THE COMING CAUSATION REVOLUTION IN EMPLOYMENT DISCRIMINATION LITIGATION

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For more than a decade, employment discrimination causation law has been a confusing, often overly restrictive quagmire that has contributed substantially to the paltry success rate of plaintiffs in employment discrimination cases. Most of these cases are dismissed pretrial, all too often based on a failure of causation. A key reason traces back to loose and misleading language—centered on a single word—in a 2009 Supreme Court opinion involving the but-for causation standard that applies in most discrimination cases. The Court said that the discriminatory motive must be "the" but-for cause of the employer's action when it should have said "a" but-for cause. This language incorrectly implies that the discriminatory motive must be the sole cause—"the" cause—of the employer's action, and though the sole-causation standard is demonstrably wrong, many courts nevertheless have required such a showing.

In 2020, the Supreme Court held in Bostock *that gay and transgender workers are protected from employment discrimination. But it did more than that. The Court discussed but-for causation in broad terms, making it clear that but-for causation does not require proof of sole causation. That discussion will likely change how causation impacts not only gay and transgender workers but employment discrimination litigation generally.*

This Article explains why. It studies the root of the causation problem and shows its real-world consequences with extensive case law analysis. Then, it analyzes how Bostock*'s broad causation language, properly interpreted, should apply to most*

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employment discrimination claims and details why Bostock *should remedy each of the identified causation issues. Based on its study of post-*Bostock *litigation outcomes and the promise of* Bostock*'s broad application, the Article predicts a revolution in employment discrimination litigation.*

TABLE OF CONTENTS

"[A] lot here turns on a small word."[1]

INTRODUCTION

A nurse lost her retaliation suit at the pleadings stage, even though she was fired a mere two weeks after complaining of race discrimination, because her file showed documented performance problems.[2] She also could not sue for both retaliation and race discrimination in the same case because asserting any nonretaliatory reason for the employer's actions—including race discrimination—negated her retaliation claim.[3] A milk delivery driver's supervisor allegedly telling him "[Y]ou are too old to be here and I'm going to get

1 Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021).

2 *See* Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *4 (N.D. Ala. Apr. 27, 2015).

3 *See id.* at *5.

rid of you" was not enough to save his age discrimination suit because the driver had also been disciplined at work.[4] A science teacher who alleged she was mistreated for being the oldest female teacher in the department could not even argue to the jury that the employer's actions resulted from both her age and her sex.[5]

These cases all turned on causation. Judges denied (incorrectly, I would contend) these plaintiffs the chance to have their day in court based on judicial interpretation and application of the causation standard. Cases like these are all too common in American courtrooms. Causation plays an outsized role in employment discrimination litigation.[6] Employment discrimination claims are notoriously unsuccessful,[7] and causation is often one of the reasons why.[8]

Which standard should apply in any particular case has been a recurring issue since Congress first passed protections against employment discrimination in 1964. In a key 2009 case, the Supreme Court in *Gross v. FLB Financial Services* held that claims under the Age Discrimination in Employment Act (ADEA), which prohibits discrimination "because of . . . age,"[9] must be evaluated using but-for causation, meaning that the employer would not have acted as it did if it had not considered the plaintiff's age, rather than a motivating-factor

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4 *See* Arthur v. Pet Dairy, 593 F. App'x 211, 212–13, 221–22 (4th Cir. 2015) (alteration in original).

5 *See* Bauers-Toy v. Clarence Cent. Sch. Dist., No. 10-CV-845, 2015 WL 13574291, at *1, *8 (W.D.N.Y. Sept. 30, 2015).

6 *See* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 68 (2013) ("At the heart of all antidiscrimination law lies the issue of causation."); Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723, 786 (2013) ("Cause-in-fact is a critical factor—perhaps the critical factor—in every disparate treatment case."); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1621 (2021) (stating that the Supreme Court "has situated the question" of but-for causation "as the central defining question of anti-discrimination law"); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 121 (2007) ("Causation is the core requirement of disparate treatment."); Sandra F. Sperino, *The Emerging Statutory Proximate Cause Doctrine*, 99 NEB. L. REV. 285, 286 (2020) ("[F]actual cause doctrine is a central battleground of discrimination jurisprudence.").

7 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891 (2006); *see also* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012); SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 15–29 (2017); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 357 (2021).

8 *See* Hillel J. Bavli, *Causation in Civil Rights Legislation*, 73 ALA. L. REV. 159, 160 (2021) (noting that causation "is the battleground on which disparate-treatment claims are frequently decided").

9 29 U.S.C. § 623(a).

standard, which requires only that age play a role in the decision, even if not an outcome-determinative one.[10] It concluded that the "ordinary meaning" of "because of" necessarily mandated a but-for standard.[11] The Court did not elaborate on the meaning of the but-for causation standard, stating only that these plaintiffs must prove "that age was *the* 'but-for' cause" of the alleged discrimination.[12]

This language is quite restrictive. Even if the Court did not intend to do so, stating that the illegal motive must be "the" but-for cause of the treatment suggested there can be only one such cause. *Gross* set off a firestorm. Scholars criticized *Gross* on many grounds, not the least of which is its wording of the but-for causation standard.[13]

Given the Supreme Court's analysis that the ordinary meaning of terms like "because of" mandates but-for causation, lower courts began applying the *Gross* standard in other employment discrimination settings and beyond.[14] The Court then added fuel to the fire in 2013 when it held that Title VII's retaliation protections were also governed by the but-for standard.[15] It characterized but-for causation as the traditional common-law rule of causation-in-fact that applies by default unless Congress chooses to implement a different standard.[16] Mirroring its holding from *Gross*, the Court stated that "Title VII retaliation claims

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10 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). *Gross* involved the private-sector provision of the ADEA. The ADEA has a separate provision protecting federal-sector employees. *See* 29 U.S.C. § 633a(a). Its causation provision differs substantially from the public-sector provision and most other federal employment statutes, which typically prohibit discrimination "because of" some factor; the federal-sector provision states that certain personnel actions "shall be made free from any discrimination based on age." *Id.* Shortly before *Bostock*, the Supreme Court addressed whether this causation language, like *Gross*'s, incorporated the traditional but-for causation standard, and the Court held that it did not, based on the distinct language in the provisions. *See* Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020). In this Article, all further references to age discrimination claims will be to the private-sector provision at issue in *Gross*.

11 *See Gross*, 557 U.S. at 175–77.

12 *Id.* at 180 (emphasis added).

13 *See infra* note 26.

14 *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 966–71 (2019) (discussing how *Gross*'s conception of but-for causation has been applied in the disability discrimination, housing discrimination, and criminal law contexts); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 863 (2012) ("Lower courts have already applied the reasoning in *Gross* to reinterpret the causation standard governing at least ten different federal statutory prohibitions on employment discrimination or retaliation, as well as the standard governing state analogues of several federal statutes."); *infra* notes 90–95 and accompanying text; *see also* Burrage v. United States, 571 U.S. 204, 213–14 (2014) (citing *Gross* and applying "traditional" but-for causation principles in interpreting the causation requirement in a federal criminal statute).

15 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).

16 *See id.* at 346–47, 360.

require proof that the desire to retaliate was *the* but-for cause" of the employer's decision.[17]

Gross and its progeny have wreaked havoc on the employment discrimination landscape. The Court's overly restrictive wording of the but-for standard has often caused litigants and courts to equate but-for cause with sole cause, and that strict standard has directly caused many dismissals.[18] This is what happened to the nurse, the milk delivery driver, and the science teacher. This occurs frequently in cases where an employer merely points to an unrebutted legitimate reason for its action, such as a performance issue, or where an employee alleges discrimination based on multiple or combined illegitimate motives, such as both retaliation and race. Cases have been dismissed at the pleadings stage, at summary judgment, and at trial. Sorting out the proper causation standard, figuring out the right language to describe it, and determining at what stage of the proceedings it applies is complex and has caused uncertainty. Confusion abounds—with scholars, litigants, judges, and juries.[19]

The Supreme Court continued to endorse but-for causation as the traditional, default causation rule[20] but had not again addressed causation significantly in the discrimination context until 2020, when it issued three decisions involving causation.[21] All three discussed but-for causation and reaffirmed its status as the ordinary, traditional, default causation standard.[22]

The most significant of these decisions is *Bostock v. Clayton County*, where the Court held that Title VII's prohibition of discrimination "because of . . . sex" prohibits discrimination based on gender identity and sexual orientation.[23] While that holding is momentous in and of itself, the Court took an unexpected route in reaching that conclusion with a deep dive into the meaning of but-for causation. Justice Gorsuch, writing for the 6–3 majority, explained that traditional but-for causation is a "sweeping standard" that does not

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17 *Id.* at 352 (emphasis added).

18 *See infra* notes 123–26, 132–65 and accompanying text.

19 *See, e.g.*, Brian S. Clarke, *The* Gross *Confusion Deep in the Heart of* University of Texas Southwest Medical Center v. Nassar, 4 CAL. L. REV. CIR. 75, 75 (2013) (characterizing *Gross* as "the root" of the "[c]haos and confusion surround[ing] the issue of factual causation in employment discrimination disparate treatment doctrine").

20 *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015); Paroline v. United States, 572 U.S. 434, 449–50, 458 (2014); Burrage v. United States, 571 U.S. 204, 210–11 (2014).

21 *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).

22 *See Bostock*, 140 S. Ct. at 1739; *Babb*, 140 S. Ct. at 1173; *Comcast*, 140 S. Ct. at 1014.

23 *Bostock*, 140 S. Ct. at 1737.

require the illegal motive to be the sole or even primary motive as long as, without considering the prohibited factor—here, sex—the outcome would not have been the same.[24] He also emphasized that a single event can have multiple but-for causes.[25] This is a far cry from what the Court said—and did not say—in *Gross*.

Bostock's statements regarding traditional but-for causation law should shake the core of employment discrimination litigation. Properly understood, the *Bostock* language on but-for causation should apply expansively across employment discrimination litigation and should solve many of the problems *Gross* left in its wake.

Gross has been widely criticized.[26] This Article adds to the discussion by comprehensively explaining and documenting the practical consequences of *Gross*'s but-for causation language. And though many commentators and scholars have predicted wide-ranging consequences from *Bostock*,[27] they have often assumed that *Bostock* will

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24 *See id.* at 1739.

25 *Id.*

26 *See, e.g.*, Anderson, *supra* note 6, at 68–69; Clarke, *supra* note 19, at 75–76; William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1065 (2014); Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1, 9–13 (2015); Michael Foreman, Gross v. FBL Financial Services—*Oh So Gross!*, 40 U. MEM. L. REV. 681, 682 (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, 105–12 (2010); Martin J. Katz, Gross *Disunity*, 114 PA. ST. L. REV. 857, 857–60 (2010); 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, 921–22 (2010); 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, 923–26 (2010); Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721, 739–42 (2016); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 279 (2010); Widiss, *supra* note 14, at 860–64.

27 *See, e.g.*, Eyer, *supra* note 6, at 1646–47; William Goren, *But For Causation Is Not Sole Causation and Other Matters: The Supreme Court LGBT Decisions*, UNDERSTANDING THE ADA (June 17, 2020), https://www.understandingtheada.com/blog/2020/06/17/but-for-causation-sole-causation-supreme-court-lgbt-decisions [https://perma.cc/T9L5-ZBGN]; Kelly S. Hughes, *"But-For" Causation Under* Bostock, NAT'L L. REV. (June 24, 2020), https://www.natlawreview.com/article/causation-under-bostock [https://perma.cc/LNG9-QBCL]; Alan Kabat, *High Court's Title VII Ruling Reaches Beyond LGBTQ Rights*, LAW360 (June 17, 2020, 4:21 PM), https://www.law360.com/articles/1283674/high-court-s-title-vii-ruling-reaches-beyond-lgbtq-rights (last visited Apr. 18, 2022); Anthony Kaylin, *Discrimination Cases May Be Easier to Prove Because of the LGBTQ Supreme Court Decision*, ASE (Sept. 8, 2020), https://www.aseonline.org/News/Articles/ArtMID/628/ArticleID/2224/Discrimination-Cases-May-Be-Easier-to-Prove-Because-of-the-LGBTQ-Supreme-Court-Decision [https://perma.cc/7H75-WJKJ]; Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. ONLINE 1, 16–17 (2020); Richard Schall, *How Justice Gorsuch's Opinion in* Bostock v. Clayton County *Will Help in Every Employment Case We Litigate on Behalf of Employees*, SCHALL & BARASCH LLC (Oct. 29, 2020), https://schallandbarasch.com/how-justice-

apply outside the Title VII context without analyzing that assumption.[28] This Article contributes by thoroughly making the case for why *Bostock*'s causation language should apply broadly to the employment discrimination spectrum. It also extensively documents the problematic *Gross* case law and details *Bostock*'s language to show how *Bostock*'s vision of but-for causation should solve the problems *Gross* created. It also analyzes the litigation trends after *Bostock* to show how courts are responding, both in applying *Bostock*'s but-for causation language outside of the Title VII context and how they actually use that language.

This Article is not about the substantive debate, raging for decades, over which causation standard is most appropriate in antidiscrimination litigation, either from a policy perspective or as a matter of statutory interpretation.[29] That ground is well trod, and in some ways, is now beside the point. The Supreme Court has dug in deep on but-for causation, and, barring congressional action,[30] it is the standard that will apply in much of employment discrimination litigation. The practical issue, then, is not whether but-for causation is proper but how but-for causation applies in light of *Bostock*.[31]

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gorsuchs-opinion-in-bostock-v-clayton-county-will-help-in-every-employment-case-we-litigate-on-behalf-of-employees [https://perma.cc/MM89-LNMQ]; Sandra Sperino, Comcast *and* Bostock *Offer Clarity on Causation Standard*, 46 HUM. RTS. 24, 25 (2021); Joan C. Williams, Rachel M. Korn & Sky Mihaylo, *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 HASTINGS L.J. 337, 404–06 (2020).

28 *See, e.g.*, Eyer, *supra* note 6, at 1624, 1644–47; Goren, *supra* note 27; Kabat, *supra* note 27; Robert S. Mantell, *Proving Motive, Causation in Bias Cases Post-*"Bostock," LEGALNEWS.COM (Aug. 4, 2020), http://legalnews.com/detroit/1490511 [https://perma.cc/3DY7-BYR5]; McGinley, Porter, Weatherby, Nelson, Wilkins & Archibald, *supra* note 27, at 17.

29 *See, e.g.*, Eyer, *supra* note 6, at 1625; Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 357–58 (2020); Widiss, *supra* note 7, at 368.

30 *See infra* notes 287–96 and accompanying text. Even congressional action is unlikely to supplant the but-for standard. *See infra* notes 287–96 and accompanying text.

31 *See* Eyer, *supra* note 6, at 1685 ("In a world in which it is clear that the Supreme Court is not going to reverse course and abandon the idea that the but-for principle is centrally important and textually mandated, it is not clear what might be gained by continuing to critique the principle's premises . . . ."); *see also* William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419, 447–48 (2021) ("The *Bostock* discussion does, however, highlight how central the Court believes causation standards are to resolving issues under the statutes. Moreover, it further ensconced the tort standard of but-for causation as the fundamental and default standard for the discrimination statutes."). Of course, the Supreme Court may not be finished refining its understanding of the but-for standard, especially now that it has taken up the issue of affirmative action. *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/7UVM-JHT3]. Thanks to Professor Guha Krishnamurthi for making this point. He and Professor Mitchell Berman have argued that although *Bostock* reached the correct result, it did so based on a

This Article predicts that *Bostock*'s expansive but-for causation language will apply broadly and will transform employment discrimination litigation over the coming years. Part I provides necessary background regarding causation in employment discrimination litigation. Part II details the *Gross* decision and the Supreme Court's subsequent entrenchment of the but-for causation standard. Then in Part III, the Article explores *Gross*'s disastrous consequences for employment discrimination plaintiffs based on its restrictive description of but-for causation. Finally, Part IV explains the analysis behind the author's prediction that *Bostock* will remedy many of *Gross*'s problems and revolutionize employment discrimination–causation litigation.

I. CAUSATION IN EMPLOYMENT DISCRIMINATION LITIGATION

Causation is at the core of employment discrimination litigation.[32] To understand its significance and fully grasp why *Bostock* will likely lead to revolutionary changes in employment discrimination cases, some background information on causation standards in employment discrimination litigation is useful.

At their base, employment discrimination statutes prohibit adverse employment actions caused by a plaintiff's protected status, such as disability or race. The two causation standards most often at issue in these cases are but-for causation and motivating-factor causation.[33]

The but-for standard is a traditional causation standard rooted in tort and criminal law.[34] As applied in the employment discrimination context, the but-for standard provides that causation is established when the employer's action would have been different if it had not considered the protected classification, such as sex.[35] In other words, if

misinterpretation of the but-for test. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 125 (2021); *see also* Robin Dembroff & Issa Kohler-Hausmann, *Supreme Confusion About Causality at the Supreme Court*, 25 CUNY L. REV. 57, 58 (2022) (criticizing *Bostock*'s conception of but-for causation). Arguments such as these raise the possibility that the Supreme Court could alter its but-for analysis in future cases.

