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GROSS’ED OUT: THE SEVENTH CIRCUIT’S OVER-EXTENSION OF GROSS v. FBL FINANCIAL SERVICES INTO THE ADA CONTEXT

ALLISON P. SUES


INTRODUCTION

Congress has created a sprawling statutory landscape of antidiscrimination laws that prevent employers from considering certain protected characteristics when deciding workplace matters. Enacted in 1964, Title VII prohibits an employer from considering race, color, religion, sex, or national origin.1 Enacted in 1967, the Age Discrimination in Employment Act (ADEA) prohibits an employer from considering age.2 Finally, enacted in 1990, the Americans with Disabilities Act (ADA) prohibits employers from impermissibly considering disability.3 Though all three statutes feature unique substantive provisions, originally they each shared identical causation phrasing.4 Specifically, these three civil rights statutes collectively

4 42 U.S.C. §§ 2000e-2(a)(1), (2) (1988) (forbidding an employer to act adversely to an employee’s interests “because of such individual’s race, color,
prohibited employers from discriminating against any employee “because of” race, color, religion, sex, national origin, age, or disability.\(^5\) Congress and the Court have spoken definitively to the precise causation scheme of Title VII\(^6\) and the ADEA\(^7\) but remained largely silent as to the ADA. Without clear instructions, courts interpreting the ADA must look to relevant yet inconclusive guidance from the Title VII and ADEA contexts and determine whether either of these statutes’ divergent interpretations are applicable to the ADA.

I. ANTIDISCRIMINATION STATUTES: THE INTERPLAY OF SUPREME COURT DECISIONS, CIRCUIT CASE LAW, AND CONGRESSIONAL REACTIONS

A. Price Waterhouse v. Hopkins: Title VII’s Original Mixed-Motive Causation Framework

In 1989, the Supreme Court in *Price Waterhouse v. Hopkins* held that a plaintiff could meet its burden in a Title VII employment discrimination claim through a showing of mixed-motive causation.\(^8\) Amy Hopkins was a senior manager at the national accounting firm, Price Waterhouse.\(^9\) In 1982, a superior proposed her for partnership; her candidacy was neither accepted nor denied, but rather accepted for “reconsideration.”\(^10\) Her evaluations hinged on her aggressive and forthright nature, which led to both glowing praise and scathing...
criticism.\textsuperscript{11} While her strong character had caused the firm to secure a multi-million dollar contract with the state, it had also caused her co-workers and supervisors to describe her as macho, impatient, and difficult to work with.\textsuperscript{12}

The Court noted that the plaintiff could meet her burden under Title VII without showing that gender discrimination was the but-for cause of the employer’s decision to delay her candidacy.\textsuperscript{13} Most simply put, the Court stated, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them.”\textsuperscript{14} Instead, Hopkins could meet her burden through a showing of mixed-motive causation.\textsuperscript{15} Thus, even if the defendant’s decision relied on legitimate weaknesses in Hopkins’ credentials, Hopkins could still prevail if she could show that the defendant also relied on impermissible sexual stereotyping, a form of gender discrimination.\textsuperscript{16} However, the Court also held that once a plaintiff met her burden through a mixed-motive claim, the defendant had the opportunity to completely escape liability through an affirmative defense.\textsuperscript{17} Specifically, the employer will not be liable under Title VII if it shows that it would have made the same decision even in the absence of the discriminatory consideration.\textsuperscript{18}

\textbf{B. The 1991 Amendments: Congress’s Modification of Price Waterhouse’s Title VII Causation Framework}

Following the \textit{Price Waterhouse} decision, Congress passed the Civil Rights Act of 1991 (the 1991 Amendments), which, inter alia, responded to the \textit{Price Waterhouse} opinion.\textsuperscript{19} Part of its response

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  \item \textsuperscript{11} \textit{Id.} at 234–35.
  \item \textsuperscript{12} \textit{Id.} at 235.
  \item \textsuperscript{13} \textit{Id.} at 244.
  \item \textsuperscript{14} \textit{Id.} at 240.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 244, 251.
  \item \textsuperscript{17} \textit{Id.} at 246.
  \item \textsuperscript{18} \textit{Id.} at 244–45.
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codified the Court’s interpretation that “because of” supports a mixed-motive claim. Congress explicitly provided for such causation by exchanging the original Title VII causation language with:

Except as otherwise provided in this [title], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Notably, the 1991 Amendments did not alter the causation language in the ADA or ADEA, which remained “because of.”

The 1991 Amendments also responded to the Price Waterhouse decision by overriding its holding that an employer could present an affirmative defense following a plaintiff’s showing of mixed-motive causation. Whereas the Court’s holding had relieved an employer of all liability if it convinced the fact-finder that it would have taken the same action in the absence of illegal motive, Congress amended Title VII to authorize declaratory relief and attorney’s fees in such a situation. However, while ultimately liable, courts cannot grant the employee “damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment” if the defendant can show that legitimate considerations could independently support the challenged action.

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20 § 107(a), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)).
21 Id. (emphasis added).
23 § 107 (b)(3) (codified as amended at 42 U.S.C. § 2000e-5(g))
C. Circuit Court Approaches to ADA Causation Following Price Waterhouse and the 1991 Amendments

Following both Price Waterhouse and the 1991 Amendments, nearly all of the federal circuit courts, including the Seventh Circuit,26 applied mixed-motive causation to the ADA context.27 In doing so, they relied on both Price Waterhouse and the 1991 Amendments.28 Price Waterhouse had found the phrase “because of” to include mixed-motive claims, and the Amendments were construed to demonstrate congressional agreement with such an interpretation.29 With reinforcement from both the Court and Congress, federal circuit courts comfortably authorized mixed-motive claims under the ADA.30 The Sixth Circuit was the lone circuit to hold that in order for plaintiffs to recover under the ADA, they would need to show that their disability was the sole cause of the discrimination.31

D. Gross v. FBL Financial Services: ADEA’s But-For Causation Framework

In 2009, the Court revisited the issue of causation under employment discrimination statutes in Gross v. FBL Financial Services, which involved a claim brought under the ADEA.32 Jack

26 Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999); see Alek v. Univ. of Chi. Hosps., 54 F. App’x. 224, 225 (7th Cir. 2002) (unpublished).
27 Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 (9th Cir. 2005); Shellenberger v. Summit Bancorp., Inc., 318 F.3d 183, 187 (3d Cir. 2003); Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25 (1st Cir. 2002); Baird ex. rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Owen v. ThermaTool Corp., 155 F.3d 137, 139 n.1 (2d Cir. 1998); Doane v. City of Omaha, 115 F.3d 624, 629 (8th Cir. 1997); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996); see Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 965 (10th Cir. 2002).
28 Id.
29 Id.
30 Id.
31 Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 454 (6th Cir. 2004).
Gross had worked as a claims administrator director for FBL Financial Group since 1971. In 2003, Gross’s employer reassigned the fifty-four-year-old to a new position, filling his former duty with an employee in her early forties whom Gross had previously supervised. While the employer argued that the reassignment had been the product of a necessary corporate restructuring, Gross argued that the reassignment violated the ADEA because it was really a demotion based on his age. Following a trial, the jury found that by the preponderance of all of the evidence, age was a motivating factor in the employer’s decision to reassign Gross because it had played a part in the employer’s decision. The employer appealed, arguing that in order to sustain a finding of liability under mixed-motive causation, Gross would need to provide direct evidence that it had considered age in the reassignment.

The Supreme Court never reached the issue granted on certiorari; instead, the Court held that regardless of the type of evidence that ADEA plaintiffs produce, they cannot shift the burden to the defendant upon a mixed-motive assertion. As it did in Price Waterhouse, the Court interpreted the phrase “because of.” In direct contrast to its precedent twenty years prior, in Gross, the Court found the language to require a showing of “but-for” causation. The Court explicitly rejected Price Waterhouse as instructive authority because of the 1991 Amendments. It reasoned that where Congress amends one piece of legislation, but remains silent regarding similar statutes, it is presumed to have acted purposefully; thus, the Court found that Congress had intended Title VII’s amended causation scheme to operate differently from the ADEA’s untouched scheme.

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33 Id. at 2346.
34 Id. at 2346–47.
35 Id. at 2347.
36 Id.
37 Id.
38 Id. at 2348.
39 Id.
40 Id.
41 Id. at 2349.
42 Id.
In a particularly sharp-tongued dissent, Justice Stevens, joined by three other Justices, criticized the majority’s “crabbed interpretation” for blurring the lines of separation of powers and “engag[ing] in unnecessary lawmaking.” The dissent found the majority’s holding to be a usurpation of congressional discretion in order to effectuate a radical change in the policy of antidiscrimination statutes. Justice Stevens also criticized the majority for its poor legal reasoning: “Unfortunately, the majority’s inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress’ intent.” The dissent argued that Price Waterhouse was binding because it provided a relevant statutory analysis of the phrase “because of.” Additionally, the 1991 Amendments ratified this interpretation, thus reflecting congressional intent that antidiscrimination statutes should authorize mixed-motive claims. Finally, though the 1991 Amendments did override Price Waterhouse’s conclusion pertaining to the employer’s ultimate liability, the dissent quite logically stated that Price Waterhouse’s “affirmative defense did not alter the meaning of ‘because of.’”

