Reprisal Revisited: *Gross v. FBL Financial Services, Inc.* and the End of Mixed-Motive Title VII Retaliation

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I. INTRODUCTION

In 2009, the Supreme Court decided *Gross v. FBL Financial Services, Inc.*, an Age Discrimination in Employment Act (ADEA) case on appeal from the Eighth Circuit.[1] In *Gross*, the Court found that the mixed-motive burden-shifting standard first announced in *Price Waterhouse v. Hopkins*[2] is *never* available to ADEA plaintiffs, and that a plaintiff must instead "prove . . . that age was the 'but-for' cause of the challenged adverse employment action."[3] While it is clear that mixed-motive Title VII discrimination claims survive *Gross*—such claims are afforded explicit statutory support in § 2000e-2(m) of Title VII—it is far less clear whether plaintiffs suing under employment anti-discrimination statutes other than Title VII will be allowed to continue to use the mixed-motive framework. Additionally, it is unclear whether the mixed-motive framework will continue to be available to plaintiffs bringing claims under a provision of Title VII to which § 2000e-2(m) arguably does not extend: § 2000e-3(a), Title VII's anti-retaliation provision.

This Article examines the impact of *Gross* on mixed-motive Title VII retaliation claims. Part II discusses the history of retaliation under Title VII and other anti-discrimination statutes, as well as some recent developments in retaliation jurisprudence. Part III introduces the mixed-motive proof framework, and discusses the framework's origins and subsequent developments. Part IV discusses the application of the mixed-motive standard to Title VII retaliation claims, as well as the impact of both the Civil Rights Act of 1991 Amendments and the Supreme Court's decision in *Desert Palace, Inc. v. Costa* on such claims.[4] Part V analyzes the decisions of both the Eighth Circuit and the Supreme Court in *Gross*. Part VI discusses a number of early cases that address the impact of

[1] 129 S.Ct. 2343 (2009).
[2] 490 U.S. 228 (1989).
[3] *Gross*, 129 S.Ct. at 2345.
[4] 539 U.S. 90 (2003).

Gross: two widely-cited Seventh Circuit opinions applying *Gross* to a § 1983 claim and an ADA claim; a Fifth Circuit mixed-motive Title VII case finding that *Gross* does not preclude mixed-motive Title VII retaliation claims;[5] and four mixed-motive Title VII retaliation cases from the D.C. district court, two of which concluded the claims survived *Gross*, while two found they do not.[6] Part VII provides a critique of *Smith v. Xerox*, identifies two potential avenues for courts to preserve mixed-motive Title VII retaliation claims, and concludes that any decision that is truly loyal to the Court's holding in *Gross* will find that mixed-motive Title VII retaliation claims are no longer viable.

II. A BRIEF HISTORY OF RETALIATION

Section 704(a) of Title VII of the Civil Rights Act of 1964, now codified at 42 U.S.C. § 2000e-3, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees or applicants for employment . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[7]

This anti-retaliation provision is designed to "safeguard the operation of [Title VII's] procedures for enforcement":[8] the provision forbids employers from punishing employees for enforcing their rights under the anti-discrimination provisions of the Act.[9] If, for example, an employee believes that she was the victim of race discrimination by her employer, that person may file a charge with the Equal Employment Opportunity Commission (EEOC) seeking a right-to-sue letter under Title VII.[10] However, she might be discouraged from doing so if she thought that her employer would seek to punish her for filing such a charge. For example, she might face potential termination, demotion, or abuse at the workplace

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[5] Smith v. Xerox, 602 F.3d 320, 330 (5th Cir. 2010).

[6] Two of the D.C. district court cases concluded that such mixed-motive claims survive *Gross*. *See* Nuskey v. Hochberg, 730 F. Supp. 2d 1, 5 (D.D.C. 2010); Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 145 (D.D.C. 2010). However, two cases found that such claims do not survive *Gross*. *See* Hayes v. Sebelius, 762 F. Supp. 2d 90, 112 (D.D.C. 2011); Beckford v. Geithner, 661 F. Supp. 2d 17, 19–21 (D.D.C. 2009).

[7] 42 U.S.C. § 2000e-3(a) (2006).

[8] GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 151 (3d ed. 2010).

[9] *See* 42 U.S.C. § 2000e-2(a)–(d) (2006).

[10] This is somewhat of an oversimplification of the process for suing one's employer under Title VII. For example, a person must often exhaust state and local remedies before receiving a right-to-sue letter from the EEOC. *See* 42 U.S.C. § 2000e-5(c), (d) (2006); 29 C.F.R. § 1601.70 (2009); *see also* RUTHERGLEN, *supra* note 8, at 160–61.

for being the "squeaky wheel." Title VII's anti-retaliation provision seeks to mitigate such fears, promising punishment for such retaliatory acts by the employer that could undermine the statute's ultimate aim: protecting individuals against unlawful discrimination.

Two separate clauses presenting distinct legal questions comprise Title VII's retaliation provision.[11] The first clause—the "opposition clause"—prohibits retaliation for "oppos[ing] any practice made an unlawful employment practice."[12] The second clause—the "participation clause"—prohibits retaliation "because [an employee] has made a charge, testified, assisted, or participated . . . in an investigation, proceeding, or hearing" under the statute.[13] In our hypothetical example above, if the employee made internal complaints about discrimination—perhaps about discriminatory actions taken by her manager—to the human resources department, her actions would be considered "opposition." But upon filing charges with the EEOC, the conduct would switch from opposition to "participation." The distinction between conduct deemed opposition and that deemed participation is important for plaintiffs, because the "reasonable, good faith belief" requirement applies only to opposition conduct. Generally, any participation conduct will be protected, regardless of reasonableness.[14] Provided that she had a reasonable, good faith belief that the conduct complained of internally (and therefore *opposed*) was unlawful, both the internal complaints and the filing of charges with the EEOC would be protected activity under the statute.[15]

Title VII of the Civil Rights Act of 1964 is but one of several civil rights statutes that contain anti-retaliation provisions. Although Title VII's prohibition "was the dawn of the history of the law of retaliation in employment as it is known today,"[16] a number of other federal statutes that offer employment protection to individuals contain similar anti-retaliation provisions. Such statutes include the Age Discrimination in Employment Act (ADEA),[17] the Americans with Disabilities Act (ADA),[18] the Fair Labor Standards Act (FLSA),[19] the Equal Pay Act

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[11] MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 461 (7th ed. 2008).

[12] 42 U.S.C. § 2000e-3(a) (2006).

[13] *Id.*

[14] *See, e.g.*, Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (finding that an employee's opposition conduct was not protected because "no one could reasonably believe that the incident . . . violated Title VII"); Glover v. S.C. Law Enf. Div., 170 F.3d 411, 412 (4th Cir. 1999) (finding that even "unreasonable" deposition testimony is protected by the participation clause). *But see* Johnson v. ITT Aerospace, 272 F.3d 498, 501 (7th Cir. 2001) (holding that the filing of frivolous charges against an employer does not meet the requirements of "participation activity").

[15] *See id.*

[16] Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 393 (2010).

[17] 29 U.S.C. § 623(d) (2006) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.").

[18] 42 U.S.C. § 12203(a) (2006) ("No person shall discriminate against any individual because such

(EPA),[20] the Family and Medical Leave Act (FMLA),[21] and the National Labor Relations Act (NLRA).[22]

In addition to statutes containing explicit retaliation provisions, the Supreme Court has found prohibitions against retaliation implied in other statutes. In the 2005 decision of *Jackson v. Birmingham Board of Education*, the Supreme Court found an implied prohibition against retaliation in Title IX of the Education Amendments of 1972.[23] Title IX's anti-discrimination provisions provide that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24] The Court held that because retaliation is an "intentional act," it was therefore a form of intentional discrimination under Title IX.[25] The defendant in *Jackson* claimed that the educational institution had retaliated against him by terminating him from his position as coach of a high school girls' basketball team after he complained to school authorities about sex discrimination.[26] After noting that Congress clearly intended to give the statute "a broad reach," the Court held that "[r]etaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,'" and that an implied claim for retaliation was therefore available to Jackson.[27]

In 2008, the Court again found implied prohibitions against retaliation in federal statutes. In *CBOCS West, Inc. v. Humphries*, the Court found an implied anti-retaliation provision in 42 U.S.C. § 1981.[28] On the same day, the Court decided *Gomez-Perez v. Potter*, in which a United States Postal Service employee sued the Postal Service under the federal-sector provisions of the ADEA for retaliation.[29] In a 6-3 decision, the Court held that despite the fact that § 633(a) of the ADEA contains

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individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

[19] 29 U.S.C. § 215(a)(3) (2006) protects employees bringing complaints under both the EPA and the FLSA. Under § 215(a)(3), it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under . . . this chapter, or has testified or is about to testify in any such proceeding.").

[20] 29 U.S.C. § 206 (2006).

[21] 29 U.S.C. § 2615(b) (2006) ("It shall be unlawful for any person to discharge or in any other manner discriminate against an individual because such individual—(1) has filed any charge, or has instituted . . . any proceeding . . . ; (2) has given . . . any information in connection with any inquiry or proceeding relating to any right provided under this subchapter . . . ; (3) has testified . . . in any inquiry or proceeding relating to any right provided under this subchapter. . . .").

[22] 29 U.S.C. § 158(a)(4) (2006) ("It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.").

[23] 544 U.S. 167, 171, 173–74 (2005).

[24] 20 U.S.C. § 1681(a) (2006).

[25] *Jackson*, 544 U.S. at 173–74.

[26] *Id.* at 171–72.

[27] *Id.* at 175–77.

[28] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008).

[29] Gomez-Perez v. Potter, 553 U.S. 474, 478–79 (2008).

no provision mentioning retaliation, "such a claim is authorized."[30]

The Court's recent willingness to "read in" to these statutes implied anti-retaliation provisions exemplifies the Court's generally broad, employee-friendly interpretations of the law of workplace retaliation in the first decade of the twenty-first century. For example, in the 2006 case *Burlington Northern & Santa Fe Railway Co. v. White*,[31] the Court resolved a four-way circuit split[32] regarding the severity of the impact on an individual's employment that an individual must show in order to have a valid retaliation claim under Title VII.[33] In *Burlington Northern*, the plaintiff alleged that as a result of filing EEOC charges, she was reassigned and later suspended without pay.[34] However, after challenging the action through an internal grievance procedure, her employer reinstated her and gave her full back pay for the period in which she was suspended.[35] Despite the back pay award, the Court held that a reasonable employee could have found such circumstances "materially adverse," and that the employer's actions could therefore have served as a deterrent to a reasonable worker contemplating making or supporting an EEOC charge.[36] The Court characterized the new "materially adverse" standard as an objective one: the plaintiff need only show that the adverse decision was "materially adverse to a reasonable employee or job applicant" and "harmful to the point that . . . [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."[37]

In 2009, the Court, in *Crawford v. Metropolitan Government of Nashville*, found that retaliation protection extended to an employee who spoke out about sexual harassment "not on her own initiative," but rather in response to questions asked to her during an internal investigation of a fellow employee.[38] As part of an internal investigation of a school district employee relations director, a human resources officer approached Crawford and asked her whether she had witnessed any "inappropriate behavior" by the employee relations director under investigation.[39] Crawford—along with two other employees—reported that the director had in fact harassed them.[40] All three employees were subsequently terminated soon after the investigation was completed; the school district

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[30] *Id.* at 477.

[31] 548 U.S. 53 (2006).

[32] *See id.* at 60–61 (describing split between restrictive circuits that require more specific relationships between the retaliatory action and employment, and relaxed circuits that require only that the retaliatory action only be materially adverse to the employee or act as a deterrent against protected activities).

[33] *Id.* at 57.

[34] *Id.* at 58–59.

[35] *Id.*

[36] *Burlington Northern*, 548 U.S. at 71–73.

[37] *Id.* at 57.

[38] Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 849 (2009).

[39] *Id.*

[40] *Id.*

alleged that Crawford was terminated for embezzlement.[41]

The Sixth Circuit upheld summary judgment for the school district, finding that the "opposition clause" of Title VII's anti-retaliation provision "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation," and Crawford did "not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing."[42] The Supreme Court unanimously reversed, holding that the Sixth Circuit's active and consistent opposition requirement set an unreasonably high bar for conduct that constituted protected opposition.[43]

Given the Court's recently broad reading of anti-retaliation provisions paired with its willingness to imply anti-retaliation provisions in statutes that do not explicitly contain them, it is unsurprising that the number of retaliation charges filed with the EEOC has risen dramatically in recent years. In 1999, there were only 19,694 retaliation charges under all the statutes enforced by the EEOC.[44] In 2007—the year following *Burlington Northern*—26,663 charges were filed, an increase of more than 4,000 charges over the previous year's total.[45] The dramatic rise continued in 2010 with 36,258 retaliation charges being filed with the EEOC.[46] Using the year 2000 as a base, the 2010 number represents a 68% increase in the number of charges filed.[47]

Not only did the number of retaliation claims filed with the EEOC grow, but also the proportion of retaliation claims to other claims increased. In 1997, for example, retaliation made up 22.6% of all charges filed with the EEOC, making retaliation the third-most-filed charge with the EEOC.[48] By 2010, retaliation filings had exceeded race discrimination charges—long the most-filed charge—to become the single-most-filed charge with the EEOC, representing 36.3% of all charges filed.[49] Recent jury verdict research suggests that not only are retaliation claims popular, but also they are relatively profitable. One study shows "that from 2002 to 2008, retaliation claims resulted in the highest median awards for frequently occurring employment claims."[50]

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[41] *Id.*

[42] *Id.* at 850.

[43] *Crawford*, 129 S.Ct. at 851–52.

[44] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2010, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 3, 2010) [hereinafter U.S. EEOC].

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* (The EEOC lists ten types of charges: race, sex, national origin, religion, retaliation under all statutes, retaliation under Title VII only, age, disability, and those brought under the Equal Pay Act or GINA.)

[49] *See* U.S. EEOC, *supra* note 44.

[50] *See* Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 349, 397 (2010).