32 *See supra* note 6 and accompanying text.

33 *See* Katz, *supra* note 6, at 121; Noonan, *supra* note 26, at 921–22; Robert G. Schwemm, *Fair Housing and the Causation Standard After* Comcast, 66 VILL. L. REV. 63, 75 (2021).

34 *See* Burrage v. United States, 571 U.S. 204, 210–14 (2014); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 14.4, at 317 (2d ed. 2016) [hereinafter DOBBS ON TORTS].

35 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020); Clarke, *supra* note 6, at 756–57; Eyer, *supra* note 6, at 1642; *see also* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON &

that one factor was changed—so if the employee was a man instead of a woman—would the employer's decision have been the same? If not, then but-for causation is established.[36] The prohibited factor must play a necessary or essential role in the employment decision.[37]

But-for cause, however, is not the same as sole cause.[38] Sole cause is the most restrictive form of causation and precludes a causation finding if any other cause contributes to the injury.[39] A single event can have many but-for causes, and a but-for cause does not need to be the primary cause; as long as changing a factor would change the outcome, then that factor is a but-for cause, even if other causes also exist.[40]

The motivating-factor standard, by contrast, examines whether the protected classification was one of the employer's motives in acting.[41] This standard is easier to show than but-for causation because even if a protected classification was not a determinative component—so even if the employer would have fired the woman anyway based on, for example, performance issues—the employee would prevail if her gender played a role in the employer's decision-making process.[42] At its most fundamental level, the difference between but-for causation and the motivating-factor standard is not whether multiple causes exist but how big a role the protected status must play in the employment decision.[43] If the protected characteristic is a necessary step in the causal chain, but-for causation is established; if it does not play a necessary role because the outcome would be the same regardless, then it is not a but-for cause but can still be a motivating factor.

DAVID G. OWEN, PROSSER & KEETON ON TORTS § 41, at 266 (W. Page Keeton ed., 5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

36 *See Bostock*, 140 S. Ct. at 1739, 1741; Martin Katz, *A Rosetta Stone for Causation*, 127 YALE L.J.F. 877, 878 (2018); Schwemm, *supra* note 33, at 71–72.

37 *See Bostock*, 140 S. Ct. at 1737, 1748; PROSSER & KEETON ON TORTS, *supra* note 35, § 41, at 265; *see also* Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020) (stating that a but-for cause is something that "affect[s] the outcome").

38 *See* Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 & n.5 (2d Cir. 2013); Leal v. McHugh, 731 F.3d 405, 415 (5th Cir. 2013); Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1277 (10th Cir. 2010); PROSSER & KEETON ON TORTS, *supra* note 35, § 41, at 266; Brief of *Amici Curiae* Employment Law Professors in Support of Respondents at 19, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171) [hereinafter Employment Law Professor Brief].

39 Katz, *supra* note 26, at 861; Schwemm, *supra* note 33, at 80.

40 *See* Burrage v. United States, 571 U.S. 204, 211 (2014); Noonan, *supra* note 26, at 928; Employment Law Professor Brief, *supra* note 38, at 3, 11–13, 16–19; DOBBS ON TORTS, *supra* note 34, § 14.4, at 317–18.

41 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013); Eyer, *supra* note 6, at 1677–78; Sullivan, *supra* note 29, at 357.

42 *See* Eyer, *supra* note 6, at 1677–78; Noonan, *supra* note 26, at 929; Sullivan, *supra* note 29, at 359–60.

43 Widiss, *supra* note 7, at 371, 409.

Scholars have long debated which standard is most desirable from a policy perspective.[44] But-for causation seems like a straightforward concept at its core, simply asking whether something such as age changed the outcome.[45] It is, however, not always so easy to apply in the real world. But-for causation usually works well for physical causation, such as the cause of a fire or a death, but not as well for human thought processes, such as motive.[46] Our brains are complex. Human decisions, such as whether to discipline or discharge an employee, are often multifaceted.[47] Determining exactly what motivated an employer's action or what might have happened if the employer had not considered a factor such as race is often an impossible task.[48] The but-for standard also allows employers to get away with some level of discrimination so long as the discrimination is not enough to have changed the outcome.[49] Motivating-factor causation does not try to parse how much of a role the protected classification played; it looks at whether it merely played a role in the actual decision.[50] This standard thus promotes a policy of keeping consideration of a protected classification completely out of the workplace decision-making process, but some see it as unfair because it allows liability even if the protected classification made no difference in the ultimate outcome.[51]

How these standards play out in any case depends in part on the specific wording used, but traditional wisdom is that the but-for standard favors employers and the motivating-factor standard is pro-employee.[52] Indeed, empirical evidence suggests that employers win

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44 *See* Eisenstadt, *supra* note 26, at 3; Eyer, *supra* note 6, at 1625; Sullivan, *supra* note 29, at 357–58.

45 *See* Clarke, *supra* note 6, at 757; Eyer, *supra* note 6, at 1664; *see also* Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020) (stating that a but-for cause is one that "affect[s] the outcome").

46 *See* Clarke, *supra* note 6, at 757; Sullivan, *supra* note 29, at 367–68.

47 *See* Richard Carlson, *Briefing the Court and Instructing the Jury on Burdens of Proof in an Employment Discrimination Case*, 69 ADVOCATE (TEX.) 96, 98 (2014); Clarke, *supra* note 6, at 725; Sullivan, *supra* note 29, at 368.

48 *See* Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 2 (2020); Eisenstadt, *supra* note 26, at 16, 21; *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 384–85 (2013) (Ginsburg, J., dissenting) ("[A] strict but-for test is particularly ill suited to employment discrimination cases.").

49 Katz, *supra* note 26, at 884–85.

50 *See* Sullivan, *supra* note 29, at 357.

51 *See* Eisenstadt, *supra* note 26, at 16; Katz, *supra* note 26, at 861, 885–88; Sullivan, *supra* note 29, at 384; Employment Law Professor Brief, *supra* note 38, at 13–14.

52 *See* Eyer, *supra* note 6, at 1625, 1683, 1688–90 (describing progressive opposition to the but-for standard and support for the motivating-factor standard); Sullivan, *supra* note 29, at 357–58 (explaining the expectations that motivating-factor liability would improve litigation outcomes for employment discrimination plaintiffs).

significantly more often with but-for jury instructions than with motivating-factor instructions.[53] Not surprisingly, antidiscrimination advocates have historically championed the motivating-factor standard.[54]

How do these standards fit into employment discrimination statutes? Congress passed Title VII of the Civil Rights Act in 1964, prohibiting employment discrimination "because of" sex, race, national origin, color, or religion or in retaliation for engaging in some forms of protected activity.[55] Other than stating that employers could not act "because of" these factors, Congress did not specify a causation standard. The same held true in 1967, when Congress enacted the ADEA, prohibiting employment discrimination "because of" age.[56] It is broadly accepted that Congress did not create a sole-causation standard here, based on the statutory language and legislative history.[57] The question left open was whether liability under these statutes depends on showing that something such as race or age was a motivating factor, or if but-for causation was required.

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53 *See* Katlyn S. Farnum & Richard L. Wiener, *Stereotype Content Model, Causal Models, and Allegations of Age Discrimination: Should the Law Change?*, 16 ANALYSES SOC. ISSUES & PUB. POL'Y 100, 100 (2016) [hereinafter Farnum & Wiener, *Should the Law Change?*] ("In line with previous research, participants were more likely to find for the defendant under but for instructions, as compared to mixed motive."); Sherwyn & Heise, *supra* note 26, at 903 ("[P]laintiffs in cases with a motivating factor jury instruction were significantly more likely to receive litigation costs and attorneys fees . . . ."); Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims*, 19 PSYCH., PUB. POL'Y & L. 395, 395 (2013) [hereinafter Wiener & Farnum, *Psychology of Jury Decision Making*] (reporting on study showing defendants receiving more favorable outcomes when jury instructed on but-for causation rather than motivating-factor causation).

54 *See* Eyer, *supra* note 6, at 1625, 1688–89 (analyzing the traditional progressive rationale for supporting the motivating-factor standard); Widiss, *supra* note 7, at 368 (discussing the "decades-long fight" of many progressive scholars for the motivating-factor standard). *But see* Eyer, *supra* note 6, at 1649 ("[U]ltimately, it seems likely that the goal of advocates and commentators ought to be a paradigm focused exclusively on the but-for principle.").

55 *See* 42 U.S.C. § 2000e-2(a).

56 *See* 29 U.S.C. § 623(a).

57 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 n.7 (1989) (plurality opinion) ("Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" (citing 110 CONG. REC. 13,837 (1964))); Katz, *supra* note 6, at 141–42 ("Congress, in creating disparate treatment law, unequivocally rejected a 'sole' cause standard. Thus, one of the few 'givens' about causation in disparate treatment law is that the law does not require plaintiffs to prove 'sole' causation." (footnote omitted)); Widiss, *supra* note 7, at 362–63 ("It is abundantly clear, however, that these statutes do not adopt a sole-cause standard. . . . The Court has also bolstered this interpretation by referencing Congress's explicit rejection of a proposed amendment that would have added 'solely' before the words 'because of,' and distinguishing Title VII's language from other statutes that *do* explicitly adopt a sole-causation standard." (emphasis in original) (footnote omitted)).

In 1989, a splintered Supreme Court in *Price Waterhouse v. Hopkins* held that a Title VII plaintiff can meet her burden of proving the employer acted "because of" a protected classification by showing that it was a "motivating" or "substantial" factor.[58] Once the plaintiff makes that showing, the burden then shifts to the defendant to prove it would have taken the same action even without considering that factor.[59] In other words, but-for causation became an affirmative defense, called the same-action defense, allowing the plaintiff to win on a showing of motivating-factor causation if the defendant could not prove the affirmative defense that it would have taken the same action anyway.[60] This decision, though universally viewed as pro-employee,[61] did little to clear up the causation debate because no one opinion gained a majority and because the Court used fairly imprecise language in describing the standard[62]—Professor Martin Katz counted more than twenty different causation formulations throughout the various opinions.[63]

In the Civil Rights Act of 1991, Congress amended Title VII and codified the motivating-factor standard.[64] It did so, however, with a significant modification. A plaintiff could still establish causation if a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice,"[65] but the same-action defense was no longer (as in *Price Waterhouse*) an affirmative defense that could completely eliminate an employer's liability. Rather, if the employer could prove it would have made the same decision regardless of the prohibited characteristic, the plaintiff would still win, but the defendant would have a defense to damages.[66] Obviously, this is viewed as even more pro-plaintiff than *Price*

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58 *See Price Waterhouse*, 490 U.S. at 258; *id.* at 259–60 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring). Though no single opinion gained a majority, six Justices agreed on the core principle that an employment action motivated by sex or where sex was a substantial factor constitutes discrimination "because of" sex. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 171 (2009).

59 *See Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring); *see also Gross*, 557 U.S. at 171.

60 *See* Corbett, *supra* note 31, at 430; Katz, *supra* note 26, at 863; Sullivan, *supra* note 29, at 360.

61 Sullivan, *supra* note 29, at 359.

62 *See* Noonan, *supra* note 26, at 925–26; Sullivan, *supra* note 29, at 361.

63 *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment of Law*, 94 GEO. L.J. 489, 491 (2006).

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

65 42 U.S.C. § 2000e-2(m).

66 *See id.* § 2000e-5(g)(2)(B); Noonan, *supra* note 26, at 926; Sullivan, *supra* note 29, at 362–63.

Waterhouse.[67] The motivating-factor standard did not replace but-for causation but supplemented it, allowing plaintiffs an alternative route for establishing liability under Title VII.[68]

Congress had enacted the Americans with Disabilities Act (ADA) in 1990, which prohibits disability-based employment discrimination.[69] In the wake of *Price Waterhouse* and the Civil Rights Act of 1991, lower courts and scholars were left to figure out how to apply the motivating-factor standard and to determine what standard to apply in age and disability cases or in cases alleging retaliation under Title VII or other statutes.[70] It is against this backdrop that the Supreme Court took up the case of *Gross v. FBL Financial Services*.[71]

II. *GROSS* AND THE ENTRENCHMENT OF BUT-FOR CAUSATION

When Jack Gross's employer restructured positions and assigned many of his responsibilities to a younger employee, Gross sued for age discrimination under the ADEA.[72] A key trial issue centered on the type of evidence Gross needed to obtain a jury instruction regarding age as a motivating factor in the demotion decision.[73] The trial court instructed the jury on motivating factor, including the same-decision defense, and Gross prevailed.[74] The Eighth Circuit reversed, holding Gross was not entitled to that instruction.[75] The Supreme Court granted

67 *See* Sperino, *supra* note 6, at 296; Sullivan, *supra* note 29, at 364.

68 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020) (characterizing the Civil Rights Act of 1991 as "supplementing" Title VII and stating that the "traditional but-for causation standard . . . continues to afford a viable, if no longer exclusive, path to relief under Title VII"); Eyer, *supra* note 6, at 1698 ("The lower courts have long treated the motivating factor and 'because of' provisions of Title VII as *alternatives*, rather than a singular standard that must be read in concert—meaning that each is an available way of bringing a discrimination claim." (emphasis in original)); Kerr v. Unified Gov't of Wyandotte Cnty., No. 21-2335-JWL, 2021 WL 4806391, at *2 n.2 (D. Kan. Oct. 14, 2021) (stating that *Bostock* indicates that motivating-factor and but-for causation standards are "alternative bases" for Title VII liability); Barton v. Warren County, No. 1:19-CV-1061, 2020 WL 4569465, at *5 (N.D.N.Y. Aug. 7, 2020) (noting that under *Bostock*, "Title VII liability can be found through either but-for causation or the motivating factor standard").

69 42 U.S.C. § 12112(a).

70 *See* Eisenstadt, *supra* note 26, at 8–9; Widiss, *supra* note 14, at 887.

71 557 U.S. 167 (2009).

72 *Id.* at 170.

73 *See id.* at 170–71.

74 *Id.*

75 *Id.* at 171; *see also* Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 358 (8th Cir. 2008).

certiorari on the issue of the type of evidence necessary to obtain a motivating-factor instruction in a non-Title VII case.[76]

But the Court did not address that issue. Instead, it considered what it characterized as the "threshold" issue of whether an ADEA plaintiff is *ever* entitled to a motivating-factor instruction.[77] Writing for the 5–4 majority, Justice Thomas held that an ADEA plaintiff is never so entitled.[78] Though Congress modeled the ADEA on Title VII and the Court previously had interpreted the two statutes fairly uniformly,[79] Justice Thomas stated that Title VII cases such as *Price Waterhouse* did not control because Congress amended Title VII after *Price Waterhouse* (via the Civil Rights Act of 1991) to add a motivating-factor provision but did not simultaneously amend the ADEA.[80]

Freed from the constraints of Title VII cases and statutory law, the Court focused on the ADEA's text.[81] The ADEA prohibits employment discrimination "because of such individual's age."[82] Citing dictionary definitions and a torts treatise, the Court held that the "ordinary meaning" of the "because of" age provision meant that the plaintiff must show that "age was the 'reason' that the employer decided to act."[83] The Court explicitly labeled this as but-for causation: "To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was *the* 'but-for' cause of the employer's adverse decision."[84] The burden never shifts to the employer—as it does with a motivating-factor standard—to prove it would have made the same decision without considering age.[85] Thus, it is "never proper" for an ADEA plaintiff to receive a motivating-factor instruction.[86]

Gross caused an immediate stir. As Justice Stevens stressed in his dissent, the Court ruled on an issue not briefed by the parties or amicus curiae.[87] And the Court did not explain the causation standard, other than to say that age must be "the 'but-for' cause" of the employer's

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76 *Gross*, 557 U.S. at 169–70; Petition for a Writ of Certiorari at i, Gross v. FBL Fin. Servs., Inc., 557 U.S. 1167 (2009) (No. 08-441).

77 *Gross*, 557 U.S. at 173 & n.1.

78 *Id.* at 169–70.

79 *See id.* at 175 n.2; *see also id.* at 183–85 (Stevens, J., dissenting).

80 *See id.* at 173–75 (majority opinion).

81 *See id.* at 175.

82 29 U.S.C. § 623(a)(1).

83 *See Gross*, 557 U.S. at 176–77.

84 *Id.* at 176 (emphasis added).

85 *See id.* at 177, 180.

86 *Id.* at 170, 180.