E. Serwatka v. Rockwell Automation, Inc.: The Seventh Circuit’s Extension of Gross to the ADA Context

In Serwatka v. Rockwell Automation, Inc., the Seventh Circuit, in a unanimous opinion written by Judge Rovner, found that Kathleen Serwatka could not recover under the ADA despite the trial court’s conclusion that Rockwell had made an employment decision, at least in part, based on its perception that Serwatka was disabled. In January 1988, Serwatka began working at Rockwell Automation, a

43 Id. at 2357 (Stevens, J., dissenting).
44 Id. at 2353 (Stevens, J., dissenting).
45 Id.
46 Id.
47 Id. at 2354 (Stevens, J., dissenting).
48 Id. at 2355 (Stevens, J., dissenting).
49 Id. at 2354 (Stevens, J., dissenting).
50 591 F.3d 957, 963 (7th Cir. 2010).
worldwide manufacturer of industrial automation components.\textsuperscript{51} Around that time, she was diagnosed with a rotator cuff tear.\textsuperscript{52} As a result of this condition, Serwatka’s physician issued several work restrictions, including that her employer limit her to sedentary work and refrain from assigning her tasks that required her to lift more than ten pounds.\textsuperscript{53} Rockwell assigned her to the task of assembling drives, a job which she could perform while sitting.\textsuperscript{54} Over the years, these drives became obsolete, and the need for Serwatka’s duty declined accordingly.\textsuperscript{55}

There were notable factual disputes between Serwatka and Rockwell. For example, while Serwatka asserted that her physician lifted her work restrictions in 1999, Rockwell argued that it was unaware of her revised restrictions until 2004.\textsuperscript{56} Additionally, while Serwatka asserted that she no longer needed to be limited to sedentary tasks, Rockwell contended that it believed that her work restrictions continued to limit her ability to perform any jobs involving standing or walking.\textsuperscript{57} On June 16, 2004, Rockwell Automation terminated Serwatka’s employment.\textsuperscript{58}

Following a trial, the jury made two findings: (1) Rockwell “terminate[d Serwatka] due to its perception that she was substantially limited in her ability to walk or stand,” and (2) Rockwell would have “discharged [Serwatka] if it did not believe she was substantially limited in her ability to walk or stand, but everything else remained the same.”\textsuperscript{59} The Eastern District of Wisconsin, finding that the jury had

\textsuperscript{51} Brief and Required Short Appendix of Defendant-Appellant, Rockwell Automation, Inc. at 5, Serwatka v. Rockwell Automation, Inc., No. 08-4010 (7th Cir. Feb. 10, 2009), 2009 WL 927655.
\textsuperscript{52} Brief and Supplemental Appendix of Plaintiff-Appellee at 7, Serwatka v. Rockwell Automation, Inc., No. 08-4010 (7th Cir. March 17, 2009), 2009 WL 927656.
\textsuperscript{53} Id.
\textsuperscript{54} Brief of Defendant, supra note 51, at 5.
\textsuperscript{55} Id.
\textsuperscript{56} Brief of Plaintiff, supra note 52, at 7.
\textsuperscript{57} Id.; Brief of Defendant, supra note 51, at 5.
\textsuperscript{58} Brief of Plaintiff, supra note 52, at 7.
\textsuperscript{59} Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 958 (7th Cir. 2010).
established a cognizable mixed-motive ADA claim, had granted Serwatka declaratory relief and attorney’s fees.60

The Seventh Circuit reversed on appeal, holding that the ADA does not recognize mixed-motive causation.61 Judge Rovner noted that in the absence of the recently-decided Gross decision, the Seventh Circuit would have affirmed, continuing the circuit’s practice of finding mixed-motive claims viable under the ADA.62 In light of Gross, however, the Seventh Circuit found that because the ADA does not mimic Title VII’s “motivating factor” language, it, like the ADEA, requires a plaintiff to show but-for causation.

Lastly, of significance, Judge Rovner revealed in a footnote that Serwatka’s holding may not survive the effectiveness of the ADA Amendments, which changed the “because of” language in the ADA to “on the basis of.”64 Judge Rovner stated, “[w]hether ‘on the basis of’ means anything different from ‘because of,’ and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, are not questions that we need to consider in this appeal.”65

F. The Seventh Circuit’s Broad Treatment of Gross Outside the Antidiscrimination Context

The Seventh Circuit has understood Gross in extremely broad terms.66 Not only has it held that Gross disallows any

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61 Serwatka, 591 F.3d at 962.
62 Id. at 963 (“The district court certainly cannot be faulted for not anticipating the Supreme Court’s decision in Gross; our own prior decisions had held that mixed-motive claims were viable under the ADA . . . But in view of the Court’s intervening decision in Gross, it is clear that [Serwatka’s award] cannot be sustained”).
63 Id. at 962.
64 Id. at 962 n.1.
65 Id.
66 Id. at 961 (construing Gross to mean that “when another anti-discrimination statute lacks comparable language [to Title VII’s “motivating factor” phrase], a mixed-motive claim will not be viable under that statute”).
antidiscrimination statute to authorize mixed-motive causation absent Title VII’s “motivating factor” language, but it has also held that Gross disallows mixed-motive causation in statutory contexts entirely outside the realm of antidiscrimination. For example, in Serafinn v. Local 722, International Brotherhood of Teamsters, the Seventh Circuit mimicked Serwatka, holding that the Labor Management Reporting and Disclosure Act (LMRDA) did not allow for mixed-motive claims because its statutory language did not include the phrase “motivating factor.” Notably, the LMRDA, which does not deal with discrimination, is hardly analogous to the ADEA. Similarly, in Fairley v. Andrews, the Seventh Circuit held that because 42 U.S.C. § 1983 does not include language identical to Title VII, Gross mandates plaintiffs to show but-for causation in asserting First Amendment claims under this statutory provision. Like the LMRDA, § 1983 is not cleanly analogous to the ADEA. The combination of Serwatka, Serafinn, and Fairley indicates that the Seventh Circuit has completely disregarded Gross’s own direction to “be careful not to apply rules applicable under one statute to a

67 Serafinn v. Local 722, Int’l Bhd. of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) (“Mixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act’s authorization of claims that an improper consideration was a ‘motivating factor’ for the contested action”); Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009), petition for cert. filed (U.S. Dec. 21, 2009) (No. 09-745) (holding that plaintiffs must show but-for causation in First Amendment claims brought under § 1983 as a result of the Gross decision).
68 Id.
69 Compare 29 U.S.C. § 621 (stating that the purpose of the ADEA is to prohibit arbitrary age discrimination in the workplace and to ensure that employers assess older employees according only to their abilities) with 29 U.S.C. § 401 (stating that the main purpose of LMRDA is to ensure that employees are free from corruption and unfairness resulting from employer and labor organization misconduct).
70 578 F.3d at 525–26.
71 Compare 29 U.S.C. § 621 (indicating that the purpose of the ADEA is to prohibit arbitrary age discrimination in the workplace and to ensure that employers assess older employees according only to their abilities) with 42 U.S.C. § 1983 (indicating that the main purpose of § 1983 is to provide a civil remedy for those who are deprived of rights).
different statute without careful and critical examination.” Instead, the Seventh Circuit has transformed Gross’s ADEA holding into a blanket rule applying to all statutes, blindly prohibiting mixed-motive causation to statutes lacking what can only be deemed as the “magic words.”

G. Other Circuit Courts’ Reactions to Gross

Because of its recentness, Gross’s effect has not had time to fully manifest in other courts. However, decisions from the Third, Fifth, and Sixth Circuits have already surfaced indicating that the Seventh Circuit’s expansive interpretation of Gross will likely be an outlier. The most noteworthy of these cases is Smith v. Xerox, Corp., where in direct contrast to Serwatka’s holding, the Fifth Circuit expressly rejected the proposition that Gross requires but-for causation in any statutory provision that lacks Title VII’s “motivating factor” language. Instead, Xerox held that Title VII’s retaliation provision did accommodate mixed-motive claims.

Serwatka and Xerox explored facts that were notably similar: the 1991 Amendments left both the ADA’s causation provision and Title VII’s retaliation provision untouched, while explicitly providing for mixed-motive causation in Title VII’s intentional discrimination provision. While Serwatka found this factual pattern to necessarily fall under the command of Gross, the Fifth Circuit held that such a

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73 See Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010); Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3d Cir. 2009); Hunter v. Valley View Local Schs., 579 F.3d 688, 692 (6th Cir. 2009); but see Geiger v. Tower Auto., 579 F.3d 614, 626 (6th Cir. 2009) (applying the Gross rationale to ERCLA claims because the circuit has held that ERCLA claims should be analyzed under the same standards as the ADEA).
74 Xerox, 602 F.3d at 328.
75 Id.
76 Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010); Xerox, 602 F.3d at 328.
77 Serwatka, 591 F.3d at 961.
simplified application of Gross was incorrect. Xerox did not read Gross as requiring any and all statutes to possess “motivating factor” language in order to authorize mixed-motive causation. Rather, Xerox stated that “the Gross Court made clear that its focus was on ADEA claims[,]” and to extend Gross to other statutory contexts would be “contrary to [the Court’s] admonition against intermingling interpretations of the two statutory schemes.” Thus, Xerox held that Title VII’s retaliation provision provides for mixed-motive causation, even though its text does not include the phrase “motivating factor.”

Similarly, in Hunter v. Valley View Schools, the Sixth Circuit declined to extend Gross outside of the ADEA context. Prior to Gross, the Sixth Circuit, guided by Title VII precedent, had recognized mixed-motive causation under the Family and Medical Leave Act (FMLA). Had the Sixth Circuit interpreted Gross as Serwatka had, it would have held that the FMLA no longer recognized mixed-motive causation because the FMLA lacks Title VII’s “motivating factor” language. Yet, the Sixth Circuit, like the Fifth Circuit, did not interpret Gross so broadly. Rather, it held that Gross did not compel any result; it merely required the Court to “revisit the propriety of applying Title VII precedent to the FMLA.” Ultimately, the Sixth Circuit held that Price Waterhouse’s mixed-motive framework was still applicable to FMLA retaliation claims.

Finally, in Brown v. J. Kaz, Inc., the Third Circuit held that the Price Waterhouse causation framework continued to apply to claims

78 Xerox, 602 F.3d at 328.
79 See id.
80 Id. at 329.
81 Id.
82 579 F.3d 688, 692 (6th Cir. 2009) (“In light of our reading of the FMLA through the lens provided by Gross, we continue to find Price Waterhouse’s burden-shifting framework applicable to FMLA retaliation claims”).
84 See also Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).
85 Hunter, 579 F.3d at 691.
86 Id.
87 Id. at 692.
brought under § 1981 following the *Gross* decision. The court said that *Gross* had no impact on its analysis because § 1981’s text is different from that of the ADEA. While § 1981 does not have the “because of” language found in the ADEA, it also does not have the phrase “motivating factor” found in Title VII. Despite this, the court held that § 1981 should be interpreted in step with Title VII because of their similar statutory goals and contexts. In addition to the Third, Fifth, and Sixth Circuits’ narrower *Gross* readings, district court decisions have deviated from the Seventh Circuit’s approach in interpreting *Gross*. Several district courts within the ambit of the Fourth and Fifth Circuits have continued to recognize mixed-motive causation under the ADA following *Gross*.

II. CIRCUIT COURT STATUTORY ANALYSIS IN LIGHT OF RELEVANT SUPREME COURT DECISIONS INTERPRETING DIFFERENT STATUTES

A. Principles of Stare Decisis

Ultimately, whether the ADA allows plaintiffs to assert claims through a showing of mixed-motive causation is a question of statutory analysis. The first step in analyzing a statute is to determine whether the language at issue has a plain and unambiguous meaning; if so, the court is bound by such language. The plainness or ambiguity of the language is determined by reference to the text itself, the specific context in which the text is used, and the broader context.

88 581 F.3d 175, 182 n.5 (3d Cir. 2009).
89 *Id*.
90 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence . . .”).
91 *Brown*, 581 F.3d at 182 n.5.

