

ENSURING FAIRNESS FOR OLDER WORKERS

HEARING OF THE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

EXAMINING S.1756, TO AMEND THE AGE DISCRIMINATION IN EMPLOY-
MENT ACT OF 1967 TO CLARIFY THE APPROPRIATE STANDARD OF
PROOF

MAY 6, 2010

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(II)

C O N T E N T S

STATEMENTS

THURSDAY, MAY 6, 2010

	Page
Harkin, Hon. Tom, Chairman, Committee on Health, Education, Labor, and Pensions, opening statement	1
Enzi, Hon. Michael B., a U.S. Senator from the State of Wyoming, opening statement	2
Leahy, Hon. Patrick, a U.S. Senator from the State of Vermont, statement	4
Berrien, Jacqueline, Chair, Equal Employment Opportunity Commission, Washington, DC	5
Prepared statement	7
Casey, Hon. Robert P., a U.S. Senator from the State of Pennsylvania	15
Hagan, Hon. Kay R., a U.S. Senator from the State of North Carolina	18
Gross, Jack, CPCU, CLU, ChFC, Des Moines, IA	21
Prepared statement	23
Norton, Helen, Professor, University of Colorado Law School, Boulder, CO	24
Prepared statement	26
Aldrich, Gail, Board of Directors, AARP, Genoa, NV	34
Prepared statement	35
Dreiband, Eric S., Partner, Jones Day, Washington, DC	39
Prepared statement	40

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Response to questions of Senator Harkin by:	
Jacqueline Berrien	65
Helen Norton	67
Response to questions of Senator Enzi by:	
Helen Norton	75
Eric S. Dreiband	76

ENSURING FAIRNESS FOR OLDER WORKERS

THURSDAY, MAY 6, 2010

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, D.C.

The committee met, pursuant to notice, at 10:19 a.m. in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, Chairman of the Committee, presiding.

Present: Senators Harkin [presiding], Enzi, Franken, Casey and Hagan.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor and Pensions will please come to order.

I apologize for being late. As you know, we had a vote on the floor that started at 10 o'clock.

We have convened this hearing to examine the issue of employment discrimination against older workers and the need, in the face of a very misguided and harmful Supreme Court decision, to enact legislation to ensure that older workers are treated with the fairness they deserve.

We will hear today from my fellow Iowan, Jack Gross. Jack devoted the prime of his life, over a quarter of a century of loyal service, to one company. And how did the company reward him for his dedication and hard work? It brazenly demoted him and other employees over the age of 50, and gave his job to a younger employee, who was significantly less qualified.

Over 40 years ago, expressly to prevent this kind of discrimination, Congress passed the Age Discrimination in Employment Act. Very simply, that act made it unlawful to discriminate on the basis of age.

When Mr. Gross sought to enforce his rights under this law, a jury ruled in his favor and concluded that age had been a motivating factor in his demotion.

Yet, when his case was appealed to the Supreme Court, a slim activist majority of five justices overturned the jury verdict and decided to rewrite the law.

For decades, the law was clear: If an employee showed that age was one factor in an employment decision, the burden was on the employer to show it had acted for a legitimate reason other than age.

The court, however, addressing a question it did not even grant certiorari on, tore up this decades-old standard and imposed a new standard that the Supreme Court itself had rejected in a prior case and which Congress had rejected when we enacted the Civil Rights Act of 1991.

The timing of the court's decision is particularly troubling. Older workers have been particularly hard hit by the tough economy. According to the Department of Labor, over 2-million workers over age 55 are unemployed, an all-time high since they began matching age and unemployment in 1948. The average duration of unemployment for older job seekers is twice as long as for other unemployed workers.

According to EEOC statistics—and I think we'll hear more about that from our witness—more than 45,000 charges of age discrimination were filed in 2008 and 2009. That's three times more than just a decade ago.

So for decades, we had a consistent standard. Unfortunately, because of the court's decision, there's now a far higher standard of proof for age than for other forms of discrimination.

The legislation I have introduced—S.1756, Protecting Older Workers Against Discrimination Act—would reverse the court's deeply-flawed decision and restore the law to what it was for decades.