87 *Id.* at 181 (Stevens, J., dissenting).

decision.[88] More on that crucial wording later. Further, the Court broke with prior practice of interpreting Title VII and the ADEA consistently, thereby creating different causation standards for claims under those two statutes, despite their similar language, history, and structure.[89] What did that mean for interpreting other statutes with "because of"–type language?

Right away, courts began applying *Gross* to these other statutes.[90] For example, before *Gross*, most courts allowed liability under the ADA based on the motivating-factor standard.[91] Since *Gross*, the trend is in the other direction, requiring plaintiffs to show but-for causation.[92] Professor Deborah Widiss has documented how courts have similarly applied *Gross* to at least ten other statutes, including the Family and Medical Leave Act and the Labor Management Reporting and Disclosure Act.[93]

There was also the question of what standard should be applied in Title VII retaliation cases because the Civil Rights Act of 1991 did not directly address the antiretaliation provision.[94] Before *Gross*, courts had gone both ways on the issue, but after *Gross*, the "tide really turned," with the majority of courts requiring but-for causation.[95]

The Supreme Court weighed in on that precise question four years later in *University of Texas Southwestern Medical Center v. Nassar*, holding that the motivating-factor provisions in Title VII apply only to status-based discrimination claims and not to Title VII retaliation

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88 *Id.* at 176, 180 (majority opinion); *see also* Clarke, *supra* note 6, at 768.

89 *See* Katz, *supra* note 26, at 867–71.

90 *See* Eyer, *supra* note 6, at 1643; *see also* Clarke, *supra* note 6, at 752.

91 *See* Widiss, *supra* note 14, at 912–13; *see also* Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 & n.63 (9th Cir. 2005) (joining the First, Second, Fourth, Fifth, Seventh, and Eighth Circuits in holding that the ADA allowed liability based on the motivating-factor standard). *But see* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996) ("[W]e hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, *i.e.*, when it is a 'but-for' cause.").

92 *See* Widiss, *supra* note 14, at 912–13; *see also* Murray v. Mayo Clinic, 934 F.3d 1101, 1104–06 (9th Cir. 2019) (relying on *Gross* to hold that the ADA requires but-for causation), *cert. denied*, 140 S. Ct. 2720 (2020); Natofsky v. City of New York, 921 F.3d 337, 345, 347–50 (2d Cir. 2019) (same), *cert. denied*, 140 S. Ct. 2668 (2020); Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 234–36 (4th Cir. 2016) (same); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (same); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62 (7th Cir. 2010) (same).

93 *See* Widiss, *supra* note 14, at 863 & n.19, 908–20.

94 *See* Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either* Price Waterhouse*'s or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (but Should)*, 64 ALA. L. REV. 1067, 1068–69 (2013); Widiss, *supra* note 14, at 887.

95 Rosenthal, *supra* note 94, at 1070–72; Widiss, *supra* note 14, at 887.

claims.[96] Title VII's antiretaliation provision prohibits discrimination "because" an employee engaged in certain protected activity.[97] The Court said the motivating-factor standard from the Civil Rights Act of 1991 did not cover the retaliation provision because of its location in the statute.[98] It then characterized but-for causation as "textbook tort law" and "the background against which Congress legislated in enacting Title VII."[99] Thus, but-for causation, according to the Court, is the "default rule[]," and it is "presumed" that Congress incorporates that standard into a statute unless the statute itself indicates otherwise.[100] Noting the similarity between the ADEA's language and the antiretaliation provision in Title VII, the Court then relied on *Gross* to hold that the statutory language requires but-for causation:

> Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.[101]

Justice Ginsburg, writing for the four dissenters, castigated the majority for creating two separate causation standards in Title VII cases and for affording retaliation claims less protection by requiring plaintiffs to meet a more difficult causation burden.[102]

As *Gross* and *Nassar* make clear, the Supreme Court is deeply entrenched in but-for causation as the baseline causation standard, particularly in employment discrimination cases.[103] The Court considered but-for as the default causation rule in two criminal cases in 2014,[104] and in 2015, it cited *Nassar* in stating that "typically" in antidiscrimination laws, "because of" language signifies "the traditional standard of but-for causation."[105] Otherwise, the Court remained fairly silent on the topic, with lower courts continuing to apply but-for causation in the employment discrimination and other contexts.[106] In

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96 570 U.S. 338, 343 (2013).

97 42 U.S.C. § 2000e-3(a).

98 *See Nassar*, 570 U.S. at 347–51.

99 *Id.* at 347.

100 *Id.*

101 *Id.* at 352.

102 *See id.* at 363–64 (Ginsburg, J., dissenting).

103 *See* Eyer, *supra* note 6, at 1624; *see also* Corbett, *supra* note 31, at 441–42.

104 *See* Paroline v. United States, 572 U.S. 434, 449–50, 458 (2014); Burrage v. United States, 571 U.S. 204, 210–12 (2014).

105 EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015).

106 *See supra* notes 14, 92, 95 and accompanying text; *see also, e.g.*, United States *ex rel.* King v. Solvay Pharms., Inc., 871 F.3d 318, 333 (5th Cir. 2017) (applying *Gross* and *Nassar* to hold that

2020, however, the Court, in three late-term decisions, reaffirmed the primacy of the but-for principle.[107] In the final case, *Bostock*, the Court substantially clarified the scope and application of the but-for standard.[108] But, to fully comprehend the significance of this development, it is important to first understand in detail the problems *Gross* and its progeny have caused.

III. *GROSS* HAS BEEN A DISASTER

Gross caused immediate confusion and upheaval in the antidiscrimination causation world, and those concerns have persisted. Scholars have lambasted *Gross* on many grounds, including that but-for causation does not, as the Court stated, naturally flow from "because of,"[109] is based on a misreading of the statute and its history,[110] and is otherwise the wrong standard for employment discrimination cases,[111] particularly because the Court made no attempt to justify importing tort law into the employment discrimination context.[112] Though sharing many of these concerns, this Article focuses elsewhere. Rather than debating whether the Supreme Court should have adopted but-for causation, this Article concentrates on what the *Gross* Court said about but-for causation—and the problems that flow directly from that.

One small word. Much of the negative fallout from *Gross* comes down to the word "the." The *Gross* Court said that age must be "the" but-for reason for the employer's action.[113] Not "a" reason—"the"

False Claims Act retaliation claims require but-for causation); Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (relying on *Gross* in holding that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law" and applying but-for standard in a § 1983/First Amendment retaliation case); Lance v. Betty Shabazz Int'l Charter Sch., No. 12 CV 4116, 2014 WL 340092, at *8 (N.D. Ill. Jan. 29, 2014) (relying on *Gross* and *Nassar* in finding that but-for causation applies to Title VI retaliation claim).

107 *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).

108 *See infra* Section IV.A.

109 *See, e.g.*, Corbett, *supra* note 31, at 422 n.19; Eisenstadt, *supra* note 26, at 11; Eyer, *supra* note 6, at 1683; Foreman, *supra* note 26, at 686; Harper, *supra* note 26, at 111–12; Katz, *supra* note 26, at 886–87; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190 (2009) (Breyer, J., dissenting) ("The words 'because of' do not inherently require a showing of 'but-for' causation, and I see no reason to read them to require such a showing.").

110 *See, e.g.*, Foreman, *supra* note 26, at 682, 685–87; Harper, *supra* note 26, at 107–11; Sherwyn & Heise, *supra* note 26, at 923–26; Widiss, *supra* note 14, at 860–64.

111 *See supra* note 29 and accompanying text.

112 *See, e.g.*, Clarke, *supra* note 19, at 77–78; Corbett, *supra* note 26, at 1061; Sandra F. Sperino, *The Tort Label*, 66 FLA. L REV. 1051, 1052–54, 1064–66 (2014).

113 *Gross*, 557 U.S. at 176.

reason. This wording strongly suggests that under the but-for standard, the protected characteristic must be the one-and-only reason for the adverse employment decision.[114] But that is incorrect. One-and-only is the sole-causation standard, not the but-for causation standard.[115]

The Supreme Court surely knew this when it decided *Gross*. The distinction between but-for and sole causation is a fundamental tenet of tort law.[116] The *Price Waterhouse* Court debated the merits of but-for cause, sole cause, and motivating factor.[117] Moreover, in his *Gross* dissent, Justice Stevens noted that the dictionary definitions the majority relied on did not define "because of" to mean "*solely* by reason of."[118] So what explains the Court's markedly unsharp wording?[119]

As many scholars have noted, the Court sloppily and skimpily imported tort causation law into the employment discrimination context and did not pay attention to subtleties, in particular those involved when multiple causal factors are at issue.[120] A single injury can have many but-for causes.[121] Moreover, the common law of torts on which the Court purportedly relied includes not only but-for causation but a "bundle of causal standards" that accompany it to account for

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114 *See* Clarke, *supra* note 19, at 78 ("The Court's use of the definite article 'the' indicates a specific, single cause or single reason (whereas the indefinite article would indicate the possibility of more than one cause or reason)."); *see also* Mantell, *supra* note 28 ("[U]sing 'the' falsely implies to the judge or jury that bias must be a sole or primary factor in the employer's decision.").

115 *See* Katz, *supra* note 26, at 861; Schwemm, *supra* note 33, at 80.

116 *See supra* note 38 and accompanying text.

117 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240–42 (1989) (plurality opinion); *id.* at 258–61 (White, J., concurring); *id.* at 262–63 (O'Connor, J., concurring); *id.* at 281–84 (Kennedy, J., dissenting); *see also Gross*, 557 U.S. at 183 n.4 (Stevens, J., dissenting) ("In *Price Waterhouse*, we recognized that the words 'because of' do not mean '*solely* because of' . . . ." (emphasis in original)); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (distinguishing sole and but-for causation).

118 *Gross*, 557 U.S. at 183 n.4 (Stevens, J., dissenting) (emphasis in original). Curiously, Justice Stevens did not explicitly take issue with the majority's wording that repeatedly stated that age must be "the" reason. *See id.*

119 *Cf.* W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129, 1139 (2014) ("The statutory reasoning in both *Gross* and *Nassar*, in particular, is so transparently flawed that it must not be what is driving the Court's holding. So what is really going on in these cases? In my view, the Court (or at least a majority of the Justices) does not see these cases as presenting a causation issue at all—or if it does, the Court is nonetheless choosing a different lens for its analysis. Rather, the Court is engaging in what, at its core, is a tort duty analysis." (footnote omitted)); Clarke, *supra* note 19, at 79 ("[O]ne is left to conclude that the Court was either profoundly sloppy with its word choice in *Gross* (which would be ironic considering that it was a case about the meaning of words), or the Court intended to adopt the most restrictive version of but-for cause available.").

120 *See, e.g.*, Corbett, *supra* note 26, at 1061; Eisenstadt, *supra* note 26, at 12–13; Sperino, *supra* note 26, at 721–22, 739–42; Sperino, *supra* note 112, at 1064.

121 Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020); Employment Law Professor Brief, *supra* note 38, at 3, 16–18; DOBBS ON TORTS, *supra* note 34, § 14.4, at 318.

other situations when many causal factors are at play.[122] But the Court overlooked all of this nuance by stating simply that age must be "the" but-for cause of the employment decision.

As demonstrated earlier, *Gross*'s "because of equals but-for" rationale spread like wildfire, and with it, mounting confusion over what the but-for standard requires.[123] Many litigants[124] and courts[125]

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122 *See* Employment Law Professor Brief, *supra* note 38, at 3, 11–13; *see also* Burrage v. United States, 571 U.S. 204, 211 (2014); DOBBS ON TORTS, *supra* note 34, §§ 14.6–.11; PROSSER & KEETON ON TORTS, *supra* note 35, § 41, at 266–68; Sperino, *supra* note 112, at 1087.

123 *See supra* note 19 and accompanying text; *see also* Widiss, *supra* note 14, at 880 ("*Gross* has quickly caused widespread upheaval and confusion . . . .").

124 *See, e.g.*, Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1277 (10th Cir. 2010); Smitherman v. Decatur Plastics Prods., Inc., No. 4:15-cv-1576-JEO, 2017 WL 3668176, at *7 (N.D. Ala. Aug. 24, 2017); Stidd v. Griffin Cap. Sec., Inc., No. 1:14-CV-3763-SCJ-JSA, 2016 WL 11664809, at *12 (N.D. Ga. May 31, 2016); Brown v. City of Caldwell, No. 1:10-cv-536-BLW, 2012 WL 892232, at *8 (D. Idaho Mar. 14, 2012); Foust v. Metro. Sec. Servs., Inc., 829 F. Supp. 2d 614, 623 (E.D. Tenn. 2011); Griffin v. United Parcel Serv., Inc., No. 08-2000, 2010 WL 126229, at *2 (E.D. La. Jan. 8, 2010); Houchen v. Dall. Morning News, Inc., No. 3:08-CV-1251-L, 2010 WL 1267221, at *2–3 (N.D. Tex. Apr. 1, 2010); *see also* Petition for Writ of Certiorari at 24, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (No. 12-484).

125 *See, e.g.*, Mollet v. City of Greenfield, 926 F.3d 894, 897 (7th Cir. 2019) (stating that the issue is not whether the protected activity "was *a* but-for cause of the adverse action, rather whether [it] was *the* but-for cause" (emphasis in original)); Bauers-Toy v. Clarence Cent. Sch. Dist., 10-CV-845, 2015 WL 13574291, at *4 (W.D.N.Y. Sept. 30, 2015) ("[A] plaintiff in an ADEA case must show that the discriminatory factor (age) was the only reason for the conduct."); Hendon v. Kamtek, Inc., 117 F. Supp. 3d 1325, 1330 (N.D. Ala. 2015) ("'But-for' causation *is* 'sole' causation." (emphasis in original)); Donald v. UAB Hosp. Mgmt., LLC, No. 2:14-cv-727-WMA, 2015 WL 3952307, at *1 (N.D. Ala. June 29, 2015) (stating that the plaintiff must prove that retaliation "was the only or but-for motive" for her termination (internal quotation marks omitted)); Savage v. Secure First Credit Union, 107 F. Supp. 3d 1212, 1216 (N.D. Ala. 2015) (dismissing the plaintiff's retaliation claim because she failed "to allege retaliation as the sole cause for her adverse treatment"), *rev'd on other grounds*, No. 15-12704, 2016 WL 2997171 (11th Cir. May 25, 2016) (per curiam); Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *5 (N.D. Ala. Apr. 27, 2015) (holding that the plaintiff's complaint must show that "retaliation was the 'only,' or 'but for' motive for her termination"); de Arce v. Dist. Bd. of Trs. of Mia.-Dade Coll., No. 12-21832-Civ., 2013 WL 4773391, at *8 (S.D. Fla. Sept. 4, 2013) ("[P]laintiff must come forth with a genuine dispute of material fact that age—not age and other motives—was the only impetus behind the adverse employment decision."); Austin v. Wal-Mart Stores, Inc., No. 1:10-CV-3556-TWT, 2012 WL 6194233, at *3 (N.D. Ga. Dec. 11, 2012) (noting that the plaintiff failed to raise a fact issue "that her age was the sole cause of her termination"); Gard v. U.S. Dep't of Educ., 752 F. Supp. 2d 30, 35 (D.D.C. 2010) ("'[S]olely by reason of' is equivalent to the 'but-for' analysis adopted in *Gross*." (alteration in original)); Pagan v. Holder, 741 F. Supp. 2d 687, 694 n.12 (D.N.J. 2010) ("The adverse employment action must be made solely on the basis of plaintiff's age."); Whitaker v. Tenn. Valley Auth. Bd. of Dirs., No. 3:08-1225, 2010 WL 1493899, at *9 (M.D. Tenn. Apr. 14, 2010) ("Post-*Gross*, it is incongruous to posit such alternate theories because the very presentation of different reasons for an action suggests that age was not the *sole* reason for the action." (emphasis in original)); Cartee v. Wilbur Smith Assocs., No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at *3 (D.S.C. Mar. 22, 2010) (holding that under *Gross*, "only the age motive truly matters"); Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009) ("*Gross* holds for the first time that a plaintiff who invokes

have explicitly equated sole and but-for causation, and others have used wording essentially leading to the same result.[126] Incorrect, but who can blame them? As Professor Brian Clarke explained,

> The Court's word choice in *Gross*, combined with its limited explanation of the parameters of the cause-in-fact standard it adopted, opened the door for interpreting factual causation in the disparate treatment context as *sole* cause. It is even the most natural interpretation of the Court's plain language.[127]

Moreover, some scholars magnified the problem; in their zest for advocating for the motivating-factor standard, they used hyperbole that perhaps overplayed the restrictiveness of the but-for standard.[128] Even though the concept of sole causation in the employment discrimination context has been characterized as "too stupid to take seriously,"[129] *Gross*'s sloppy language created a sole-cause trend.[130]

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the ADEA has the burden of proving that the fact that he is over 40 years old was the *only* or the '*but-for*' reason for the alleged adverse employment action." (emphasis in original)); Wardlaw v. City of Phila. Sts. Dep't, Nos. 05-3387, 07-160, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009) ("The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the only reason for discrimination."), *aff'd*, 378 F. App'x 222 (3d Cir. 2010).