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of the statute as a whole. However, in Serwatka, Judge Rovner bypassed the first fundamental step of statutory analysis, beginning the opinion not with an independent and isolated examination of the ADA phrase “because of,” but instead with an examination of the Supreme Court’s prior interpretation of this phrase in different antidiscrimination statutes. Judge Rovner’s re-routing of traditional statutory analysis was not in error, as the Supreme Court has held that decided issues of statutory analysis are afforded a super presumption of stare decisis. This presumption forces into the Serwatka discussion three different decisions, all of which have previously analyzed the phrase “because of” in an antidiscrimination statute.

The first case to be considered is Foster v. Arthur Andersen, LLP, a 1999 Seventh Circuit decision, holding that the ADA recognizes mixed-motive causation. Horizontal stare decisis, or the concept that a panel’s decision binds all subsequent panels within that circuit, is as strong as the super presumption of stare decisis towards Supreme Court statutory interpretations. Joining a majority of the other circuits, the Seventh Circuit has explicitly adopted this super presumption of horizontal stare decisis within the realm of statutory construction. Given this, Serwatka was obliged to follow Foster unless the Supreme Court had created controlling precedent on the issue.

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95 Id.
97 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166 (stating that considerations of stare decisis have special effect when a previous court has interpreted statutory language).
98 See also Gross v. FBL Fin. Servs., 129 S. Ct. 2343 (2009); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Foster v. Arthur Andersen, LLP, 168 F.3d 1029 (7th Cir. 1999).
99 168 F.3d at 1033.
101 See id.; Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (7th Cir. 1994).
102 See Steinberg, 32 F.3d at 272.
Of course, the Supreme Court has twice interpreted the phrase “because of” in antidiscrimination statutes; thus, two more cases necessarily enter the Serwatka analysis. First, the Court interpreted “because of” in Price Waterhouse, finding that the phrase in Title VII supported mixed-motive causation. Second, twenty years later, the Court analyzed “because of” in Gross, finding the same phrase in the ADEA to equate to but-for causation. Though both of these decisions are largely relevant to the Seventh Circuit’s analysis in Serwatka, they do not warrant a strict, blind application. Per the Gross Court’s instruction, “[w]hen conducting statutory interpretation, the Court ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’” This instruction indicates that though these two cases and their interpretation of “because of” are relevant to the Serwatka ADA issue, they are not conclusive because neither speak directly to the ADA. However, while the ultimate holding of the Court’s Title VII and ADEA cases are not binding, their rationale may be, if it comfortably extends to the ADA context.

B. Varying Circuit Court Approaches in Relying on Analogous Supreme Court Precedent

Federal appeals courts disagree on how to approach statutory interpretation where circuit precedent is directly on point and pertains to the statute in question, and instructive Supreme Court precedent also exists, but relates to a different statute. The Second, Seventh, and Ninth Circuits have undergone fairly flexible analyses in deciding whether Supreme Court precedent binds their decisions. The Second Circuit, for example, does not consider Supreme Court precedent

105 See id. at 2349 (stating that it is inappropriate to apply the Court’s interpretation of one statute to a different statute without engaging in independent analysis).
106 Id. (citing Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).
107 Id. (ADEA); Price Waterhouse, 490 U.S. at 242 (Title VII).
binding unless the Court’s reasoning applies to the different statutory context “with equal force.”

Similarly, the Seventh and Ninth Circuits have not explicitly stated a standard, but have simply reconsidered their precedent in light of intervening Supreme Court precedent, following the intervening decision only if they find the related statutes to be completely analogous. Slightly less deferential to the Supreme Court interpretation, the Fifth Circuit will not “overrule the decision of a prior [circuit] panel unless such overruling is unequivocally directed by controlling Supreme Court precedent.”

Finally, employing a greater level of adherence to the Supreme Court interpretation, the Eleventh Circuit will overturn prior circuit precedent if the intervening Supreme Court decision simply causes tension with or undermines it.

Despite the slight differences in the level of deference that appeals courts afford to such Supreme Court precedent, one general rule stems: no circuit court finds that Supreme Court precedent interpreting one statute is automatically binding to different statutes merely because both laws share common language. Rather, all circuit courts consider the underlying rationale of the Supreme Court decision and determine whether such reasoning is relevant to the context of the statute in question.

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108 Castellano v. N.Y.C., 142 F.3d 58, 68–69 (2d Cir. 1998).
109 See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1111 (9th Cir. 2000) (finding that Robinson’s interpretation of Title VII’s ambiguous language did not affect prior circuit interpretation of the ADA, which was unambiguous); see Morgan v. Joint Admin. Bd., 268 F.3d 456, 458 (7th Cir. 2001) (noting that the Robinson rationale is inapplicable to the ADA because while recognizing former employees under Title VII would increase the statute’s effectiveness, doing so under the ADA would create a perverse incentive for the employer not to offer disability benefits at all).
110 Smith v. Xerox Corp., 602 F.3d 320, 330 (5th Cir. 2010) (emphasis in original).
111 Johnson v. K-Mart Corp., 273 F.3d 1035, 1045 (11th Cir. 2001), vacated pending a reh’g en banc.
C. A Helpful Example: Interpreting “Employee” under the ADA in Light of the Court’s Analogous Title VII Decision, Robinson v. Shell Oil, Inc.

The Seventh and Eleventh Circuits’ evolving interpretation of the ADA’s use of the word “employees” serves as a helpful example in showing how circuit courts approach statutory analysis of one statute when the Supreme Court has interpreted identical wording in a different statute. Prior to 1997, the Supreme Court had been silent as to whether the word “employee” in any of the antidiscrimination statutes included former employees. Under independent circuit analyses, the Seventh and Eleventh Circuits held that the ADA’s “employee” language only referred to current employees.112 Following these cases, the Supreme Court in Robinson v. Shell Oil, Inc. held that Title VII’s use of the same word also encompassed former employees.113 After Robinson, new ADA cases presented the circuits with the tasks of re-examining whether the ADA includes former employees and detangling two different, seemingly controlling precedents.114 On the one hand, the previous circuit cases, EEOC v. CNA Insurance Companies and Gonzales v. Garner Food Services, Inc., were directly on point because their analyses specifically concerned the ADA’s language.115 However, Robinson also demanded attention because the Supreme Court’s interpretation of an identical word, albeit in the context of a different statute, could mandate the circuit courts to overrule their prior decisions.116

112 Equal Employment Opportunity Comm’n v. CNA Ins. Cos., 96 F.3d 1039, 1041, 1045 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1528 (11th Cir. 1996).
114 See Johnson, 273 F.3d at 1036; Morgan, 268 F.3d at 457.
115 CNA Insurance, 96 F.3d at 1041, 1045; Gonzales, 89 F.3d at 1528.
116 519 U.S. at 346.

In examining the ADA’s meaning of “employee,” the Eleventh Circuit in *Johnson v. K Mart Corp.* held that its prior precedent could not withstand *Robinson.*117 *Robinson* had reasoned that the term “employees” in Title VII’s anti-retaliation provision was ambiguous because there was no temporal qualifier preceding it; thus, the Court construed the word in accordance with the broader statutory purpose of Title VII.118 Noting that some ADA recitations of “employee” were similarly ambiguous, the Eleventh Circuit overruled *Gonzales* because it found tension between its prior holdings and the Court’s interpretation.119 The concurring judge agreed while clarifying the proper approach in assessing whether *Gonzales* withstood *Robinson.*120 “[Federal circuit courts] are … compelled to overrule [their] precedent when the rationale the Supreme Court uses in a [sic] intervening case directly contradicts the analysis that [the circuit] has used in a related area, and establishes that [the circuit’s] current rule is wrong.”121 Both the majority and concurrence found that the rationale behind *Robinson*’s statutory analysis of Title VII’s retaliation provision extended to the ADA’s intentional discrimination provision.122

However, the dissent strongly argued that *Gonzales* should remain good law because *Robinson* did not address any ADA issues and did not purport to overrule *Gonzales.*123 Therefore, because *Robinson*, a Title VII case, was not “squarely on point” with the ADA issue, the Eleventh Circuit should have adhered to its existing precedent in *Gonzales.*124 Conceding that *Robinson* may have overlapped with and weakened some of the reasoning in *Gonzales*,

117 *Johnson*, 273 F.3d at 1047.
118 *Id.* at 1043 (summarizing the *Robinson* decision).
119 *Id.* at 1045.
120 *Id.* at 1063 (Barkett, J., concurring).
121 *Id.* (emphasis in original).
122 *Id.* at 1047, 1063.
123 *Id.* at 1065 (Carnes, J., dissenting).
124 *Id.* at 1067.
Judge Carnes insisted that a mere undermining of circuit precedent did not warrant an overruling of it:

It is critical that when sitting as panel judges we be diligent in policing the line between prior precedent that has been contradicted and thereby overruled by intervening Supreme Court precedent, and that which has been only weakened by it. The strength and integrity of our prior precedent rule, upon which so much rests, is dependent upon that distinction.125

Though in disagreement about the extent to which an intervening Supreme Court case need conflict with circuit case law in order to overrule it, all three Eleventh Circuit judges agreed that the point of comparison is the rationale behind the relevant cases.126 Within the debate, no judge contended that mere comparison of statutory text was sufficient.127 Despite this shared approach, the dissent came to a different ultimate conclusion.128 Judge Carnes reasoned that the rationale of Robinson could not extend to the ADA context because Title VII’s retaliation provisions and the ADA’s intentional discrimination provisions are largely divergent in purpose and legislative history.129 Without a similar background or context, rationale used to interpret Title VII retaliation claims could not apply to the ADA.130

2. The Seventh Circuit’s Approach in Morgan v. Joint Administration Board

In contrast to Johnson, the Seventh Circuit in Morgan v. Joint Administration Board held that its prior precedent did withstand Robinson and that ADA’s “employee” language continued to exclude

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125 Id.
126 Id. at 1047, 1063, 1065.
127 See id.
128 Id. at 1065 (Carnes, J., dissenting).
129 Id.
130 See id.
former employees.\textsuperscript{131} Even though \textit{Robinson} had interpreted identical language in an analogous statute, the Seventh Circuit, focusing on the specific policy consequences of including retired employees under the ADA, found the difference between Title VII’s “employees” in retaliation claims and the ADA’s “employees” in intentional discrimination claims to be “stark.”\textsuperscript{132} Allowing retired employees with disabilities to challenge disparate benefits under the ADA would create a perverse incentive for employers not to provide any disability coverage as part of their fringe benefits.\textsuperscript{133} Title VII does not harbor the same risk of perverse incentive because, unlike disability,\textsuperscript{134} a benefits plan cannot constitutionally differentiate treatment according to race, color, sex, or national origin.\textsuperscript{135} Thus, the employer does not risk Title VII challenges to its benefits plan from former employees. The overall purpose of both Title VII and the ADA is to draw protected classes of people into the workforce.\textsuperscript{136} Interpreting Title VII employees to encompass former employees may further such a goal; however, doing the same with respect to the ADA would impede it.\textsuperscript{137} Because this argument is unique to the ADA and does not stretch to Title VII, the court found that \textit{Robinson} was not applicable to the ADA.\textsuperscript{138}