III. A BRIEF HISTORY OF MIXED-MOTIVE

A. Title VII's Two Proof Structures

Roughly speaking, Title VII prohibits adverse employment actions that are motivated by unlawful considerations—such as race, sex, and national origin. But what does "motivated by"—or, in the language of Title VII's anti-discrimination provision, "because of"—unlawful considerations actually mean, and how does one prove that such considerations were used? Professor Catherine Struve summarizes two of the general frameworks that are used in Title VII cases:

> Under the framework set by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine*, an employment discrimination plaintiff bears the burden of proving that discrimination was the *determinative factor* in the challenged employment decision. But under an alternative framework that burden can shift: in 1989 a fractured Supreme Court held that upon a showing that the plaintiff's protected status (such as sex) played a *motivating* (or substantial) part in the employer's adverse action, the burden would shift to the employer to prove that it would have made the same decision even if the plaintiff had not had that protected status.[51]

Under the *McDonnell Douglas* framework, the burden of persuasion never shifts from the plaintiff.[52] First, the plaintiff must establish a *prima facie* case of discrimination.[53] Once this has been established, the employer has the burden of *production* to put into evidence "some legitimate, nondiscriminatory reason" for the adverse employment action.[54] When the employer has carried this burden, the "presumption" of discrimination established by the plaintiff's prima facie showing is rebutted.[55] However, the plaintiff then has the opportunity to show that the employer's professed "nondiscriminatory reason" for the adverse action was in reality a pretext for a motivation that was actually discriminatory.[56]

McDonnell Douglas is the case most often cited in "single motive" cases: "the employer had either acted from discriminatory motives or it had acted because of its asserted 'legitimate,

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[51] Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 280–281 (2010) (emphasis added).
[52] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[53] *Id.* at 802.
[54] *Id.*
[55] ZIMMER ET AL., *supra* note 11, at 54.
[56] *McDonnell Douglas*, 411 U.S. at 802–04.

nondiscriminatory reason.'"[57] However, not all Title VII discrimination cases are so easily disposed of. In some cases, courts are presented with situations in which the adverse employment action was the result of a mixture of both legitimate and illegitimate considerations. Such cases are commonly referred to as "mixed-motive" cases.[58] In *Price Waterhouse v. Hopkins*, the Supreme Court made its first attempt at supplying an analytical framework for such situations.[59]

In *Price Waterhouse*, Ann Hopkins, a manager at an accounting firm, had her partnership application put on hold by the firm's Policy Board, which later refused to reconsider the application.[60] At trial, the judge found that certain aspects of Hopkins' behavior—she was considered to be prone to abrasiveness and was impatient with her staff—"doomed her bid for partnership."[61] However, "[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; [and] a third advised her to 'take a course at charm school.'"[62]

A plurality of the Court found the *McDonnell Douglas* framework unsuited to deal with such a mixed-motive case: "Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was *the* 'true reason,'"[63] the "determinative factor," or the "but for cause" of the decision made by the employer. Instead, the Court held that a burden-shifting framework should apply.[64] First, the plaintiff must show "that an impermissible motive played a motivating part in an adverse employment decision."[65] After this burden has been satisfied, the burden shifts to the employer to prove, by a preponderance of the evidence, "that it would have made the same decision in the absence of discrimination."[66] The Court characterized the employer's burden as an affirmative defense: "the plaintiff must persuade the factfinder" that an impermissible motive played a part in the employment decision, "and then the employer, if it wishes to prevail, must persuade" the factfinder that it would have made the same decision even without consideration of the impermissible factors.[67] This came to be known as the employer's

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[57] ZIMMER ET AL., *supra* note 11, at 43.

[58] David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 910 (2010).

[59] *See Price Waterhouse*, 490 U.S. at 228.

[60] *Id.* at 231–32.

[61] *Id.* at 234–35.

[62] *Id.* at 235 (internal citation omitted).

[63] *Id.* at 247 (internal quotations omitted).

[64] *Price Waterhouse*, 490 U.S. at 250.

[65] *Id.* at 250.

[66] *Id.* at 252–53.

[67] *Id.* at 246.

"same decision defense."[68]

B. Civil Rights Act of 1991

The *Price Waterhouse* decision was extremely advantageous to plaintiffs alleging unlawful employment discrimination. At the same time, however, the employer's affirmative defense was a powerful one under the standard established by the Court. Even if the employer *admitted* to using impermissible motives—such as race or gender discrimination—in making an employment decision, if the employer could show that it would have made the same decision *even if it had not* discriminated, the employer would escape liability entirely.[69] Congress responded to the *Price Waterhouse* decision with the Civil Rights Act of 1991.[70] Although Congress approved the basic burden-shifting framework enunciated by the Court, it limited employers' ability to avoid liability entirely through use of the same-decision defense.[71] Instead, "the employer does not escape liability if it proves that it would have made the decision regardless of the protected class. . . . [P]laintiffs receive a declaratory judgment, and may receive costs and attorneys fees, if they can satisfy the first prong of the two-prong mixed-motive test."[72] The employer's "affirmative defense," then, is not a *complete* bar to recovery by the plaintiff: if it is established that discrimination played a motivating role in the employer's decision, the matter becomes *how much* the plaintiff can recover, not *whether* the plaintiff can recover. If employers fail to satisfy their burden on the second prong, they "are subject to back pay, reinstatement, punitive and compensatory damages, as well as costs and fees."[73]

C. Direct vs. Circumstantial Evidence in Mixed-Motive Cases

While the 1991 Act provided important clarification to courts regarding the proper application of the mixed-motive framework and the remedies that could flow from a showing of the use of discriminatory considerations, certain questions were left unanswered. One of these unanswered questions was whether a plaintiff needed direct evidence to proceed under a mixed-motive framework.

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[68] *See* Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 872 (2004).
[69] *Price Waterhouse*, 490 U.S. at 258.
[70] Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 107 (1991).
[71] *Id.* § 107.
[72] Sherwyn & Heise, *supra* note 58, at 914.
[73] *Id.*

In *Price Waterhouse*, a divided Court produced a plurality opinion, two concurrences, and a dissent. The plurality, led by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, established the general mixed-motive framework, holding that if a plaintiff "proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken . . . gender into account."[74] Justice White filed a concurring opinion in which he stated that the burden should shift to the employer only when a plaintiff "show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action."[75] In her own concurring opinion, Justice O'Connor agreed with Justice White that the "substantial factor" test was the appropriate one, and that the burden on the issue of causation would shift to the employer only if "a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion" was involved.[76]

While the 1991 Act provided a definitive answer to one of the disputes between the concurrences and the plurality by codifying the "motivating factor" test, it left unanswered the question of the type of evidence required to proceed under a mixed-motive framework. It was Justice O'Connor's approach—differentiating between direct and circumstantial evidence, and requiring the former for a mixed-motive instruction—that took hold in the circuits.[77] The majority of courts followed the general rule that "when the Supreme Court rules by means of a plurality opinion . . . inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree."[78] Courts found that the "narrowest ground" with respect to the type of evidence required for a mixed-motive instruction was that espoused by Justice O'Connor.

In 2003, the Supreme Court finally took on this evidentiary issue in *Desert Palace, Inc. v. Costa*.[79] In *Costa*, the Ninth Circuit had held—in stark contrast to many courts that had considered the question—that

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[74] 490 U.S. at 258 (emphasis added).

[75] *Id.* at 259 (White, J., concurring).

[76] *Id.* at 276 (O'Connor, J., concurring) (emphasis added).

[77] Davis, *supra* note 68, at 873.

[78] Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999). *See also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (quoting Gregg v. Georgia, 428 U.S. 153, 169 (1976) (internal citations omitted)). Note, however, that not all courts initially embraced Justice O'Connor's narrow interpretation of Title VII. *See, e.g.*, Thomas v. NFL Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent."); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("The requirement of 'direct evidence' was not . . . adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.").

[79] 539 U.S. 90 (2003).

direct evidence was *not* necessary for the mixed-motive burden-shifting scheme to apply.[80] The Supreme Court unanimously affirmed the Ninth Circuit decision.[81] Justice Thomas felt no need to take sides as to "which of the opinions in *Price Waterhouse* is controlling," because he found the petitioner's argument—that direct evidence was required before a mixed-motive instruction could be given—to be "inconsistent with the text of § 2000e-2(m)."[82] He wrote:

> Our precedents make clear that the starting point for our analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the "judicial inquiry is complete". . . . Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[83]

Because the statute required only that a plaintiff "demonstrate" the use of such a consideration, requiring anything more stringent would be an error.[84] Justice Thomas also pointed to the fact that Congress explicitly defined "demonstrates" in the 1991 Act as to "meet[] the burdens of production and persuasion,"[85] without any caveat requiring a heightened showing.[86] Justice Thomas noted that the lack of such a caveat "is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances."[87]

Leaving the text of the statute, Justice Thomas pointed to additional evidence that suggested a heightened evidence requirement was unwarranted. Justice Thomas cited "the [c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases . . . [which] requires a plaintiff to prove his case 'by a preponderance of the evidence,' using 'direct or circumstantial evidence.'"[88] Moreover, Justice Thomas noted that circumstantial evidence can be *more* persuasive than direct evidence, and that such evidence is deemed to be sufficient in criminal trials—even though criminal trials require proof beyond a reasonable doubt, a higher standard than is required in a Title VII civil case.[89] Finally, Justice Thomas pointed to the use of the term "demonstrates" in other provisions of Title VII—such as § 2000e-2(k)(1)(A)(i) and § 2000e-5(g)(2)(B)—to

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[80] 299 F.3d 838, 855 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).
[81] 539 U.S. 90, 101–02 (2003).
[82] *Id.* at 98.
[83] *Id.* at 98–99 (internal citations omitted).
[84] *Id.* at 99.
[85] 42 U.S.C. § 2000e(m) (2006).
[86] 539 U.S. at 99.
[87] *Id.*
[88] *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)) (internal citations omitted).
[89] *Id.* at 100 (emphasis added).

"show further that § 2000e-2(m) does not incorporate a direct evidence requirement."[90]

IV. THE MIXED-MOTIVE STANDARD AND TITLE VII RETALIATION

Following Congress's amendment of Title VII in 1991 and the Supreme Court's decision in *Desert Palace*, one might have expected Title VII retaliation cases to simply track Title VII discrimination cases. Under this interpretation, the 1991 Amendments established a "limited defense" that employers could use to reduce (but not extinguish) damages if they admitted to using impermissible considerations—in this case, individuals' engagement in protected activity—in taking an adverse employment action. Similarly, the Court's unanimous decision in *Desert Palace* would establish that plaintiffs need not present direct evidence to avail themselves of the mixed-motive framework. However, not all courts were willing to extend the benefits offered by the 1991 Amendments to plaintiffs in the context of Title VII retaliation. The *Desert Palace* decision proved to be somewhat of a more difficult issue for Title VII retaliation than for Title VII discrimination claims.

A. Mixed-Motive Retaliation Cases

An important issue to address at the threshold is whether a plaintiff alleging Title VII retaliation could *ever* utilize the mixed-motive framework first laid out in *Price Waterhouse*. Given the disagreements that eventually materialized regarding the proper element of mixed-motive Title VII retaliation cases, it is perhaps surprising that courts, beginning in the 1990s, have generally accepted the appropriateness of such cases without great discussion. The Tenth Circuit took on the issue in *Kenworthy v. Conoco, Inc.*, in which it affirmed the district court's use of the *Price Waterhouse* standard in a Title VII retaliation case.[91] Interestingly, the court did not differentiate between the type of Title VII discrimination claim that was the subject of *Price Waterhouse* and the

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[90] *Id.* at 100–01.

[91] 979 F.2d 1462, 1471–72 (10th Cir. 1992). Although the Tenth Circuit was *one of* the first circuit courts to address the issue post-*Price Waterhouse*, it was not the first. *See* Wilson v. Univ. of Tex. Health Ctr., 973 F.2d 1263, 1267 (5th Cir. 1992) (finding that because the lower court concluded that the plaintiff "did not prove that her reports of sexual harassment caused her termination and that her misrepresentations did," the plaintiff would have similarly failed under a mixed-motive framework); McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991) (citing *Price Waterhouse* for the proposition that "plaintiff has the ultimate burden of showing pretext by proving that the filing of the discrimination lawsuit was the 'motivating part' in the decision to terminate [plaintiff]"); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989) (finding that a mixed-motive proof structure would be applicable to a Title VII retaliation case if plaintiff had presented direct evidence of discrimination).

Title VII retaliation claim that was at issue in the case. The court merely stated, citing *Price Waterhouse*, that "because the court below found [defendant's] proffered reasons legitimate *and* nevertheless credited [plaintiff's] evidence of retaliation, the retaliation is subject to the mixed-motives analysis applicable to situations involving both valid and invalid reasons for the challenged employment action."[92] The Second Circuit took a similar approach in *Cosgrove v. Sears, Roebuck & Co.*, in which the court reversed the district court's grant of summary judgment to the defendant but approved the application of *Price Waterhouse* to the retaliation issue.[93] Again, the court made no mention whatsoever of the wisdom of extending *Price Waterhouse* to a Title VII claim that alleged retaliation instead of (or at least, in addition to) discrimination.

Given the history of courts' interpretations of the sequence and burdens of proof for retaliation claims, however, it is understandable that the courts generally viewed the extension of *Price Waterhouse*'s framework to retaliation claims as unproblematic. As the Sixth Circuit noted in *Zanders v. National Railroad Passenger Corp.*:

> In a retaliation claim, a plaintiff alleges that she has been mistreated for engaging in protected activity, and that the employer's motivations are therefore illicit. Thus, a retaliation claim is analogous to an intentional discrimination claim, or "disparate treatment" claim, where the employee must demonstrate the employer's discriminatory intent; *the sequence and burden of proof applicable to disparate treatment cases are applicable to retaliation claims.*[94]

Courts may have believed that extending a new framework—one explicitly endorsed by the Supreme Court for discrimination claims—to retaliation claims was the most reasonable course to take because courts had long held that the more traditional frameworks for disparate treatment claims[95] were applicable to retaliation claims and the Supreme Court had issued no opinion to the contrary.[96] Regardless of the reasoning of the various circuits, it is clear that all circuits were, at least at one time, willing to entertain mixed-motive Title VII retaliation

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[92] 979 F. 2d at 1470.

[93] 9 F.3d 1033, 1039–41 (2d Cir. 1993).

[94] 898 F.2d 1127, 1134 (6th Cir. 1990) (emphasis added).

[95] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[96] *See, e.g.*, Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) ("The sequence of proof and burdens prescribed by . . . [*McDonnell Douglas* and *Burdine*] . . . are applicable to retaliation cases under § 2000e-3 as well as to discriminatory treatment claims."), *abrogated by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) ("The order and allocation of proof in Title VII suits generally . . . is also applied in cases alleging retaliation for participation in title VII processes.") (collecting cases); Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW 373, 376 ("Although the Supreme Court developed the *McDonnell Douglas* framework for disparate treatment cases, lower courts have almost universally adopted and applied its principles to retaliation cases.").

claims.[97, 98]

B. Effect of 1991 Amendments on Mixed-Motive Retaliation Cases

The 1991 Amendments to Title VII were beneficial to plaintiffs proceeding under the mixed-motive proof structure because attorneys would be more willing to take their cases. Before the amendments, the complete bar to recovery (following *Price Waterhouse*) that would occur if a defendant could establish the "same decision" defense served as a disincentive to plaintiffs' attorneys contemplating taking Title VII cases. By allowing recovery of attorneys' fees *in spite of* a defendant's successful "same decision" defense, mixed-motive Title VII cases began to look more appealing to such attorneys.[99]

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[97] Tanca v. Nordberg, 98 F.3d 680, 684–85 (1st Cir. 1996); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039–41 (2d Cir. 1993); Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993), *cert denied*, 510 U.S. 865 (1993), *overruled on other grounds by* Miller v. CIGNA Corp., 47 F.3d 586, 596 n.8 (3d Cir. 1995); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 553 n.8 (4th Cir. 1999) ("While the Fourth Circuit has never had an occasion to explicitly hold that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § 704 if the plaintiff can establish the evidentiary threshold, our sister circuits have unanimously applied the mixed-motive proof scheme to retaliation claims . . . Because we are unable to fathom any plausible reason for holding otherwise, we expressly join our sister circuits in holding that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § 704 if the plaintiff can establish the necessary evidentiary threshold.") (citations omitted); Fierros v. Tex. Dep't of Health, 274 F.3d 187, 192 (5th Cir. 2001); Zanders v. Nat'l R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (noting that the sequence and burden of proof applicable to disparate treatment cases are applicable to retaliation claims); Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 892–93 (7th Cir. 1996); Cronquist v. City of Minneapolis, 237 F.3d 920, 925 (8th Cir. 2001) (holding that petitioner's claim that district court erred by not applying mixed-motive framework was without merit, as petitioner failed to present any direct evidence of retaliation); Shea v. Tosco Corp., Nos. 98-35588, 98-35658, 98-36019, 2000 WL 1036071, at *2 (9th Cir. July 27, 2000); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470–71 (10th Cir. 1992) ("[B]ecause the court below found [defendant's] proffered reasons legitimate *and* nevertheless credited [plaintiff's] evidence of retaliation, the retaliation claim is subject to the 'mixed motives' analysis applicable to situations involving both valid and invalid reasons for the challenged employment action."); Burrell v. Bd. of Trs. of Ga. Military Coll., 125 F.3d 1390, 1394–95 (11th Cir. 1997); Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 200 (D.C. Cir. 1997).