126 *See, e.g.*, Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 252 (4th Cir. 2015) (stating that "but for" and "the real reason" are "functionally equivalent"); Smith v. CH2M Hill, Inc., 521 F. App'x 773, 774–75 (11th Cir. 2013) (affirming dismissal of the plaintiff's age discrimination claim that alleged age "substantially motivated" his termination because that was not sufficient to infer but-for causation); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 323 (6th Cir. 2012) (Clay, J., concurring in part and dissenting in part) ("While the but-for standard may lessen the burden on plaintiffs . . . when compared with the sole-cause standard, it barely does so."); *see also* Petition for a Writ of Certiorari at 9, Murray v. Mayo Clinic, 140 S. Ct. 2720 (2020) (No. 19-995).

127 Clarke, *supra* note 19, at 79 (emphasis in original); *see also Hendon*, 117 F. Supp. 3d at 1330–31 (stating that "'[b]ut-for' causation *is* 'sole' causation" is "the natural and, indeed, the only logical conclusion to be drawn" from *Gross* and *Nassar* (emphasis in original)); Widiss, *supra* note 7, at 371–72 ("Its use of a definite article, rather than an indefinite article, helped fuel the misimpression that there can only be one but-for cause, and that but-for cause is functionally equivalent to sole cause." (footnote omitted)); *see also* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481 (2021) ("Normally, indefinite articles (like 'a' or 'an') precede *countable* nouns." (emphasis in original)).

128 Eyer, *supra* note 6, at 1678–79.

129 Clarke, *supra* note 19, at 76 (quoting email from Professor Charles Sullivan); *see also* Eyer, *supra* note 6, at 1679 ("It is no doubt correct that a requirement to demonstrate sole causation . . . would be an insurmountable requirement for most plaintiffs. Virtually all discriminatory decision-making involves multiple impetuses as a matter of fact, making it very difficult (if not impossible) to show that class status was the *sole* cause." (emphasis in original)); Sullivan, *supra* note 29, at 373 n.75 ("'Sole cause' is, of course, incoherent as a concept since any human activity can be viewed as the result of literally billions of prior events, tracing back to the Big Bang.").

130 Justice Ginsburg arguably added to the confusion in her *Nassar* dissent, implying that but-for causation and sole causation were equivalent. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 384–85 (2013) (Ginsburg, J., dissenting) (describing the majority's "strict but-for test"

Not all courts have jumped onto the "but-for equals sole" bandwagon,[131] but the problem is widespread and has caused direct, concrete injuries to discrimination plaintiffs. Recall the nurse who sued for race discrimination and retaliation.[132] She alleged that she complained to her employer about thirteen unfair employment conditions, stating that she had been singled out and treated differently.[133] Her employer fired her two weeks later.[134] She sued for race discrimination and retaliatory discharge based on her complaints about her treatment.[135] The court granted summary judgment on her retaliation claim,[136] emphasizing *Nassar*'s requirement that retaliation be "the" but-for cause of the employer's action.[137] Before *Nassar*, the court reasoned, two weeks between protected activity and termination would have been sufficient to survive summary judgment, but temporal proximity alone, even when this close, "does not meet the new 'but for' causation standard."[138] Thus, the *Gross* standard, as applied to Title VII retaliation claims in *Nassar*, directly led to this summary judgment that previously would have been denied.

Most employment discrimination cases involve many potential motives for the employer's conduct[139]—after all, employers typically do not readily admit that they acted based on something like the plaintiff's race.[140] The interpretation of *Gross* that but-for causation requires sole cause typically plays out against the plaintiff in these cases.

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and the problems it creates in assessing employers' motives, then stating that "[t]his point, lost on the Court, was not lost on Congress" because in enacting Title VII, it "considered and rejected an amendment that would have placed the word 'solely' before 'because of'"); *see also Hendon*, 117 F. Supp. 3d at 1332 (relying in part on Justice Ginsburg's *Nassar* dissent to conclude "that 'sole' and 'but-for' causation are synonymous"); Widiss, *supra* note 7, at 371 n.116 ("In *Nassar*, the dissenting Justices also seem to incorrectly equate but-for cause with sole cause."); *cf.* Burrage v. United States, 571 U.S. 204, 219 (2014) (Ginsburg, J., concurring) ("I do not read 'because of' in the context of antidiscrimination laws to mean 'solely because of.'").

131 *See, e.g.*, Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 236 n.5 (4th Cir. 2016); Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 & n.5 (2d Cir. 2013); Leal v. McHugh, 731 F.3d 405, 415 (5th Cir. 2013); Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1277 (10th Cir. 2010).

132 *See supra* notes 2–3 and accompanying text.

133 Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-SGC, 2014 WL 8728435, at *3 (N.D. Ala. Nov. 4, 2014).

134 *Id.* at *3–4.

135 *Id.* at *1.

136 Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *1 (N.D. Ala. Apr. 27, 2015). Montgomery dropped her race claim, so granting summary judgment on the retaliation claim ended her case. *See id.* at *5.

137 *Id.* at *4.

138 *Id.*

139 *See supra* note 47 and accompanying text; Widiss, *supra* note 7, at 400.

140 *See* Widiss, *supra* note 7, at 378, 392.

Take, for example, a scenario where a plaintiff has alleged discrimination based on an illegal motive and the employer counters that it acted for a legitimate reason, such as a job performance problem.[141] Many courts have held that if the plaintiff cannot negate the employer's proffered reason, the plaintiff loses as a matter of law, despite evidence of an illegal motive.[142] Under the strict interpretation of *Gross*'s language, the existence of a legitimate motive means it is impossible that the employer also acted for an illegal reason because, according to this theory, but-for causation requires a showing that the illegal factor is the *one and only* motive. It is a binary choice: either the employer acted based on the illegal factor or it did not.

This was the downfall of the milk delivery driver discussed earlier.[143] He had undisputedly been disciplined at work, and that alone justified summary judgment under *Gross*.[144] Even though the Fourth Circuit gave lip service to the idea that but-for cause need not be sole cause, it still said that age must be "the reason" for the employer's decision, and because the plaintiff had documented performance issues, it was impossible to show that age was "the but-for cause" of his termination.[145] The same result has played out in case after case, especially those involving age claims,[146] as in *Gross*, or retaliation claims,[147] following on the heels of *Gross* in *Nassar*.

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141 Employers usually make this argument in cases governed by the *McDonnell Douglas* burden-shifting paradigm. *See* Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 968–69 (2019); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973). Most employment discrimination cases are filtered through this paradigm. *See* Eyer, *supra*, at 968; Widiss, *supra* note 7, at 375, 378. *See generally* SANDRA SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018).

142 *See infra* notes 143–47 and accompanying text; *see also* Widiss, *supra* note 7, at 400–01.

143 *See supra* note 4 and accompanying text.

144 *See* Arthur v. Pet Dairy, 593 F. App'x 211, 221–22 (4th Cir. 2015).

145 *See id.* at 220, 222.

146 *See, e.g.*, de Arce v. Dist. Bd. of Trs. of Mia.-Dade Coll., No. 12-21832-Civ., 2013 WL 4773391, at *8 (S.D. Fla. Sept. 4, 2013) (granting summary judgment because the plaintiff's documented performance issues meant there was no fact issue that "age—not age and other motives—was the only impetus" for the employer's decision); Austin v. Wal-Mart Stores, Inc., No. 1:10-CV-3556-TWT, 2012 WL 6194233, at *3 (N.D. Ga. Dec. 11, 2012) (granting summary judgment because the plaintiff's evidence of age-related comments did not raise a fact issue "that her age was the sole cause" of her termination for gross misconduct); Howard v. STERIS Corp., 886 F. Supp. 2d 1279, 1300 (M.D. Ala. 2012) (granting summary judgment because the plaintiff's unrebutted performance issues "bar[red] him from proving that but for his age," the company would not have fired him); Whitaker v. Tenn. Valley Auth. Bd. of Dirs., No. 3:08-1225, 2010 WL 1493899, at *9 (M.D. Tenn. Apr. 14, 2010) (granting summary judgment because the plaintiff's low interview score meant that he could not present a jury question "on whether his age was the *sole* reason for his non-selection" (emphasis in original)).

147 *See, e.g.*, Mollet v. City of Greenfield, 926 F.3d 894, 897–98 (7th Cir. 2019) (affirming summary judgment because the plaintiff's performance issues meant retaliation may have been

Similarly, plaintiffs face an uphill battle when they allege alternative impermissible motives and at least one of those motives is governed by a but-for standard, such as being discriminated against based on age or race. In the nurse's case, she sued for both race discrimination and retaliation.[148] In addition to rejecting her retaliation claim because fourteen days of temporal proximity was insufficient as a matter of law to meet the new but-for standard, the court said her allegation that race motivated her termination defeated her retaliation claim because she must plead and prove that retaliation was "the 'only'" motive for termination.[149] Court after court has ruled in the same fashion, rejecting age and retaliation claims—which require but-for

"*a* but-for cause of the adverse action" but not "*the* but-for cause" (emphasis in original)); Pastoriza v. Keystone Steel & Wire, No. 15-cv-1174, 2015 WL 8490902, at *6–7 (C.D. Ill. Dec. 10, 2015) (dismissing retaliation claim because the plaintiff's complaints about issues not within the purview of Title VII, in addition to a sexual harassment complaint, "torpedo a finding of but-for causation"); Lance v. Betty Shabazz Int'l Charter Sch., No. 12 CV 4116, 2014 WL 340092, at *9 (N.D. Ill. Jan. 29, 2014) (granting motion to dismiss Title VI retaliation claim because the "quantity and severity of the alternative reasons" for his termination meant that the plaintiff, as a matter of law, did not plead facts sufficient to show but-for causation); Rattigan v. Holder, 982 F. Supp. 2d 69, 81 (D.D.C. 2013) (granting summary judgment because the employer's "legitimate security concerns" about the plaintiff meant "it would be impossible for a jury to conclude that retaliatory animus was the but-for cause" of the employment action, rather than merely "*a* cause" (emphasis in original)), *aff'd on other grounds*, 780 F.3d 413 (D.C. Cir. 2015).

148 *See* Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-SGC, 2014 WL 8728435, at *1 (N.D. Ala. Nov. 4, 2014).

149 *See* Montgomery v. Bd. of Trs. of Univ. of Ala., No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *4–5 (N.D. Ala. Apr. 27, 2015).

causation—when combined with Title VII status claims,[150] disability claims,[151] or claims based on any other illegal motive.[152]

These rulings mean that these plaintiffs have no right to present their cases to a jury, regardless of the merits of their claim that a factor such as age played a role in their termination, because the existence of a second motive—whether legal or illegal—makes proving *Gross* but-for causation impossible. Some courts have gone so far as to apply this standard at the pleading stage, holding that plaintiffs cannot even plead alternative discrimination theories when one of those theories requires but-for causation, because pleading a fact in support of the alternative theory (such as race) negates any possibility of but-for causation for the theory that requires it (such as age).[153] Fortunately for plaintiffs, most

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150 *See, e.g.*, Best v. Johnson, No. 1:15-CV-00086-NBB, 2018 WL 4145921, at *2–3 (N.D. Miss. Aug. 30, 2018) (prohibiting the plaintiff from presenting any age-based evidence at trial because she also alleged the employer mistreated her based on gender); Thomas v. Kamtek, Inc., 143 F. Supp. 3d 1179, 1186 (N.D. Ala. 2015) (granting summary judgment, holding that because the plaintiff alleged his termination was based on race, "age cannot be the 'but-for' cause of his termination"); Hendon v. Kamtek, Inc., 117 F. Supp. 3d 1325, 1330, 1334 (N.D. Ala. 2015) (granting summary judgment on the plaintiff's age discrimination claim because "'[b]ut-for' causation *is* 'sole' causation" and thus the plaintiff "cannot insist upon her age as a cause and at the same time insist that her termination was the product of her race and/or sex" (emphasis in original)); Donald v. UAB Hosp. Mgmt., LLC, No. 2:14-cv-727-WMA, 2015 WL 3952307, at *2, *5 (N.D. Ala. June 29, 2015) (requiring the plaintiff to dismiss her race discrimination claim as mutually exclusive with her retaliation claim and its but-for standard); Barnes v. McHugh, No. 12-2491, 2013 WL 3561679, at *12 (E.D. La. July 11, 2013) ("The *Gross* decision that mixed-motivation ADEA claims are necessarily invalid implies that a plaintiff's ADEA claim must be dismissed if it arises from the same discriminatory employment decision as a plaintiff's Title VII claim."); Cartee v. Wilbur Smith Assocs., No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at *3, *5 (D.S.C. Mar. 22, 2010) ("[T]he court finds that any allegations involving gender discrimination are irrelevant and will not be admissible at trial" of the plaintiff's age discrimination claim because "only the age motive truly matters."); Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1270, 1271–72 (N.D. Ala. 2009) (forcing the plaintiff to elect between his race and age claims because *Gross* means "an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was any other proscribed motive involved" (emphasis in original)).

151 *See, e.g.*, Howard, 886 F. Supp. 2d at 1300 n.7 (stating that the plaintiff's disability discrimination claim "necessarily undermines his claim that but for his age," he would not have been fired); Wardlaw v. City of Phila. Sts. Dep't, Nos. 05-3387, 07-160, 2009 WL 2461890, at *4 (E.D. Pa. Aug. 11, 2009) (granting summary judgment because the plaintiff could not show age was the sole cause of the employment action when her suit also alleged discrimination based on disability, race, and gender), *aff'd*, 378 F. App'x 222 (3d Cir. 2010).

152 *See, e.g.*, Dawson v. Wal-Mart Stores E., LP, 160 F. Supp. 3d 1303, 1305–06 (N.D. Ala. 2016) (dismissing age, retaliation, and disability claims, leaving only the plaintiff's race discrimination claim, because the others were inconsistent with but-for causation); Speer v. Mountaineer Gas Co., No. 5:06CV41 (STAMP), 2009 WL 2255512, at *7 n.6 (N.D. W. Va. July 28, 2009) (dismissing age discrimination claim because the plaintiff also alleged retaliation based on union activities).

153 *See, e.g.*, *Hendon*, 117 F. Supp. 3d at 1333–34; Savage v. Secure First Credit Union, 107 F. Supp. 3d 1212, 1216 (N.D. Ala. 2015), *rev'd on other grounds*, No. 15-12704, 2016 WL 2997171 (11th Cir. May 25, 2016) (per curiam); Conner v. Ass'n of Flight Attendants, No. 13-2464, 2014

courts have rejected this theory.[154] They say that *Gross* did not address pleading and that alternative, inconsistent pleading is a staple of federal litigation.[155] They do, however, acknowledge that the *Gross* standard might mean that these plaintiffs will lose at summary judgment or will have to elect before trial, even if not at the pleading stage.[156]

A distinct but related problem arises when plaintiffs allege discrimination based on the intersection of protected characteristics—such as being an older woman—as opposed to multiple protected characteristics in the alternative—such as being older or being a woman.[157] Courts have struggled with these intersectional claims on various grounds, but the primary objection centers on causation when the intersecting bases would have different causation standards if

WL 6973298, at *1 n.1 (E.D. Pa. Dec. 10, 2014); Lance v. Betty Shabazz Int'l Charter Sch., No. 12 CV 4116, 2014 WL 340092, at *8 (N.D. Ill. Jan. 29, 2014); *Barnes*, 2013 WL 3561679, at *12. *See generally* Brian S. Clarke, *Grossly Restricted Pleading:* Twombly/Iqbal*,* Gross*, and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101 (detailing how *Gross* will impact pleading standards when plaintiffs allege multiple bases of discrimination).

154 *See* Stidd v. Griffin Cap. Sec., Inc., No. 1:14-CV-3763-SCJ-JSA, 2016 WL 11664809, at *12–13 (N.D. Ga. May 31, 2016); Munoz v. Union Pac. R.R. Co., No. 2:21-cv-00186-SU, 2021 WL 3598531, at *2 (D. Or. Aug. 13, 2021) (rejecting similar argument post-*Bostock*).