The legislation would make certain that, once again, Mr. Gross, and all older workers in this country, enjoy the full protections of the law.

And, with that, I'll turn to Senator Enzi for an opening statement.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Chairman Harkin. I appreciate you calling the hearing for today.

As the baby-boom generation phases into retirement, more and more of us are choosing to continue working past traditional retirement ages. In fact, the number of workers aged 55 and over is expected to increase by 47 percent over the next 7 years. Luckily, America's employers will need us as well, because labor economists forecast a huge worker shortage in coming years.

I was pleased Congress addressed the needs of older workers in the Pension Protection Act enacted in 2006. And, with the help of my colleagues on this committee, I look forward to improving the Workforce Investment Act, through reauthorization, to better meet the job-training needs of older workers this year.

Today, the committee looks at the technically-complex issue of burden of proof in so-called mixed-motive, disparate-impact cases rising under the Age Discrimination in Employment Act, ADEA, in a case entitled *Gross v. FBL Financial*.

The U.S. Supreme Court recently held that, in such cases, the burden remains with the plaintiff throughout the case. In effect, this means that even where there is some evidence that age may have been a factor in an adverse employment decision, it still remains the plaintiff's burden to demonstrate that his or her age was the "but-for" reason for the adverse action. This allocation of bur-

den is different than the one applicable under other Federal employment discrimination statutes, most notably title VII.

In the *Gross* decision, however, the court found such differences to be grounded squarely in the specific statutory language used by Congress in the two laws and in the fact that, in 1991, Congress amended the title VII and specifically adopted a burden-shifting procedure for cases under that discrimination statute, but did not extend the same procedure to the ADEA.

In trying to determine the best course of any future action, I look forward to reviewing the testimony of the experts who are here today as well as reviewing their answers to the questions that are asked of them.

I won't be able to stay for the entire hearing. I do have questions prepared and know that those answers will make a real difference in the legislation.

However, before we hear from them, I would like to make a few brief comments.

This is not the first time, nor will it be the last time, that there is legislation in Congress aimed directly at a decision of the Supreme Court. I don't have any problem with this. Our system of checks and balances, quite correctly, always gives Congress this prerogative.

What disturbs me lately, however, is the rhetoric that attaches itself to such efforts. That rhetoric manifests itself in two ways.

First, there's a direct attack on the competency of the court itself. Those who do not like a decision—most notably for transparently political reasons—immediately fire off the claim that the court got it wrong.

What that really means, of course, is that the speaker doesn't agree with the court, not that the court was objectively wrong. There's obviously nothing wrong with disagreeing with the court and seeking to change the law. That's an honest starting point for a fair debate on legal or public policy. To start by employing the rhetoric that the court is wrong, needlessly and unjustly, undermines the court's integrity and the public's confidence in the institution.

We should have robust debate about our legal and public policies, but we shouldn't predicate that debate on the claim that the Supreme Court got it wrong. That's not only unjustified, it's ultimately harmful.

The second disturbing rhetoric overreach that now accompanies almost every public-policy disagreement is the reckless maligning of the opposition. This is particularly true when it comes to issues arising under our discrimination statutes.

For example, those who earlier this Congress had legitimate concerns about largely eliminating the statute of limitations in pay-discrimination cases were promptly labeled as pro-discrimination and anti-feminist and worse. These claims are, of course, baseless. Yet, their effect is often as effective as it is transparent.

The sad truth is that, in our sound-bite culture and our 24-hour news cycle, it's always more effective to demonize the other side rather than to engage in constructive debate. That's like the irony of calling a press conference to complain that the other side is politicizing an issue.

Although I sometimes hold different views than those of the current Administration, I believe the president was correct earlier this week when he noted that the overblown rhetoric of the public debate closes the door to compromise and undermines democratic deliberation. I hope that, going forward, the Administration and the Congress practice what they are now preaching.

I look forward to hearing today's witnesses and appreciate the time and testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Enzi.