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\textsuperscript{131} 268 F.3d 456, 458 (7th Cir. 2001).
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Equal Employment Opportunity Comm’n v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) (finding that a benefit plan that provided disparate coverage depending on whether disabilities were mental or physical “may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term”).
\textsuperscript{135} \textit{E.g.}, Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (finding an equal protection violation in a benefits plan that provided more favorable treatment to the spouses of male employees than to the spouses of female employees).
\textsuperscript{136} \textit{See} 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 12101 (a)(7) (“the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals”).
\textsuperscript{137} \textit{See id.}
\textsuperscript{138} \textit{Morgan}, 268 F.3d at 458.
\end{flushright}
Reaching a sounder outcome, the Seventh Circuit’s approach to the Robinson inquiry illustrates an important point. The Supreme Court only considers an interpretation’s relation to the particular context, policy, and history of the statute at issue. While often Congress uses identical words to serve identical purposes, each piece of legislation is ultimately unique. Thus, while analogous decisions serve as guidance, each statute’s interpretation must also be unique. Likely a result of the three Johnson judges’ debate on this issue, the Eleventh Circuit vacated its opinion and will rehear the case en banc.\(^{139}\)

D. The Serwatka Inquiry: Necessary Considerations in Determining if the ADA Recognizes Mixed-Motive Causation

The Serwatka case involves additional folds to the Title VII/ADA employee analysis. Akin to Gonzales and CNA Insurance, Foster serves as existing case law directing Serwatka to recognize mixed-motive causation in the ADA.\(^{140}\) Akin to Robinson, Gross serves as intervening Supreme Court precedent directing Serwatka to authorize only but-for causation if its rationale logically extends into the ADA context.\(^{141}\) Price Waterhouse creates the additional fold, serving as a Supreme Court case on which Foster relies and with which Gross clashes.\(^{142}\) Given this, Serwatka does not simply require a single assessment of existing circuit precedent in light of one analogous Supreme Court decision. Rather, the Serwatka analysis

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\(^{139}\) Johnson v. K-Mart Corp., 273 F.3d 1035, 1070 (11th Cir. 2001). As a result of the defendant filing Chapter 11 Bankruptcy, the Johnson case has not yet been decided by an en banc panel. Johnson v. K Mart Corp., 281 F.3d 1368, 1368 (11th Cir. Feb. 14, 2002) (stating that no decision will be rendered until the bankruptcy court grants relief from the automatic stay or the stay lapses).

\(^{140}\) Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033–34 (7th Cir. 1999).


mandates an inquiry into the Court’s two separate and entirely conflicting interpretations of the phrase “because of.”

At first glance, Serwatka would only need to consider Gross’s applicability because it is the Court’s most recent interpretation of “because of.” Where a court first interprets a given statute in one way but later adopts a different interpretation, the latter interpretation controls. The Court decided Gross over twenty years after Price Waterhouse; however, if it does not control the Serwatka decision, Price Waterhouse could extend to Serwatka in two ways. First, the general rule that only the most recent statutory interpretation is controlling is not implicated when the former interpretation stems from a separate statute. Gross did not overrule or replace Price Waterhouse outside of the ADEA context. If the Seventh Circuit determined that Gross did not apply to the ADA context, Price Waterhouse remains as a separate source of guiding interpretation. Second, on a more practical level, if Gross does not control Serwatka, the Seventh Circuit would be bound to follow existing circuit precedent developed in the interim between Price Waterhouse and Gross because of the principles of horizontal stare decisis. Foster, the existing Seventh Circuit precedent, adopted the Price Waterhouse analysis in finding that the ADA does recognize mixed-motive causation. Thus, in deciding whether Gross applies, the Seventh

143 Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010) (looking to both Price Waterhouse and Gross for guidance in determining whether the ADA authorizes mixed-motive claims).
144 Gross, 129 S. Ct at 2350 (decided June 18, 2009).
146 See also Hubbard, 514 U.S. at 704 (offering new interpretation of un-amended statute, where the Court had previously interpreted the same statute with a contrary result).
147 Gross, 129 S. Ct. at 2351 (simply noting that the Court’s ADEA interpretation is not controlled by Price Waterhouse).
148 Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (emphasizing principles of horizontal stare decisis).
149 Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999).
Circuit found itself in Serwatka as the referee between the two Supreme Court interpretations of “because of.” First, the Serwatka inquiry must determine if Gross’s rationale extends to the ADA context. Second, if Gross is inapplicable, the Seventh Circuit needs to revisit the propriety of applying the Price Waterhouse framework to the ADA.

This Note examines which of the two Supreme Court precedents is most applicable to the ADA. Ultimately, it concludes that Serwatka was incorrectly decided and that the ADA does indeed allow recovery under mixed-motive causation. First, this Note argues that Gross’s ADEA rationale does not extend to the ADA context; thus, Serwatka incorrectly relied on Gross. Second, this Note argues that Price Waterhouse’s rationale in analyzing Title VII logically extends to the ADA context. Moreover, the 1991 Amendments did not undermine the continued viability of Price Waterhouse’s application to the ADA; thus, the Seventh Circuit should have continued to adhere to the Price Waterhouse analysis for ADA claims. Third, this Note examines the effect of the 2008 ADA Amendments, which exchanged the causation phrase “because of” with “on the basis of,” and concludes that this modification did not mark Congress’ intent to change causation under the ADA. Thus, the ADA should continue to recognize mixed-motive causation.

III. IS GROSS APPLICABLE IN THE ADA CONTEXT? AN EXAMINATION OF GROSS’S RATIONALE.

Serwatka erred when it concluded that Gross mandated an overruling of Foster. Per Gross’s own instructions, one statute’s analysis should not leak to another without careful and critical examination.\(^{150}\) As circuit precedent indicates, this examination must be of the Supreme Court’s rationale in interpreting the statute as it did.\(^{151}\) First, Gross’s rationale in rejecting Price Waterhouse’s application to the ADEA does not extend to the ADA. For purposes of

\(^{150}\) Gross, 129 S. Ct. at 2349.

\(^{151}\) See, e.g., Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1111 (9th Cir. 2000).
this Note, this rationale will be referred to as the “Legislative Intent Rationale.” Second, Gross’s vague rationale, used in its independent statutory analysis of the ADEA’s “because of” language, does not apply to the ADA. For purposes of this Note, this rationale will be referred to as the “Statutory Interpretation Rationale.”

A. Gross’s Legislative Intent Rationale is Inapplicable to the ADA.

The Gross opinion begins with a discussion concerning Price Waterhouse’s applicability. The Court found that the 1991 Amendments indicated that Price Waterhouse’s mixed-motive interpretation could not apply to the ADEA. Because Congress considered both the ADEA and Title VII simultaneously but only explicitly provided for mixed-motive causation in Title VII, Congress meant for the ADEA to have a causation scheme different from that of Title VII. Gross decided it “must give effect to Congress’ choice.”

Serwatka oversimplified this rationale, stating that Gross held “that because the [ADEA] lacks the language found in Title VII expressly recognizing mixed-motive claims, such claims are not authorized by the ADEA.” In so doing, it diluted Gross’s examination of legislative history into a shallow test that simply looks to the absence or presence of specific language within each statute. While it is true that Gross ultimately held that Price Waterhouse could not extend to the ADEA because it lacked Title VII’s amended language, that holding was the product of a more developed analysis. The Court’s reasoning did not hinge on the mere inclusion or exclusion of certain statutory words; rather, Gross’s rationale hinged on congressional actions and considerations that preceded and

152 Gross, 129 S. Ct. at 2349.
153 Id.
154 Id.
155 Id. at 2350 n.3.
156 Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010).
157 Gross, 129 S. Ct. at 2349 (discussing the legislative history behind the exclusion of “motivating factor” in the ADEA).
caused the selection of statutory text.\textsuperscript{158} Quite simply, \textit{Gross}’s rationale relied on the ADEA’s legislative intent.\textsuperscript{159}

This is the nub of the Seventh Circuit’s error in \textit{Serwatka}. By failing to realize the importance that congressional intent played in the \textit{Gross} analysis, it failed to compare the congressional intent of the ADA to the ADEA in order to determine if the \textit{Gross} rationale should apply in \textit{Serwatka}. Because congressional intent pertaining to the ADA’s causation scheme is notably similar to Title VII and notably dissimilar to the ADEA, \textit{Serwatka} erred in concluding that \textit{Gross} prohibited the \textit{Price Waterhouse} framework to apply to the ADA.

\textit{Gross}’s reason for not extending \textit{Price Waterhouse}’s mixed-motive causation framework to the ADEA was premised on the Court’s negative inference that Congress intended for the ADEA to feature a causation scheme different from that of Title VII.\textsuperscript{160} Conversely, there is legislative history both within the 1991 Amendments and outside of the Amendments that clearly evidences congressional intent that the ADA’s causation scheme should mirror Title VII’s mixed-motive causation. First, while the 1991 Amendments were silent regarding the ADEA’s causation, they did speak to the ADA. Specifically, the Amendments provided for remedies to mixed-motive claims in Title VII’s remedies provision, which is cross-referenced by the ADA.\textsuperscript{161} Second, while Congress enacted Title VII and the ADEA before the Court decided \textit{Price Waterhouse}, Congress enacted the ADA after that decision.\textsuperscript{162} Thus, when Congress included the phrase “because of” in the ADA’s causation provision, it did so with the understanding that such a phrase supported mixed-motive claims.\textsuperscript{163} Third, legislative history shows

\begin{itemize}
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Pub. L. No. 102-166, § 107(B)(i)–(ii), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-5(g)).
\item \textsuperscript{162} See 42 U.S.C. § 12112 (enacted in 1990).
\item \textsuperscript{163} See McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996) (stating that the presumption that Congress legislates against the background of the law is “particularly compelling where, as here, Congress adopts operative
\end{itemize}
that careful debate occurred prior to the ADA’s enactment regarding whether the word “solely” should precede “because of.” The exclusion of this qualifier in the enacted statute reflects congressional intent for the ADA to authorize mixed-motive causation.

1. The ADA’s Cross-Reference to Title VII’s Powers, Remedies, and Procedures

Where the 1991 Amendments amended several provisions of the ADEA, including provisions relating to attorney’s fees and statutes of limitations, it was entirely silent on the causation provision of the ADEA. In contrast, the 1991 Amendments did alter the ADA’s causation framework. As Serwatka acknowledges, the Amendments to the Price Waterhouse decision were two-fold. They changed Title VII’s “because of” language to “motivating factor,” and they altered Title VII’s allowance of liability and damages stemming from a mixed-motive claim. Notably, the latter amendment modified the powers, remedies, and procedures section of Title VII that is cross-referenced by the ADA. Thus, the 1991 Amendments were not silent as to the ADA’s recognition of mixed-motive claims because they explicitly recognized remedies for them under the ADA.