[98] Courts also extended the *Price Waterhouse* mixed-motive framework to a variety of anti-discrimination statutes and statutory provisions outside of Title VII. *See, e.g.*, Metoyer v. Chassman, 504 F.3d 919, 931–34 (9th Cir. 2007) (applying *Price Waterhouse* in a retaliation claim brought under 42 U.S.C. § 1981); Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 335 (5th Cir. 2005) (finding that a mixed-motive analysis is proper under the Family and Medical Leave Act); Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 147 (3d Cir. 2004) (applying *Price Waterhouse* in a Family and Medical Leave Act case); Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001) (applying *Price Waterhouse* in a 42 U.S.C. § 1983 case); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000) (collecting cases from six circuit courts applying the *Price Waterhouse* framework to claims of disability discrimination under the Americans with Disabilities Act); Thomas v. Denny's, Inc., 111 F.3d 1506, 1511–12 (10th Cir. 1997) (finding that it was error for the district court to reject a mixed-motive instruction in a § 1981 case); Robert Fuller, Gross v. FBL Financial Services, Inc.: *A Simple Interpretation of Text and Precedent Results in Simplified Claims Under the ADEA*, 61 MERCER L. REV. 995, 1013 n. 151 (2010) (collecting cases in which circuit courts have found that *Price Waterhouse's* burden-shifting framework applies to § 1981 and § 1983 claims).

[99] Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Fin.

But by its terms, § 107 of the 1991 Amendments applies exclusively to claims brought under § 703, which prohibits discrimination based on factors such as race, sex, and national origin.[100] No mention of § 704—the section prohibiting retaliation—is made in § 107. Lending to an interpretation of § 107 that this omission was not merely unintentional, § 704 *is* in fact referenced in other, unrelated parts of the 1991 Amendments.[101]

However, the EEOC officially took the position that the 1991 Amendments do apply to Title VII retaliation cases, and that the limited "same decision" defense provided by the Amendments should overrule the *Price Waterhouse* complete bar on recovery in such cases. The EEOC Compliance Manual states that "[i]f there is credible direct evidence that retaliation was *a* motive for the challenged action, 'cause' should be found. Evidence as to any legitimate motive for the challenged action *would be relevant only to relief, not to liability.*"[102] This is consistent with the more recent of the two frameworks. Under the earlier *Price Waterhouse* standard, evidence of a legitimate motive (or motives) would be relevant to *liability*: If the employer can show that it would have taken the employment action even absent any retaliatory motive, the plaintiff is not entitled to recover anything. Under the 1991 Amendments, however, a successful same-action defense does not absolve the employer of *liability*, but only the obligation to provide certain forms of *relief*.[103] A footnote to the Compliance Manual clarifies:

Servs, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 96 (2010) ("More employees presumably could find lawyers willing to bring more cases with less clear evidence of how the employees would have been treated but for discriminatory bias . . . Plaintiffs' lawyers presumably could realistically threaten to proceed with litigation where they could prove the existence of bias in the employer's decision-making process, as all parties would realize that lawyers could collect attorney's fees based on proof of bias even if the employer could prove that the bias would have made no difference to the lawyers' imperfect clients.").

[100] Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)) ("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 . . . may grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) . . . ."). Note that the 1991 Amendments added a new subsection, 703(m), in which the mixed-motive proof structure was explicitly approved. *Id.* at § 107(a) ("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 favor for any employment practice, even though other factors also motivated the practice.").

[101] *Id.* §§ 102, 109. *See also* McNutt v. Bd. of Trs. of Univ. of Ill., 141 F.3d 706, 709 (7th Cir. 1998) ("The full text of the CRA suggests that Congress intentionally limited the protection against mixed-motive discrimination to the types of cases specified in § 2000e-2(m). Retaliation claims receive specific and explicit mention in the 1991 Act. For instance, Section 102 of the CRA . . . authorizes awards of compensatory and punitive damages for actions brought under either § 2000e-2 or § 2000e-3. Moreover, the statutory provision immediately preceding § 2000e-5(g)(2)(B) makes explicit reference to retaliation claims . . . .").

[102] EEOC COMP. MAN., Section 8: Retaliation § 8-16 (May 20, 1998) (emphasis added), *available at* http://www.eeoc.gov/policy/docs/retal.html.

[103] 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006). *See* Harper, *supra* note 99, at 92 (noting that under the 1991 Amendments, "[t]he remedies that are to be excluded by a successful 'same action defense' are 'damages' or 'admission, reinstatement, hiring, promotion, or payment' of back wages. The relief that may be granted regardless of any successful 'same action' defense include 'declaratory relief,

> Some courts have ruled that Section 107 does not apply to retaliation claims. . . . Those courts apply . . . [*Price Waterhouse*], and therefore absolve the employer of liability for proven retaliation if the [sic] establishes that it would have made the same decision in the absence of retaliation. Other courts have applied Section 107 to retaliation claims. . . . The Commission concludes that Section 107 applies to retaliation. Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation. Furthermore, an interpretation of Section 107 that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism.[104]

The EEOC, then, takes a more purposeful and historical approach to the amendments. Though language in the text arguably suggests otherwise, both the purpose of the anti-retaliation provisions and the history of retaliation in relation to other provisions of Title VII suggest that extending § 107 to retaliation claims is appropriate.

Despite this explicit endorsement by the EEOC, along with its assertion that some "courts have applied Section 107 to retaliation claims,"[105] the circuit courts nearly unanimously declined to extend § 107 to retaliation claims. Following the 1991 Amendments, courts generally adhered to the text of the statute, implicitly rejecting the EEOC's purposive and historical approach and explicitly refusing to extend the plaintiff-friendly version of the "same decision" defense to Title VII retaliation claims.[106] Instead, plaintiffs were limited to the

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injunctive relief . . . and attorney's fees and costs.'").

[104] EEOC COMP. MAN., *supra* note 102 at § 8 – II.E.1 n. 45.

[105] *Id.* at n. 46. The EEOC points to one circuit court decision, Merritt v. Dillard Paper Co., 120 F.3d 1181, 1191 (11th Cir. 1997) in support of its assertion that courts have applied § 107 to retaliation claims. The portion of the opinion that briefly discusses § 107, titled "Some Closing Thoughts," addresses § 107 in a context different from the way in which most circuits consider the Amendments. *Merritt* explains how plaintiff's remedies are *limited* under § 107, not how plaintiff's remedies are *broader* under § 107 than *Price Waterhouse* (the path that most circuits take). In fact, no mention at all is made in the opinion of *Price Waterhouse*, of mixed-motive, or of the way in which the 1991 Amendments *altered* the law of Title VII retaliation. Although the portion of *Merritt* discussing § 107 has never been expressly overruled, it has been treated negatively by one Tenth Circuit decision—a Northern District of Alabama case. There, the Northern District of Alabama explicitly declined to follow *Merritt*, found the statement regarding § 107 to be "dicta," and instead chose to follow "the four United States Courts of Appeals that have directly considered the issue [and that] have unanimously agreed that, based upon its plain language, § 107 does not apply to Title VII retaliation claims." Lewis v. Young Men's Christian Ass'n, 53 F. Supp. 2d 1253, 1262 (N.D. Ala. 1999). Since the EEOC Compliance Manual's § 8 guidance was published in 1998, the 11th Circuit has conclusively ruled on this issue, finding that § 107 does not apply to retaliation claims. Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001) ("[W]e hold that the [*Price Waterhouse*] mixed-motive defense remains good law . . . with respect to [plaintiff's] Title VII retaliation claim. On this point, we are in agreement with all other circuits that have considered this issue.").

[106] *See, e.g.,* Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Behne v. 3M

analysis provided by *Price Waterhouse*: if defendants could prove that they would have made the same decision even in the absence of retaliatory motives, the fact that retaliation was a "motivating factor" of the decision would be immaterial, and would not entitle plaintiffs to any recovery.

C. Effect of *Desert Palace* on Mixed-Motive Retaliation Cases

Prior to *Desert Palace*,[107] most courts held that to proceed under the *Price Waterhouse* mixed-motive framework in a Title VII retaliation case, plaintiffs needed to produce *direct* evidence of retaliation.[108] When *Desert Palace* was decided in 2003, courts were faced with a difficult interpretive task: Did Justice Thomas' opinion establish the evidentiary requirement for *all* mixed-motive cases, or only for those types of cases that fell under the 1991 Amendments? If the latter, then the evidentiary requirements of Title VII mixed-motive retaliation cases would remain unchanged per each circuit's decision on the issue.[109] In other words,

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Microtouch Sys., Inc., 11 F. App'x 856, 860–61 (9th Cir. 2001); Garner v. Miss. Dep't of Mental Health, 439 F.3d 958, 961 (8th Cir. 2006); Speedy v. Rexnord Corp., 243 F.3d 397, 406–07 (7th Cir. 2001); Marbly v. Rubin, No. 98-1846, 1999 WL 645662, at *2 n.2 (6th Cir. Aug. 13, 1999); Kubicko v. Ogden Logistics Servs, 181 F.3d 544, 552–53 (4th Cir. 1999); Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); Matima v. Celli, 228 F.3d 68, 80–81 (2d Cir. 2000); Tanca v. Nordberg, 98 F.3d 680, 681 (1st Cir. 1996). The Tenth Circuit has explicitly refused to decide this issue on multiple occasions. *See* Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1225 n.5 (10th Cir. 2008) ("[W]e have yet to decide whether these amendments actually apply to retaliation cases, and we decline to do so today . . . ."); Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 n.4 (10th Cir. 1999) (noting defendant's argument that the plain language of 2000e-2(m) does not include retaliation cases, but declining to decide the issue). The D.C. Circuit, similarly, has twice declined to resolve the issue. *See* Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005) ("[A]lthough every circuit to address the issue has held that the mixed motive provisions of the 1991 Act do not apply to retaliation claims, it remains an open question in this circuit."); Borgo v. Goldin, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) ("[W]hile discrimination claims . . . were covered by the 1991 Act, Congress did not expressly include retaliation claims in the provision that modified *Price Waterhouse* . . . This circuit has not addressed that question."). The Fifth Circuit has also expressly refused to decide the issue. *See* Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 403 (5th Cir. 2000) ("[W]e respectfully decline the invitation to address this issue now."); *see also* Earl M. Jones, III, Jason R. Dugas, & Jennifer A. Youpa, *Employment Law*, 59 SMU L. Rev. 1211, 1220 (2006) ("[T]he Fifth Circuit has not expressly addressed the question of whether the amended statute applies in Title VII retaliation cases . . . .").

[107] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[108] *See, e.g.*, Kubicko v. Ogden Logistics Serv., 181 F.3d at 552–53 ("Absent the threshold showing [of direct evidence] necessary to invoke the mixed motive proof scheme . . . a plaintiff must prevail under the less advantageous standard of liability applicable in pretext cases in which the plaintiff always shoulders the burden of persuasion."); Montemayor v. City of San Antonio, 276 F.3d 687, 692 (5th Cir. 2001); Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 381–82 (6th Cir. 2002) (noting that plaintiff alleging Title VII retaliation may proceed under *Price Waterhouse* only when direct evidence of retaliation has been presented); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997) (stating, after noting that § 107 of the 1991 Amendments does not apply to retaliation claims, that "[n]ot all evidence that is probative of illegitimate motives suffices to entitle a plaintiff to a mixed-motives/*Price Waterhouse* charge. Rather . . . the employee must show '*direct evidence* that an illegitimate criterion was a substantial factor in the decision.'") (quoting *Price Waterhouse*, 490 U.S. at 276).

[109] *See supra* note 97.

Title VII retaliation plaintiffs would still be required to present direct evidence in order to proceed under the *Price Waterhouse* mixed-motive framework, while Title VII *discrimination* plaintiffs could present *either* direct or circumstantial evidence in order to proceed under the statutory mixed-motive framework.

In examining the *Desert Palace* decision itself, support can be found for both interpretations. Justice Thomas rhapsodizes broadly on the benefits of circumstantial evidence, noting that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[110] If circumstantial evidence can, in some situations, be even more reliable and persuasive than direct evidence, why should the presence of circumstantial evidence in a retaliation case categorically bar a plaintiff from proceeding under a potentially beneficial framework? Justice Thomas further notes, "The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."[111] This statement is especially damning to the *Price Waterhouse* direct evidence requirement: If circumstantial evidence is both reliable and persuasive enough to support convictions that stripping citizens of fundamental liberties, how can such evidence be categorically *insufficient* in civil cases, which invoke a lowered standard of proof? Finally, Justice Thomas notes that "juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'"[112] Justice Thomas then points out that, unsurprisingly, the petitioner and its *amici curiae* were unable to "point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute."[113]

If one only read the above portion of the decision, it would seem reasonable to conclude that, "absent some affirmative directive in a statute," a plaintiff—including a Title VII retaliation plaintiff seeking to proceed under a mixed-motive framework—should not be restricted to direct evidence. However, much of the rest of Justice Thomas' opinion deals directly with the text of the 1991 Amendments, and more specifically, with § 107.[114] At the beginning of the second section of the opinion (where the Court analyzes and applies the applicable law), Justice Thomas presents the issue before the Court as "whether a plaintiff must present direct evidence of discrimination in order to obtain a

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[110] 539 U.S. at 100 (2003) (quoting Rogers v. Mo. Pacific R. Co., 352 U.S. 500, 508 n. 17 (1957)).

[111] *Id.*

[112] *Id.* (quoting 1A K. O'MALLEY, J. GRENIG, & W. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 12.04 (5th ed. 2000)).

[113] *Id.* (referencing Tr. of Oral Arg. 13).

[114] Section 107 is codified in part at 42 U.S.C. § 2000e-2(m).

mixed-motive instruction under 42 U.S.C. § 2000e-2(m)."[115] Thomas immediately turns to the text of the statute, noting:

> Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrate[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[116]

By focusing on the part of Title VII that, according to most courts, only applies to Title VII *discrimination* claims, the applicability of the holding of *Desert Palace* to Title VII retaliation claims begins to look less obvious. Thomas continues to focus on the language of the 1991 Amendments, pointing out that the definition of the term "demonstrates" (which is present in § 2000e-2(m), but absent in any provision that clearly applies to retaliation) is defined elsewhere in the Act as "to 'mee[t] the burdens of production and persuasion.'"[117] Finally, Justice Thomas' conclusion reinforces the potentially limited scope of his holding:

> In order to obtain an instruction *under § 2000e-2m*, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."[118]

Justice Thomas could have simply written that "in order to obtain a *mixed-motive instruction under Title VII*, a plaintiff need only . . .," but he instead limited his holding to the *statutory* mixed-motive framework. Interestingly, Justice O'Connor's concurring opinion (in which she seems to defend her decision in *Price Waterhouse* to require direct evidence) uses broader language than the majority opinion: "in the Civil Rights Act of 1991, Congress codified a new evidentiary rule *for mixed-motive cases arising under Title VII*."[119] This could suggest not only that Title VII mixed-motive retaliation cases could proceed using the mixed-motive framework, but that, contrary to every circuit that had decided the issue,[120] the 1991 Amendments applied to Title VII mixed-motive retaliation cases.[121]

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[115] Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003).