155 *See, e.g.*, *Savage*, 2016 WL 2997171, at *1; Pastoriza v. Keystone Steel & Wire, No. 15-cv-1174, 2015 WL 8490902, at *6 (C.D. Ill. Dec. 10, 2015); Woldetadik v. 7-Eleven, Inc., 881 F. Supp. 2d 738, 741–43 (N.D. Tex. 2012); Bailey v. City of Huntsville, No. 5:11-cv-0156-PWG, 2012 WL 2047672, at *9 (N.D. Ala. May 25, 2012); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 578–79 (E.D. Pa. 2010); Houchen v. Dall. Morning News, Inc., No. 3:08-CV-1251-L, 2010 WL 1267221, at *3 (N.D. Tex. Apr. 1, 2010); Chacko v. Worldwide Flight Servs., Inc., No. 08-CV-2363 (NGG)(JO), 2010 WL 424025, at *4 (E.D.N.Y. Feb. 3, 2010); Belcher v. Serv. Corp. Int'l, No. 2:07-CV-285, 2009 WL 3747176, at *3 (E.D. Tenn. Nov. 4, 2009); Riley v. Vilsack, 665 F. Supp. 2d 994, 1006 (W.D. Wis. 2009).

156 *See, e.g.*, *Pastoriza*, 2015 WL 8490902, at *6; *Woldetadik*, 881 F. Supp. 2d at 742; *Bailey*, 2012 WL 2047672, at *9 n.6; *DeAngelo*, 738 F. Supp. 2d at 578; *Houchen*, 2010 WL 1267221, at *3; *Belcher*, 2009 WL 3747176, at *3; *Riley*, 665 F. Supp. 2d at 1006.

157 Many scholars are doing groundbreaking work exploring the intersection of various protected characteristics, including race, gender, age, disability, and LGBTQ+ status. *See, e.g.*, Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15 (2018); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, 18 PAC. RIM L. & POL'Y J. 293 (2009); Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469 (2019); Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107 (2017); Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER, L. & JUST. 75 (2018); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79 (2003) [hereinafter Porter, *Sex Plus Age Discrimination*]; Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099 (2017).

brought as separate claims or when one basis is governed by but-for causation.[158] The science teacher who alleged she was mistreated for being the oldest female teacher faced this problem.[159] The court noted the "conflicting standards of proof" for age and sex claims and cited *Gross* for the proposition that age must be "the only reason for the conduct" in an age claim.[160] Because of this, the teacher could not combine her claims, either under Title VII or the ADEA.[161] Either combination would allow the plaintiff to argue age as a basis for liability without showing that age was the only motive for the decision, and, according to the court, that is inconsistent with *Gross*.[162] Thus, the plaintiff could not argue to the jury that the employer acted both because of her age and her sex.[163] The court forced her to contend either that the employer acted because she was older, or because she was a woman, but not an older woman—even though it is well established that older women face discrimination distinct from that of younger women or older men.[164] Many other courts have held similarly.[165]

The causation confusion in these cases flows directly from *Gross*. A Supreme Court opinion generated the problem. Perhaps another Supreme Court opinion can repair it.

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158 *See* McAllister, *supra* note 157, at 493–94.

159 *See supra* note 5 and accompanying text.

160 *See* Bauers-Toy v. Clarence Cent. Sch. Dist., No. 10-CV-845, 2015 WL 13574291, at *4–5 (W.D.N.Y. Sept. 30, 2015).

161 *Id.* at *8.

162 *See id.* at *5–8.

163 *Id.* at *8.

164 *See* Porter, *Sex Plus Age Discrimination*, *supra* note 157, at 94–101; Lindsey Cook, Comment, *A Wrinkle in Title VII: Rigid Evidentiary Requirements and Inadequate Causation Tests Trammel Women's Sex-Plus-Age Claims*, 66 VILL. L. REV. 415, 415–18, 423–30 (2021); Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1049 (10th Cir. 2020); *see also* Maxwell Ulin, Bostock*'s Surprise Winner: Intersectional Age Claims*, ONLABOR (Feb. 24, 2021), https://onlabor.org/intersectional-age-claims-after-bostock [https://perma.cc/VN7Z-Y9FT] ("Black women . . . suffer from specific societal stereotypes regarding Black womanhood. Older women workers, as well, encounter similar intersectional challenges; since society tends to value women based on physical appearance more than it does men, the reduced attractiveness that our culture associates with aging causes employers to devalue older women . . . .").

165 *See, e.g.*, Best v. Johnson, No. 1:15-CV-00086-NBB, 2018 WL 4145921, at *2–3 (N.D. Miss. Aug. 30, 2018) (prohibiting the plaintiff from claiming discrimination based on a combination of age and sex, noting that the "most important difference" between the ADEA and Title VII is their differing causation standards); Famighette v. Rose, No. 2:17-cv-2553 (DRH)(ARL), 2018 WL 2048371, at *5 (E.D.N.Y. May 2, 2018) (concluding that *Gross* requires dismissal of the plaintiff's age and gender intersectional claim under the ADEA); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 579 (E.D. Pa. 2010) ("*Gross* certainly prohibits plaintiffs from alleging, in the same count, a combined age/gender discrimination claim."); Cartee v. Wilbur Smith Assocs., No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at *3 (D.S.C. Mar. 22, 2010) ("*Gross* appears to prohibit claims asserting 'an intersection of motives' brought pursuant to the ADEA, as only the age motive truly matters.").

IV. *BOSTOCK* WILL REVOLUTIONIZE EMPLOYMENT DISCRIMINATION LITIGATION

Bostock has the potential to revolutionize the causation landscape in antidiscrimination litigation. This Part lays out the basis for predicting that it will do so. After explaining the *Bostock* decision, this Part will show why *Bostock*'s but-for causation language should apply beyond Title VII status claims to all federal antidiscrimination statutes requiring but-for causation. From there, a detailed comparison between the language in the *Gross* line of cases and *Bostock* makes abundantly clear that, properly applied, *Bostock*'s vision of but-for causation will undo much of *Gross*'s damage. Though predictions are inherently uncertain, especially regarding employment discrimination litigation trends, there are good reasons to be hopeful, even in the face of a cautionary tale from an earlier attempted course-correction. This Part ends with thoughts on how the motivating-factor standard fits into this *Bostock*-dominated future.

A. Bostock*: Not* Gross*'s But-For*

In *Bostock*, the Supreme Court considered three consolidated cases involving one transgender and two gay workers.[166] Their employers had fired each of them allegedly for no reason other than their sexual orientation or gender identity.[167] The issue before the Court was whether Title VII's prohibition of discrimination "because of . . . sex" includes discrimination based on sexual orientation or gender identity.[168] The Court held that it did,[169] but the route it took to reach that conclusion came as a surprise to many.[170]

A linchpin of Justice Gorsuch's analysis was causation law. Hearkening back to cases such as *Gross* and *Nassar*, Justice Gorsuch stated that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" and that indicates the "'traditional' standard of but-for

166 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737–38 (2020).

167 *Id.* at 1737.

168 *Id.* at 1738.

169 *See id.* at 1737.

170 *See, e.g.*, Sandra Sperino, Bostock *and Causation*, WORKPLACE PROF BLOG (June 16, 2020), https://lawprofessors.typepad.com/laborprof_blog/2020/06/bostock-and-causation.html [https://perma.cc/8BWZ-PGCS] ("The case is worth reading for a number of reasons, but there is a surprising reason to read it: causation."); *see also* Kabat, *supra* note 27 (characterizing the causation issue in *Bostock* as a "sleeper").

causation."[171] That standard "change[s] one thing at a time [to] see if the outcome changes," and if so, that thing is a but-for cause.[172] Describing this standard as "sweeping,"[173] Justice Gorsuch emphasized that there can be multiple but-for causes and took great pains to distinguish but-for causation from other standards such as sole causation.[174] Playing a necessary role is sufficient, he explained, even if the causal factor at issue was not the primary or main cause.[175] He noted that the Civil Rights Act of 1991 had added a motivating-factor standard to allow liability in some instances when discrimination is not a but-for cause, but that new standard had merely supplemented, rather than displaced, the but-for standard that flows directly from the statutory "because of" language.[176]

So what does all this have to do with whether firing a gay or transgender worker violates Title VII?[177] Justice Gorsuch said that "sex plays an unmistakable and impermissible role" in any employment decision based on gender identity or sexual orientation because if the employee's sex is changed, that would yield a different outcome.[178] In other words, for example, if an employer "fires [a] male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates" in a female employee.[179] Bottom line: "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[180] That makes the employee's sex a but-for cause of the termination.[181] Even if sex is not the employer's primary or main motivation, because sex "plays a necessary and undisguisable role in the decision," Title VII prohibits that conduct under a but-for causation analysis.[182]

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171 *Bostock*, 140 S. Ct. at 1739 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350, 360 (2013)).

172 *Id.*

173 *Id.* at 1739–40; *see also id.* at 1745 ("expansive").

174 *See id.* at 1739.

175 *See id.* at 1737, 1739.

176 *See id.* at 1739–40.

177 Justice Alito apparently wondered the same thing. *See id.* at 1757 (Alito, J., dissenting) ("The Court observes that a Title VII plaintiff need not show that 'sex' was the sole or primary motive for a challenged employment decision . . . . All that is true, but so what?"); *see also* Corbett, *supra* note 31, at 439 ("The discussion of standards of causation in *Bostock v. Clayton County* is somewhat enigmatic, as it seems peripheral to the issue the Court was deciding.").

178 *Bostock*, 140 S. Ct. at 1741–42.

179 *Id.* at 1741.

180 *Id.*

181 *See id.* at 1741–42.

182 *See id.* at 1737, 1739.

As should be immediately apparent by this point, Justice Gorsuch's description of but-for causation in *Bostock* is markedly different from the *Gross* Court's description and how lower courts have interpreted it. As in *Bostock*, *Gross* said that "because of" means "by reason of" or "on account of" and thus its ordinary meaning indicates but-for causation.[183] From that starting point, the *Gross* Court then stated that "a plaintiff must prove that age was *the* 'but-for' cause" of the employment decision.[184] Other than a few parentheticals,[185] the *Gross* Court did not further explain how the but-for causation standard should work in general or in employment cases. As demonstrated earlier, many lower courts interpreted *Gross*'s "the" cause language to require sole causation.[186] For example:

- "'But-for' causation *is* 'sole' causation."[187]
- The plaintiff must show "that age—not age and other motives—was the only impetus" for the employment decision.[188]
- Under *Gross*, "only the age motive truly matters."[189]
- The plaintiff must prove that the discriminatory factor "was the only reason for the conduct."[190]

Bostock's language is striking by comparison. The most immediate difference is the article—liability attaches if discrimination based on the protected status is "a" but-for cause,[191] not "the" but-for cause. And rather than stopping there, as *Gross* did, *Bostock* provides detailed examples and explains, repeatedly, several key aspects of but-for causation, including:

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183 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

184 *Id.* (emphasis added).

185 *See id.* at 176–77.

186 *See supra* note 125 and accompanying text.

187 Hendon v. Kamtek, Inc., 117 F. Supp. 3d 1325, 1330 (N.D. Ala. 2015) (emphasis in original).

188 de Arce v. Dist. Bd. of Trs. of Mia.-Dade Coll., No. 12-21832-Civ., 2013 WL 4773391, at *8 (S.D. Fla. Sept. 4, 2013).

189 Cartee v. Wilbur Smith Assocs., No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at *3 (D.S.C. Mar. 22, 2010).

190 Bauers-Toy v. Clarence Cent. Sch. Dist., No. 10-CV-845, 2015 WL 13574291, at *4 (W.D.N.Y. Sept. 30, 2015).

191 Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020). Justice Gorsuch made near-identical statements three more times. *See id.* at 1745 ("Title VII's legal analysis . . . asks simply whether sex was a but-for cause."); *id.* at 1748 ("sex plays an essential but-for role"); *id.* ("sex was a but-for cause of the employer's refusal to hire him").

- "Often, events have multiple but-for causes."[192]
- If sex "was one but-for cause" of an adverse employment decision, "that is enough to trigger" Title VII.[193]
- The employee's protected status need not be "the sole . . . cause" of the employer's action.[194]
- The employee's protected status also need not be the "primary cause"[195] or "main cause"[196] of the employer's action.
- "[A] defendant cannot avoid liability by just citing some *other* factor that contributed to its challenged employment decision."[197]
- "It doesn't matter if other factors besides the plaintiff's sex contributed to the decision."[198]
- But-for causation can be established even if another factor "play[ed] a more important role in the employer's decision."[199]
- "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[200]

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192 *Id.* at 1739; *see also id.* at 1748 ("confluence of two factors"); *id.* ("two but-for factors combine"); *id.* ("but-for factors that can combine").

193 *Id.* at 1739.

194 *Id.* at 1744; *see also id.* at 1739 ("Congress . . . could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law."); *id.* at 1745 (sex need not be "the only factor"); *id.* at 1748 (stating that an interpretation of Title VII that sex must be "the sole . . . reason" for the employer's action is "mistaken"); *id.* (rejecting employer's suggestion "that sex must be the sole . . . cause" of the adverse employment action).

195 *Id.* at 1744; *see also id.* at 1739 (noting that Congress "could have written 'primarily because of'"); *id.* at 1748 (explaining that Title VII does not apply only when the protected classification is the "primary reason" for the employer's decision); *id.* (stating that any suggestion that Title VII applies only when the protected classification is the "primary cause" of the adverse action "is at odds with everything we know about the statute").

196 *Id.* at 1739; *see also id.* at 1745 ("main factor").

197 *Id.* at 1739 (emphasis in original); *see also id.* at 1744 ("it's irrelevant . . . what else might motivate" an employer's decision).

198 *Id.* at 1741; *see also id.* at 1742 ("Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision."); *id.* ("two causal factors may be in play"); *id.* at 1744 ("it has no significance here if another factor . . . might also be at work"); *id.* at 1748 ("Nor does the statute care if other factors besides sex contribute to an employer's discharge decision.").

199 *Id.* at 1744.

200 *Id.* at 1741; *see also id.* ("based in part"); *id.* at 1743 ("discriminate . . . in part"); *id.* ("That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII."); *id.* at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual

All told, Justice Gorsuch emphasized the breadth of the but-for standard, that it is not the same as sole cause, and how it accounts for multiple causal factors—even ones that are more important than the protected status—at least thirty-five times.

B. Bostock *Should Apply Broadly Across Employment Discrimination Statutes*

Bostock, of course, was written in the context of Title VII sex discrimination claims. For *Bostock*'s vision of but-for causation to stand a chance of cleaning up the post-*Gross* causation chaos, it cannot be limited to the Title VII context in which it arose. *Bostock*'s causation language must apply to all employment discrimination statutes allowing liability based on but-for causation. Justice Gorsuch acknowledged employers' fears that *Bostock* "will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" but noted that "none of these other laws are before us."[201] Even so, the Court's rationale that discrimination "because of . . . sex" includes discrimination based on gender identity and sexual orientation has already been applied to many other federal statutes and regulations.[202] Indeed, one of President Biden's first-day executive orders directed that *Bostock*'s reasoning be applied to other federal laws "that prohibit sex discrimination," including Title IX of the Education Amendments of

in part because of sex. And that is all Title VII has ever demanded to establish liability."); *id.* ("in part"); *id.* at 1746 ("in part").

201 *Id.* at 1753.

202 *See, e.g.*, Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984, 27,984 (May 25, 2021) (codified at 45 C.F.R. pts. 86, 92) (notifying the public that, consistent with *Bostock* and Title IX, the department will interpret and enforce section 1557 of the Affordable Care Act's prohibition on discrimination on the basis of sex to include sexual orientation and gender identity); Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637 (June 22, 2021) (notifying the public that, consistent with *Bostock*, the department interprets Title IX to prohibit discrimination on the basis of sexual orientation and gender identity); Memorandum from Pamela S. Karlan, Principal Deputy Ass't Att'y Gen., C.R. Div., U.S. Dep't of Justice, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download [https://perma.cc/8KD6-SUMX] (concluding that under *Bostock*, Title IX's prohibition on discrimination because of sex includes discrimination based on sexual orientation and gender identity); Memorandum from Jeanine M. Worden, Acting Ass't Sec'y for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf [https://perma.cc/2R4P-UHNZ] (directing HUD's Office of Fair Housing and Equal Opportunity to enforce the Fair Housing Act to prohibit discrimination based on gender identity and sexual orientation based on *Bostock*).

1972 and the Fair Housing Act.[203] While tremendously important, these developments are beside the point for this analysis. Here, the issue is whether *Bostock*'s explanation of the scope and contours of traditional but-for causation will apply to antidiscrimination statutes other than Title VII's status-based protections.