I have a statement I would like to insert in the record from the Chairman of the Judiciary Committee, Senator Leahy, after our opening statements or any other statements that members of the committee want to insert for the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR LEAHY

I am pleased to join Senator Harkin in supporting the "Protecting Older Workers Against Discrimination Act," and I thank him for scheduling this hearing today so that we can move this important civil rights legislation. Our legislation is necessitated by the Supreme Court's controversial decision in *Gross v. FBL Financial*, where five justices decided to change the standard that American workers must prove in age discrimination cases.

In *Gross*, a divided Court thwarted congressional intent, overturned well-established precedent, and delivered a major blow to the ability of older workers to fight age discrimination, just as it eliminated Lilly Ledbetter's claim to equal pay, until Congress stepped in to set the law right. After spending 32 years working for an Iowa subsidiary of a major financial company, Jack Gross was demoted, and his job duties were reassigned to a younger worker who was significantly less qualified. In his lawsuit under the Age Discrimination Act, a jury concluded that age had been a motivating factor in his demotion and awarded him nearly \$50,000 in lost compensation.

However, a narrow majority of Court unabashedly rewrote civil rights laws, making it harder for workers facing age discrimination to enforce their rights. The Court ruled that it is no longer enough for a victim of discrimination to prove that age was a motivating factor in an adverse employment decision. Now, an employee must prove that it was *the decisive* factor. This means that victims of age discrimination face a higher burden than those alleging race, sex, national origin or religious discrimination. I am concerned that those protections will also be weakened by the Supreme Court as a result of their decision in Mr. Gross' case.

Mr. Gross appeared before the Senate Judiciary Committee last year. His compelling testimony reaffirmed the need for this important legislation. In these tough economic times, millions of Americans are concerned with the security of their jobs. We cannot let the Supreme Court's wrong-headed decision stand in the way of the financial security of American families. I urge the committee to move without delay to protect our most experienced workers.

The CHAIRMAN. So our first witness. We will hear from Jacqueline Berrien, Chairman of the EEOC.

Prior to joining the EEOC, Ms. Berrien served as the Associate Director—Counsel for the NAACP Legal Defense and Education Fund, and before that as a program officer in the Ford Foundation’s Peace and Social Justice Program.

Ms. Berrien, your statement will be made a part of the record in its entirety. And if I could ask you to sum it up in five minutes or so, I would certainly appreciate it, but welcome back again.

STATEMENT OF JACQUELINE A. BERRIEN, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC

Ms. BERRIEN. Thank you so much. Thank you, Mr. Chairman, Ranking Member Enzi and distinguished members of the committee.

I appreciate the opportunity to appear before you at this important hearing to discuss age discrimination and the Protecting Older Workers Against Discrimination Act, which would supercede the Supreme Court’s 2009 decision in *Gross v. FBL Financial Services*.

This decision imposed new legal burdens on claimants bringing claims under the Age Discrimination in Employment Act of 1967. And the EEOC is here today to provide more details about some of the concerns that have emerged since the decision.

At the heart of every Federal anti-discrimination statute the EEOC enforces is a congressional recognition that decisions in the workplace should not be driven by stereotypes or made on the basis of certain protected characteristics, including age.

As Congress noted more than 40 years ago when the ADA was enacted, the purpose of the act is to promote employment of older persons based on their ability, rather than age, and prohibit arbitrary age discrimination in employment. Nevertheless, workers who are subjected to age discrimination today sometimes encounter undue resistance as they pursue their claims.

For example, some courts or judicial opinions have dismissed age-based comments as merely stray remarks and consider them irrelevant to the question of whether age discrimination occurred.

These remarks have included—and I am quoting them directly—calling a plaintiff the old guy in the department, stating that an age-discrimination victim looked old and tired, repeatedly referring to a plaintiff as an old man, saying that the company’s goal was to attract younger talent and stating that some workers were just too old to get the job done and that the company wanted to go to a young, aggressive group of people.

It is difficult to reconcile judicial disregard of these kinds of statements with Congress’ express purpose in passing the ADEA, and this is the backdrop against which the *Gross* decision was announced.