[116] *Id.* at 91.

[117] *Id.* at 99.

[118] *Id.* at 101 (emphasis added).

[119] *Id.* at 102 (O'Connor, J., concurring) (emphasis added).

[120] *See supra* Part IV(B).

[121] Of course, such a reading would be extremely beneficial to plaintiffs, in that the limitations imposed by the *Price Waterhouse* mixed-motive standard—the broad "same decision" defense that precluded any recovery by plaintiffs if defendants could show that they would have made the same decision even absent the retaliatory animus—would no longer be present. Instead, only the statutory

Courts varied in their interpretations of how *Desert Palace* applied to mixed-motive Title VII retaliation cases. *Vialpando v. Johanns*,[122] a 2008 decision written by District of Colorado Judge Marcia Krieger, is representative of many of the decisions that found that *Desert Palace* had no impact on the evidentiary requirements of mixed-motive Title VII retaliation cases. In the original action the court tasked the jury with deciding whether two actions taken by plaintiff's employer constituted retaliation in violation of Title VII. Upon receiving a limited damage award, the plaintiff moved for a new trial, arguing, *inter alia*, that "the court erred in instructing the jury that she must prove that 'but for' her protected conduct, the Defendant would not have taken an adverse action against her."[123] The court rejected the plaintiff's argument that she was entitled to invoke a mixed-motive analysis. Judge Krieger explained as follows:

> *Desert Palace's* reasoning is predicated on a statutory provision that applies solely to *disparate treatment* claims, not *retaliation* claims. The lynchpin of *Desert Palace's* analysis is 42 U.S.C. § 2000e-2(m), a section newly-added to Title VII . . . as part of the Civil Rights Act of 1991. That section . . . codifies the "motivating factor" test in cases where "race, color, religion, sex, or national origin" are alleged to be the basis of the prohibited discrimination. Conspicuously absent from § 2000e-2(m), however, is any mention of retaliation or reference to "protected activity" being the motivating factor for the challenged employment practice. Whether it be by Congressional design or imprecise draftsmanship, it is readily apparent that § 2000e-2(m) does not purport to apply to retaliation cases under Title VII.[124]

By describing § 2000e-2(m) as the lynchpin of Justice Thomas' decision, the direction the court will take becomes clear: if *Desert Palace* is based primarily on § 2000e-2(m), and that section has no bearing on retaliation claims, *Desert Palace* should have no effect on retaliation claims. Indeed, the court continues:

> Having followed the path all the way to the point where the "mixed-motive" and *McDonnell Douglas* "pretext" analyses merge, we now begin backtracking. Because § 2000e-2(m) does not apply to retaliation cases, such as the one at issue here, the reasoning of *Desert Palace*, which turned entirely on

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same decision defense would be available to defendants, which would still afford plaintiffs' attorneys' fees in the face of a defendant's successful same decision defense.

[122] 619 F. Supp. 2d 1107 (D. Colo. 2008).

[123] *Id.* at 1111.

[124] *Id.* at 1115.

> that statutory section, is not controlling.[125]

The court then reviewed Tenth Circuit precedent on pre-*Desert Palace* mixed-motive cases, and determined that controlling precedent "made clear that 'a mixed motives analysis only applies once a plaintiff has established direct evidence of discrimination.'"[126] The court concluded that because the plaintiff was not entitled to the "assistance of *Desert Palace*," the plaintiff "was entitled to avail herself of the 'mixed-motive' analysis . . . only if she came forward with *direct evidence* that the adverse employment action(s) against her were motivated by her protected conduct."[127]

Kotewa v. Living Independence Network Corp., a 2007 decision written by District of Idaho Judge Edward Lodge, is representative of the decisions finding that the standard of proof set forth in *Desert Palace* applies to retaliation cases.[128] In that case, the defendant argued that the *McDonnell Douglas* standard should apply to the plaintiff's claim, as the plaintiff had "not met her burden of proof of presenting direct evidence" of retaliation.[129] After describing the history of *Price Waterhouse*, the 1991 Amendments, and the Supreme Court's decision in *Desert Palace*, the court tackled the post-*Desert Palace* issue of Title VII retaliation:

> [t]he question in this case is whether the standard of proof set forth in [*Desert Palace*] applies to retaliation cases. One viewpoint is that the 1991 amendments did not affect retaliation cases and so the direct evidence requirement in Justice O'Connor's *Price Waterhouse* opinion still applies to mixed-motive retaliation cases. The other viewpoint is that the Ninth Circuit has historically said the standards of proof are the same for Title VII discrimination and retaliations claims and recently ruled in "any" Title VII action the standard of proof allows for direct or circumstantial evidence to be used by plaintiff.[130]

Note that this inquiry differs from the one undertaken in *Vialpando v. Johanns*. In that case, the court noted that in the Tenth Circuit the requirement of direct evidence in mixed-motive cases was clear.[131] In

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[125] *Id.*

[126] *Id.* (quoting Shorter v. ICG Holdings, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999)).

[127] 619 F. Supp. 2d at 1115–16 (emphasis added). Note that the Tenth Circuit is one of the three circuits that expressly declined to decide whether the 1991 Amendments apply the mixed-motive Title VII retaliation claims. *See supra* note 106. Given the language of Judge Krieger's opinion regarding the lack of any mention of retaliation in § 2000e-2(m), however, it appears to be clear that if direct evidence had been presented, the plaintiff would be entitled only to the *Price Waterhouse* mixed-motive framework, not the statutory mixed-motive framework established by the 1991 Amendments.

[128] Kotewa v. Living Independence Network Corp., No. CV05-426-S-EJL, 2007 WL 433544 (D. Idaho Feb. 2, 2007).

[129] *Id.* at *5.

[130] *Id.* at *7 (citation omitted).

[131] Vialpando v. Johanns, 619 F. Supp. 2d at 1115 (quoting Shorter v. ICG Holdings, 188 F.3d 1204,

Kotewa, however, the court found that the state of the law in the Ninth Circuit regarding evidentiary requirements for Title VII mixed-motive retaliation cases to be decidedly unclear.[132]

The *Kotewa* court pointed to *Stegall v. Citadel Broadcasting Co.*, a Ninth Circuit decision that "did not specifically analyze whether the direct evidence only standard of proof applied for retaliation mixed-motive cases at the summary judgment stage,"[133] but which nevertheless "held that 'the plaintiff in *any* Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played a motivating factor."[134] The court took *Stegall* and the Ninth Circuit's en banc decision in *Desert Palace*[135] (later affirmed by the Supreme Court) to establish that "the Ninth Circuit finds the standard of proof should be the same for all Title VII cases since it did not set forth a different rule for retaliation claims."[136] The court found that this conclusion was "logical," as "trying to figure out the import of the passing reference to 'direct evidence' in Justice O'Connor's concurring opinion in *Price Waterhouse* results in a conundrum."[137]

Finally, Judge Lodge looked to Justice Thomas' opinion in *Desert Palace*, although he interpreted the case differently than did Judge Krieger. Judge Lodge cited *Desert Palace* for the position that "Title VII is silent with respect to the type of evidence required for retaliation cases, so it would be unfair and prejudicial to apply a heightened standard of proof where Title VII is also silent with respect to the type of evidence for discrimination cases."[138] Although this part of the decision gives fairly little attention to *Desert Palace*, it is clear that Judge Lodge believes Justice Thomas' decision supports this reading of the evidentiary requirements, as he writes that "[w]hile other circuits have held there is a direct evidence requirement for mixed-motive retaliation cases which survives due to the *Price Waterhouse* decision, these . . . [decisions] *were issued long before the Supreme Court's ruling in* Desert Palace."[139]

Perhaps not surprisingly, then, courts that felt the direct evidence requirement still applied focused on the language of Justice Thomas' opinion in *Desert Palace* that appeared to limit the applicability of the holding to § 2000e-2(m). These courts found that § 2000e-2(m) was a

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1208 n.4 (10th Cir. 1999)).

[132] *See Kotewa*, 2007 WL 433544 at *5–8 (reviewing 9th Circuit case law).

[133] *Id.* at *7.

[134] *Id.* (quoting Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1068 (9th Cir. 2004) (emphasis added) (internal quotations omitted)).

[135] Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (en banc).

[136] *Kotewa*, 2007 WL 433544, at *7.

[137] *Id.*

[138] *Id.* (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) ("We should not depart from the '[c]onventional rul[e] of civil litigation [that] generally appl[ies] to all Title VII cases.'") (citations omitted)).

[139] *Id.* at 8 (emphasis added).

"lynchpin" of the decision.[140] On the other hand, courts that believed plaintiffs alleging retaliation could proceed under a mixed-motive framework with either direct or circumstantial evidence pointed to Justice Thomas' broader statements in *Desert Palace* regarding "conventional rules" and legal traditions, ignoring or minimizing the language that arguably cabined his holding.[141]

In the end, most circuit courts that decided the issue found that mixed-motive Title VII retaliation claims did not require direct evidence in a post-*Desert Palace* world.[142] However, to say that these courts decided the issue is perhaps being overly generous. Most of these courts made only passing (if any) reference to the impact of *Desert Palace*, and no circuit courts engaged in robust examinations like those found in *Vialpando* and *Kotewa* regarding the scope of the holding of *Desert Palace*.[143] The circuit decision with arguably the most thorough discussion of mixed-motive Title VII retaliation post-*Desert Palace* is *Fye v. Oklahoma Corp. Commission*, which fails to even mention the distinction that can be drawn between Title VII retaliation and Title VII *discrimination* cases, apparently simply assuming that *Desert Palace* applies to mixed-motive retaliation cases.[144] Ironically, the one circuit that was willing to raise the issue in detail—the Fifth Circuit—repeatedly

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[140] *See also* Funai v. Brownlee, 369 F. Supp. 2d 1222, 1227–28 (D. Haw. 2004) (holding that, despite the fact that the Supreme Court in *Desert Palace* held "that direct evidence of discrimination is *not* required to obtain a mixed-motive instruction under Section 2000e-2m," because "2000e-2(m) does not apply to retaliation claims and . . . *Price Waterhouse* continues to provide the relevant standards . . . for mixed-motive retaliation claims," a plaintiff still must introduce "'direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion.'") (quoting Kubicko v. Ogden Logistics Serv., 181 F.3d 544, 552–53 (4th Cir. 1999).

[141] *See also* Dilettoso v. Potter, No. CV 04-0566-PHX-NVW, 2006 WL 197146, at *24–25 (D. Ariz. Jan. 25, 2006). In *Dilettoso*, the court held that "[n]otwithstanding the Court's narrow statutory holding" in *Desert Palace*, the opinion "could shed light on the appropriateness of a heightened evidentiary burden of persuasion in retaliation cases." The court first pointed to the fact that Justice Thomas emphasized that "the text of the 1991 Act did not indicate that any 'special evidentiary showing' was required," and that "[n]either, of course, does Title 42's retaliation provision." Second, the court pointed to Justice Thomas' remarks on "the adequacy of circumstantial evidence in general."

[142] Semsroth v. City of Wichita, 304 F. App'x 707, 720–21 (10th Cir. 2008) (allowing circumstantial evidence to establish retaliation as a motivating factor); Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224-26 (10th Cir. 2008) (same); Culver v. Gorman & Co., 416 F.3d 540, 545–46 (7th Cir. 2005) (same); Spiegla v. Hull, 371 F.3d 928, 941–43 & n.10 (7th Cir. 2004) (applying motivating factor causation standard in First Amendment retaliation case, and noting the causation standard is the same in Title VII retaliation cases); Calmat Co. v. U.S. Dep't of Labor, 364 F.3d 1117, 1123 (9th Cir. 2004) (noting (in dicta) that the Administrative Review Board "erroneously stated that direct evidence of retaliation is necessary to apply the mixed-motive framework"). *But see* Carrington v. Des Moines, 481 F.3d 1046, 1050–53 (8th Cir. 2007) (asserting that "[i]n the absence of direct evidence, the burden-shifting framework of [*McDonnell Douglas*] . . . governs retaliation claims" without mentioning *Desert Palace*).

[143] For example, the courts in *Culver* and *Spiegla* fail to even mention *Desert Palace*.

[144] *Fye*, 516 F.3d at 1226 n.6 ("[Plaintiff] argues that the Supreme Court's decision in *Desert Palace* . . . modified out existing precedent. . . . The Court specifically noted that Title VII is silent "with respect to the type of evidence required in mixed-motive cases" and held that a plaintiff may prove her case using either direct or circumstantial evidence. . . . To the extent that any of our cases hold that direct evidence is required to establish a mixed-motive case, they are no longer good law.") (quoting *Desert Palace*, 539 U.S. at 99) (internal citations omitted).

refused to decide the matter.[145]

D. Conclusion

In the twenty years between *Price Waterhouse* and the Supreme Court's 2009 decision in *Gross v. FBL Financial*, the mixed-motive framework had undergone some significant changes and developments. Most important for Title VII retaliation claims was the fact that every circuit either explicitly or implicitly allowed for mixed-motive Title VII retaliation claims. However, not all of the benefits that mixed-motive Title VII *discrimination* plaintiffs enjoyed extended to Title VII retaliation plaintiffs. After the 1991 Amendments, all of the circuits that decided the issue held that the aspects of the Amendments favorable to plaintiffs—such as eliminating *Price Waterhouse*'s complete "same decision" defense, and replacing it with a modified defense that allowed plaintiffs to recover attorneys' fees despite a defendant's successful "same decision" showing—did not apply in mixed-motive Title VII *retaliation* cases. These courts found that mixed-motive Title VII retaliation plaintiffs still faced the less favorable *Price Waterhouse* complete "same decision" defense.

But not all of the post-*Price Waterhouse* developments excluded mixed-motive retaliation plaintiffs. After *Desert Palace*, most circuit courts that decided the issue found that mixed-motive Title VII retaliation claims did not require direct evidence, something that Justice O'Connor's opinion in *Price Waterhouse* required. This was quite beneficial to retaliation plaintiffs, as a showing of direct evidence of retaliation—or any type of adverse treatment, for that matter—was often difficult for a plaintiff to obtain.

V. THE *GROSS* DECISION

In 2009, the Supreme Court decided an Age Discrimination in Employment Act ("ADEA") case on appeal from the Eighth Circuit. Although certiorari had been granted on a rather narrow issue, the Court instead issued a broad holding that foreclosed an ADEA plaintiff's

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[145] *See, e.g.*, McCullough v. Houston Cnty Tex., 297 F. App'x 282, 288 n.7 (5th Cir. 2008) ("[I]t is now established that in Title VII *discrimination* cases, 'a plaintiff need only meet the 'motivating factor' standard even if the plaintiff is adducing only circumstantial evidence.' . . . This court has not extended the holdings of either *Desert Palace* or *Rachid* so as to apply the mixed-motives analysis to Title VII *retaliation* claims. . . . This is particularly true where, as is the case here, neither party raises the issue, both parties argue pretext, and both parties engage in a but-for analysis." (internal quotations and citations omitted)); Campbell v. England, 234 F. App'x 183, 186 n. 4 (5th Cir. 2007) (introducing the issue with the same language the Fifth Circuit used in *McCullough*, and refusing to decide the issue on the same grounds).

ability to proceed under a mixed-motive framework. Because courts tend to view the proof structures of Title VII retaliation and ADEA cases similarly, this decision could have a profound effect on plaintiffs attempting to use the mixed-motive proof structure for Title VII retaliation claims.

