n.4 (N.D. Cal. Jan. 27, 2014).

189. *Rubano v. Farrell Area Sch. Dist.*, 991 F. Supp. 2d 678, 705 (W.D. Pa. 2014).

190. See SUSAN GROVER ET AL., EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK 54 (2d ed. 2014) (“On questions of retaliation, the courts very often read the statutes *in pari material*, meaning that precedent under one statute often guides courts in their decisions under other statutes.”).

national origin discrimination,<sup>191</sup> which makes the “motivating factor” standard particularly appropriate to ADA claims. In contrast to race or sex, for example, people often create false classifications for individuals with disabilities and then make negative assumptions about those individuals they arbitrarily and erroneously classify.<sup>192</sup> The actual limitations of people with disabilities are mostly irrelevant in making these negative assumptions.<sup>193</sup> Being gainfully employed is one of the most effective methods for individuals with disabilities to overcome these stigmas.<sup>194</sup> It would thus be unjust to use the more stringent “but for” causation standard in ADA cases, in which employers have, based on a false and socially constructed stigma, used an employee’s disability status or opposition to instances of disability discrimination as the basis for retaliation.

Not only is disability fundamentally different than the Title VII statuses, disability is also simply more prone to retaliation that is difficult to litigate.<sup>195</sup> For example, in at least some cases, the employer will retaliate without the affected employee recognizing his employer’s actions as retaliation. This may occur if the employee has an intellectual disability or is otherwise unable to perceive the causal relationship between his disability and his adverse employment action. There is also the difficulty of defining “disability”<sup>196</sup> or “essential job functions” for which accommodations are not

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191. See Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1436 (1986) (“[T]he problems of disadvantage in [the race, sex, age, and disability] sectors are qualitatively different.”).

192. See Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People With Disabilities*, 40 UCLA L. REV. 1341, 1357 (1993).

193. *Id.*

194. See 42 U.S.C. § 12101(a) (2012) (addressing the fact that disability does not diminish a person’s right to participate in society and that isolation and segregation of individuals with disabilities is a serious and pervasive social problem); see also Drimmer, *supra* note 192, at 1349-50 (“According to many sociologists, the major problem faced by people with disabilities is learning to conquer ... social stigma.”).

195. See Drimmer, *supra* note 192, at 1437-38. (contrasting the “brutal history of racism in America” with the “complex” treatment of people with disabilities).

196. See *id.* at 1438-39 (“Unlike ... victims of sex discrimination, [people with disabilities] do not constitute a coherent group.... [Also,] ‘handicapping’ conditions are, to a large extent, relative and socially defined characteristics, not absolute criteria.”).

required.<sup>197</sup> With this difficulty and subjectivity comes the possible trepidation of an employee with a disability failing to request an accommodation because she fears that her employer will say that the accommodation is unreasonable or that the job function is essential, and then terminate her in retaliation for requesting an accommodation.

Despite these important differences, federal courts have ignored them in the past and simply imported a Title VII rule into the ADA, with minimal analysis of its actual applicability.<sup>198</sup> For example, this occurred, to the detriment of ADA plaintiffs, in *Eckles v. Consolidated Rail Corporation*, when the Seventh Circuit used Title VII reasonable accommodation law relating to religious practices to interpret the ADA's reasonable accommodation for disabilities provision, notwithstanding the *Eckles* Court's own recognition that Congress had specifically instructed courts not to do this.<sup>199</sup> The *Eckles* Court thus "demonstrate[d] either a disregard for or ignorance of plainly expressed congressional intent."<sup>200</sup>

In the aftermath of *Nassar*, there is a possibility that the Court may repeat an *Eckles*-type error in the ADA retaliation context. In fact, *Nassar* itself seemed to be doing something similar in Title VII with its strange reliance on *Gross*, detailed above.<sup>201</sup> *Gross* decided that textual differences between the ADEA and Title VII counseled against importing Title VII's "motivating factor" standard into the ADEA. However, the *Nassar* Court cited *Gross* to argue that textual similarities between the ADEA and Title VII require the adoption of the ADEA's "but for" test for Title VII retaliation claims.

That the Court viewed the ADA and Title VII in the same light is also suggested by the *Nassar* Court's citation to the ADA as justification for the disjointed method of statutory construction it employed to interpret Title VII. Specifically, the Court wrote that: "Further confirmation of the inapplicability of § 2000e-2(m) [to § 2000e-3] may be found in Congress's approach to the [ADA] ... [which] include[s] an express antiretaliation provision ... [that]

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197. See Louis C. Rabaut, *The Americans with Disabilities Act and the Duty of Reasonable Accommodation*, 70 U. DET. MERCY L. REV. 721, 723 (1993) ("One of the most difficult tasks under the ADA is the determination of essential job functions.").