I would also like to refer you to a compelling example from the EEOC’s enforcement efforts. In the case *EEOC v. Dawes County*, the commission brought suit on behalf of Mr. Russell Hack, who, after working for the Dawes County Road Department for more than 30 years, was forced to retire at the age of 71.

There was no evidence he was having any performance problems. He intended to continue to work for several more years, but the county told him that it was creating a stress test to determine

whether workers over the age of 70 could meet the physical requirements of their jobs.

The county never administered the test to Mr. Hack, and, instead, Mr. Hack was forced to leave his job, based on their assumption that he would not be able to pass the test.

As Mr. Gross will testify today himself, the U.S. Supreme Court decision in his case has created new hurdles which age-discrimination victims must now overcome in order to obtain relief.

Specifically, the court held that age-discrimination plaintiffs must now prove that the defendant's employer would not have taken a challenged-employment action, but for his or her age.

As a result, unlike plaintiffs pursuing claims under Title VII of the Civil Rights Act of 1964, age-discrimination plaintiffs are no longer allowed to show that discrimination was because of age by showing that age was one of the factors that motivated an adverse employment decision.

This creates a dichotomy between the ADEA and title VII that is confusing, unfortunate and unnecessary. Before *Gross* was decided, every court presented with this question concluded that age-discrimination plaintiffs should be able to proceed under the same standards as allowed in title VII cases; that is, under mixed-motive theories.

Nothing in the legislative history or the statutory language of the age-discrimination act suggests that this Congress intended to subject victims of age discrimination to a more stringent standard than victims of the types of discrimination prohibited by title VII.

The case is causing concrete hardships for workers. Although it appears to be an abstract set of principles, the hardships are real. And it's expressed in decisions in the little under a year since the *Gross* case was decided where plaintiffs have been required to prove that—not only that age was the “but-for” cause of the employment action, but that it was the only reason for the employment action. So, in a short step, the standard has been elevated even further by some courts.

It has also been the case, in at least one court, that the *Gross* decision was applied to limit relief for a plaintiff in an Americans With Disabilities Act case, although there is no evidence, again, that this Congress intended for a more stringent standard to apply to ADEA plaintiffs.

As the Nation's chief enforcer of Federal law prohibiting employment discrimination, the EEOC is especially concerned by these developments. Continued erosion of employment rights contravenes congressional intent, and we believe it is important for this Congress to act to correct it.

Legislation like the Protecting Older Workers Against Discrimination Act would ensure that age-discrimination plaintiffs receive the same core protections and are subject to the same basic legal standards as title VII plaintiffs. Nothing more. Nothing less.

We believe this would effectuate the congressional intent evident in the original passage of the Age Discrimination in Employment Act, namely, that discrimination on the basis of age—like discrimination on the basis of race, color, national origin, sex, religion—has no place in the Nation's workplaces.

The commission stands ready and eager to assist in any way with this legislation or future related legislation.

Thank you again for inviting me, and I look forward to your questions.

[The prepared statement of Ms. Berrien follows:]

PREPARED STATEMENT OF JACQUELINE A. BERRIEN

INTRODUCTION

Mr. Chairman, and distinguished members of the committee, thank you for the opportunity to appear before you at this important hearing to discuss the “Protecting Older Workers Against Discrimination Act” (S. 1756), which would supersede the Supreme Court’s 2009 decision in *Gross v. FBL Financial Services*.¹

The Supreme Court in *Gross* held that “mixed-motives” claims are not cognizable under the Age Discrimination in Employment Act of 1967 (ADEA), and that older workers cannot prevail on a claim of age discrimination unless they prove that age was the “but for” cause of the employment practice at issue. In practice, this means that an ADEA plaintiff will no longer have a valid claim, and therefore will be entitled to no relief whatsoever—even if a defendant *admits* that it took an adverse employment action in part because of the plaintiff’s age—unless the plaintiff can show that the defendant would not have made the same decision anyway (i.e., if the employer had not actually taken the victim’s age into account).