A. The Eighth Circuit Opinion

In *Gross v. FBL Financial Services, Inc.*, the Eighth Circuit reviewed a decision in which Jack Gross, an FBL employee, had successfully sued his employer for allegedly demoting him because of his age, in violation of the ADEA.[146] At trial, the jury awarded Gross $46,945.[147] FBL appealed the decision, arguing that the trial judge incorrectly instructed the jury "concerning the elements of the claim and the burden of proof."[148] The district court had required Gross to show only that his age was a "motivating factor" of FBL's decision to demote him, despite the fact that (as Gross conceded) he had not presented direct evidence of discrimination.[149] Gross contended that there had been no error, as "the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace, Inc. v. Costa* . . . supersede *Price Waterhouse* and . . . [the Eighth Circuit's] precedents applying *Price Waterhouse* to the ADEA."[150] Previously, the Eighth Circuit has held that "[t]he *Price Waterhouse* rule calls for a shift in the burden of persuasion only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision."[151]

The Eighth Circuit reversed the district court and remanded the case for a new trial. The court held that because Gross failed to present direct evidence, "a mixed motive instruction was not warranted under the *Price Waterhouse* rule," and that:

> [the] claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.[152]

Similar to the findings of the circuit courts regarding the applicability of

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[146] 526 F.3d 356 (8th Cir. 2008).
[147] *Id.* at 358.
[148] *Id.*
[149] *Id.* at 360.
[150] *Id.*
[151] *Gross*, 526 F.3d at 360.
[152] *Id.*

the 1991 Amendments to Title VII retaliation,[153] the Eighth Circuit found that "§ 2000e-2(m) does not apply to claims arising under the ADEA." The court focused on the language of § 2000e-2(m), noting that "[by] its terms, the new section applies only to employment practices in which 'race, color, religion, sex, or national origin' was a motivating factor."[154] The court bolstered this *inclusio unius est exclusio alterius*[155] argument by pointing to other provisions of the 1991 Amendments that *did* address the ADEA explicitly,[156] which suggested that the absence of any mention of the ADEA from § 2000e-2(m) was not accidental.

Nor was the court persuaded by Gross's argument that "*Desert Palace* shows that the *Price Waterhouse* analysis no longer should govern his ADEA claim."[157] In an approach similar to Judge Krieger's in *Vialpando*, the court emphasized that *Desert Palace* "focused on the particular text of the 1991 Act . . . ," and noted that "[t]he Court . . . declined to address which opinion in *Price Waterhouse* was controlling . . . or to revisit *Price Waterhouse*'s interpretation of a statute, unadorned by § 2000e-2(m)."[158] Because "the Court did not speak directly to the vitality of [*Price Waterhouse*]," and because Eighth Circuit precedent had long held that it "should follow the *Price Waterhouse* rule in ADEA cases," the court concluded "that the *Price Waterhouse* rule continues to govern mixed motive instructions in an ADEA case."[159]

B. The Supreme Court Opinion

After losing in the Eighth Circuit, Gross petitioned the Supreme Court. The Court granted certiorari to decide "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under [the ADEA]."[160] But the Court never answered that question. Instead, the majority, with Justice Thomas writing, held that the Eighth Circuit had incorrectly decided a threshold question: "whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[161] In other words, the question the Court put before itself was whether a mixed-motive proof structure was ever appropriate under the ADEA. In a move that surprised many employment law

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[153] *See supra* Part IV(B) and note 97.
[154] *Gross*, 526 F.3d.at 361.
[155] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, 831 (9th ed. 2009).
[156] *Gross*, 526 F.3d at 361.
[157] *Id.*
[158] *Id.* at 362.
[159] *Id.*
[160] Gross v. FBL Fin. Servs, Inc., 129 S. Ct. 2343, 2346 (2009).
[161] *Id.* at 2348 (emphasis added).

practitioners and scholars, the Court answered this question in the negative.[162]

After a summary of the Eighth Circuit opinion, the Court began its own investigation of the issue in Part II of the opinion by differentiating between Title VII and the ADEA. Justice Thomas pointed to the *post*-1991 Amendments to Title VII, noting that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §[] 2000e-2(m)."[163] This of course ignores (or at least avoids) the fact that, although Title VII *now* contains text that provides for a mixed-motive proof structure, it lacked such explicit language in 1989 when the Court decided *Price Waterhouse*.

The Court next moved to "the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim."[164] In a move similar to that of the Court twenty years earlier in *Price Waterhouse*, Justice Thomas gives significant attention to the "because of" language in the statute.[165] Interestingly, however, he comes to the *opposite* conclusion reached in *Price Waterhouse*, despite the fact that Title VII's pre-1991 Amendments language and the language found in the current version of the ADEA are strikingly similar.[166] Justice Thomas cited three dictionaries and (somewhat ambiguous) language in three Supreme Court cases to support his conclusion that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[167] Because, according to Justice Thomas, age must be *the* reason, it follows that "[t]o establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[168]

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[162] *See, e.g.*, John A. Beranbaum, *Assessing The Impact of "Gross" on Employment Discrimination Cases*, 244 N.Y. L.J 44, (2010) (noting that "[t]he Court's decision came as something of a shock"); Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the But-For Requirement*, 43 SUFFOLK U. L. REV. 921 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMPL. RTS. & EMP. POL'Y J. 253, 270–71 (2009).

[163] 129 S. Ct. at 2349.

[164] *Id.* at 2350.

[165] *Price Waterhouse*, 490 U.S. at 239–42.

[166] The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (2006) (emphasis added). The version of Title VII from which the Supreme Court drew the conclusion that "because of" meant something other than but-for causation forbade an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's [sex]." 42 U.S.C. §§ 2000e-2(a)(1), (2) (1988) (emphasis added).

[167] *Gross*, 129 S. Ct. at 2345.

[168] *Id.* at 2350.

In Part III of his opinion, Justice Thomas finally addressed (albeit briefly) the potential complications that the *Price Waterhouse* decision presents to his interpretation of the ADEA. He begins his discussion with a surprising statement, though perhaps an understandable one given his apparent dismissal of the decision elsewhere in his opinion:

> Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. *In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.*[169]

Justice Thomas does not further elaborate on his apparent skepticism regarding the doctrinal integrity of *Price Waterhouse*. However, he does note that "even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[170]

Justice Thomas makes a comment in a footnote that is telling of his view of the current status and usefulness of the non-statutory *Price Waterhouse* mixed-motive framework. In footnote five, Thomas responds to Justice Stevens' contention that the Court "must apply *Price Waterhouse* under the reasoning of *Smith v. City of Jackson*," where "the Court applied to the ADEA its pre-1991 interpretation of Title VII with respect to disparate-impact claims despite Congress' 1991 amendment adding disparate-impact claims to Title VII but not the ADEA."[171] Thomas writes that in the 1991 Amendments:

> Congress not only explicitly added "motivating factor" liability to Title VII . . . , but it also partially abrogated *Price Waterhouse*'s holding by eliminating an employer's complete affirmative defense to "motivating factor" claims, see 42 U.S.C. § 2000e-5(g)(2)(B). If such "motivating factor" claims were already part of Title VII, the addition of § 2000e-5(g)(2)(B) alone would have been sufficient. Congress' careful tailoring of the "motivating factor" claim in Title VII, as well as the absence of a provision parallel to § 2000e-2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework to the ADEA.[172]

Justice Thomas appears to make the claim that, if Congress agreed with *Price Waterhouse*'s mixed-motive framework, and disagreed only with that Court's complete affirmative defense, it would have simply added §

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[169] *Id.* at 2351–52 (emphasis added).
[170] *Id.* at 2352.
[171] *Id.* at 2352 n. 5.
[172] *Id.*

2000e-5(g)(2)(B) to Title VII, and would have felt it unnecessary to add § 2000e-2(m).

This is an odd approach. It would mean, essentially, that Congress thought that the Supreme Court in *Price Waterhouse* had *incorrectly* read mixed-motive into Title VII, but that Congress (apparently upon further reflection) thought that mixed-motive *should be* in Title VII and, therefore, added that language to the statute. That would mean that now there *is* a mixed-motive framework because—and only because—of Congress's creation of such a framework in the 1991 Amendments. This would also mean that *Price Waterhouse* was wrongly decided: the Court was reading something into the pre-1991 Amendments to Title VII that was not there.

There seems to be a much simpler explanation for why § 2000e-2(m) exists: Congress was merely codifying the part of *Price Waterhouse* with which it agreed. Many courts had found precisely that in the years between the 1991 Amendments and *Gross*.[173] For Justice Thomas, however, § 2000e-2(m) was a sign that the Supreme Court had gotten it wrong, for if Congress had agreed with the Court's interpretation in *Price Waterhouse*, it would have simply said nothing.

C. The Dissent

Justice Stevens wrote a strongly-worded dissent, characterizing Justice Thomas' opinion as "irresponsible,"[174] "unwise and inconsistent with settled law,"[175] and ultimately showing an "utter disregard of our precedent and Congress' intent."[176] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, noted that what Justice Thomas was actually advocating was the same standard—originally advocated by Justice Kennedy in his dissenting opinion in *Price Waterhouse*—that both the Court in *Price Waterhouse* and Congress in the 1991

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[173] *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (noting that the *Price* Waterhouse Court's statement that "the words 'because of' do not mean 'solely because of'" "was codified by the Civil Rights Act of 1991" (quoting *Price Waterhouse*, 490 U.S. at 241) (citing 42 U.S.C. § 2000e-2(m)); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 n.4 (3d Cir. 1995) (noting that "the Civil Rights Act of 1991 . . . codified *Price Waterhouse*'s 'mixed-motives' standard at 42 U.S.C.A. § 2000e-2(m) . . . ."); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992) (noting that the *Price Waterhouse* Court's "theory has been codified in the Civil Rights Act of 1991," citing 42 U.S.C.A. § 2000e-2(m)); Overall v. Univ. of Pa., No. Civ. A. 02-1628, 2003 WL 23095953 at *6 (E.D. Pa. Dec. 19, 2003) ("The Supreme Court first established the mixed motive test in *Price Waterhouse*, but Congress codified it in the 1991 amendments to the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2003)."); Moreno v. Grand Victoria Casino, 94 F. Supp. 2d 883, 900 (N.D. Ill. 2000) ("The Civil Rights Act of 1991 codified the *Price Waterhouse* interpretation of the 'because of' language."); Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1286 (D. Minn. 1995) ("[T]he *Price Waterhouse* 'mixed-motive' analysis was codified as relating to gender in the 1991 amendments to the civil rights statutes.").

[174] *Gross*,129 S. Ct. at 2353.

[175] *Id.* at 2358.

[176] *Id.* at 2353.

Amendments rejected.[177] Justice Stevens argued that the mere fact

> [t]hat the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[178]

Justice Stevens then examined the two cases on which Justice Thomas principally relies—*Hazen Paper Co.*[179] and *Reeves*,[180] both single-motive ADEA cases—and asserted that they actually support that the ADEA *should be* interpreted consistently with Title VII, as both "followed the standards set forth in non-mixed-motives Title VII cases."[181]

Justice Stevens also took aim at Justice Thomas' characterization of the relationship between *Price Waterhouse* and the 1991 Amendments. In Justice Stevens' opinion, "Congress *ratified Price Waterhouse*'s interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See § 2000e-2(m)."[182] This interpretation stands in stark contrast to Justice Thomas's, which read § 2000e-2(m) as Congress creating a mixed-motive standard that had not previously existed. Because the 1991 Amendments amended only Title VII and not the ADEA, however, Justice Stevens would have found those amendments to apply only to Title VII claims, with "*Price Waterhouse*'s construction of 'because of' remain[ing] the governing law for ADEA claims."[183]

Finally, Justice Stevens provided the answer he would have given to the question for which certiorari was granted. Following *Desert Palace*, Justice Stevens stated that he "would . . . hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motive instruction."[184] Interestingly, and contrary to the widely held interpretation of the circuits, Justice Stevens found Justice White's concurrence—not Justice O'Connor's—to be controlling. Therefore, because Justice White did not require direct evidence, such evidence was never required under *Price Waterhouse*. Also, Justice Stevens noted that "[a]ny questions raised by *Price Waterhouse* as to a direct evidence requirement were settled by this Court's unanimous decision in *Desert Palace*."[185] Justice Stevens took an approach to *Desert Palace* similar to

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[177] *Id.*
[178] *Id.* at 2354 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).
[179] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
[180] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).
[181] *Gross*, 129 S. Ct. at 2355.
[182] *Id.* at 2355–56 (emphasis added).
[183] *Id.* at 2356.
[184] *Id.* at 2357.
[185] *Id.*

that of the lower courts that had considered the issue and found that after *Desert Palace* direct evidence was no longer required for Title VII mixed-motive cases:[186] he focused on the broad language of the decision that suggested that in the face of statutory silence, a heightened proof requirement should not be assumed.[187]

D. Conclusion

Had the Supreme Court answered the question for which certiorari was granted, the circuits may have gotten a relatively clear resolution to the issue discussed in Part IV(C): whether *Desert Palace*'s latitudinous evidentiary requirement for mixed-motive claims applies outside of the 2000e-2(m) context—and, by extension, to mixed-motive Title VII retaliation claims. Instead, Justice Thomas authored an opinion that effectively overruled the interpretations of ten federal circuit courts and well over a decade of jurisprudence.[188] After *Gross*, it was clear that mixed-motive ADEA claims were dead. What was less clear was the impact that this decision would have on the continuing vitality of other types of mixed-motive claims—specifically those brought under statutes (or, in the case of Title VII retaliation claims, *parts* of statutes) to which § 2000e-2(m) did not apply.

VI. THE COURTS RESPOND: EARLY CASES ADDRESSING THE IMPACT OF *GROSS*

After *Gross*, lower courts were tasked with determining the scope of the Supreme Court's holding on anti-discrimination statutes other than the ADEA. Given the long tradition of applying the *Price Waterhouse* mixed-motive framework to a variety of anti-discrimination statutes on the one hand, and Justice Thomas' broad language that potentially abrogates that tradition on the other, it is unsurprising that the decisions that followed closely after *Gross* varied in both their interpretations and their conclusions.

A. The Seventh Circuit: *Fairley* and *Serwatka*

The Seventh Circuit was one of the first circuits to address the

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[186] *See supra* Part IV(C).

[187] *Gross*, 129 S. Ct. at 2358.

[188] *Id.* at 2355 n.5 (citing Smith v. City of Jackson, 544 U.S. 228 (2005)).

impact of *Gross* on anti-discrimination statutes outside of the ADEA context. Although neither of these early cases addressed Title VII retaliation claims, their analysis is potentially important to such claims, and other courts have cited them in examining a variety of anti-discrimination statutes.