Serwatka focuses on the fact that the ADA’s substantive causation phrases do not explicitly provide for mixed-motive language to which the Supreme Court has recently given an authoritative interpretation in a similar context.

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165 Id.
166 Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2349 (2009) (listing the 1991 Amendment’s changes to the ADEA and noting that none of the modifications related to its causation provision).
168 Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010).
169 Id.; 105 Stat. at 1075.
170 See 42 U.S.C. § 12133 (“the remedies, procedures, and rights set forth in section 794(a) of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132); 29 U.S.C. § 794(a)(1).
171 See id.
causation. Under this focus, the Seventh Circuit argues that the Amendments do not indicate congressional intent to allow mixed-motive claims under the ADA because even though the 1991 Amendments create ADA remedies for mixed-motive claims, they do not create ADA liability. This conclusion is unsound both because it is nonsensical and because it does not match the congressional intent behind creating this cross-reference in the ADA.

First, the Seventh Circuit argument is based on the outlandish assumption that Congress would offer remedies to a claim that could not be created. Given that courts have long interpreted statutes so that each word is given operative effect, it is absurd to interpret a statute so that an entire remedy is inoperative. Where a statute explicitly provides remedies for a certain violation, courts should not construe that statute as to eliminate the plaintiff’s possibility of showing liability to activate such remedies. Though courts have expressed separation-of-powers concerns in substituting Congress’ enacted language with judicial judgment on what is sensible, the canon of construction that directs courts to construe statutes in a manner that avoids truly absurd results remains a legitimate interpretive tool.

Second, to give no effect to the ADA’s remedy for mixed-motive claims, though it is specifically included within its cross-referenced text, is to allow the ADA to fall out of step with Title VII. Such a result is in direct contradiction to the very purpose of creating the cross-reference in the first place. Though Congress could have simply inserted the language of Title VII into the ADA, it chose instead to create a cross-reference. Cross-references denote a definite legislative intent for one statute’s interpretation to continually

172 Serwatka, 591 F.3d at 962.
173 Id.
175 Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999).
align with that of another statute. 179 “When Congress [merely] repeats the same word in a different statutory context, it is possible that Congress might have intended the context to alter the meaning of the word[s] . . . No such possibility exists with [cross-references].” 180

Legislative history of the ADA’s drafting reinforces this notion. Congress provided the cross-reference to guarantee that the ADA “currently and as amended in the future” followed Title VII. 181 Simply incorporating the language could freeze interpretation of one statute from extending to the other. The House Report that accompanies the ADA re-emphasized this goal, stating that “the purpose of the ADA is to “provide civil rights protection for people with disabilities that are parallel to those available to minorities and women.” 182

Moreover, Congress not only intended for a broad parallel between the ADA and Title VII, but Congress also specifically stated that the 1991 Amendments should not diverge the two statutory schemes. 183 The House Report which supplemented the 1991 Amendments explicitly stated that “other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act.” 184 The ADA cannot offer parallel protection to that of Title VII where courts construe one of the cross-referenced remedies as dormant under the ADA. 185

Notably, the ADEA, the statute on which Gross relies, lacks a cross-reference to Title VII. Instead the ADEA cross-references the powers, remedies, and procedures of the Fair Labor Standards Act,, which itself lacks an explicit mixed-motive provision. 186 Oddly, the

180 Id.
184 Id.
185 See id.
Seventh Circuit notes this distinction in a footnote without inquiring into whether such a distinction between the ADA and ADEA should impact whether *Gross* extends to the ADA analysis.\(^{187}\) Indeed, there are meaningful similarities, specifically the cross-reference, between the ADA and Title VII that are lacking in the ADEA. While courts routinely refer to the ADA as a “sibling statute of Title VII,”\(^{188}\) they acknowledge that the ADEA is a “hybrid statute” that possesses characteristics similar to both Title VII and the Fair Labor Standards Act.\(^{189}\)

2. The Timing of the ADA’s Enactment

Indicia of legislative intent, separate from the 1991 Amendments, also demonstrate that Congress specifically intended for the ADA to authorize mixed-motive claims. Unlike the ADEA, Congress enacted the ADA subsequent to the *Price Waterhouse* decision but prior to the 1991 Amendments.\(^{190}\) A canon of construction frequently used to determine legislative intent is that the “evaluation of congressional action must take into account its contemporary legal context.”\(^{191}\) When choosing to word the ADA’s causation provision with the phrase “because of,” Congress was fully aware of Supreme Court precedent interpreting that very language to authorize mixed-motive causation.\(^{192}\) If Congress had wished for the

\(^{187}\) Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 n.2 (7th Cir. 2010).


\(^{189}\) E.g., McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 357 (1995); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 810 n.3 (8th Cir. 1982).


\(^{192}\) Traynor v. Turnage, 485 U.S. 535, 546 (1988) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law”); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996); see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE. L. J. 331, 343 (1991) (noting that Congress continually monitors Supreme
ADA to have a different effect than the *Price Waterhouse* burden-shifting scheme, it is likely it would have enacted language that did not fall directly under *Price Waterhouse*’s interpretation. The same inferences cannot be drawn for the ADEA, which was enacted prior to the Supreme Court’s interpretation of “because of.”

3. Legislative Debates on the Word “Solely”

The ADA was closely modeled after the Rehabilitation Act, a statute which authorizes federal employees to recover for disability discrimination. Though Congress mirrored many concepts from this statute when drafting the ADA, it intentionally altered the Rehabilitation Act’s causation provision, which reads “solely by reason of.” After careful debate, Congress specifically chose not to use the term “solely” in the ADA. The House Committee Report discussing the adoption of the ADA’s phrase “because of,” specifically states: “The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 [of the Rehabilitation Act] by virtue of the fact that the phrase ‘solely by reason of his or her handicap’ has been deleted.” Just as courts must give all modifying words operative effect, courts must also consider all omitted words in understanding the statute. Congress had debated explicitly providing for but-for causation, through the use of the word “solely.”

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Its ultimate decision to omit “solely” indicates a decision not to require but-for causation.\textsuperscript{199}

The fact that the ADEA’s “because of” language also lacks “solely” as a modifier is less compelling evidence that Congress intended to authorize mixed-motive claims. In contrast to the ADEA, it can concretely be shown that the ADA’s omission was thoroughly considered and purposefully done. Further, \textit{Serwatka} need not consider the wisdom of the \textit{Gross} decision as it applies to the ADEA; it need only determine if its logic applies to the ADA. Where there is clear and certain evidence of congressional intent that the ADA supports a mixed-motive claim, \textit{Gross}’s Legislative Intent Rationale does not apply, and \textit{Gross} does not compel the Seventh Circuit to terminate any reliance on \textit{Price Waterhouse}.

\textbf{B. Gross’s Statutory Interpretation Rationale is Inapplicable to the ADA Context.}

\textit{Serwatka}’s extension of \textit{Gross} seems to be based solely on \textit{Gross}’s rejection of \textit{Price Waterhouse}.\textsuperscript{200} After incorrectly extending \textit{Gross}’s Legislative Intent Rationale, the Seventh Circuit concluded that \textit{Gross} mandated but-for causation in all statutes lacking the “motivating factor” language.\textsuperscript{201} However, \textit{Gross} conducted a separate statutory analysis of the phrase “because of” in order to come to the conclusion that the ADEA phrase mandates but-for causation.\textsuperscript{202} Thus, in order for the Seventh Circuit to rely on \textit{Gross} in holding that ADA’s “because of” language necessitates but-for causation, it would need to independently examine \textit{Gross}’s ADEA Statutory Interpretation Rationale to determine if it extends to the ADA context. Following a “careful and critical examination,”\textsuperscript{203} this Note argues that, like \textit{Gross}’s Legislative Intent Rationale, its Statutory Interpretation Rationale also should not extend to the ADA context.

\textsuperscript{199} See also \textit{id.}

\textsuperscript{200} \textit{Serwatka} v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010).

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{Gross} v. FBL Fin. Servs., 129 S. Ct. 2343, 2350 (2009).

\textsuperscript{203} \textit{Id.} at 2349.
Gross seems to base the majority of its justification for but-for causation on the finding that Congress intended for Title VII and the ADEA to have different causation provisions. In a subsequent statutory analysis of the phrase, Gross uses hurried and vague rationale to conclude that “because of” mandates but-for causation. First, Gross provided a list of synonyms for “because of” in an effort to find the phrase’s plain meaning. “Because of” equates to phrases such as “by reason of” or “on account of,” all of which, Gross contends, mandate but-for causation. This analysis is unpersuasive because, just like “because of,” phrases such as “by reason of” and “on account of” also lack a modifier that would relieve the phrase of its existing ambiguity. Indeed, the Rehabilitation Act’s causation provision provides that a government employer cannot discriminate “solely by reason of a disability.” If the phrase “by reason of” independently supported but-for causation, it would have been superfluous for Congress to include “solely” in the Rehabilitation Act.

Gross’s second statutory analysis argument is equally weak. Gross argues that the default rule in burden-allocation should apply to ADEA plaintiffs; thus, the ADEA requires but-for causation. Serwatka echoes this argument and states, “unless a statute [explicitly] provides otherwise, demonstrating but-for causation is part of the plaintiff’s burden in all suits under federal law.” Gross and Serwatka overlook the fact that often, courts poke exceptions into this default rule in order to prevent unjust or inequitable results.

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204 See id. at 2349–50.
205 See id. at 2350–51.
206 Id. at 2350.
207 Id.
209 Id.
210 Gross, 129 S. Ct. at 2351.
211 Serwatka v. Rockwell Automation, Inc. 591 F.3d 957, 961 (7th Cir. 2010).
or plaintiffs are in a particularly difficult position to meet their burden, courts have created a variety of alternative doctrines to mitigate the harshness of causation. When the traditional burden-allocation to the plaintiff is unfair or particularly difficult to meet, as it is within the context of employment discrimination statutes, it has been recognized that the burdens may be adjusted to accommodate equitable concerns.