A proper reading of *Bostock* and the cases it builds on unmistakably demonstrates that *Bostock*'s but-for language should apply to all antidiscrimination statutes that require a but-for analysis. Justice Gorsuch purported to apply the "ordinary" meaning of "because of" to indicate the "traditional" but-for test.[204] "Ordinary" and "traditional" are concepts that span statutes.[205] This is why *Nassar*, in considering Title VII's antiretaliation provision, relied on *Gross*'s interpretation of the ADEA—because they shared the same language and thus shared a common, ordinary meaning.[206] And *Bostock* was not written on a clean slate; it came on the heels of *Comcast v. National Association of African American-Owned Media*, issued only three months earlier and also written by Justice Gorsuch, where he described the but-for standard in § 1981 race discrimination cases using these same "ordinary" and "traditional" principles.[207] These traditional but-for principles are the default rules, the background law that Congress is presumed to have incorporated into statutes unless the text indicates otherwise.[208]

Bostock relied on cases such as *Gross* and *Nassar*—cases that used dictionary definitions and basic tort law to discuss the "ordinary" meaning of phrases like "because of" to apply "traditional" but-for causation principles in the age and Title VII retaliation contexts.[209] Justice Gorsuch appropriately drew on these sources involving other

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203 Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021); *see* 20 U.S.C. §§ 1681–1688 (Title IX); 42 U.S.C. §§ 3601–3619 (Fair Housing Act).

204 *See Bostock*, 140 S. Ct. at 1739.

205 *See* Tolbert v. RBC Cap. Mkts. Corp., 758 F.3d 619, 624–25 & n.4 (5th Cir. 2014) (applying the "ordinary meaning" of the word "results" from the Supreme Court's opinion in *Burrage v. United States*, 571 U.S. 204, 210–11 (2014), regarding a criminal statute to an ERISA provision, noting that "[t]he word 'results' retains its ordinary meaning, regardless of whether it appears in Title 21 or Title 29 of the United States Code"); *see also* Fairley v. Andrews, 578 F.3d 518, 525–27 (7th Cir. 2009) (relying on *Gross* in holding that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law").

206 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).

207 *See* 140 S. Ct. 1009, 1013, 1015 (2020).

208 *See id.* at 1014; *Nassar*, 570 U.S. at 347; *see also* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481–82 (2021) ("[U]ntil and unless someone points to evidence suggesting otherwise, affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning.").

209 *See Nassar*, 570 U.S. at 346–47, 350, 360 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); *see also Burrage*, 571 U.S. at 210–11 (same in the criminal context).

statutes to show the ordinary and traditional meaning of these default but-for causation concepts. There is no justification for any interpretation of *Bostock* that categorically limits its understanding of basic but-for causation law to the Title VII context.

Most courts that have considered the issue have applied *Bostock*'s but-for causation language outside the Title VII status-based discrimination context.[210] This includes cases involving age discrimination claims,[211] an intersectional claim based on age and sex,[212] Title VII retaliation claims,[213] § 1981 race claims,[214] a § 1983 Equal

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210 *See, e.g.*, Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 20-11297-PBS, 2021 WL 3667760, at *15 (D. Mass. Aug. 18, 2021) ("Though *Bostock* was a Title VII case, the Supreme Court's reasoning applies equally outside of Title VII.").

211 *See* Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 551–52 (9th Cir. 2020); Bernstein v. N.Y.C. Dep't of Educ., No. 19-cv-11816, 2021 WL 4429318, at *10 (S.D.N.Y. Sept. 27, 2021); Albright v. Lowe's Home Ctrs., LLC, No. 2:18-cv-01005-JHE, 2021 WL 1171522, at *8–9 (N.D. Ala. Mar. 29, 2021); Keller v. Hyundai Motor Mfg., 513 F. Supp. 3d 1324, 1330 (M.D. Ala. 2021); Parmelee v. PurePlanetPools, LLC, No. 20-2036, 2020 WL 4495547, at *5–6 (Fla. Div. Admin. Hrgs. July 20, 2020).

212 *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–47 (10th Cir. 2020); *see also* Sowash v. Marshalls of MA, Inc., No. 7:19-cv-361, 2021 WL 2115359, at *4 (W.D. Va. May 25, 2021) (applying *Bostock* in the sexual harassment context, stating: "Harassment because of sex need not be motivated by sexual desire. Nor does sex need to be the only factor for discrimination as long as it is a but-for cause." (citations omitted)).

213 *See* Haydar v. Amazon Corp., No. 19-2410, 2021 WL 4206279, at *6 (6th Cir. Sept. 16, 2021); Valdivia v. Wash. State Dep't of Corr., No. C20-1429-RSM-SKV, 2021 WL 5217289, at *6 (W.D. Wash. Oct. 15, 2021); Andrews v. McDonough, No. 1:20-cv-35-DBH, 2021 WL 3824795, at *8 (D. Me. Aug. 26, 2021); Reed v. Riverboat Corp. of Miss., No. 1:18cv405-HSO-JCG, 2020 WL 4023945, at *8 (S.D. Miss. July 16, 2020).

214 *See* Stankiewicz v. Pump N' Pantry, Inc., No. 3:20-CV-2021, 2022 WL 36238, at *3 & n.3 (M.D. Pa. Jan. 4, 2022); Stallworth v. Nike Retail Servs., No. 2:20-cv-05985-VAP-GJSx, 2021 WL 5989962, at *8 (C.D. Cal. Nov. 12, 2021); Bowie v. Automax Used Cars, LLC, No. CIV-21-393-D, 2021 WL 5065852, at *1–2 (W.D. Okla. Nov. 1, 2021); B&S Glass, Inc. v. Del Metro, No. 20-2769 (CKK), 2021 WL 3268360, at *8 (D.D.C. July 30, 2021); Orr v. Russell Forest Prods., Inc., No. 5:19-cv-01173-HNJ, 2021 WL 5216884, at *23 (N.D. Ala. July 14, 2021); Smith v. Nautic Star, LLC, No. 1:20-CV-242-DMB-DAS, 2021 WL 2104634, at *2–3 (N.D. Miss. May 25, 2021); Myers v. IHC Constr. Cos., No. 18-cv-4887, 2021 WL 1172740, at *8 (N.D. Ill. Mar. 29, 2021); Nadendla v. WakeMed, No. 5:18-CV-540-H, 2021 WL 1056521, at *2 (E.D.N.C. Feb. 23, 2021); Hill v. Big Horn Cnty. Elementary Sch. Dist. 2, No. CV 20-42-BLG-SPW-TJC, 2021 WL 835524, at *5 (D. Mont. Feb. 16, 2021); Cruz v. Farmers Ins. Exch., No. 19-cv-02337-MEH, 2021 WL 307504, at *12 (D. Colo. Jan. 28, 2021); Marks v. N.Y. Life Ins. Co., No. 18-0327-WS-B, 2020 WL 5752852, at *9 (S.D. Ala. Sept. 25, 2020).

Protection sexual harassment claim,[215] retaliation under the False Claims Act,[216] and various other federal statutes[217] and state-law torts.[218]

The Sixth Circuit, however, has gone the other way. In *Pelcha v. MW Bancorp, Inc.*, the court held that *Bostock* applies only to Title VII cases.[219] Pelcha sued her employer under the ADEA, and her employer said it fired her not based on her age but for insubordination.[220] The Sixth Circuit affirmed summary judgment for the employer after going through the now-familiar process of quoting *Gross* for the principle that age must be "the 'but-for' cause" of her termination.[221] Summary judgment was proper, said the Sixth Circuit, because Pelcha could not show that the "true motive" for her termination was age rather than insubordination.[222] Pelcha argued that *Bostock* altered her burden under *Gross* and thus she need not prove that age "was the only cause of the termination."[223] The court rejected her argument, stating simply that Justice Gorsuch's comment that the Court was not at that time considering other laws meant "the rule in *Bostock* extends no further than Title VII and does not stretch to the ADEA."[224] Thus, the Sixth Circuit applied *Gross* because it "directly controls" age discrimination claims.[225] Even after briefing on rehearing, including an amicus curiae brief from the Equal Employment Opportunity Commission explaining the court's error in endorsing the idea that age and Title VII claims are

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215 *See* Starnes v. Butler Cnty. Ct. of Common Pleas, 971 F.3d 416, 426–27 (3d Cir. 2020); *see also* Younge v. Fulton Jud. Cir. Dist. Att'y's Off., No. 1:20-cv-684-WMR-CMS, 2020 WL 12029309, at *3 (N.D. Ga. Dec. 21, 2020) (citing *Bostock* but-for causation standard as applying to claims under Title VII, § 1981, § 1983, and the Equal Protection Clause).

216 *See* Herman v. Miller, No. 2:18-cv-1509-BHH, 2021 WL 5879220, at *2, *5–6 (D.S.C. Sept. 27, 2021); United States *ex rel.* Seabury v. Cookeville Reg'l Med. Ctr. Auth., No. 2:15-cv-00065, 2021 WL 4594784, at *15 (M.D. Tenn. Oct. 6, 2021); United States *ex rel.* Barrick v. Parker-Migliorini Int'l, LLC, No. 2:12-cv-00381-JNP-CMR, 2021 WL 2717952, at *2–3 (D. Utah June 30, 2021).

217 *See* United States v. Anthony, 22 F.4th 943, 950 (10th Cir. 2022) (sex trafficking victims restitution); Thomas v. CalPortland Co., 993 F.3d 1204, 1208–11 (9th Cir. 2021) (mine safety); Easom v. US Well Servs., Inc., 527 F. Supp. 3d 898, 912, 914–15 (S.D. Tex. 2021) (WARN Act); Lucas v. United States, 240 A.3d 328, 341 (D.C. 2020) (hate crime); *In re* Houck, No. 11-51513, 2020 WL 5941415, at *8 n.18 (Bankr. W.D.N.C. Oct. 6, 2020) (damages for violating bankruptcy stay).

218 *See* Lofgren v. Polaris Indus. Inc., No. 3:16-cv-02811, 2021 WL 2580047, at *10–11 & nn.30–31 (M.D. Tenn. June 23, 2021) (manufacturing defect); Doull v. Foster, 163 N.E.3d 976, 986–87 (Mass. 2021) (medical malpractice).

219 988 F.3d 318, 324 (6th Cir.), *cert. denied*, 142 S. Ct. 461 (2021).

220 *Id.* at 323, 326.

221 *See id.* at 323–24.

222 *Id.* at 326.

223 *See id.* at 324.

224 *Id.*

225 *Id.*

governed by differing but-for causation standards,[226] the Sixth Circuit refused to budge.[227]

This is nonsense. *Bostock* relied on *Gross* to support its initial conclusions and then expanded beyond *Gross*'s minimal explanation of but-for causation.[228] The whole point of a default rule is that it applies routinely across cases. Nothing in *Bostock* suggests it was differentiating the ordinary, traditional, default but-for causation standard applied to age claims from that same standard as applied to Title VII status claims. There is only one but-for causation standard, not separate but-for standards for different statutes.[229] And there would be no reason for Justice Gorsuch to broaden the standard for Title VII status claim (as compared to age claims under the ADEA in *Gross*) because Title VII already has the less restrictive motivating-factor standard available.[230] No rational statutory interpretation supports the outcome that "because of age" means age must be "the" but-for cause of discrimination while "because of . . . sex" means that sex must be "a" but-for cause.

Fortunately, one district court in Arizona seems to be the only court outside of the Sixth Circuit going down this erroneous path.[231]

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226 *See* Pl.-Appellant's Pet. for Reh'g & Reh'g En Banc, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 32; Br. of EEOC as Amicus Curiae in Support of Reh'g, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 35; Br. of Amici Curiae AARP et al. Supporting Pl.-Appellant's Pet. for Reh'g & Reh'g En Banc, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 42.

227 *See* Pelcha v. MW Bancorp, Inc., No. 20-3511 (6th Cir. Apr. 29, 2021), ECF 55 (order denying petition for rehearing en banc). Before denying rehearing, the court slightly modified its original opinion. *Compare* Pelcha v. MW Bancorp, Inc., 984 F.3d 1199, 1205 (6th Cir. 2021), *with* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 323–24 (6th Cir.), *cert. denied*, 142 S. Ct. 461 (2021). These changes were cosmetic at best and did not remedy the underlying problems. *See* Pl.-Appellant's Supp. Mem. in Support of Pet. for Reh'g & Reh'g En Banc at 1, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 47; Supp. Mem. of Amici Curiae AARP et al. Supporting Pl.-Appellant's Pet. for Reh'g & Reh'g En Banc at 1–2, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 49; Letter Br. of EEOC as Amicus Curiae in Support of Pl.'s Supp. Mem. in Support of Pet. for Reh'g at 2, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511), ECF No. 50; *see also* Widiss, *supra* note 7, at 403.

228 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020); *supra* note 88 and accompanying text.

229 Thanks to Professor Sandra Sperino for emphasizing this point so clearly.

230 Credit to Professor Nicole Porter for suggesting this additional argument.

231 *See* Bollfrass v. City of Phoenix, No. CV-19-04014-PHX-MTL, 2020 WL 4284370, at *1 (D. Ariz. July 27, 2020) (refusing to apply *Bostock* to an equal protection claim solely because "Plaintiffs have not advanced a claim under Title VII"). Lower courts in the Sixth Circuit have, of course, followed *Pelcha*. *See* Taylor v. Methodist Le Bonheur Healthcare, No. 2:19-cv-02796-MSN-atc, 2021 WL 2934596, at *4, *8 (W.D. Tenn. June 22, 2021) (granting summary judgment based on *Pelcha*, stating that even if the plaintiff "could prove that age discrimination was one of the reasons" she was not hired, she could not establish but-for causation because there were other reasons she was not hired); *see also* Duncan v. Sam's E., Inc., No. 3:20-cv-200, 2022 WL 394383,

Though the defense bar continues to assert that *Bostock* is limited to Title VII,[232] most courts have properly rejected this argument. The Sixth Circuit's position is indefensible in the context of the ADEA and any other statute that applies traditional but-for principles.[233] *Pelcha* has drawn the most attention, but it is an outlier.[234]

C. Bostock*'s But-For Language Will Remedy Many of* Gross*'s Problems*

The law of but-for causation as *Bostock* described would, if properly applied, ameliorate many of the problems *Gross* has caused, helping plaintiffs both have their day in court and prevail when they get in front of the jury.

The root of many *Gross*-based dismissals is the belief held by many defense lawyers and courts that but-for causation is sole causation, based on *Gross*'s "the 'but-for' cause" language.[235] *Bostock* puts that flawed argument to bed. Post-*Bostock*, it is simply no longer legally viable to argue or hold that traditional but-for causation is equivalent

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at *4 (S.D. Ohio Feb. 9, 2022) (following *Pelcha*); Kindness v. Anthem, Inc., No. 3:20-cv-137, 2021 WL 6197651, at *3–4 (S.D. Ohio Dec. 30, 2021) (same); Rafee v. Volvo Grp. N. Am., LLC, No. 2:19-cv-02860-JMP-tmp, 2021 WL 3686625, at *3, *6 (W.D. Tenn. Aug. 19, 2021) (same); Walls v. Sterling Jewelers, Inc, No. 2:19-cv-02844-JMP-tmp, 2021 WL 3519463, at *3 (W.D. Tenn. Aug. 10, 2021) (same); Bunt v. Clarksville Montgomery Cnty. Sch. Sys., No. 3:19-cv-01013, 2021 WL 1264431, at *6 (M.D. Tenn. Apr. 6, 2021) (same); Anderson v. Target Stores, Inc., No. 2:19-cv-02889-MSN-cgc, 2021 WL 2639026, at *15 (W.D. Tenn. June 25, 2021) (same); McMaster v. Kohl's Dep't Stores, Inc., No. 18-13875, 2021 WL 429336, at *7 (E.D. Mich. Feb. 8, 2021) (same). Two days before the court denied rehearing in *Pelcha*, a different Sixth Circuit panel applied *Bostock*'s but-for causation language in a Title VII retaliation case, with no fanfare and no discussion of *Pelcha*. *See* Peterson v. W. TN Expediting, Inc., 856 F. App'x 31, 34 (6th Cir. 2021); *Pelcha*, No. 20-3511 (6th Cir. Apr. 29, 2021), ECF 55 (order denying petition for rehearing en banc). A later panel applied *Pelcha* but focused only on analyzing whether a jury could find that age "had a determinative influence" on the termination decision rather than the stricter *Pelcha* "true motive" language and *Gross* quotations. *See* Sloat v. Hewlett-Packard Enter. Co., 18 F.4th 204, 213 (6th Cir. 2021) (emphasis omitted).

232 *See, e.g.*, Jordan Dunham, *Sixth Circuit Confirms But-For Causation Standard Remains in ADEA Claims*, KOLLMAN & SAUCIER, P.A. (Feb. 26, 2021), https://www.kollmanlaw.com/age-discrimination/sixth-circuit-confirms-but-for-causation-standard-remains-in-adea-claims/?utm_source=rss&utm_medium=rss&utm_campaign=sixth-circuit-confirms-but-for-causation-standard-remains-in-adea-claims [https://perma.cc/C3W6-VFRT]; Alexandra McNicholas, *The Supreme Court Affirms the "But-For" Causation Standard in Certain Discrimination Statutory Frameworks*, LANER MUCHIN (Sept. 21, 2020), http://www.lanermuchin.com/newsroom-fastlaner-727 [https://perma.cc/5AR8-XD6Z].