Fairley v. Andrews involved a § 1983 action brought by former guards at the Cook County Jail in Chicago.[189] After the plaintiffs expressed their willingness to testify truthfully if subpoenaed regarding instances of inmate abuse, other guards at the jail threatened to kill the plaintiffs and harassed them in a variety of ways.[190] The plaintiffs sought relief under § 1983, contending "that defendants violated their speech rights by assaulting and threatening them for reporting abuse to Jail supervisors and for their willingness to testify truthfully" in a suit by inmates who had suffered abuse.[191]

As to the plaintiff's proof of causation, the Seventh Circuit held that:

> Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats. This means but-for causation. . . . Some decisions . . . [in this circuit] say that a plaintiff just needs to show that his speech was a motivating factor in [the] defendant's decision. These decisions do not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law.[192]

Interestingly, this is the only analysis that *Fairley* gives to the issue, and the court does not engage in an analysis of the language of § 1983 and how that language compares to that found in the 1991 Amendments. Regardless, this decision is important as *Fairley* was the first case in which a circuit court applied *Gross* to a non-ADEA claim brought under an anti-discrimination statute. Additionally, it was the first time in which a circuit court found that the but-for standard was now the sole standard under which a plaintiff could proceed under ADEA.

In *Serwatka v. Rockwell Automation, Inc.*, the jury's mixed-motive finding in an ADA case had led to a grant of declaratory and injunctive relief in favor of the plaintiff, as well as an award of attorneys' fees and costs.[193] The defendant appealed, arguing that "given the provisions of the ADA and the Supreme Court's . . . decision in *Gross*," the jury's mixed-motive finding did not entitle the plaintiff to a judgment

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[189] Fairley v. Andrews, 578 F.3d 518, 518 (7th Cir. 2009).
[190] *Id.* at 520–21.
[191] *Id.* at 521.
[192] *Id.* at 525–26.
[193] 591 F.3d 957, 958–60 (7th Cir. 2010).

in her favor and the relief that the district court had awarded her.[194] The provision of the ADA in question provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[195] The Seventh Circuit agreed with the defendant:

> Like the ADEA, the ADA renders employers liable for employment decisions made "because of" a person's disability, and *Gross* construes "because of" to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII's mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice.[196]

Because the ADA used the "because of" language—the same language that the courts had previously been found to allow for mixed-motive in *Price Waterhouse*, but later, in *Gross*, to *foreclose* mixed-motive—and because no other evidence pointed to the appropriateness of a mixed-motive standard under the ADA, the Seventh Circuit found that "the district court's decision to award Serwatka . . . relief . . . cannot be sustained."[197] The court pointed out that the Seventh Circuit's "prior decisions had held that mixed-motive claims were viable under the ADA."[198] However, after *Gross*, the decisions no longer stated the applicable law in ADA cases in the Seventh Circuit.

B. The Fifth Circuit Responds: *Xerox*

Roughly two months after the Seventh Circuit issued its opinion in *Serwatka*, the Fifth Circuit decided *Smith v. Xerox Corp.*,[199] a Title VII retaliation case. The plaintiff in *Smith*, an Office Solutions Specialist at Xerox, alleged that her manager made negative employment decisions based on her gender and age, then terminated her for filing a discrimination charge against Xerox with the EEOC.[200] Over the defendant's objection, "the district court concluded that the case had been tried as a mixed-motive retaliation case and instructed the jury on a

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[194] *Id.* at 959.
[195] *Id.* at 961 (quoting 42 U.S.C. § 12112(a) (2006) (emphasis added)).
[196] *Id.* at 962.
[197] *Id.* at 963.
[198] *Serwatka*, 591 F.3d at 963 (citing Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033–34 (7th Cir. 1999)).
[199] 602 F.3d 320 (5th Cir. 2010).
[200] *Id.* at 323–24.

mixed-motive theory of causation."[201] The jury awarded Smith $317,500 and the court awarded Smith her attorneys' fees.[202] On appeal, Xerox argued that the court "erroneously instructed the jury on the burden of proof by allowing it to find for Smith on her retaliation claim with only 'motivating factor' rather than 'but for' causation, thereby improperly shifting the ultimate burden of persuasion to Xerox."[203]

The Fifth Circuit engaged in a lengthy analysis of the impact of *Gross* on Title VII retaliation claims. The court first examined the circuit's precedent pre-*Gross*, detailing the different requirements of the *Price Waterhouse* and *McDonnell Douglas* standards and the impact of the 1991 Amendments, which it noted, "codified the [*Price Waterhouse*] holding" with regard to Title VII discrimination claims.[204] The court analyzed the *Gross* decision and how it applied to the case before the court.

The Fifth Circuit's opinion is strikingly honest, in that the court early on "recognize[s] that the *Gross* reasoning could be applied in a similar manner to the instant case."[205] It writes rather extensively on how applying *Gross*'s reasoning to the Title VII retaliation context is intuitively appealing:

> The text of § 2000e-2(m) states only that a plaintiff proves an unlawful employment practice by showing that "race, color, religion, sex, or national origin was a motivating factor." It does not state that *retaliation* may be shown to be a motivating factor. Moreover, although Congress amended Title VII to add § 2000e-2(m) in 1991, it did not include retaliation in that provision. These considerations are, of course, similar to the Supreme Court's reasoning in *Gross,* and Xerox understandably urged at oral argument that *Gross* dictates the same conclusion here, i.e., a Title VII retaliation plaintiff, like an ADEA discrimination plaintiff, may not obtain a motivating factor jury instruction and must instead prove that retaliation was the but-for cause for the adverse employment action.[206]

However, after noting this, the court stated "that such a simplified application of *Gross* is incorrect."[207] The key difference between the two cases, the court found, was that "*Gross* is an ADEA case, not a Title VII case."[208] While the court acknowledged that Title VII *retaliation* cases and Title VII *discrimination* cases are distinct, the fact that the court was

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[201] *Id.* at 325.
[202] *Id.*
[203] *Id.*
[204] *Smith*, 602 F.3d at 327.
[205] *Id.* at 328.
[206] *Id.* (emphasis in original).
[207] *Id.*
[208] *Id.* at 329.

"concerned with construing Title VII, albeit in the retaliation context," meant that Title VII decisions like *Price Waterhouse* and *Desert Palace*, "along with . . . [the Fifth Circuit's] own precedent recognizing the application of mixed-motive analysis in Title VII retaliation cases, are not unimportant."[209]

The court gave special emphasis to what it viewed to be the continuing importance of *Price Waterhouse*, a case which, notwithstanding Justice Thomas' less than enthusiastic opinion of it, the Supreme Court did not overrule. The court acknowledged that in "*Price Waterhouse* . . . [the Court] specifically provided that the 'because of' language in the context of Title VII authorized the mixed-motive framework," while twenty years later in *Gross* the Court "decided that the same language in the context of the ADEA meant 'but-for,' but also refused to incorporate its prior Title VII decisions as part of the analysis."[210] Still, the court found that "under these circumstances, the *Price Waterhouse* holding remains our guiding light."[211]

The Fifth Circuit justified its continuing adherence to *Price Waterhouse* in the face of *Gross* by pointing to the language in *Gross* itself:

> [W]e think that [extending *Gross* into the Title VII context] would be contrary to *Gross's* admonition against intermingling interpretations of the two statutory schemes. . . . It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court. . . . The Supreme Court recognized that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion." Because the Court recognized this difference but was not presented in *Gross* with the question of how to construe the standard for causation and the shifting burdens in a Title VII retaliation case, we do not believe *Gross* controls our analysis here.[212]

Two important points may be drawn from this analysis. First, as the Court in *Gross* warned, rules that apply to one statutory scheme should not automatically be applied to a different statute—even if two statutes are similar in language and purpose, a court must recognize that the statutes are distinct. Second, despite the difference between Title VII discrimination and Title VII retaliation, the Supreme Court drew a line in *Gross* between Title VII—without distinguishing between discrimination and retaliation under that statute—and the ADEA. The Fifth Circuit appears to be saying that it should not draw a finer distinction between

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[209] *Smith*, 602 F.3d at 329.
[210] *Id.*
[211] *Id.*
[212] *Id.* at 329–30 (internal citation omitted).

two different provisions *within* Title VII than the Court in *Gross* actually drew.[213]

The court also drew justification for its restraint from its own precedents. The court noted that it had "previously recognized that the motivating-factor analysis and burden-shifting scheme of *Price Waterhouse* may be applicable in Title VII mixed-motive retaliation cases."[214] The court found that it was thus bound by its circuit precedent, because in the Fifth Circuit a court may not "overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent."[215] Because "the *Gross* Court made clear that its focus was on ADEA claims," not Title VII retaliation claims, and because Title VII mixed-motive retaliation claims had been allowed in the Fifth Circuit in the past, the court felt compelled "to continue to allow the *Price Waterhouse* burden shifting in such cases unless and until the Supreme Court says otherwise."[216]

After deciding this issue, the court turned to a question that it had previously discussed in more detail than most circuits, yet repeatedly avoided answering: whether direct evidence is required to proceed under a mixed-motive theory in a Title VII retaliation case. [217] The court gave the issue far more consideration than any other circuit had.[218] The majority engaged in an analysis that resembled Judge Lodge's in *Kotewa*,[219] focusing on the broad language of Justice Thomas' opinion in *Desert Palace* suggesting that "Congress has specifically provided for a heightened standard of proof in other statutes and clearly knows how to require such a showing."[220] The Fifth Circuit also referenced Justice Thomas' statements regarding the "long-established rule in civil litigation" that a plaintiff could prove his case using direct or circumstantial evidence.[221] The court noted "that circumstantial evidence may often be more persuasive" than direct evidence, and that circumstantial evidence, alone, can be sufficient even in criminal cases.[222] Notably absent from the majority's decision was a consideration of the possible limitations of the *Desert Palace* holding imposed by §

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[213] The majority addresses this last point again in responding to Judge Jolly's dissenting opinion. Judge Jolly "insists that *Gross* has changed our law because *Gross* explained that the 1991 Amendments to Title VII 'should be read as limiting the mixed motive analysis to the statutory provision under which it was codified—Title VII *discrimination* only.'" *Id.* at 330 n.34 (majority quoting *Smith*, 602 F.3d 320 at 338 (Jolly, J., dissenting) (emphasis in original)). The majority, of course, disagreed, finding that "[t]he *Gross* court made no such broad pronouncement." *Id.* at 330, n.34.

[214] *Smith*, 602 F.3d at 330.

[215] *Id.* (quoting Cain v. Transocean Offshore USA, Inc., 518 F.3d 295, 300 (5th Cir. 2008) (citations omitted) (internal quotations omitted)).

[216] *Id.* at 330.

[217] *See* Vialpando v. Johanns, 619 F. Supp. 1107, 1115 (D. Colo. 2008).

[218] *See supra* Part IV(C).

[219] *See supra* Part IV(C).

[220] *Smith*, 602 F.3d at 331.

[221] *Id.*

[222] *Id.*

2000e-2(m), what Judge Krieger in *Vialpando* had deemed the "lynchpin" of the Supreme Court's decision.[223] Not surprisingly, the Fifth Circuit held that to the extent that direct evidence of retaliation had previously been required in a Title VII mixed-motive retaliation case, its decisions had "been necessarily overruled by *Desert Palace*. Smith therefore was not required to present direct evidence of retaliation in order to receive a mixed-motive jury instruction."[224]

C. The D.C. Intra-Circuit Split: *Beckford*, *Nuskey*, *Beckham*, and *Hayes*

Courts in the D.C. Circuit have considered how *Gross* applies to Title VII mixed-motive retaliation claims more than anywhere else in the country. Since *Gross* was decided in 2009, the D.C. district court has tackled the issue four times, leading to four decisions of varying length and complexity. Perhaps more importantly, in these decisions, D.C. district court judges have come to three different conclusions.

The first two decisions that addressed the impact of *Gross* on Title VII mixed-motive retaliation cases did so in a cursory fashion, but their contrary holdings established an intra-circuit split on this issue. The first decision, *Beckford v. Geithner*, involved a Department of Treasury employee who alleged that she received a negative performance evaluation and discipline in retaliation for filing an Equal Employment Opportunity complaint with the IRS accusing her supervisor of sexual harassment.[225] The plaintiff argued that a jury could infer that retaliation "was among the motivating factors which led to the [negative appraisal]."[226] The court noted that "the reasoning of the Supreme Court in *Gross* . . . appears applicable to the anti-retaliation provision of Title VII, which also prohibits discrimination only 'because' the employee has engaged in a protected act."[227] Under this interpretation of *Gross*, it therefore followed that "the suggestion that retaliation was 'among' the factors motivating Ms. Beckford's review is insufficient as a matter of law to defeat summary judgment."[228]

Nuskey v. Hochberg was the next case decided by the D.C. district court.[229] While *Beckford* was decided in late 2009—at which point no circuit court had engaged in a substantial analysis of the impact of *Gross* on Title VII retaliation claims—*Nuskey* was decided in July 2010, over four months after the Fifth Circuit's decision in *Smith*. In *Nuskey* a

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[223] *Vialpando*, 619 F. Supp. at 1115.
[224] *Smith*, 602 F.3d at 332 (internal citations omitted).
[225] Beckford v. Geithner, 661 F. Supp. 2d 17, 19–21 (D.D.C. 2009).
[226] *Id.* at 25 n.3.
[227] *Id.*
[228] *Id.*
[229] 730 F. Supp. 2d 1 (D.D.C. 2010).

defendant objected to the court's proposed jury instructions, which stated that the "plaintiff need only prove that . . . retaliation was 'a motivating factor' in the [defendant's] decision to fire her."[230] In the court's decision, Judge Friedman, citing Judge Huvelle's opinion in *Beckford*, noted that he was not writing on a blank slate within the circuit.[231] However, Judge Friedman disagreed with Judge Huvelle, and the court thus chose to "align[] itself instead with the analysis of the Fifth Circuit in *Smith v. Xerox Corp.*"[232] The court cited the Fifth Circuit's proposition that "*Price Waterhouse* . . . still remains the touchstone for analysis in a Title VII retaliation case."[233] Although the D.C. Circuit never actually addressed the question of whether the 1991 Amendments or *Price Waterhouse* governs Title VII retaliation claims,[234] Judge Friedman noted that "a number of courts have concluded that retaliation claims are still governed by *Price Waterhouse*," and that "[u]nder *Price Waterhouse*, a mixed motive theory and thus an 'a motivating factor' instruction are available in retaliation cases."[235] Somewhat oddly, the court failed to give any detail as to *why* it found the Fifth Circuit's analysis more compelling than Judge Huvelle's analysis in *Beckford*: it simply stated that it sides with the Fifth Circuit, and then traced out the consequences of that choice to the facts of that case.[236]

Less than two months after *Nuskey*, D.C. district judge Rosemary Collyer decided *Beckham v. National Railroad Passenger Corp.*, the third D.C. district court case to address Title VII mixed-motive retaliation post-*Gross*.[237] In *Beckham*, the plaintiff, an African-American woman, contended that her employer had retaliated against her for her participation in a racial discrimination class-action lawsuit.[238] The court acknowledged "the legal analysis applicable to claims of retaliation under Title VII—specifically mixed-motive retaliation claims—is now a subject of debate among the circuit courts" and D.C. district court judges.[239] The court discussed *Price Waterhouse*, the 1991 Amendments, and *Gross* in some detail, as well as both the majority and dissenting opinions in *Smith v. Xerox Corp.*[240] However, the court then took a turn that set it on a path different from both *Nuskey* and *Beckford*:

> Congress approved the "motivating factor" analysis from *Price Waterhouse* when it amended Title VII in 1991 to adopt that standard explicitly for mixed-motive cases. *See* 42 U.S.C.