198. See Malloy, *supra* note 18, at 634 nn.147-49.

199. See *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996); *id.* at 635-36.

200. See Malloy, *supra* note 18, at 635.

201. See *supra* Part II.A.2.

shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so in clear textual terms.”<sup>202</sup>

This citation to the ADA only proves the immediately apparent fact that Title VII and the ADA both include discrete retaliation sections. However, the citation implies that the Court will interpret the ADA and Title VII interchangeably in the future, substantiating the concern that ADA retaliation law is at risk of being subsumed by *Nassar*’s erroneous “but for” standard. But again, the mere fact that Congress addressed retaliation “in clear textual terms”<sup>203</sup> in the ADA, as in Title VII, demonstrates nothing more than Congress’s expression of a particular disdain for employment retaliation based on disability, not an expression of congressional intent to treat retaliation differently than status-based discrimination.<sup>204</sup>

Therefore, the *Nassar* Court’s citation of the ADA as justification for its textual analysis of Title VII should not be used in the future to import the same logic into cases involving the ADA. The ADA is a different law that protects different interests than Title VII and should not be analyzed in the same way.<sup>205</sup> Courts should distinguish future ADA retaliation cases from *Nassar* on this basis.

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202. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. at 2517, 2531 (2013).

203. *Id.*

204. This particular disdain was possibly grounded in the growing societal acceptance and understanding of people with disabilities. *See* 42 U.S.C. § 12101(a) (2012).

205. *See* Malloy, *supra* note 18, at 635-36; *see also* *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008) (urging “employees and their counsel [to] be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.”).

## IV. COUNTERARGUMENTS

Critics may argue that civil rights laws are already overly plaintiff-friendly and that implementing the “motivating factor” standard will increase the cost to society of civil rights litigation.<sup>206</sup> These are improper angles from which to view this issue, and they are also inaccurate. Civil rights litigation is not plaintiff-friendly. In fact, the overwhelming majority of civil rights litigation results in a loss for the plaintiff.<sup>207</sup> In the ADA context, over 93 percent of litigation results in a loss for the plaintiff.<sup>208</sup> These statistics severely undermine the argument that employers must walk on eggshells to avoid upsetting overly sensitive employees just to avoid exposure to litigation.

Critics may also argue that “but for” causation is the most popular standard for retaliation claims among all statutes, especially claims governed by the *McDonnell Douglas* burden-shifting scheme.<sup>209</sup> The argument is that, because most courts use a “but for” test, and because some courts have applied the “but for” test to the ADA itself for status-based discrimination claims, all discrimination claims across all statutes should be governed by the “but for” test. This would, as the argument goes, vindicate the purposes of uniformity and prevent the flood of litigation that would occur under the “motivating factor” standard. However, uniformity for the sake of uniformity between civil rights laws is not necessarily a valid or desirable goal, especially when considering the fact that disability is fundamentally different than age or race or sex. This Note has

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206. See, e.g., *Nassar*, 133 S. Ct. at 2532.

207. See, e.g., EEOC 1997-2013, *supra* note 156; EEOC 1992-1996, *supra* note 156; Colker, *supra* note 157, at 100 n.10 (“[P]laintiff success rate in civil rights actions for a seven-year period (1978-1985) [were found] to range from voting rights cases (53%) to prisoner civil rights cases (14%) .... Employment discrimination cases, which are most analogous to the ADA cases studied ... were found to have a success rate of 22%.” (citing Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989))).

208. Colker, *supra* note 157, at 100 (“[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level.”).

209. Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 148-49 (1998).

shown that, especially in ADA retaliation situations, the “but for” standard unjustly limits employees’ rights and that the “flood of litigation” argument has been soundly rejected by both academics and judges.<sup>210</sup> In light of these considerations, the “motivating factor” test would be a valid standard to make consistent across Title VII and the ADA. However, the clarity and consistency that would result from such a standardization would promote the interests of protecting employees’ rights and uphold the intent of anti-discrimination legislation.