233 *See* United States *ex rel.* Barrick v. Parker-Migliorini Int'l, LLC, No. 2:12-cv-00381-JNP-CMR, 2021 WL 2717952, at *3 (D. Utah June 30, 2021) (rejecting *Pelcha*'s reasoning and applying *Bostock*'s but-for principles to False Claims Act retaliation claim).

234 *See infra* Section IV.D.

235 *See supra* Part III.

to sole cause.[236] As Justice Gorsuch stated, "[A] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[237] That shield is now gone.

Eliminating this defense should have profound consequences in many types of employment discrimination cases. In cases where the employer points to a legal reason for firing a plaintiff, that alone cannot form the basis for dismissal because, according to *Bostock*, "[i]t doesn't matter if other factors besides the plaintiff's [protected status] contributed to the decision."[238] Similarly, a worker's claim alleging two illegal motives for termination, such as both race and retaliation, cannot be rejected on the bare ground that asserting two illegal motives cancels out one or the other because, as *Bostock* makes clear, both illegal causes can be but-for causes: "Often, events have multiple but-for causes."[239] This should have a significant impact on age and retaliation claims, where the Supreme Court has held that the but-for standard applies,[240] and on disability claims, where most post-*Gross* courts have applied the but-for standard and likely will continue to do so.[241] So too for intersectional claims, where employees allege discrimination based on a combination of protected characteristics, such as age and sex. The primary ground for dismissing such claims has been the supposed incompatibility of their strict causation standards,[242] but *Bostock* shows that multiple bases of discrimination fit comfortably within the but-for causation framework.[243] Thus, it is no longer defensible to reject intersectional claims on the basis that the intersecting categories have strict causation standards that allow for only one motive.

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236 *See* McGinley, Porter, Weatherby, Nelson, Wilkins & Archibald, *supra* note 27, at 16; Sperino, *supra* note 27.

237 Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) (emphasis in original).

238 *Id.* at 1741.

239 *Id.* at 1739.

240 *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (age); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (retaliation).

241 *See supra* notes 92, 151 and accompanying text; *see also* Corbett, *supra* note 31, at 442 n.154; Eyer, *supra* note 6, at 1643–44 & n.92; Sullivan, *supra* note 29, at 364 n.33; Widiss, *supra* note 7, at 367; McCann v. Badger Mining Corp., 965 F.3d 578, 588 n.46 (7th Cir. 2020) (noting that *Bostock* leaves "little doubt" that but-for causation applies to ADA claims).

242 *See supra* note 158 and accompanying text.

243 *See supra* notes 192–200 and accompanying text. Other scholars and advocates have also predicted that *Bostock* will particularly benefit plaintiffs alleging intersectional claims. *See, e.g.*, McGinley, Porter, Weatherby, Nelson, Wilkins & Archibald, *supra* note 27, at 17; Erin Mulvaney, *Landmark LGBT Ruling Has Expansive Reach at Work and Beyond*, BLOOMBERG L. (June 15, 2021, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/landmark-lgbt-ruling-has-expansive-reach-at-work-and-beyond [https://perma.cc/64WT-34EB]; Ulin, *supra* note 164; Williams, Korn & Mihaylo, *supra* note 27, at 405, 446–47; *see also* Kayla King, Comment, *Tenth Circuit Ruled in Favor of Sex-Plus-Age Claims of Discrimination Under Title VII in the Wake of* Bostock v. Clayton County, 62 B.C. L. REV. E-SUPP. II-185, II-202–03 (2021).

Bostock's language can also help these plaintiffs when their cases, having avoided dismissal, actually get to the jury. Empirical evidence from mock jury studies has shown that employers win more often with but-for causation jury instructions than with those based on motivating factor.[244] The motivating-factor instructions in these studies, however, were more elaborate and nuanced than the but-for instructions. The but-for instructions included language that (1) "age played a role" and the plaintiff "would not have [been] demoted . . . if [the employer] had not considered age"[245] or (2) the defendant "would have promoted Plaintiff had he not been of Mexican national origin but everything else was the same."[246] By contrast, the motivating-factor instructions (1) stated that the plaintiff was "not required to prove that his age was the sole motivation or even the primary motivation,"[247] (2) provided that liability could be established "even though other factors allowable under the law may also have motivated [the employer],"[248] or (3) specifically mentioned factors that "contributed to the Defendant's decision."[249] This explanatory language in the motivating-factor instructions is 100% consistent with *Bostock*'s description of but-for causation.[250] Thus, using *Bostock*'s language in but-for jury instructions—language that tracks the successful motivating-factor instructions in these empirical studies—should improve employees' chances of succeeding at trial.

This is especially true considering the results of Professor James Macleod's study about the meaning of ordinary causation principles. Because the Supreme Court has repeatedly relied on what it terms the "ordinary" meaning of causation phrases like "because of" to mandate

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244 *See* Farnum & Wiener, *Should the Law Change?*, *supra* note 53, at 100 ("In line with previous research, participants were more likely to find for the defendant under but for instructions, as compared to mixed motive."); Sherwyn & Heise, *supra* note 26, at 903 ("[P]laintiffs in cases with a motivating factor jury instruction were significantly more likely to receive litigation costs and attorney fees . . . ."); Wiener & Farnum, *Psychology of Jury Decision Making*, *supra* note 53, at 395, 407 (reporting on study showing defendants receiving more favorable outcomes when jury instructed on but-for causation rather than motivating factor).

245 Farnum & Wiener, *Should the Law Change?*, *supra* note 53, at 113; Wiener & Farnum, *Psychology of Jury Decision Making*, *supra* note 53, at 400.

246 Sherwyn & Heise, *supra* note 26, at 945.

247 Farnum & Wiener, *Should the Law Change?*, *supra* note 53, at 112; Wiener & Farnum, *Psychology of Jury Decision Making*, *supra* note 53, at 400.

248 Farnum & Wiener, *Should the Law Change?*, *supra* note 53, at 112; Wiener & Farnum, *Psychology of Jury Decision Making*, *supra* note 53, at 400.

249 Sherwyn & Heise, *supra* note 26, at 946.

250 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1744 (2020) ("[T]he plaintiff's sex need not be the sole or primary cause of the employer's adverse action."); *id.* (stating that "it's irrelevant . . . what else might motivate" an employer's decision); *id.* at 1741 ("It doesn't matter if other factors besides the plaintiff's sex contributed to the decision."); *see also supra* notes 192–200 and accompanying text.

but-for causation,[251] Professor Macleod decided to study what people actually think about these terms.[252] Professor Macleod surveyed nearly 1,500 people nationally and found that they do not view causation words in the way the Supreme Court thinks they do.[253] In the employment context, participants indicated that they thought an employer who fired a worker based in part on a prohibited factor considered that firing to be "because of" that factor, even if it did not rise to the level of a but-for cause.[254] "These results demonstrate that the courts have been incorrect in claiming that but-for causation tracks the ordinary, plain meaning of the statutory causation language at issue" in *Gross* and other Supreme Court cases.[255] Professor Macleod also noted that the study showed "participants were responsive to small differences in causal language."[256] It stands to reason, then, that jury instructions using *Bostock*'s language—which matches the plaintiff-friendly motivating-factor language from the empirical jury studies and comports more closely with the actual common understanding of "because of"—would produce more favorable jury outcomes for employment discrimination plaintiffs.

D. *This Optimism Is Justified*

It is by no means guaranteed that *Bostock* will in fact be applied broadly and correctly to remedy much of the mayhem in employment discrimination causation law. Employers are worried.[257]

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251 *See, e.g.*, Burrage v. United States, 571 U.S. 204, 210 (2014); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

252 *See* Macleod, *supra* note 14, at 961.

253 *See id.* at 962.

254 *See id.*

255 *Id.* at 1007.

256 *Id.*

257 *See* Stephanie L. Adler-Paindiris & Andrew F. Maunz, *EEOC Argues for Broader Causation Standard and Provides a Peek into the EEOC's Future Focus*, JACKSONLEWIS (Feb. 26, 2021), https://www.jacksonlewis.com/publication/eeoc-argues-broader-causation-standard-and-provides-peek-eeoc-s-future-focus [https://perma.cc/3HJN-CWA3]; *Has the U.S. Supreme Court Turned the Proof Standard in Title VII and Other Federal Employment Laws on its Head?*, BELL NUNNALLY (Aug. 24, 2020) [hereinafter *Proof Standard in Title VII*], https://www.bellnunnally.com/has-the-us-supreme-court-turned-the-proof-standard-in-title-vii-and-other-federal-employment-on-its-head [https://perma.cc/D5XY-C7SY]; Dunham, *supra* note 232; Alexandra Hayes, *The (Unintended?) Impact of* Bostock v. Clayton County, Georgia, 39 TRIAL ADVOC. (FDLA) 56, 56–58 (2020); McNicholas, *supra* note 232.

Antidiscrimination scholars and advocates are hopeful.[258] Is this optimism justified?

So far, the signs are mostly favorable. Barely a month after *Bostock*, the Tenth Circuit became the first federal appellate court to recognize an intersectional claim based on age and sex under Title VII, and it explicitly relied on *Bostock* to reach this conclusion.[259] The Ninth Circuit reversed summary judgment on a Title VII retaliation claim, rejecting the argument that retaliation must be "the," rather than "one," but-for cause of the termination under *Bostock*.[260] In an age discrimination case, a district court in Alabama slapped down a similar sole-cause argument in style, stating, "This argument crashes, Wile E. Coyote-esque, into veritable mountains of contrary precedent," including *Bostock*.[261] Other courts have followed suit.[262]

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258 *See supra* note 26 and accompanying text; *see also* Kabat, *supra* note 27; Mantell, *supra* note 28; Schall, *supra* note 27; Ulin, *supra* note 164. *But see* Berman & Krishnamurthi, *supra* note 31, at 125 (arguing that Justice Gorsuch misapplied the but-for causation standard in *Bostock*, though ultimately reaching the correct conclusion).

259 *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–48 (10th Cir. 2020); *see also* Fillion v. Somerville-Cambridge Elder Servs., Inc., No. 2181CV00213, 2021 WL 5626300, at *2 (Mass. Super. Ct. Nov. 1, 2021) (denying motion to dismiss sex-plus claim, relying on *Bostock*); McGinley, Porter, Weatherby, Nelson, Wilkins & Archibald, *supra* note 27, at 17 n.96; Ulin, *supra* note 164.

260 *See* Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 549, 551–52 (9th Cir. 2020). Two Sixth Circuit panels, each consisting of completely different judges than the *Pelcha* panel, held similarly, without citing *Pelcha*. *See* Nathan v. Great Lakes Water Auth., 992 F.3d 557, 567 (6th Cir. 2021); Peterson v. W. TN Expediting, Inc., 856 F. App'x 31, 34 (6th Cir. 2021); *see also supra* note 231.

261 Keller v. Hyundai Motor Mfg., 513 F. Supp. 3d 1324, 1330 (M.D. Ala. 2021).

262 *See* Smith v. Nautic Star, LLC, No. 1:20-CV-242-DMB-DAS, 2021 WL 2104634, at *1, *3 (N.D. Miss. May 25, 2021) (denying dismissal of § 1981 race discrimination claim and, based on *Bostock*, rejecting the defendant's argument that plaintiff's allegations of discriminatory and nondiscriminatory bases for dismissal defeated but-for causation); *see also* Isaacson v. Brnovich, No. CV-21-01417-PHX-DLR, 2021 WL 4439443, at *9 n.9 (D. Ariz. Sept. 28, 2021) (using *Bostock* to distinguish sole cause in the context of language in an Arizona abortion statute); Stallworth v. Nike Retail Servs., No. 2:20-cv-05985-VAP-GJSx, 2021 WL 5989962, at *8 (C.D. Cal. Nov. 12, 2021) (applying *Bostock*'s language regarding multiple but-for causes in a § 1981 case); Bowie v. Automax Used Cars, LLC, No. CIV-21-393-D, 2021 WL 5065852, at *1–2 (W.D. Okla. Nov. 1, 2021) (same); Hill v. Life Line Screening of Am., LLC, No. 8:21CV161, 2021 WL 4400300, at *3 (D. Neb. Sept. 27, 2021) (same in a national origin and religious discrimination case); Irwin v. Fry Commc'ns, Inc., No. 1:21-CV-00186, 2021 WL 5756386, at *9 (M.D. Pa. Aug. 17, 2021); Munoz v. Union Pac. R.R. Co., No. 2:21-cv-00186-SU, 2021 WL 3598531, at *2 (D. Or. Aug. 13, 2021) (same in a disability and race discrimination case); B&S Glass, Inc. v. Del Metro, No. 20-2769 (CKK), 2021 WL 3268360, at *8 (D.D.C. July 30, 2021) (same in a § 1981 case); United States *ex rel.* Barrick v. Parker-Migliorini Int'l, LLC, No. 2:12-cv-00381-JNP-CMR, 2021 WL 2717952, at *2–3 (D. Utah June 30, 2021) (same in a False Claims Act retaliation case); Lofgren v. Polaris Indus. Inc., No. 3:16-cv-02811, 2021 WL 2580047, at *10–11 & nn.30–31 (M.D. Tenn. June 23, 2021) (same in a manufacturing defect case); Flores v. Va. Dep't of Corr., No. 5:20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) (same in a sex discrimination case); Lucas v. United States, 240 A.3d 328, 341 (D.C. 2020) (same in a case interpreting a hate crime statute).

Of course, as *Pelcha* exemplifies, not all courts have taken the right path. *Pelcha* seemed to understand exactly what *Bostock* said and refused to follow it, but other courts appear perplexed about the meaning of *Bostock*'s but-for causation language. For example, the Seventh Circuit suggested that *Bostock*'s "one but-for cause" language is the standard for motivating-factor liability under Title VII rather than a description of how multiple causes can support liability under a but-for causation theory.[263] Other courts have simply stated, without elaboration, that *Bostock* cannot apply outside of the Title VII sex context because the Supreme Court said it was not deciding those issues in *Bostock*.[264] Practitioners have also gotten it wrong.[265] And, of course,

But see Clerveaux v. E. Ramapo Cent. Sch. Dist., 984 F.3d 213, 232 (2d Cir. 2021) (declining to apply *Bostock*'s but-for causation language and analysis in a Voting Rights Act case); Cabrera v. Black & Veatch Special Projects Corps., No. 19-cv-3833-EGS-ZMF, 2021 WL 3508091, at *20 (D.D.C. July 30, 2021) (same in Antiterrorism Act case).

263 *See* Arevalo-Carrasco v. Middleby Corp., 851 F. App'x 628, 631 (7th Cir. 2021) (mem.); *see also* Walker v. J.H. Findorff & Son, Inc., No. 21-cv-420-slc, 2022 WL 179339, at *4 (W.D. Wis. Jan. 19, 2022) (quoting *Arevalo-Carrasco* and stating that race must be "the determinative reason" under § 1981's but-for test); Davis v. Huntington Ingalls, Inc., No. 1:20-cv-18-HSO-RHWR, 2021 WL 5989935, at *2, *4 (S.D. Miss. Dec. 17, 2021) (citing *Bostock* for the basic nondiscrimination principle of Title VII but not quoting any of its but-for causation language and requiring plaintiff to rebut "each and every one of the nondiscriminatory reasons" the employer gave for firing her); Armstead v. Union Pac. R.R., No. 8:21CV183, 2021 WL 4033328, at *3–4 (D. Neb. Sept. 3, 2021) (quoting *Bostock*'s language regarding multiple but-for causes in regard to a Title VII race discrimination claim but then quoting *Gross*'s "the 'but-for' cause" language for the age discrimination claim); Whitley v. SecTek, Inc., No. 1:20-cv-01411 (RDA/TCB), 2021 WL 3625311, at *4 (E.D. Va. Aug. 13, 2021) (quoting *Bostock* to support the meaning of motivating factor under Title VII); Bandy v. City of Salem, No. 7:19-cv-00826, 2021 WL 1081123, at *7 n.5, *8 (W.D. Va. Mar. 19, 2021) (implying that age as only "a motivating factor" for a hiring decision inherently defeats but-for causation under *Bostock*); Nadendla v. WakeMed, No. 5:18-CV-540-H, 2021 WL 1056521, at *2 (E.D.N.C. Feb. 23, 2021) (citing *Bostock*'s but-for causation language but rejecting plaintiff's argument that race playing a role in the decision could possibly establish but-for causation); Congress v. District of Columbia, 514 F. Supp. 3d 1, 12 (D.D.C. 2020) (stating that sole cause means but-for cause and citing *Gross* and *Bostock* in support); Hall v. Wash. Metro. Area Transit Auth., No. 19-1800 (BAH), 2020 WL 5878032, at *9 (D.D.C. Oct. 2, 2020) (citing *Bostock* to support the statement that a statute explicitly requiring sole causation means that "the traditional 'but-for' causation standard" applies).