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[230] *Id.* at 3.
[231] *Id.* at 5.
[232] *Id.*
[233] *Id.*
[234] *See supra* note 106 (noting that the D.C. Circuit has twice declined to resolve this issue).
[235] *Nuskey*, 730 F. Supp. 2d at 5.
[236] *Id.*
[237] Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130 (D.D.C. 2010).
[238] *Id.*
[239] *Id.* at 142.
[240] *Id.* at 142–44 (internal citation omitted).

> § 2000e-2(m). . . . This Court concludes that § 2000e-2(m) means just what it says: when an impermissible motive animates "*any* employment practice," even though permissible motives were also involved, "an unlawful employment practice is established. There can, therefore, be mixed-motive retaliation cases despite the "because" language in the statute.[241]

Under this approach, if § 2000e-2(m) applied directly to a mixed-motive retaliation claim, the extension of the mixed-motive framework would be uncontroversial. After all, one of the main reasons Justice Thomas refused to extend the mixed-motive structure to ADEA claims was that Congress added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII and "neglected" to similarly amend the ADEA.[242] By finding that § 2000e-2(m) applies to Title VII retaliation, the somewhat more difficult issue of whether *Gross* effectively overruled *Price Waterhouse* becomes moot, as the authority for the mixed-motive structure is found in an unambiguous statutory provision—§ 2000e-2(m)—and not in a Supreme Court opinion of questionable precedential value.

However, this "easy fix" is not unproblematic. The main weakness of Judge Collyer's approach is that every circuit that has decided the issue of whether the 1991 Amendments apply to Title VII retaliation claims has found that they do not.[243] In a footnote, the court recognized that "several" circuits have found this to be the case, but then noted that "[t]he D.C. Circuit, however, has not addressed the question."[244] This is of course true—the D.C. Circuit, the Tenth Circuit, and the Fifth Circuit all declined to resolve the issue, with the D.C. Circuit twice explicitly refusing to do so.[245] But, to resolve an issue in favor of a position that nine circuits have found to be incorrect and that no circuit has actually endorsed would seem to require a fairly substantial justification—or at least a more rigorous analysis than the court provided in *Beckham*, where the issue is "resolved" in just over one-hundred words.[246]

The D.C. district court revisited the issue in *Hayes v. Sebelius*, a case decided by Chief Judge Royce Lamberth.[247] The plaintiff in *Hayes* alleged that the Department of Health and Human Services had retaliated against him in a variety of ways for bringing a discrimination claim. He also contended that "retaliatory animus was a 'motivating factor' in HHS's decision to deny him" a position to which he desired to be promoted.[248] In response, "HHS contend[ed] that Hayes may not, as a

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[241] *Id.* at 144–45.
[242] Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009).
[243] *See supra* Part IV(B) and note 106.
[244] 736 F. Supp. 2d at 145 n.13.
[245] *See supra* note 106.
[246] 736 F. Supp. 2d at 145.
[247] Hayes v. Sebelius, 762 F. Supp. 2d 90 (D.D.C. 2011).
[248] *Id.* at 93.

matter of law, raise a motivating-factor retaliation claim under Title VII."[249]

The court began its analysis with a thorough discussion of *Price Waterhouse* and the 1991 Amendments. It noted that in the D.C. Circuit it is still an "open question whether Title VII plaintiffs may bring mixed-motives retaliation claims under *Price Waterhouse* or motivating-factor retaliation claims under the 1991 Act."[250] But while the D.C. district court in *Beckham* decided that such claims should be brought under the 1991 Act,[251] Judge Lamberth came out differently on the issue, finding that "[t]he Supreme Court's recent decision in *Gross* . . . resolves any doubt: Title VII plaintiffs may bring *neither* mixed-motives retaliation claims under *Price Waterhouse* nor motivating-factor retaliation claims under the 1991 Act."[252]

First, the court analyzed the possibility of Title VII mixed-motive retaliation claims under the *Price Waterhouse* framework post-*Gross*. The court noted that "[t]he Supreme Court's recent decision in *Gross* . . . makes clear that *Price Waterhouse*'s interpretation of 'because of' is flatly incorrect," as the language in the ADEA that the Supreme Court interpreted in *Gross* "is indistinguishable from Title VII's discrimination and retaliation provisions, both of which contain the same 'because of' formulation."[253] The court also pointed to other attacks that Justice Thomas lodged against *Price Waterhouse*, such as the difficulty courts have in applying its burden-shifting framework, and (what Justice Thomas deemed to be) the decision's generally questionable reasoning.[254] As a result of what he believed to be the Supreme Court's unambiguous direction, Judge Lamberth concluded that he would "not apply . . . [*Price Waterhouse*'s] interpretation of 'because of' to Title VII's retaliation provision."[255]

Having dispensed with *Price Waterhouse*, the court moved on to consider "whether the 1991 Act provides an independent basis for a motivating-factor retaliation claim."[256] Judge Lamberth relied on Justice Thomas' statement in *Gross* that "'[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.'"[257] Judge Lamberth noted that:

> In the case currently before the Court, Congress made changes to various parts of Title VII affecting both discrimination and retaliation claims. When it came to crafting the motivating-

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[249] *Id.*

[250] *Id.* at 110–11.

[251] Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 144–45 (D.D.C. 2010).

[252] *Hayes*, 762 F. Supp. 2d at 111 (emphasis added).

[253] *Id.*

[254] *Id.* at 112.

[255] *Id.*

[256] *Id.*

[257] *Hayes*, 762 F. Supp. 2d at 112 (quoting Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009)).

> factor analysis, however, it amended one section of Title VII and was silent *as to another provision of Title VII.* Thus, the inference that Congress considered both provisions and was therefore intentional in its disparate application of the motivating-factor provision applies with even greater force here.[258]

Because Congress amended certain parts of Title VII's retaliation provision in the 1991 Amendments but failed to extend § 2000e-2(m) to retaliation, Congress should be presumed to have *made the choice* to *refuse* to do so—not to have *made a mistake* by *neglecting* to do so. As Judge Lamberth put it, "this Court finds it difficult to believe that the absence of motivating-factor language in Title VII's retaliation provision is the result of accident."[259]

Interestingly, after deciding mixed-motive Title VII retaliation claims were not available under either the *Price Waterhouse* or 1991 Amendments frameworks, the court engaged in a rather extensive examination of the Fifth Circuit's decision in *Smith v. Xerox Corp.* Judge Lamberth wrote, "[t]he Fifth Circuit's reasoning rests almost entirely on one argument . . . that courts 'must be careful not to apply rules applicable under one statute without careful and critical examination' . . . ."[260] The court explained that it believed the Fifth Circuit was mistaken for two reasons. First, the court drew a distinction between rules of law and rules of statutory construction. The court noted that

> [t]here is a critical difference between a rule of law developed under a certain statute and the rules of statutory construction implemented to derive that rule of law. The former is unique to the statute at issue, but the latter by its very nature applies generally.[261]

Gross's admonition, upon which the Fifth Circuit heavily relied, "was limited to the application of *rules of law* developed under one statute to another statute 'without careful and critical examination.'"[262] In other words, that *Gross* involved the ADEA and not Title VII should not prevent a court from following the *rules of statutory construction* developed in *Gross* in a Title VII case. This, in Judge Lamberth's

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[258] *Id.*

[259] *Id.* at 113. The court also points to a number of other reasons leading to its conclusion that the 1991 Amendments do not apply to Title VII retaliation claims, most of which draw from the *Gross* decision. These reasons include Justice Thomas' statements regarding the non-existence of motivating factor claims prior to the 1991 Amendments (conclusion he finds support for in Congress's decision to add section 2000e-2(m), as opposed to just § 2000e-5(g)(2)(B)). The court found that "the only construction that gives meaning both to Section 2000e-5(g)(2)(B) as well as the motivating-factor provision without reading either as surplusage is one that restricts the motivating-factor provision's application to Title VII discrimination claims only." *Id.*

[260] *Id.* at 114 (quoting Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010)).

[261] *Id.*

[262] *Hayes*, 762 F. Supp. 2d at 114 (quoting *Gross*, 129 S. Ct. at 2349).

opinion, was what the court did in finding that *Gross* foreclosed the possibility of mixed-motive Title VII retaliation claims.[263]

Second, Judge Lamberth wrote that "even if *Gross* had never been decided, many of the arguments this Court made above would still apply."[264] Most of the court's analysis here seems to support the court's finding that the 1991 Amendments do not provide for mixed-motive Title VII retaliation claims[265]—which every circuit court that had decided the issue had also found.[266] However, Judge Lamberth also wrote that analysis of Title VII's anti-retaliation provision itself "shows that its text plainly indicates its exclusion of motivating factor retaliation cases under the principle of *inclusio unius est exclusio alterius*."[267] This is a bold statement that stands in stark contrast to the actual history of mixed-motive Title VII retaliation cases, as *every* circuit—including the D.C. Circuit—allowed mixed-motive Title VII retaliation claims of some type before *Gross*.[268] Although the court wrote that "wholly apart from *Gross*, this Court would find that Title VII does not allow motivating-factor retaliation claims," it is not entirely clear that it *could have* done so, as the D.C. Circuit appeared to approve of such claims.[269]

D. Conclusion

Because the Fifth Circuit is the only circuit court to have ruled precisely on the issue of whether *Gross* forecloses mixed-motive Title VII retaliation claims—the Seventh Circuit cases dealt with mixed-motive under § 1983 and the ADA—it is premature to say that there is a true circuit split. However, such a split seems inevitable, especially considering the Seventh Circuit's reliance on *McNutt,* a mixed-motive Title VII retaliation case, in its finding in *Serwatka.* In *Serwatka*, the court found that the mixed-motive proof structure is unavailable to ADA plaintiffs post-*Gross*, and the Seventh Circuit's broad statement in *Fairley* that *Gross* stands for the rule that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all suits under federal law*."[270] It is currently unclear which way the D.C. Circuit will go, with

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[263] *Id.* at 115.

[264] *Id.*

[265] For example, the court notes that *Gross* was not "the first case to hold that court should look to the text of a statute when interpreting it," and that it was also not the "first to recognize that when Congress amends one provision of a statute but not another, it can be interpreted to have signaled its intention not to apply the amendment to the unaffected provision." *Hayes*, 762 F. Supp. 2d at 115.

[266] *See supra* Part IV(B) and note 106.

[267] *Hayes*, 762 F. Supp. 2d at 115.

[268] *See supra* Part IV(A) and note 106.

[269] *See, e.g.*, Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997) (allowing a mixed-motive Title VII retaliation claim against an employee's former employer).

[270] Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added).

some judges siding with the Fifth Circuit, and others following the path set out by the Seventh Circuit's ADA and § 1983 cases.

VII. MOVING FORWARD: THE FUTURE OF MIXED-MOTIVE TITLE VII RETALIATION

Mixed-motive Title VII retaliation claims have endured a rather strange evolution. After the Supreme Court decided that the mixed-motive claims were available under Title VII's discrimination provision in *Price Waterhouse*, courts extended this interpretation to Title VII retaliation claims. Indeed, it would have been somewhat difficult to justify if they had failed to do so: the Court held that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them,"[271] and the section of Title VII that prohibits retaliation uses the same "because" formulation.[272] However, when Congress amended Title VII in 1991, the circuits by and large left retaliation behind: while Title VII *discrimination* plaintiffs proceeding under the mixed-motive framework could still recover attorneys' fees and costs even if the employer could prove that it would have made the same decision absent discrimination, Title VII *retaliation* plaintiffs still faced a complete bar to recovery if an employer was successful on its "same decision" defense. Still, the mixed-motive framework was useful to retaliation plaintiffs in that once a plaintiff showed retaliation was *a* factor that motivated an employer's adverse action against an employee, the burden of persuasion would then shift to the employer—a shift that did not take place under single-motive claims.

But not all the benefits that Title VII discrimination plaintiffs received in the post-*Price Waterhouse* developments were withheld from Title VII retaliation plaintiffs. After *Desert Palace* most courts held that Justice Thomas' abolition of the direct-evidence requirement in mixed-motive Title VII discrimination cases also extended to mixed-motive Title VII retaliation claims. This was a significant improvement for retaliation plaintiffs, who could now enjoy the plaintiff-friendly burden-shifting benefits of *Price Waterhouse* without presenting direct evidence of retaliation.

The Supreme Court's decision in *Gross* certainly had the potential to end mixed-motive Title VII retaliation claims entirely. Even the Fifth Circuit—the court that found that such claims *are not* precluded by *Gross*—admitted that "the *Gross* reasoning could be applied in a similar

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[271] Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

[272] 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter . . . .") (emphasis added).

manner" to Title VII retaliation.[273] But the Fifth Circuit's decision in *Smith v. Xerox* shows that courts may yet find life in mixed-motive Title VII retaliation. There are too few decisions on the precise issue to tell which way the majority of courts will go.[274] In light of the Seventh Circuit's strong language in *Fairley*, counseling against a reading of mixed-motive into statutory provisions that do not expressly provide for it, and the Fifth Circuit's clear endorsement in *Smith* of a post-*Gross* mixed-motive Title VII retaliation framework, an irreconcilable circuit split seems inevitable.

A. Was the Fifth Circuit Right? A Critique of *Xerox*

But which reading of *Gross* with respect to mixed-motive Title VII retaliation is correct? The main argument behind the Fifth Circuit's decision in *Smith v. Xerox* appears to be that Title VII—*both* in the retaliation and discrimination contexts—is simply different from the ADEA, and therefore that the rules applicable to the two statutes should not be confused. The problem with this argument is that the "rules applicable" to Title VII retaliation claims and Title VII discrimination claims have *never* been the same since the 1991 Amendments according to the circuit courts, all of which held that mixed-motive Title VII retaliation claims were still stuck with the *Price Waterhouse* framework. The "material[] differen[ce]"[275] between Title VII and the ADEA that Justice Thomas pointed to was not the entirety of Title VII, but rather the part of Title VII to which § 2000e-2(m) applied.[276] When we subtract § 2000e-2(m) from our Title VII analysis and just focus on the unamended retaliation language—"*because* he has opposed any practice . . . or *because* he has made a charge . . ."—the "material[] differen[ce]" all but

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[273] Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010).

[274] For district court cases finding that mixed-motive Title VII retaliation claims survived *Gross*, see Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 145 (D.D.C. 2010) (discussing *Gross* and *Smith* at length and deciding that mixed-motive retaliation cases survive *Gross*); Nuskey v. Hochberg, 730 F. Supp. 2d 1, 5 (D.D.C. 2010) (agreeing explicitly with *Smith*). For district court cases finding that mixed-motive Title VII retaliation claims are no longer viable post-*Gross*, see Hayes v. Sebelius, 762 F. Supp. 2d 90, 111 (D.D.C. 2011) (citing *Gross* for the holding that mixed-motive retaliation claims are not permitted under Title VII); Beckford v. Geithner, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009) (holding that in light of *Gross* an allegation that a prohibited reason was "among" the reasons for the alleged retaliation cannot survive summary judgment); Hayes Awad v. Nat'l City Bank, No. 1:09-CV-00261, 2010 WL 1524411, at *10 n.4 (N.D. Ohio Apr. 15, 2010) (citing both *Serwatka* and *Smith*, and concluding that the plaintiff "is not entitled to a mixed-motive retaliation claim"); Ge Zhang v. Children's Hosp. of Philadelphia, No. 08-5540, 2011 WL 940237, *2 (E.D. Pa. Mar. 14, 2011) ("[T]he Court finds no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*. Accordingly, the Court finds that § 2000e-3(a) requires Plaintiff to show that his protected activity was the 'but-for' cause of the employer's adverse action.").