The *Gross* decision was a startling departure from decades of settled precedent developed in Federal district and intermediate appellate courts. It erected a new, much higher (and what will often be an insurmountable) legal hurdle for victims of age-based employment decisions. Indeed, recent case law reveals that *Gross* already is constricting the ability of older workers to vindicate their rights under the ADEA, as well as other anti-discrimination statutes.

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) believes that legislation like S. 1756 is needed to restore and bolster the basic protections that applied to ADEA claims pre-*Gross*. This would more fully effectuate Congress’s original intent in passing the ADEA—to “promote employment of older persons based on their ability rather than age” and “to prohibit arbitrary age discrimination in employment.”²

THE SURGE IN ADEA CHARGES AND THE STAYING POWER OF AGE-BASED STEREOTYPES

The *Gross* ruling could not have come at a worse time. More than 40 years after Congress passed the ADEA, age discrimination may be at historic highs. EEOC receipts of ADEA charges certainly are at or near record-levels. In fiscal year 2008, age discrimination charges jumped nearly 30 percent over the previous year, and represented nearly 26 percent of all charges the EEOC received that year.³ In 2009, age-based charges were at their second-highest level ever (exceeded only by the previous year), and constituted over 24 percent of all receipts.⁴

It is difficult to pinpoint the causes of this surge in age discrimination charges. It is clear, however, that negative stereotypes about older workers remain deeply entrenched.⁵ These stereotypes include unwarranted assumptions that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, and less energetic than younger employees.⁶ Employers also may be reluctant to invest in training and other developmental opportunities for older workers based on the perception that they have less time remaining in their careers.⁷

¹ 129 S. Ct. 2343 (2009).

² 29 U.S.C. § 621(b).

³ In fiscal year 2008, the EEOC received 24,582 charges containing ADEA allegations (an increase from the 19,103 ADEA charges received in fiscal year 2007). See <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

⁴ In fiscal year 2009, the EEOC received 22,778 ADEA charges. See *id.*

⁵ See Daniel Kohrman & Mark Hayes, *Employers Who Cry “RIF” and the Courts That Believe Them*, 23 HOFSTRA LAB. & EMP. L.J. 153, 160 (2005) (studies show that bias against older people is more deeply embedded than other forms of bias including race, gender, religion, and sexual orientation).

⁶ See Remarks of Professor Michael Campion, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, <http://www.eeoc.gov/eeoc/meetings/7-15-09/campion.cfm>.

⁷ See *id.*

While extensive research has shown that these negative age-based stereotypes have little basis in fact, they undoubtedly influence far too many employment decisions.⁸ For instance, as a result of these stereotypes, older persons with the same or similar qualifications typically receive lower ratings in interviews and performance appraisals than younger counterparts (and thus are apt to have more trouble finding or keeping a job or securing a promotion).⁹ Older workers also typically are rated as having less potential for development than younger workers, and thus are given fewer training and development opportunities.¹⁰

Further, it appears that age-based stereotypes operate to disadvantage older workers in corporate “downsizing” situations, in particular. Because the main goal of such downsizing is usually to cut costs, age-based stereotypes that older workers are more costly, harder to train, less flexible, or less competent may become much more prominent in the minds of the decisionmakers.¹¹ To make matters worse, once older workers are laid off, they often are again vulnerable to age-based stereotyping as they attempt to find new jobs. It seems older workers who have been laid off are less likely to obtain reemployment than younger workers, take longer to find new jobs than younger workers, and generally fail to obtain jobs paying the same wages as their previous positions.¹²

The EEOC has brought numerous cases under the ADEA involving the manifestation of just these sorts of ageist stereotypes. These include:

- *EEOC v. Lockheed Martin Global Telecommunications, Inc.* The EEOC alleged that the employer violated the ADEA by firing eight employees as part of a reduction-in-force. To determine who would be laid off, employees were placed in comparison groups, and with only one exception, the oldest employee within the comparison group was the one laid off. The RIF rated employees using subjective criteria that included the “ability to get along with others.” Again, with only one exception, the ratings for “ability to get along with others” corresponded to employee ages, with the youngest employees being ranked highest in this area and the oldest employees the lowest. This case was settled for \$773,000.