Gross overemphasizes how general this rule is and fails to recognize that Price Waterhouse “did not traverse new ground” in altering the burden-allocation of plaintiffs and defendants in the antidiscrimination context. In fact, when looking at other remedial statutes, the Court has likewise adjusted the relative burdens between parties to increase the scope of the statute’s coverage. Courts have construed the National Labor Relations Act, the Equal Pay Act, the Pregnancy and Discrimination Act, and § 1983 as all requiring plaintiffs to only meet the burden of showing that their protected trait or activity was a substantial, albeit not exclusive, cause

213 Id.
214 Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (noting the difficulty in obligating a Title VII plaintiff to “identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges”).
215 Kessler, supra note 212, at 498.
216 Price Waterhouse, 490 U.S. at 248; see Gross, 129 S. Ct. at 2351.
217 Id. at 250 (referring to the court’s interpretation of causation under employee speech doctrines, National Labor Relations Act, Equal Pay Act, and Pregnancy Discrimination Act, all of which allow for mixed-motive causation).
218 Loparex LLC v. Nat’l Labor Relations Bd., 591 F.3d 540, 546 (7th Cir. 2009) (stating that Board must make a showing that anti-union animus was a motivating factor in the challenged employment decision before the burden then switches to the employer).
219 Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974) (holding that employer, not employee, must prove that the actual disparity in pay is not linked to sex under the Equal Pay Act).
of the defendant’s actions. Given these many exceptions, Gross’s default rule rationale should not be extended.

Third, Gross attempts to bolster its statutory construction with a policy consideration, stating that burden-shifting frameworks are difficult to apply.\footnote{Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2352 (2009).} To support this notion, Gross cites two circuit court opinions, both of which were then over fifteen years old and one of which was a dissenting opinion.\footnote{Id. (relying on Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1179 (2d Cir. 1992); Visser v. Packer Eng’g Assoc., Inc., 924 F.3d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting)).} This dated precedent is undermined by the many examples of statutes that do implement a burden-shifting framework.\footnote{See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).} Additionally, Serwatka itself illustrates that the mixed-motive framework can be successfully applied, as evidenced from the case’s clearly-worded jury instructions and responses.\footnote{See Serwatka v. Rockwell Automation, Inc., 591 F.3d, 957, 958 (7th Cir. 2010).} Moreover, it is inappropriate to root statutory analysis in a court’s own views of substantive policy.\footnote{Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 98 n.14 (1981) (quoting U.S. v. Gilman, 347 U.S. 507, 511–13 (1954)) (The legislature is most equipped to determine policy because “[t]he selection of . . . policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised”).} Whether the difficulties in applying a burden-shifting framework outweigh the benefits of increased statutory protection is a question of balance that the legislative branch is most equipped to decide.\footnote{Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 259 (1970) (Black, J., dissenting).} Substantive policy “is a question for lawmakers, not law interpreters.”\footnote{Id.} If it is inappropriate for the Supreme Court to consider its own policy preferences, it is
especially inappropriate for an intermediate appellate court to infer policy preferences in interpreting the causation scheme of the ADA—especially where, as discussed supra in Section III.A., legislative history clearly suggests that Congress preferred that the ADA authorize mixed-motive causation. Thus, this policy rationale should not extend to Serwatka.

Overall, this nebulous reasoning does not compel the circuit courts to adopt similar approaches in other statutory contexts because it fails to provide a clear and applicable analogy to the ADA context. Lacking persuasive reasoning even within the ADEA context, Gross’s hurried statutory analysis should not be extended to the ADA, where such an application would be one of circuit discretion rather than one of compulsory stare decisis.229 Thus, in addition to the Legislative Intent Rationale, Gross’s Statutory Interpretation Rationale does not extend to the ADA with equal force.

IV. IS PRICE WATERHOUSE APPLICABLE TO THE ADA? AN EXAMINATION OF PRICE WATERHOUSE’S RATIONALE AND CONTINUING VIABILITY.

Because Gross’s two rationales cannot be extended to the ADA context to preclude reliance on Price Waterhouse or to mandate but-for causation, the Seventh Circuit should have recognized mixed-motive claims under the ADA. This result is legally sound both technically and doctrinally. Technically, without disruption from Gross, application of stare decisis instructs the Seventh Circuit to continue to apply Foster.230 Doctrinally, Price Waterhouse, the case on which Foster relies, uses rationale in interpreting the phrase “because of” that applies with equal force to the ADA. This section will first establish that Price Waterhouse’s rationale is both legally sound and fully applicable to the ADA context. Second, this section will establish that the subsequent congressional amendments in the

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229 See supra, Section II.B.
230 See Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (7th Cir. 1994) (stating the importance of stare decisis within the Seventh Circuit).
1991 Amendments in no way depleted Price Waterhouse’s application to circuit court ADA decisions.

A. The Rationale Behind Price Waterhouse’s Title VII Statutory Interpretation Applies with Equal Force to the ADA.

The Price Waterhouse holding rested entirely on statutory analysis of the phrase “because of.” Simply stated by the Court, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them.” In its statutory analysis, the Court found four independent rationales that justified why Title VII’s “because of” language supported mixed-motive claims. Each of these four reasons applies with equal force to the ADA.

First, the Court noted that but-for causation was an inappropriate scheme given the present tense of Title VII’s operative verbs. Of all the textual components of a statute, verbs are most likely to affect the legal outcome of a case. Courts have explicitly considered verb tense as a reliable indicator of the statute’s application. For example, in Barrett v. United States, the Supreme Court interpreted the Federal Gun Control Act, which provides that it is unlawful for certain convicted criminals “to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” The defendant was a Kentuckian who went to a

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232 Id.
233 Id. at 240–251.
234 Id. at 240.
237 423 U.S. at 213 (emphasis added); see 18 U.S.C. § 922(g)(9).
local shop to purchase a weapon that had been originally shipped from Massachusetts. The defendant argued that the scope of the Federal Gun Control Act did not extend to his case because the Act meant only to restrict interstate gun trafficking and did not cover sales by local merchants to local residents. However, the Court noted that the language regarding the foreign commerce was in present perfect tense, denoting an action that was already completed. Thus, the defendant’s local purchase still fell into the purview of the statute, even if the interstate gun trafficking did not occur at the moment he made his weapon purchase.

Price Waterhouse made an analogous argument regarding the operative verbs in Title VII. Specifically, Title VII states that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s [protected trait.]” The present tense of the proscribed verbs indicates that courts must consider the employer’s actions at the moment they were made in order to discern whether the employer has violated the statute. This inquiry accommodates mixed-motive causation, which requires only a narrow analysis—whether the employer considered an employee’s protected trait at the time of the adverse employment action. On the other hand, but-for causation is “a hypothetical construct,” forcing courts to reason outside of the mixed-motive claim’s narrow analysis. Rather than concluding whether an employer’s decision violated Title VII at the moment it was made, but-for causation forces courts to hypothetically reconstruct the factual scenario after it has been completed and determine if the employer would have made the same decision without the illegal

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238 Barrett, 432 U.S. at 213–214.
239 Id. at 216.
240 Id. at 216–17.
241 Id.
242 Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (referencing § 703(a)(1)).
243 Id. at 241.
244 Id. at 240.
245 Id.
consideration. Thus, just as in Barrett, where the court’s interpretation allowed the proscribed act to be already completed, in order for Title VII’s language to support but-for causation, its verbs would need to be in present perfect tense. Because Title VII did not read, “it shall be unlawful for an employer to have failed or refused to hire or to have discharged any individual because of their protected characteristic,” Price Waterhouse correctly concluded that the provision did not require but-for causation.

This statutory construction applies with equal force to the ADA, which also features verbs drafted in present tense, rather than present perfect tense. Rather than stating that no employer shall have discriminated against a qualified individual because of their disability, the ADA states that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability . . .” Moreover, the statute then fleshes out what constitutes discrimination, listing the proscribed actions as present tense participles. Specifically, discrimination includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee, . . . utilizing [discriminatory] standards, criteria, or methods of administration, . . . excluding or otherwise denying equal jobs or benefits . . .” Like Barrett and Price Waterhouse, the present tense of the operative verbs in the ADA require courts to determine if a statutory violation occurred at the moment the adverse employment action was made. Courts cannot meet this requirement through a but-for causation analysis; thus, mixed-motive causation is the most appropriate interpretation.

Second, Price Waterhouse reasoned that because Title VII’s causation language said “because” and not “solely because,” plaintiffs

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246 Id.
248 See Price Waterhouse, 490 U.S. at 241.
249 42 U.S.C. § 12112(a) (emphasis added).
251 Id. (emphasis added).
253 See id.
need not show but-for causation.254 Just as each included word in a statute should be deemed to have operative effect, any missing words should also be considered to be purposefully excluded.255 Moreover, specific legislative history exists to show that Congress purposefully omitted the word “solely,” thus bolstering the assumption that the legislature did not intend for Title VII to require but-for causation.256

*Price Waterhouse* noted that Congress had considered including the word “solely” in its drafting deliberations but ultimately declined to do so.257 Where Congress purposefully chose to omit a qualifying word, the Court seemed to reason that it was improper to read that very word into the statute’s construction.258

This rationale comfortably extends to the ADA context. As discussed *supra* in Section III.A.3., the ADA also lacks the qualifying word “solely” in its causation phrase. Moreover, just like the drafting deliberations of Title VII, Congress similarly discussed and debated preceding the ADA phrase “because of” with solely, but declined to do so. Thus, the Court’s reasoning that it should not read into a statute a word that legislators consciously omitted applies to the ADA context.

Third, *Price Waterhouse* supported its Title VII statutory analysis by reference to § 2000e-2(e), which shields employers from liability for considering gender in an employment decision if gender is a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.”259 Where Congress explicitly carves out a narrow exception in allowing employers to consider gender, it follows that any other considerations of gender that do not fall within the exception are proscribed, whether they are paired with legitimate considerations or standing alone.260

Again, this reasoning applies with equal force to the ADA context. Just as Title VII contains explicit statutory exceptions, the

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254 *Price Waterhouse*, 490 U.S. at 241.
255 See id.
256 *Id.* at 241 n.7.
257 *Id.*
258 See id. at 241.
ADA also contains explicit exceptions that permit employers to consider an employee’s disability. For example, the ADA removes liability from an employer for using a screening test that tends to screen out people with disabilities where the test is “job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.”261 This clause raises the same inference that Price Waterhouse made: that “in all other circumstances, a person’s [disability] may not be considered.”262

Fourth, the court relied on logic and equitable principles in construing what Congress intended “because of” to mean, stating that “[w]e need not leave our common sense at the doorstep when we interpret a statute.”263 Surely, the Court reasoned, Congress did not intend for Title VII plaintiffs to endure the impossible task of ascertaining the precise causal role of an employer’s actions by detangling the employer’s legitimate and illegitimate considerations.264 If plaintiffs can show, at the least, that the defendant did consider factors prohibited by statute, then they have shown that the defendant is a wrong-doer in the situation.265 Though to what extent the employer will be liable is still not clear, it is fair that the wrongdoer bear the difficult task of separating its own motives, should it attempt to show that it would have made the same decision even without considering the illegitimate factor.266 Common sense and equity dictate that if someone needs to “bear the risk that the influence of legal and illegal motives cannot be separated,” it should be the defendant because “[it] knowingly created the risk and because the risk was created not by innocent activity but by [its] own wrongdoing.”267 These equitable concerns are not unique to Title VII and should extend to the ADA.