[275] *Gross*, 129 S. Ct. at 2348.

[276] *See id.* 2348–49 (pointing to Congress's addition of 42 U.S.C. § 2000e-3(m) as distinguishing Title VII from the ADEA).

disappears.[277]

A careful analysis of some of the passages of *Smith v. Xerox* illustrates the opinion's flaws. The Fifth Circuit wrote that "[t]he *Gross* Court cautioned that when conducting statutory interpretation, courts 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[278] This is, of course, a correct restatement of *Gross*. However, context is important. Immediately before and after the passage quoted in *Gross*, Justice Thomas focused on the text of § 2000e-2(m), and how this text was absent from the ADEA. The sentences that follow this passage in *Gross* read as follows:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . .[279]

It appears, then, that the "careful and critical examination"[280] to which Justice Thomas referred centers on an examination of the *text* of the statute—what the text of the statute actually says and how that text was amended. Like that of the ADEA, the text of Title VII's anti-retaliation provision does not provide that a plaintiff may establish discrimination by showing that retaliation was "simply a motivating factor"[281] unless we are willing to extend § 2000e-2(m) to retaliation, which, as mentioned numerous times above, most courts have been unwilling to do. Similarly, Congress neglected to add this provision to Title VII's anti-retaliation provision, even though it contemporaneously amended § 2000e-3(a) in other ways.[282]

After quoting Justice Thomas' "careful and critical examination" language, the Fifth Circuit wrote in *Smith*: "[t]he Court's comparison of Title VII with the ADEA, and the textual differences between those two statutory schemes, led it to conclude that Title VII decisions like *Price Waterhouse* and *Desert Palace* did not govern its interpretation of the ADEA."[283] This passage is somewhat misleading. If, as the Fifth Circuit suggests, the *Gross* Court engaged in a comparison between Title VII *in its entirety* and the ADEA, it would seem logical to conclude that perhaps Title VII is "just different," and that the Court's holding in

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[277] 42 U.S.C. § 2000e-3(a) (emphasis added).
[278] *Smith*, 602 F.3d at 329 (quoting *Gross*, 129 S. Ct. at 2349).
[279] *Gross*, 129 S. Ct. at 2349.
[280] *Id.* (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008).
[281] *Id.*
[282] *See supra* note 101.
[283] *Smith*, 602 F.3d at 329.

Gross should not extend to *any* portion of Title VII. But the comparison was *not* between *all* of Title VII and the ADEA—it was between the parts of Title VII to which § 2000e-2(m) applies (Title VII discrimination) and the ADEA.[284]

The Fifth Circuit attempts to remedy this ham-handed conflation in *Smith* by reminding the reader that it knows it is addressing Title VII retaliation, not discrimination: "But we *are* concerned with construing Title VII, albeit in the retaliation context."[285] However, this legerdemain is not enough to cure the problems in the *Smith* analysis. Courts have found that Title VII retaliation and Title VII discrimination are materially different when it comes to their mixed-motive structures.[286] Furthermore, the mixed-motive Title VII framework discussed in *Gross* is, according to the circuits that have decided the issue, exclusive to Title VII discrimination claims.[287] In fact, the court returns to its conflation two paragraphs later, stating that "[t]he Supreme Court recognized that Title VII and the ADEA are 'materially different with respect to the relevant burden of persuasion,'" and uses this statement as evidence that *Gross* does not control in Title VII retaliation cases.[288]

When the language of Title VII's retaliation provision is read properly—that is, entirely without the support of § 2000e-2(m)—the "careful and critical examination" required by *Gross* leads to only one conclusion. In view of the fact that the "because of" language of Title VII retaliation and § 623(a) of the ADEA are so similar, and because neither provision was found to be one to which § 2000e-2(m) applies, *Gross* should apply in the Title VII retaliation context, and the mixed-motive framework is therefore never applicable to Title VII retaliation claims. The Fifth Circuit therefore erred in finding that mixed-motive Title VII retaliation claims are still available post-*Gross*. Judge Jolly, the lone dissenter in *Smith v. Xerox*, captures the court's error nicely:

> The majority would have to *explain*, not gloss over, why these differences between Title VII's retaliation provision and Title VII's discrimination provision—differences that were determinative in *Gross*—are now immaterial in resolving this case involving identical language and the same absence of a proviso authorizing mixed-motive claims. It is only by *avoiding* a "careful and critical examination" that the majority concludes that *Gross* does not control our analysis today.[289]

Simply because the Court in *Gross* and the Fifth Circuit address different provisions of Title VII, does not excuse the court from engaging in the

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[284] *Gross*, 129 S. Ct. at 2349.
[285] *Smith*, 602 F.3d at 329.
[286] *Id.* at 328.
[287] *Id.*
[288] *Id.* at 329–30.
[289] *Id.* at 338 (Jolly, J. dissenting) (emphasis in original).

sort of "careful and critical examination" required by Justice Thomas' opinion.

B. Can Mixed-Motive Title VII Retaliation Claims Be Saved? Two (Leaky) Lifeboats

After *Gross*, there appear to be only two potential avenues for courts to preserve mixed-motive Title VII retaliation claims. First, courts could argue that § 2000e-2(m) *does* apply to Title VII retaliation claims. If so, then there would clearly be a statutory basis for the mixed-motive framework—a requirement after *Gross*.[290] However, all courts that have considered the issue have found that § 2000e-2(m) does *not* apply to § 2000e-3(a).[291] Still, the court could have gone this route in *Smith*, as the Fifth Circuit is one of three circuits that have not decided the issue.[292] However, it did not. The court never explicitly said § 2000e-2(m) does *not* apply, but in two places the court seemed to strongly suggest that it places its reliance elsewhere. The court first conceded that § 2000e-2(m) "does not state that *retaliation* may be shown to be a motivating factor," and that "although Congress amended Title VII to add § 2000e-2(m) in 1991, it did not include retaliation in that provision."[293] Later, in a footnote, the court distinguished the issue before it from the issues the Seventh Circuit was addressing in *Serwatka* and *McNutt*, where "the court was confronted with the effect of the remedy provision of the 1991 amendments to the Civil Rights Act, § 2000e-5(g)(2)(B) . . . ."[294] The court then noted that "irrespective of the remedies available under the 1991 amendments under those circumstances, we feel bound by *Price Waterhouse* on the issue whether in a Title VII retaliation case the motivating factor framework may be submitted to the jury in the first place."[295] Although this passage mentions only § 2000e-5(g)(2)(B), because of the language of § 2000e-5(g)(2)(B), § 2000e-5(g)(2)(B) and § 2000e-2(m) are functionally inseparable: where one is applicable, the other is applicable; where one is inapplicable, the other is inapplicable as well.[296] Because the court found that it was bound by *Price Waterhouse* "irrespective of the remedies available" under § 2000e-5(g)(2)(B), this

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[290] *See Gross*, 129 S. Ct. at 2350.

[291] *See supra* note 106 and accompanying text.

[292] *See supra* note 106.

[293] *Smith*, 602 F.3d at 328.

[294] *Id.* at 329 n.28.

[295] *Id.*

[296] Section 2000e-5(g)(2)(B) states that "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title . . . ." 42 U.S.C. § 2000e-5(g)(2)(B).

must mean that the court felt it was bound by *Price Waterhouse* irrespective of the *statutory support for the mixed-motive framework*—§ 2000e-2(m)—as well.

But could a court still find that § 2000e-2(m) applies to Title VII retaliation after *Gross*? A close reading of *Gross* suggests that this interpretation would have even less support after *Gross*. First, Justice Thomas noted, "Congress has since amended Title VII by explicitly authorizing *discrimination claims* in which an improper consideration was 'a motivating factor' for an adverse employment decision."[297] Justice Thomas' reference to "discrimination claims"—as opposed to simply "claims"—seemed intentional. Second, the tools of statutory interpretation Justice Thomas focused on suggest that one should not make an inference that § 2000e-2(m) applies to claims outside of those explicitly provided for in the provision. Justice Thomas noted, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[298] Additionally, he quoted *Lindh v. Murphy* for the proposition that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'"[299] Both of these propositions seem to suggest that one should not read § 2000e-2(m) as encompassing Title VII retaliation.

However, a court could still make an argument that § 2000e-2(m) does apply to Title VII retaliation claims. One could point to the EEOC Compliance Manual and the purposive and historical arguments the Commission makes for finding that § 2000e-2(m) extends to retaliation.[300] There are also a few district court opinions supporting this proposition.[301] Again, this argument is somewhat weaker after *Gross*, but it could still be argued that because Title VII retaliation is *within* Title VII—albeit in a different statutory provision—the framework added by the 1991 Amendments should reach that provision.

A second way by which courts could preserve mixed-motive Title VII retaliation claims post-*Gross* would be to argue that the language in Title VII's anti-retaliation provision is materially different from the provision of the ADEA discussed in *Gross*. This seems to be a particularly difficult argument to make in the case of Title VII retaliation,

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[297] *Gross*, 129 S. Ct. at 2349 (emphasis added).

[298] *Id.* (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

[299] *Id.* (quoting Lindh v. Murphy, 521 U.S. 320, 330 (1997)).

[300] *See supra* Part IV(B).

[301] *See, e.g.*, Warren v. Terex Corp., 328 F. Supp. 2d 641, 645 (N.D. Miss. 2004) ("[I]t seems likely that § 2000e-2(m) represented an effort by Congress to modify certain aspects of the *Price Waterhouse* decision, rather than a conscious adoption of a more lenient standard of recovery in Title VII discrimination cases as opposed to ADEA and retaliation cases."); Heywood v. Samaritan Health Sys., 902 F. Supp. 1076, 1081 (D. Ariz. 1995) (noting that "the specific language of the amendment, and of the House report, do not include retaliation[,]" but nevertheless finding that "it is certainly reasonable to assume that the Congressional policy articulated in the amendment and in the House report, reaches retaliation as well as the enumerated considerations."); Hall v. City of Brawley, 887 F. Supp. 1333, 1345 (S.D. Cal. 1995) (finding that 42 U.S.C. § 2000e-5(g)(2)(B) applies in a Title VII retaliation case).

as the provision's "because" language is so close to the "because of" language interpreted in *Gross* to mean "but-for."[302] In *Hayes v. Sebelius*, Chief Judge Lamberth went so far as to say that the "because of" language in 29 U.S.C. § 623(a)(1) "is *indistinguishable* from Title VII's . . . retaliation provision."[303] Additionally, while two of the dictionaries Justice Thomas cites for the proposition that "because of" means "but-for" define the *phrase* "because of," Justice Thomas also cites The Random House Dictionary of the English Language's definition of "because" for this proposition, suggesting that Justice Thomas believes that "because of" and "because" are functionally equivalent.[304] While other statutes with language materially different from the "because"/"because of" language might fair better—and already have, in some instances[305]—the similarity of the language in § 623(a)(1) to that found in § 2000e-3(a) appears to make any serious attempt at differentiation between the two a stretch, even by the most creative courts.

C. The End of Mixed-Motive Title VII Retaliation

Despite the various ways lower courts may find around *Gross*, any reading of *Gross* that is truly loyal to the Court's holding and the guidance that the decision provides will find that mixed-motive Title VII retaliation claims are no longer viable. Whether the majority's opinion in *Gross* was a *good* decision—or even an arguably *correct* one—is an entirely different issue, and one beyond the scope of this Article.[306] *Smith v. Xerox*, though artfully composed, appears to be a somewhat inaccurate—possibly even disingenuous—application of the principles

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[302] Hayes v. Sebelius, 762 F. Supp. 2d 90, 111 (D.D.C. 2011).

[303] No. 1:08-cv-0150-RCL, 2011 WL 316043, at *19 (D.D.C. Feb. 2, 2011) (emphasis added).

[304] *Gross*, 129 S. Ct. at 2350 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966)).

[305] *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3d Cir. 2009) (finding that the language in 42 U.S.C. § 1981(a) is broader than the ADEA's "because of" language, and that the continued "use of the *Price Waterhouse* framework makes sense in light section 1981's text"); Hunter v. Valley View Local Schools, 579 F.3d 688, 692 (6th Cir. 2009) (finding that Department of Labor regulations implementing the FMLA "forbid an employer from considering an employee's use of FMLA leave when making an employment decision[,]" and therefore concluding that "the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors[,]" even after *Gross*); Fuller v. Gates, No. 5:06-CV-091, 2010 WL 774965, at *1 (E.D. Tex. March 1, 2010) (finding that mixed-motive claims under § 633a(a) of the ADEA are not prohibited post-*Gross*, as "[u]nlike the 'because of' language in § 623(a), the plain meaning of 'free from any' [in § 633a(a)] is broad enough to embrace a mixed-motive analysis").

[306] Most commentators have argued that *Gross* was wrongly decided. *See, e.g.*, Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!*, 40 U. MEM. L. REV. 681 (2010); Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 264-274 (2009).

established in *Gross*.[307] Still, courts looking to preserve mixed-motive retaliation—and the substantial lines of case law built around its existence—will undoubtedly cite the case, and will therefore require the Supreme Court to address the post-*Gross* mixed-motive Title VII retaliation question squarely. It is also likely that many—quite possibly most—circuits will adopt the approach that the D.C. district court takes in *Hayes v. Sebelius*,[308] and will find that, post-*Gross*, Title VII does not allow for a mixed-motive retaliation claim. Again, no circuit has yet ruled precisely on the issue and found that mixed-motive Title VII retaliation claims are no longer available. However, with most of the heavy theoretical legwork having been completed in *Hayes* roughly two months before this Article was written, it is likely that those decisions are on the horizon. The thorough analysis provided by Chief Judge Lamberth, and subsequent decisions that follow his lead, will likely bring about the end of mixed-motive Title VII retaliation in a number of circuits and for a number of plaintiffs.

Congress could put an end to all of this, of course, if it passes legislation clarifying the appropriate frameworks available for Title VII retaliation claims. The *Gross* decision was met with significant public disapproval,[309] and Congress responded quickly with proposed legislation titled the Protecting Older Workers Against Discrimination Act ("POWADA").[310] POWADA would restore (or preserve, depending on one's interpretation) the mixed-motive framework to any federal employment law "forbidding . . . retaliation against an individual for engaging in, or interfering with, any federally protected activity including the exercise of any right established by Federal law."[311] In other words, mixed-motive Title VII retaliation claims would now have express statutory approval. However, with the recent shifts in power in both the House and Senate, some believe that POWADA stands no more than a slim chance at becoming law.[312] For now, then, courts must decide for themselves how to read *Gross*, and how to apply that decision to the mixed-motive Title VII retaliation context.

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[307] *See supra* Part VI(B).

[308] *See supra* Part IV(C).

[309] *See, e.g.*, Steven Greenhouse, *Democrats Working to Overturn Justices on Age Bias*, N.Y. Times, Oct. 6, 2009, at A20, *available at* http://www.nytimes.com/2009/10/07/us/politics/07older.html.

[310] H.R. 3721, 111th Cong. (1st Sess. 2009); S. 1756, 111th Cong. (1st Sess. 2009).

[311] H.R. 3721, 111th Cong. § 3(g)(5)(3) (1st Sess. 2009).

[312] *See Election results' big impact on law, lawyers*, THE BALTIMORE DAILY RECORD, Nov. 21, 2010, *available at* http://findarticles.com/p/articles/mi_qn4183/is_20101121/ai_n56363638/?tag=content;col1.