264 *See, e.g.*, Hennessy-Waller v. Synder, 529 F. Supp. 3d 1031, 1044 (D. Ariz. 2021); *see also* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir.), *cert. denied*, 142 S. Ct. 461 (2021).

265 *See, e.g.*, *Proof Standard in Title VII*, *supra* note 257 (stating that *Bostock* eliminated the statutory motivating-factor standard for Title VII claims and that *Bostock*'s discussion of the causation standard "may not be binding on lower courts"); John T. Below, *Workplace Law Lowdown: Sixth Circuit Will Not Expand Landmark Title VII Case of* Bostock v. Clayton County, BODMAN PLC (Jan. 22, 2021), https://www.bodmanlaw.com/news/workplace-law-lowdown-sixth-circuit-will-not-expand-landmark-title-vii-case-of-bostock-v-clayton-county [https://perma.cc/5LB2-CDJY] (stating that *Pelcha* indicates that age "claims are still judged under a 'but-for' or 'sole reason' standard, not the expanded 'one of multiple factors' test set forth

advocates will advocate—some lawyers continue to press sole-cause arguments, despite *Bostock*'s clear command to the contrary,[266] and this might lead to further court and jury confusion.

Even with these missteps, the forceful and unequivocal language in *Bostock* should course-correct *Gross*'s wreckage better than the Supreme Court's apparent previous attempt to do so in 2014 in *Burrage v. United States*.[267] *Burrage* involved a criminal statute that imposed a mandatory sentence on a defendant who unlawfully distributes certain drugs when "death or serious bodily injury results from the use of such substance."[268] The statute does not define "results from," so the Court gave the term its ordinary meaning and determined that this phrase, like "because of" in the employment statutes, required but-for causation.[269] In doing so, the Court relied on *Gross* and *Nassar*, in addition to many criminal law authorities.[270] *Burrage* involved the role of multiple drugs in the victim's system, and the Court analyzed how those drugs (only one of which the defendant provided) implicated the defendant's guilt.[271] So with multiple causal factors at issue in the case, when Justice Scalia, writing for the majority, quoted *Gross* and *Nassar*, he did it with a twist. He altered the key phrase—"the 'but-for' cause"—by bracketing "the" and changing it to "a."[272] Thus, Justice Scalia quoted both *Gross* and *Nassar* as stating that to establish but-for causation, the illegal factor must be "[a] 'but-for' cause" of the employer's conduct.[273]

These alterations would seem to indicate that the Court recognized the implications of its poor wording in *Gross* and *Nassar* and was attempting to correct its mistake. But *Burrage* has not had much impact in the employment discrimination realm. Being a criminal case, *Burrage* probably did not cross the radar of most employment-law attorneys or

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under *Bostock*"); McNicholas, *supra* note 232 (stating that *Bostock*'s holding was based on the motivating-factor standard and not but-for causation).

266 *See, e.g.*, *Stallworth*, 2021 WL 5989962, at *8; *Bowie*, 2021 WL 5065852, at *1–2; *Munoz*, 2021 WL 3598531, at *2; *B&S Glass*, 2021 WL 3268360, at *8; *Smith*, 2021 WL 2104634, at *1–2; *Keller*, 513 F. Supp. 3d at 1330; *Lucas*, 240 A.3d at 341.

267 571 U.S. 204 (2014).

268 *Id.* at 206 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C)).

269 *See id.* at 210–11.

270 *See id.* at 210–14

271 *See id.* at 206–07.

272 *See id.* at 212–13.

273 *See id.* (alteration in original) (first quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013), and then quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)). This is particularly interesting with regard to *Nassar* because once in the *Nassar* opinion, the Court used the "a" phrasing rather than "the." *See Nassar*, 570 U.S. at 343, 352, 362. Justice Scalia could have quoted the single instance of *Nassar* using "a," but instead, he bracketed and altered "the." Also, the linguistic inconsistency further supports the notion that using "the" in *Gross* and *Nassar* was due to lack of care, not any intention to equate but-for causation with sole causation.

courts analyzing discrimination claims. And when it was noticed, courts were reluctant to read too much into the alterations. A couple of courts noted the bracket trick but did not really do much with it.[274] One court called it dicta—which it clearly was not.[275] A few cited *Burrage* in employment cases without seeming to notice the changed language.[276] And several courts have flat-out rejected plaintiffs' arguments that *Burrage* signaled a change in the *Gross* standard or in any way clarified that but-for cause is not sole cause.[277] If Justice Scalia meant *Burrage* to be an errata sheet for *Gross* and *Nassar*, he was too subtle. As the Fourth Circuit stated, "Although we are unsure how to regard the Supreme Court's alteration of this excerpt from *Gross*, we suspect that if the Court desired to make a radical change to recent precedent, it would not do so quietly in a case having nothing to do with employment discrimination."[278]

Bostock is not nearly so subtle. It is an employment discrimination case, and it unambiguously states, at least thirty-five times, that but-for cause is not sole cause or uses similar language showing the breadth and scope of the but-for standard, especially where multiple causal factors are at issue.[279] No reading between the lines is necessary to see that sole cause is off the table. Granted, the Court did not expressly disavow the troublesome *Gross* and *Nassar* language. It would have been better to take Justice Kagan's recent approach where she specifically acknowledged some inelegant and potentially incorrect language from a prior opinion.[280] Nonetheless, given *Bostock*'s clarity and repetition of key language showing that equating but-for causation with sole causation is not legally viable, it is difficult to see a rash of courts misinterpreting it, *Pelcha* notwithstanding.

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274 *See* Squyres v. Heico Cos., 782 F.3d 224, 231, 233 n.5 (5th Cir. 2015); Briggs v. Temple Univ., 339 F. Supp. 3d 466, 500–02 (E.D. Pa. 2018).

275 Desselle v. Louisiana *ex rel.* Dep't of Transp. & Dev., No. 19-565-SDD-RLB, 2021 WL 2425987, at *5 n.66, *11 (M.D. La. June 14, 2021).

276 *See* Thomas v. CalPortland Co., 993 F.3d 1204, 1209 (9th Cir. 2021); Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 553 (9th Cir. 2020) (Bumatay, J., concurring in part and dissenting in part); Hendon v. Kamtek, Inc., 117 F. Supp. 3d 1325, 1330–33 (N.D. Ala. 2015); Donald v. UAB Hosp. Mgmt., LLC, No. 2:14-cv-727-WMA, 2015 WL 3952307, at *2–3 (N.D. Ala. June 29, 2015).

277 *See* Arthur v. Pet Dairy, 593 F. App'x 211, 220 n.9 (4th Cir. 2015); Boyd v. Medtronic, PLC, No. 2:17-cv-01588-LSC, 2019 WL 2448567, at *8 n.7 (N.D. Ala. June 12, 2019); White v. Parker, No. 2171, Sept. Term, 2014, 2017 WL 727794, at *8–11 (Md. Ct. Spec. App. Feb. 24, 2017).

278 *Arthur*, 593 F. App'x at 220 n.9.

279 *See supra* notes 191–200 and accompanying text.

280 *See* Borden v. United States, 141 S. Ct. 1817, 1833 n.9 (2021) (plurality opinion) ("The locution shows only that sometimes we do not paraphrase complex statutory language as well as we might. (*Mea culpa*).").

E. *What About Motivating Factor?*

This Article has focused mostly on the promise of a robust but-for causation standard of liability in employment discrimination litigation. But what about the motivating-factor standard? It provides an alternative basis for liability for Title VII status-based discrimination claims[281] and is traditionally considered the most plaintiff-friendly causation standard.[282] So how does motivating-factor liability fit into the post-*Bostock* world?

Despite its facial potential and the strong advocacy of antidiscrimination scholars, motivating-factor liability does not seem to have changed the overall success rate for employment discrimination plaintiffs.[283] Many explanations have been offered, but there seems to be widespread agreement that one issue comes down to incentives—plaintiffs and their attorneys often do not use the motivating-factor approach because, through the same-decision defense discussed above,[284] it can lead the jury to split the baby by handing plaintiffs nominal victories but shutting them out of damages awards.[285] With but-for causation seeming much more attractive post-*Bostock*, plaintiffs are even less likely to choose the motivating-factor route.[286]

Congress has attempted to broaden motivating-factor liability in employment discrimination statutes. Immediately after *Gross*, both the House and the Senate introduced bills called the Protecting Older Workers Against Discrimination Act (POWADA).[287] They explicitly criticized *Gross* and would have amended the ADEA to incorporate the same motivating-factor standard as found in Title VII.[288] They also

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281 *See supra* note 68 and accompanying text.

282 *See supra* notes 52–54 and accompanying text.

283 *See* 42 U.S.C. § 2000e-5(g)(2)(B); Corbett, *supra* note 31, at 449–50; Sullivan, *supra* note 29, at 365–66.

284 *See supra* notes 60, 66 and accompanying text.

285 *See* Corbett, *supra* note 31, at 449–50; Eyer, *supra* note 6, at 1690; Sullivan, *supra* note 29, at 396–98.

286 *See* Schall, *supra* note 27 ("Until the *Bostock* decision, many of us viewed 'but-for' cause as a standard far more difficult to overcome than the seemingly more preferable 'motivating factor' standard. In light of *Bostock*, I think that should no longer be the case. In fact, . . . I'm liking the 'but-for' standard as the preferable one, at least in most cases."); Sperino, *supra* note 27, at 25 ("One reason plaintiffs' attorneys had vigorously opposed 'but for' cause is that many trial and appellate courts equated 'but for' cause with sole cause and held that an outcome could only have one 'but for' cause. *Bostock* puts many of these concerns to rest."); Williams, Korn & Mihaylo, *supra* note 27, at 405 ("[C]ases plaintiffs' lawyers could not afford to bring before *Bostock* become more attractive, given that the plaintiffs' bar typically is paid on a contingency basis (and so needs to bring cases that give rise to damage awards).").

287 *See* H.R. 3721, 111th Cong. (2009); S. 1756, 111th Cong. (2009).

288 *See* H.R. 3721, §§ 2(a), 3; S. 1756, §§ 2(a), 3.

would have applied that same standard to "any Federal law forbidding employment discrimination."[289] The bills did not pass.[290] Other versions of POWADA have been introduced in every congressional session since,[291] all unsuccessful (so far).[292] Over time, the bill has kept the same name (focusing on older workers) but expanded to explicitly amend not only the ADEA but also Title VII's retaliation provision and the Americans with Disabilities Act.[293] The latest versions were introduced in March 2021,[294] and the House passed its bill in June 2021.[295] President Biden intends to sign the law if it makes it through the Senate.[296]

Even if Congress enacts POWADA, it is unlikely to eclipse the use of but-for causation. By firmly rejecting sole causation and clarifying that multiple but-for causes can exist, *Bostock* makes clear that but-for causation offers many of the benefits of motivating-factor liability without the burden of its limited remedies.[297] Thus, even with POWADA, many plaintiffs will likely find the robust but-for standard *Bostock* described much more appealing.

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289 *See* H.R. 3721, § 3; S. 1756, § 3.

290 Anderson, *supra* note 6, at 70.

291 *See* S. 880, 117th Cong. (2021); H.R. 2062, 117th Cong. (2021); H.R. 1230, 116th Cong. (2020); S. 485, 116th Cong. (2019); H.R. 2650, 115th Cong. (2017); S. 443, 115th Cong. (2017); H.R. 5574, 114th Cong. (2016); S. 2180, 114th Cong. (2015); S. 1391, 113th Cong. (2013); H.R. 2852, 113th Cong. (2013); S. 2189, 112th Cong. (2012).

292 Patricia Barnes, *Finally, U.S. House Will Address Disastrous U.S. Supreme Court Ruling on Age Discrimination*, FORBES (Jan. 13, 2020, 1:16 PM), https://www.forbes.com/sites/patriciagbarnes/2020/01/13/finally-us-house-will-address-disastrous-us-supreme-court-ruling-on-age-discrimination/?sh=2eeff615efde (last visited Apr. 21, 2022).

293 *See, e.g.*, S. 880, § 2; H.R. 2062, § 2.

294 *See* S. 880; H.R. 2062.

295 *See* H.R. 2062; Carmen Reinicke, *House of Representatives Passes Bill to Protect Older Americans in the Workplace*, CNBC (June 24, 2021, 5:27 PM), https://www.cnbc.com/2021/06/24/the-house-passed-a-bill-to-protect-older-americans-in-the-workforce.html [https://perma.cc/84AA-CVYD].

296 *See The Biden Plan for Older Americans*, BIDENHARRIS, https://joebiden.com/older-americans [https://perma.cc/VL8F-2UHH]. The 2020 version was doomed, as President Trump planned to veto it. Jaclyn Diaz, *Age-Bias Bill Passed by House as White House Threatens Veto*, BLOOMBERG L. (Jan. 15, 2020, 7:14 PM), https://news.bloomberglaw.com/daily-labor-report/age-bias-bill-passed-by-house-as-white-house-threatens-veto [https://perma.cc/M7VN-7BDV].

297 *See* Eyer, *supra* note 6, at 1690 ("[I]t is also important to note that there is far less daylight between the 'motivating factor' approach and the but-for approach than progressives have traditionally suggested.").

CONCLUSION

As Professor Sullivan has observed, "[F]orecasts of the transformation of Title VII have a habit of being proved wrong."[298] He documented that phenomenon in the context of motivating-factor liability after the Civil Rights Act of 1991, calling it "the revolution that wasn't."[299] Perhaps the predicted *Bostock* causation revolution will suffer the same fate.

But that seems unlikely. The Supreme Court unequivocally eviscerated a key defense theory that has hobbled employment discrimination plaintiffs for more than a decade. This theory—that but-for causation is sole causation—has blocked scores of claims based on various combinations of legal and illegal motives. *Gross*, a Supreme Court decision, caused much of that problem. Surely a later Supreme Court decision that so clearly rejects that theory will have some positive impact. The Supreme Court caused this mess; hopefully now it has fixed it.

Difficulty in proving but-for causation post-*Gross* is not, of course, solely responsible for plaintiffs' dismal success rate in employment discrimination cases. Scholars have written about many problems, including unfair evidentiary standards[300] and technicalities of the *McDonnell Douglas* burden-shifting framework that has dominated employment discrimination litigation for more than forty years.[301] *Bostock* cannot, alone, solve all of these problems. But it is certainly a step in the right direction. And it might open the door to less direct but still profound changes.[302]

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298 Sullivan, *supra* note 29, at 365.

299 *Id.* at 366.

300 *See generally* Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2105 (2021); SPERINO & THOMAS, *supra* note 7; Widiss, *supra* note 7, at 393–95.

301 *See* Eyer, *supra* note 141; Widiss, *supra* note 7. *See generally* sources cited *supra* note 141.

302 Professor Katie Eyer is using *Bostock* as a rallying cry for progressives to formally shift focus from advocating for motivating factor to fully embracing the but-for standard as "the central defining feature of disparate treatment doctrine," which she concludes might ameliorate "many of the existing pathologies in anti-discrimination law." Eyer, *supra* note 6, at 1627, 1653. Professor Deborah Widiss believes *Bostock*, with its emphasis on potential multiple but-for causes, could help dismantle the entire *McDonnell Douglas* paradigm, which she contends "functionally imposes a sole-causation standard." *See* Widiss, *supra* note 7, at 355–56, 358, 390; *see also supra* note 141; Noelle N. Wyman, Comment, *Because of* Bostock, 119 MICH. L. REV. ONLINE 61, 63 (2021) ("By explicitly recognizing that adverse employment actions can have *multiple* but-for causes, *Bostock* throws *McDonnell Douglas* into question." (emphasis in original)); Marks v. N.Y. Life Ins. Co., No. 18-0327-WS-B, 2020 WL 5752852, at *9 n.11 (S.D. Ala. Sept. 25, 2020) (noting but declining to address plaintiff's argument that *Bostock* "effectively destroys the *McDonnell Douglas* burden-shifting framework"). *But see* Burrell v. United Parcel Serv., Inc., No. 7:19cv-01704-LSC, 2021 WL 4894607, at *3 (N.D. Ala. Oct. 20, 2021) (rejecting

Antidiscrimination proponents must do their part to help *Bostock* change the landscape of employment discrimination litigation. Advocates must carefully and thoroughly brief these arguments for the courts and push for expanded jury instructions incorporating *Bostock*'s key language. Scholars are thoughtfully and abundantly writing about *Bostock*'s potential and should continue to do so. I add my voice to theirs.

the argument that *Bostock* necessarily eliminated the *McDonnell Douglas* paradigm); Coleman v. Morris-Shea Bridge Co., No. 2:18-cv-00248-LSC, 2020 WL 6870450, at *9 & n.17 (N.D. Ala. Nov. 23, 2020) (same).