262 See Price Waterhouse, 490 U.S. at 242.
263 Id. at 241.
264 Id.
265 Id. at 249.
266 Id.
267 Id. at 250; Kessler, supra note 212, at 498 (stating that when causation is particularly difficult to prove, “the malfeasor should suffer the inequity”).
In sum, the rationale of Price Waterhouse’s Title VII decision applies with equal force to the ADA context268 and thus can be extended to the ADA following a “careful and critical examination.”269 Not only had Price Waterhouse looked to language identical to that of the ADA, but more importantly, each of its independent rationales in support of mixed-motive causation neatly fit within the context of the disability discrimination statute.

B. The 1991 Amendments Did Not Undermine the Instructive Value of Price Waterhouse’s Interpretation of the Phrase “Because Of”

Viewing Price Waterhouse in isolation, Section IV.A. discussed the applicability of that Supreme Court decision to the ADA. Of course, before comfortably extending Price Waterhouse to the ADA, the Seventh Circuit would need to consider the continuing viability of this decision in light of the subsequent 1991 Amendments.270 Gross did not indicate that the 1991 Amendments served to undermine Price Waterhouse as good law.271 Rather, Gross’s focus on the 1991 Amendments related to their portrayal of legislative intent regarding the ADEA only.272 Serwatka, on the other hand, seemed to reason that Price Waterhouse lost all persuasive or instructive value following the 1991 Amendments; it essentially concluded that the phrase “because of” could never create mixed-motive causation.273 However, Supreme Court law, specifically Price

268 E.g., Parker v. Columbia Pictures Indus., 204 F.3d 326, 336 (2d Cir. 2000) (Sotomayor, J.) (“Although the ADA includes no explicit mixed-motive provision, a number of other circuits have held that the mixed-motive analysis available in the Title VII context applies equally to cases brought under the ADA”).
269 See also Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2349 (2009).
270 See Hunter v. Valley View Schs., 579 F.3d 688, 691 (6th Cir. 2009) (stating that it was necessary to reconsider the propriety of applying Price Waterhouse to a different statutory context in light of Gross’s comments on the 1991 Amendments).
271 See Gross, 129 S. Ct. at 2348 (stating only that Price Waterhouse does not control the construction of the ADEA).
272 Id. at 2349.
273 See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).
Waterhouse, demonstrates that “because of” can create mixed-motive causation. The Seventh Circuit erred in ignoring this instructive precedent. The 1991 Amendments did not impair Price Waterhouse’s continued viability; they strengthened it.

Clearly stated, the purpose of the 1991 Amendments was to restore the protection afforded to employees under antidiscrimination statutes, which had been eroded by Supreme Court statutory construction. In reaching this purpose, Congress responded to various Supreme Court decisions, including Ward’s Cove Packing Co. v. Atonio and Price Waterhouse. Congress dissected these two opinions into segments, codifying the aspects of the legal precedent that afforded protection to employees and overriding the aspects of the opinions which over-extended the employer’s interests to the detriment of a stringent antidiscrimination policy. In 1989, the Court in Ward’s Cove followed Griggs v. Duke Power Co. in recognizing that Title VII plaintiffs can recover under disparate impact claims where employers utilize facially-neutral employment practices that have a disadvantageous impact on women or minority groups. It departed from Griggs as to the defendant’s burden in these claims by allowing an employer to escape liability if it could carry its burden of producing evidence of a business justification for the challenged employment practice.

275 Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (stating that one of the purposes of the 1991 Amendments was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”).
277 490 U.S. 228 (1989).
278 § 107(a)-(b), 105 Stat. at 1075 (codifying mixed-motive causation and eliminating defendant’s affirmative defense); § 105, 105 Stat. at 1074 (explicitly providing for disparate impact claims and heightening the defendant’s burden in escaping liability under such claims).
280 Ward’s Cove, 490 U.S. at 658.
281 Id. at 660.
The 1991 Amendments reacted to this decision by affirming the aspects of the opinion that increased the scope of Title VII’s protection, while overriding the aspects of the opinion that narrowed its scope. Accordingly, the Amendments codified Ward’s Cove and Griggs’s authorization for Title VII’s disparate impact claims by explicitly providing for such liability, but they restored protection to employees by overriding Ward’s Cove’s holding that provided a lenient burden for the defendant. Instead of the Ward’s Cove burden, which only required the defendant to produce evidence showing a business justification, the Amendments provide for a more stringent burden on the defendant, namely both production and persuasion of a business necessity. Thus, under the 1991 Amendments’ modification of disparate impact doctrine, courts are more likely to find a Title VII employer liable once a plaintiff establishes the occurrence of discriminatory practices.

In complete parallel, Congress reacted to the Price Waterhouse decision by codifying the aspects of the holding that afforded protection to the plaintiffs and overriding the aspects of the holding...
that narrowed Title VII’s protective scope.  

Price Waterhouse had considered two arguments: Hopkins had contended that an employer violates Title VII any time it considers, solely or partially, a protected trait in making an employment decision; Price Waterhouse contended that it was the plaintiff’s burden to show that her protected trait was the but-for cause of the challenged action. In light of these competing interests, the Court held that a “plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive.” Finding that this conclusion struck the appropriate balance between an employee’s protection and an employer’s free choice, the Court stated that “as often happens, the truth lies somewhere in between.” The 1991 Amendments disagreed with this sentiment and repositioned the “truth” in favor of employee protection.

In its re-balancing of interests, Congress codified the aspect of Price Waterhouse that accommodated employee interests by explicitly providing that Title VII plaintiffs can meet their burden through a showing of mixed-motive causation. On the other hand, the 1991 Amendments overrode the Price Waterhouse holding that equipped employers with an affirmative defense to mixed-motive claims. Specifically, the 1991 Amendments recognize that any time an

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290 § 107(b), 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-5(B)(i)–(ii) (“On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief . . . and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment”).
292 Id. at 250.
293 Id. at 238.
294 See § 107(b).
295 § 107(a).
296 § 107(b).
employer considers an impermissible characteristic, they have violated federal law; however, where an employer can show that they would have made the same decision absent the illegal consideration, its obligations are substantially lowered. 297 The effect of this amendment is both symbolic and practical. Symbolically, Congress has made clear that any time an employer considers a factor prohibited by Title VII, it has committed a violation. 298 Practically, it ensures that plaintiffs can always collect attorney’s fees if they show that their employer discriminated against them. 299

Clearly, the aspects of the Ward’s Cove and Price Waterhouse decisions, which afforded employer’s discretion at the expense of employee protection, are no longer good law as a result of the superseding statute. 300 They were unequivocally overridden by the 1991 Act. 301 However, Congress did not call into question the Court’s holdings that enlarged the protective scope of Title VII; rather, Congress endorsed their instructive value through codification. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, noted this exact point in his dissent in Gross:

[T]he fact that Congress endorsed this Court’s interpretation of the “because of” language in Price Waterhouse (even as it rejected the employer’s affirmative defense to liability) provides all the more reason to adhere to that decision’s motivating-factor test. Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII. 302

297 Id.
298 See § 107(b).
299 Id.
301 See id.
In parallel reasoning to the *Gross* dissent, following the 1991 Amendments, courts have continued to follow the codified segments of the Court’s Title VII disparate impact precedent in other Title VII cases and to extend it to other statutory contexts. For example, in *Smith v. City of Jackson, Mississippi*, the Supreme Court held that Griggs’ recognition of disparate impact claims survived the 1991 Amendments when it questioned whether the ADEA authorized recovery under these claims. *Smith* could have applied a reasoning akin to *Gross*’s Legislative Intent Rationale. In fact, the Court acknowledged that the 1991 Amendments had explicitly provided for disparate impact claims under Title VII, while remaining silent as to such claims under the ADEA. However, *Smith* did not reason, as *Gross* did, that this legislative action indicated that the ADEA should not recognize disparate impact claims. Instead, *Smith* correctly noted that Congress’ codification of a Court’s interpretation does not undermine future reliance on that decision. Explicitly stated, the Amendments serve to provide “additional protections against unlawful discrimination,” “additional remedies under Federal law,” and an “expan[sion of] the scope of relevant civil rights statutes.”

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303 See Cota v. Tucson Police Dep’t, 783 F. Supp. 458, 472 n.14 (D. Ariz. 1992) (“The 1991 Act, however, leaves unchanged the standards for a prima facie case. Thus, under Title VII, both before and after its recent amendment, the prima facie inquiry in a disparate impact case will be identical”).


305 Smith, 544 U.S. at 237.

306 Id. at 240.

307 Id. (“While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination”).

308 Compare Gross v. FBL Fin. Servs., 129 S. Ct 2343, 2349 (2009), with *Smith*, 544 U.S. at 240.

309 Smith, 544 U.S. at 234, 240 (noting that both Griggs and *Ward’s Cove* are “precedent of compelling importance” and applying them to the Title VII context).

good law because of Congress’ codification is to contradict Congress’ very purpose in enacting the 1991 Amendments. 311

Interestingly, Smith extended Ward’s Cove much further than Serwatka would need to extend Price Waterhouse in order to authorize ADA mixed-motive causation. In addition to relying on Ward’s Cove’s bare recognition of disparate impact claims, Smith also applied Ward’s Cove’s lenient employer’s burden, which the 1991 Amendments explicitly overruled as to the Title VII context. 312 In recognizing mixed-motive causation, Serwatka need not rely on the repudiated aspects of the Price Waterhouse decision; an ADA defendant’s mitigated liability is directly controlled by the ADA’s cross-reference to the 1991 Amendment. 313 Instead, Serwatka would only rely on the aspect of the Price Waterhouse decision that Congress codified. 314 If the Supreme Court has found that a clearly repudiated provision of Ward’s Cove could apply to other statutory contexts, surely Serwatka should have held that Price Waterhouse’s congressionally-endorsed mixed-motive framework could apply to the ADA. 315

Of course, a fair argument can be made that if Congress truly agreed that the phrase “because of” supported mixed-motive causation, amending that language to “motivating factor” was superfluous—and when legislating, every action of Congress is

311 See id.
312 Smith, 540 U.S. at 240 (“Ward’s Cove’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA”). Smith is an example of using what scholars refer to as “shadow precedent,” where courts find judicial interpretation of statutory language controlling with respect to any application not explicitly addressed by the congressional override. Widiss, supra note 183, at 532. Widiss argues that this practice is controversial because it thwarts congressional will and diminishes the predictability and fairness of stare decisis. Id. at 560–01. If Serwatka had relied on Price Waterhouse’s bare recognition of mixed-motive causation, it would not have engaged in this controversial practice because Congress did not override that aspect of the Price Waterhouse holding. See id. at 532.
intentional and operative.316 However, Congress codifies Court precedent frequently without any intent to correct it.317 In so doing, it merely solidifies or clarifies existing precedent.318 This practice does not cast any doubt on the Court’s decision.319