It is possible that the legislative remedies to *Nassar* that this Note proposes are insufficient. Michael C. Harper, in his 2010 article proposing a response to *Gross*, advocated for a comprehensive reconstruction of anti-discrimination legislation.<sup>211</sup> But many would view an overhaul of this magnitude as impracticable.<sup>212</sup> This Note takes a more practical approach. Although a comprehensive overhaul would certainly be preferred, especially in the current political climate, a small patch is simply more practical than an entirely new statutory structure.<sup>213</sup>

Finally, a cynic may point to the “solely by reason of” language in Section 504 of the Rehabilitation Act of 1973<sup>214</sup> to undermine this Note’s theme that disability discrimination claims should never be analyzed as starkly as Title VII retaliation claims post-*Nassar*. Since Congress previously enacted strict “but for” causation standards in the disability discrimination context, so the argument goes, a “but for” standard in the ADA would not be unprecedented or unacceptable. This point is easily dismissed. The Rehabilitation Act was amended in 1992, to parallel the recently enacted ADA.<sup>215</sup> Although Congress did not remove the “solely by reason of” language,

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210. See *supra* Part II.B.2.

211. Harper, *supra* note 163, at 70-71.

212. See Toobin, *supra* note 165 (pointing out that current political realities likely rule out even a small patch, much less a comprehensive overhaul).

213. See Corbett, *supra* note 164, at 136-37.

214. “No otherwise qualified individual with a disability ... shall, solely by reason of his disability ... be subjected to discrimination under any program or activity receiving federal financial assistance.” Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012).

215. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344; see S. Rep. No. 102-357, at 2, 7 (1992), reprinted in 1992 U.S.C.C.A.N. 3712, 3713, 3718 (stating that one purpose of the 1992 amendments to the Rehabilitation Act was “to ensure that the precepts and values embedded in the Americans with Disabilities Act are reflected in the Rehabilitation Act of 1973”).



this phrase was expressly superseded for employment claims: “The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990.”<sup>216</sup> As explained above, that standard is the “motivating factor” standard in the majority of the Circuits.<sup>217</sup> Thus, at least for claims of employment discrimination, the Rehabilitation Act’s “solely by reason” language poses no obstacle for, and indeed supports the continued use of, the “motivating factor” standard in ADA cases.<sup>218</sup>

In sum, the ADA protects different interests than Title VII, and even though the ADA is purportedly based on Title VII, Title VII jurisprudence should not be analogized to the ADA without thoughtful consideration.

#### CONCLUSION

Though critics of employee protection laws believe that retaliation should be more difficult to prove than asserted in this Note, this sentiment leads to decisions like *Nassar*. The Court in *Nassar* either misread or ignored the plain intent of Title VII by holding retaliation to a different, more stringent standard than status-based discrimination. The *Nassar* Court also failed to fully appreciate significant public policy concerns and the potential collateral impact the decision may have on other civil rights statutes, especially the Americans with Disabilities Act.

There are several ways to mitigate the impact of the *Nassar* decision. First, Congress should consider an amendments act to clarify that the “motivating factor” standard, which was statutorily

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216. 29 U.S.C. § 794(d) (2012).

217. See *supra* note 187.

218. It goes without saying that discrimination and retaliation do not occur only in the employment setting. Though beyond the scope of this Note, others have explained why Congress did not remove the “solely by reason of” language as it applies to instances of disability discrimination unrelated to employment. Lauren R. S. Mendonsa, *Dualing Causation and the Rights of Employees with HIV Under § 504 of the Rehabilitation Act*, 13 SCHOLAR 273, 310 (2010) (“Causation is generally not central to claims against providers of public services and accommodations, such as hospitals, grocery stores, and schools, for failing to accommodate people with disabilities, or, if it is, a stricter causation standard is less likely to impact defendant liability.”). As Ms. Mendonsa suggests, however, causation generally is central to claims against employers, as evidenced by *Nassar* itself. *Cf. id.*



imposed on status-based discrimination claims, also applies to retaliation claims. Similarly, the EEOC should consider promulgating new regulations regarding Title I of the ADA. The Court left room in its analysis for the possibility of regulatory deference if the regulations fit more strictly within the *Skidmore* rules. Finally, lower courts should distinguish *Nassar* to minimize its effect on the ADA. This third solution is not ideal, as it leaves the *Nassar* decision intact, to be possibly used against deserving plaintiffs. But it is likely the fastest and most achievable method of mitigating *Nassar*'s impact, which is necessary if the ADA is to maintain its integrity and efficacy in protecting the civil rights of individuals with disabilities. By adopting this Note's proposals, courts and Congress would promote the principles of clarity, consistency, and justice in both Title VII and the Americans with Disabilities Act.

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