- *EEOC v. Mike Albert Leasing, Inc.* The charging party, aged 60, was the oldest area manager for a company that leased cars, trucks, and vans throughout several States. There was evidence that about a year before the charging party was fired, the company president commented at a sales meeting that the sales force was “old and aging” and that the company needed some fresh young blood. Shortly before firing the charging party, the company hired a 38-year-old male to take over the charging party’s accounts. The EEOC alleged that although the charging party’s job evaluations and sales numbers indicated he was outperforming the majority of his peers, the company fired him for his failure to meet “goals” that were intentionally unrealistic. This case was settled for \$100,000.

- *EEOC v. Dawes County, Nebraska.* After working for the respondent for more than 30 years, the charging party was fired at the age of 71 from his position with the county roads department, even though there was no evidence of performance problems. The EEOC alleged that the county decided to impose a stress test for workers 70 or older to determine whether they could meet the physical requirements of their job and the charging party was fired based on the assumption that he would not be able to pass the test. The respondent never actually implemented the stress test, and no one other than the charging party was fired because of the test. This case was settled for \$50,000.

THE UNFAVORABLE LEGAL CLIMATE FOR AGE DISCRIMINATION PLAINTIFFS

Unfortunately, older workers who are victims of such age-based decisionmaking now must seek to assert their ADEA rights in a legal landscape that increasingly

⁸See *id.* (while older workers face stereotypes that job performance declines with age, extensive research actually shows that it improves with age); see also Towers Perrin, *The Business Case for Workers Age 50+, Planning for Tomorrow’s Talent Needs in Today’s Competitive Environment* (AARP), at 33 (Dec. 2005) (it is a myth that performance suffers over time, and “mounting evidence—both anecdotal and statistical—demonstrates that older workers bring experience, dedication, focus, stability and enhanced knowledge to their work, in many cases to a greater degree than younger workers”); William McNaught & Michael C. Barth, *Are Older Workers “Good Buys”? A Case Study of Days Inns of America*, SLOAN MGMT. REV. 53–63 (Spring 1992) (net cost of employing older reservations agents was nearly identical to the net cost of employing younger workers; with regard to flexibility, older workers were just as quick as younger workers to adapt to modern computer technology, and training times for the two groups were virtually identical).

⁹See Remarks of Professor Campion, *supra* note 6.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

minimizes the significance of age discrimination. The prevailing judicial approach distinguishes ADEA claims from those brought under title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, or national origin. Notably, for example, in a statement that appears to reflect the erroneous but widespread stereotypes about older workers, the Supreme Court has said that a lower level of protection under the ADEA than under title VII is “consistent with the fact that age, unlike race or other classifications protected by title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”¹³

This judicial antipathy to age discrimination claims also can be seen in lower court decisions in which courts apply crabbed interpretations of the ADEA to rule against plaintiffs even when plaintiffs present evidence of age-based comments by managers. For example, courts have dismissed as “stray remarks” not probative of age discrimination comments calling the plaintiff “he old guy in the department,”¹⁴ stating that the plaintiff looked “old and tired,”¹⁵ repeatedly calling the plaintiff “old man,”¹⁶ saying that the company goal was to “attract younger talent,”¹⁷ and stating that some workers “were just too old to get the job done” and that the company “wanted to go to a young aggressive group of people.”¹⁸

Given this relatively inhospitable legal climate, it is perhaps not surprising that while all discrimination plaintiffs face enormous challenges in proving their claims, success seems to be especially elusive for age discrimination plaintiffs.¹⁹

THE GROSS DECISION

Against this already-challenging legal backdrop, the Supreme Court’s recent ruling in *Gross* is particularly troubling. *Gross* is the latest, and in some respects the most problematic, in a string of judicial decisions that have weakened the ADEA significantly. Moreover, because lower courts have begun to extend *Gross*’s reasoning beyond the ADEA context, the decision threatens to undermine numerous other Federal anti-discrimination laws, as well.