Price Waterhouse, in establishing mixed-motive causation, did so in a splintered and uncertain fashion.520 Four Justices joined a plurality opinion, Justice White and Justice O’Connor separately concurred in the judgment, and three Justices dissented.321 While six Justices ultimately agreed that the burden of persuasion shifts to the defendant if a Title VII plaintiff shows that discrimination was a “motivating” or “substantial” factor in the employer’s decision, it remained unclear whether plaintiffs, in meeting their burden, needed to present direct evidence of discrimination.322

Given these fractures in the Court’s voice, it is reasonable to conclude that Congress meant only to clarify that the statutory language, “because of,” does indeed support a mixed-motive causation scheme.323 Moreover, this codification guaranteed that Price

317 E.g., United States v. Soderling, 970 F.2d 529, 533 (9th Cir. 1992) (finding that congressional reaction to Hughey v. U.S. codified rather than undermined the Hughey decision and recognizing that congressional codification of a court’s statutory interpretation is “by no means an unusual tack for Congress to take”); see Eskridge, supra note 192, at 424–27 (app. I) (noting seven examples from the 100th and 101st Congressional sessions where Congress amended statutes with the purpose of clarifying the statutes’ interpretations rather than overriding them).
318 Id.
319 Id.
320 Gross, 129 S. Ct at 2347 (listing the specifics of the “splintered” Price Waterhouse decision).
321 Id.
322 See id. (O’Connor, J., concurring).
323 While the 1991 Amendment’s legislative history explicitly states that it is overturning certain Court holdings, the history shows that the Amendments only clarified Price Waterhouse’s recognition of mixed-motive causation. See 137 CONG. REC. E3832 (1991) (statement of Rep. Dixon). For example, California Representative Dixon stated that the “motivating factor” amendment is a “compromise [that] makes clear that any employer may not make an employment decision based in any way on race, color, sex, or national origin.” Id. (emphasis added).
Waterhouse’s interpretation was no longer susceptible to the Court’s reexamination or modification.\textsuperscript{324} The risk of Court reexamination seemed likely, given the inter-opinion disagreement; a codification enabled Congress to definitively end the debate with a clear, single voice.\textsuperscript{325} In sum, the 1991 Amendments did not vitiate the continued applicability of \textit{Price Waterhouse}’s instructive value. Thus, the Seventh Circuit should rely on its rationale in authorizing mixed-motive claims under the ADA.

V. THE IMPACT OF THE 2008 ADA AMENDMENTS: EXCHANGING “BECAUSE OF” WITH “ON THE BASIS OF”

Judge Rovner acknowledged that her decision in \textit{Serwatka} did not take into consideration the ADA Amendments Act of 2008.\textsuperscript{326} Though these amendments have been in effect since January 1, 2009, the Seventh Circuit decided \textit{Serwatka} under the ADA’s original language because Serwatka was discharged in 2004 and the trial occurred in 2008, all before the amendments took effect.\textsuperscript{327} The Amendments, among other things, modify the ADA’s causation phrase, replacing “because of” with a prohibition against discriminating against an individual “on the basis of” a disability.\textsuperscript{328} In a footnote, Judge Rovner stated that, “[w]hether ‘on the basis of’ means anything different from ‘because of,’ and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, are not questions that we need to consider in this appeal.”\textsuperscript{329} As time passes, the Seventh Circuit is

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\textsuperscript{324} Widiss, \textit{supra} note 183, at 520.
\textsuperscript{325} Einer Elhauge, \textit{Preference-Eliciting Statutory Default Rules}, 102 COLUM. L. REV. 2162, 2170 (2002) (“[E]xplicit phrasing can offer a more precise statutory resolution, often one that is unavailable as a legal interpretation, and thus reflect political preferences more accurately than judicial guesses of what the legislature would have done”).
\textsuperscript{326} Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 n.1 (7th Cir. 2010).
\textsuperscript{327} \textit{Id}.
\textsuperscript{328} 42 U.S.C. \textsection 12112(a) (2009).
\textsuperscript{329} \textit{Serwatka}, 591 F.3d at 962 n.1.
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certain to face this analysis. This section will argue that “on the basis of” supports a mixed-motive claim.330

Seemingly, “on the basis of” is the equivalent of “because of;” thus, the arguments presented in Sections III and IV relating to the extension of Gross and Price Waterhouse also apply to the 2008 ADA Amendments. However, an independent statutory analysis of this phrase is useful because the phrase “on the basis of” presents fresh statutory language that the Court has not yet interpreted in an antidiscrimination employment statute.

The first step in analyzing a statute is always to look to the text to determine whether the language is plain and unambiguous.331 A closer look into this phrase indicates that it may offer greater justification for mixed-motive causation than did the phrase “because of.” Black’s Law Dictionary defines “basis” as “a fundamental principle, and underlying fact or condition.”332 An underlying fact or condition suggests a non-exclusive causal role because for a fact to be underlying, it must have a relation to another fact. Thus, where an employer acts “on the basis of disability,” it need not act exclusively because of the disability. Rather, the disability need only form one part of the decision or, like in Title VII, be a motivating factor of the decision.333

Though the definition of “basis” suggests that this amended causation phrase supports mixed-motive causation, the argument is far from conclusive. “On the basis of” shares the same problem of ambiguity as “because of.”334 Both phrases necessitate a preceding

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330 Few courts have addressed the statutory analysis of the amended phrase “on the basis of.” A New York District Court provided a cursory analysis of this issue and concluded that despite the change in statutory analysis, it would follow Second Circuit precedent to find that “because of” allowed mixed-motive claims. Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 343 (S.D.N.Y. 2010).
332 BLACK’S LAW DICTIONARY 171 (9th ed. 2009).
334 This ambiguity is easily reflected by the fact that the Supreme Court conducted independent analyses of the phrase “because of” used in similar contexts and came up with two conflicting, plausible results. See Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2351 (2009); Price Waterhouse, 490 U.S. at 250.
qualifier in order to allow only one plausible interpretation.\(^{335}\) Had Congress stated that an employer could not act “solely because of” an employee’s disability or “solely on the basis of” an employee’s disability, then a court’s interpretation would necessarily need to find but-for causation.\(^{336}\) On the other hand, Congress likewise did not precede these causation phrases with a qualifier such as “partially” that would explicitly provide mixed-motive causation.

Indeed, in interpreting antidiscrimination statutes, the Court has placed weighty emphasis on the presence or absence of a qualifier to the statutory language.\(^{337}\) For example, in *Robinson*, the Court found the use of the word “employees” in Title VII to be ambiguous because it was not preceded by a qualifier such as “current” or “former.”\(^{338}\) In light of this ambiguity, the Court selected the interpretation that would match the broad, remedial purposes of Title VII and increased its coverage; thus, the Court determined employees to mean both current and former employees.\(^{339}\)

Under *Robinson*, the ambiguity of “on the basis of” should be determined by reference to the broader context of the statute as a whole.\(^{340}\) Like Title VII, the ADA features a very broad goal.\(^{341}\) The overall purposes of the ADA include to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; . . . to provide clear, strong, consistent, enforceable standards addressing discrimination . . . ; and . . . to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination.”\(^{342}\) Additionally, the ADA’s congressional findings echo the remedial nature of this statute, stating that discrimination towards people with disabilities is a societal

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\(^{335}\) *See also Robinson*, 519 U.S. at 341 (finding that “employee” was ambiguous because it lacked a temporal modifier).

\(^{336}\) *See Price Waterhouse*, 490 U.S. at 241.

\(^{337}\) E.g., *Robinson*, 519 U.S. at 341.

\(^{338}\) *Id.*

\(^{339}\) *Id.* at 345.

\(^{340}\) *Id.* at 341.

\(^{341}\) *See 42 U.S.C.§ 12101(b).*

\(^{342}\) *Id.* (emphasis added).
problem. Thus, ambiguous ADA phrases should be interpreted according to the familiar statutory maxim that remedial statutes are construed broadly. Mixed-motive causation increases employee protection and is the appropriate construction.

Even if the ambiguity cannot be resolved, an additional step in statutory analysis still indicates that “on the basis of” should authorize mixed-motive claims. If a proper interpretation cannot be gleaned from the statute’s text, courts should examine the legislative history behind the statutory text in order to ascertain the appropriate meaning. Legislative history pertaining to the 2008 ADA Amendments indicates that the inclusion of the phrase “on the basis of” was intended to serve the narrow purpose of correcting the Court’s interpretation in *Sutton v. United Air Lines*. In *Sutton*, the Court held that a person with a device that mitigates their impairments, such as glasses or contacts, was no longer deemed to have a disability under the ADA. Throughout the ADA Amendment Senate Report, the only reference to “on the basis of” related to the clarification of *Sutton*. In a section-by-section analysis of the changes that the Amendments Act would effectuate, the Senate Report comments regarding the inclusion of “on the basis of” were limited to:

Discrimination on the Basis of Disability. Prohibits discrimination under Title I of the ADA “on the basis of disability” rather than “against a qualified individual with a disability because of the disability of such individual.” Clarifies that covered entities that use qualification standards based on uncorrected vision must show that such a requirement is job-related and consistent with business necessity.

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343 42 U.S.C. § 12101(a).
345 *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985) (“Because we find the statute ambiguous on its face, we seek guidance in the . . . relevant legislative history”).
Thus the legislative intent shows that the change in causation phrasing was not intended to alter the plaintiff’s burden in showing discrimination or to create any meaningful deviation from the phrase “because of.”\textsuperscript{348} Rather, the change in the causation phrase was an inadvertent word choice occurring within a larger amendment that prohibited courts from considering mitigating devices when determining whether an employee had a disability under the ADA.\textsuperscript{349} This legislative history indicates that Congress did not have an objective to change the causation scheme of the ADA.\textsuperscript{350} Prior to \textit{Gross} and at the time of the 2008 ADA Amendments’ enactment, a vast majority of the circuit courts were applying mixed-motive causation to ADA claims.\textsuperscript{351} This indicates congressional intent that the ADA allow plaintiffs to recover under mixed-motive claims.

CONCLUSION

Given the frequency with which the Supreme Court hears antidiscrimination cases and the friction between \textit{Price Waterhouse} and \textit{Gross}, it is likely that the Court will soon explicitly define what particular causation scheme the ADA authorizes. In the interim, circuit courts should look to the rationale underlying the Court’s interpretations in \textit{Gross} and \textit{Price Waterhouse}. In doing so, circuit courts should rely on \textit{Price Waterhouse} and authorize recovery under the ADA for mixed-motive claims.

\textsuperscript{348} See id.
\textsuperscript{349} See id.
\textsuperscript{350} See id.
\textsuperscript{351} Supra, notes 26–27.