The Supreme Court granted certiorari in *Gross* to answer what appeared to be an arcane legal question—whether “direct evidence” is needed to obtain a “mixed-motives” jury instruction in an ADEA case. In the end, however, the Court’s ruling in *Gross* struck at the heart of the ADEA’s core anti-discrimination provision.

In the 1989 decision in *Price Waterhouse v. Hopkins*, the Supreme Court had held that a title VII plaintiff who had shown that discrimination was a “motivating factor” in an employment decision could request a mixed-motives jury instruction, which would shift the burden of proof to the employer to show that it would have taken the same action in the absence of discrimination.²⁰ The Supreme Court subsequently held that a title VII plaintiff could rely on either direct or circumstantial evidence to request such a mixed-motives instruction.²¹ While lower courts agreed that mixed-motives claims were cognizable under the ADEA, as well, the lower courts were split as to whether ADEA plaintiffs needed to present “direct evidence” to obtain a mixed-motives instruction (or whether, like title VII plaintiffs, they could present either direct or circumstantial evidence to justify the instruction).²²

The majority in *Gross* ultimately decided that it was unnecessary to address this issue—the question on which the Court had granted certiorari—because it concluded that mixed-motives claims are never available under the ADEA at all. The Court held that in an ADEA case, the burden of proof *never* shifts to the employer to defend its action, and that an ADEA plaintiff must always prove that age was the “but for” factor in the adverse employment action. This issue was never briefed by the parties or amici, and counsel for the United States had urged the Court during oral

¹³ *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). Of course, as already indicated, the Court’s statement seems to assume a closer correlation between age and inability than research suggests exists. See *supra* note 8.

¹⁴ *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049, 1055 (7th Cir. 2006).

¹⁵ *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007).

¹⁶ *EEOC v. Republic Servs., Inc.*, 640 F. Supp. 2d 1267, 1286 (D. Nev. 2009).

¹⁷ *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 351–52 (5th Cir. 2007).

¹⁸ *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000).

¹⁹ See Kohrman and Hayes, *supra* note 5, at 153 (data collected by the Administrative Office of the U.S. Courts for 1998–2001 shows that ADEA plaintiffs win 20.93 percent of bench trials while the win rate for bench trials in employment discrimination cases overall is 25.94 percent).

²⁰ 490 U.S. 228, 258 (1989).

²¹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003).

²² Compare *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008) (ADEA plaintiff must produce direct evidence in order to obtain mixed-motives instruction), with *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (direct evidence not needed for mixed-motives instruction under ADEA).

argument not to reach the issue.²³ And, as already indicated, lower courts had unanimously concluded that ADEA plaintiffs could indeed obtain a mixed-motives instruction and had only disagreed as to whether direct evidence was needed.²⁴

NEED FOR LEGISLATION TO SUPERSEDE GROSS

While the *Gross* decision dealt with seemingly abstract concepts about causation and burdens of proof, it is having real-world implications for age discrimination litigants. Now, after *Gross*, ADEA plaintiffs are unable to prove age discrimination by showing that age was one factor (of perhaps several factors) that motivated the challenged employment practice, unless they can also prove that age was the “but for” factor for the decision. Thus, ADEA plaintiffs with cases involving “mixed motives” are subject to a more demanding standard of causation and burden of proof than similar title VII plaintiffs.

When Congress enacted the Civil Rights Act of 1991, it confronted a similar issue. Congress responded by expressly “authorizing discrimination claims in which an improper consideration was ‘a motivating factor’ for an adverse employment decision.”²⁵

Similar to the negative impact *Price Waterhouse* had on victims of sex-based and race-based discrimination, the Supreme Court’s decision in *Gross* is damaging the ability of victims of age discrimination to vindicate their statutory rights. In the *Gross* case itself, the Eighth Circuit on remand reversed a jury verdict and nearly \$47,000 in lost compensation the jury had awarded to Jack Gross.²⁶ In addition to the adverse effect it had in Mr. Gross’s ADEA case, the Supreme Court’s ruling has begun to negatively impact other litigants. One district court affirmed summary judgment for the employer even though there was sufficient evidence for a jury to conclude that age was one of the factors that motivated the plaintiff’s termination. Relying on *Gross*, the court noted that “just because age may have played a role in the decision does not mean that it was a ‘but for’ cause of his termination.”²⁷ Similarly, the Third Circuit has concluded that a plaintiff could not prevail on his termination claim under the ADEA despite evidence that the employer wanted to get rid of “older and better paid” employees and to retain “younger and cheaper” employees. The court stated that such evidence showed at most that age was a “secondary consideration” in the plaintiff’s termination, not a “but for” factor as required by *Gross*.²⁸

In addition, some courts now have interpreted *Gross* as not only requiring a plaintiff to prove that age was a “but for” cause, but also to show that it was the *sole* cause, for the challenged employment action. For example, in one case, the plaintiff was forced to choose between his title VII claim and his ADEA claim. The court concluded that, under *Gross*, the plaintiff was required to demonstrate that age was “the only or the but-for reason for the alleged adverse employment action,” and thus, the plaintiff could not claim that the action was based on age while simultaneously claiming that there was another unlawful motive involved.²⁹ Similarly, another court dismissed a plaintiff’s ADEA claim because she had alleged not only age discrimination but also discrimination based on gender, race, and disability. The court interpreted the *Gross* decision as requiring a plaintiff to present direct evidence that age was the sole reason for the challenged action.³⁰ This particular interpretation of *Gross* would appear to preclude “intersectional” discrimination claims (e.g., those alleging that discrimination occurred because of a combination of two or more protected traits). This doctrinal development would upend decades of settled law allowing for such claims, and represent an alarming restriction on longstanding civil rights protections.³¹

Finally, the *Gross* decision not only impedes the ability of older workers to successfully challenge various forms of age discrimination. It has also begun to undermine the enforcement of other Federal anti-discrimination statutes. For example,

²³ *Gross*, 129 S. Ct. at 2353 n.2 (Stevens, J., dissenting).

²⁴ *Id.* at 2355 & n.5 (collecting cases).

²⁵ *Id.* (quoting 42 U.S.C. § 2000e-2(m)).

²⁶ *Gross v. FBL Fin. Servs., Inc.*, 588 F.3d 614 (8th Cir. 2009).

²⁷ *Anderson v. Equitable Res., Inc.*, 2009 WL 4730230, at *14–15 (W.D. Pa. Dec. 4, 2009).

²⁸ *Kelly v. Moser, Patterson & Sheridan, L.L.P.*, 2009 WL 3236054 (3d Cir. Oct. 9, 2009) (unpublished).

²⁹ *Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009).

³⁰ *Wardlaw v. City of Philadelphia Streets Dep’t*, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009).

³¹ Cf. Remarks of Cathy Ventrell-Monsees, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, <http://www.eeoc.gov/eeoc/meetings/7-15-09/ventrell-monsees.cfm> (noting *Gross* “is extremely problematic for older women and older minorities who often bring claims under both the ADEA and title VII”).

the Seventh Circuit recently determined, citing *Gross*, that plaintiffs alleging discrimination under the Americans with Disabilities Act (ADA) now must show that disability is a “but for” cause of a challenged employment practice.³²

Clarifying legislation will thus not only protect plaintiffs who bring claims under the ADEA, but also plaintiffs who seek redress under other anti-discrimination laws which may be similarly weakened by the application of the *Gross* decision.

S. 1756

S. 1756 would legislatively overturn *Gross* to ensure that ADEA plaintiffs receive the same core protections and are subject to the same basic standards of causation with respect to disparate treatment claims as title VII plaintiffs. This aspect of the legislation would simply restore the law to the state of parity that existed between ADEA and title VII pre-*Gross*. Such parity reflects the Congressional intent evident in the original passage of the ADEA—namely, that age discrimination should be no more permissible than discrimination based on race, color, sex, religion, or national origin.³³

The bill would make clear that the ADEA may be violated any time age is a motivating factor for the complained of practice; that plaintiffs can use any evidence, direct or circumstantial, to make that showing; and that every method of proof, including the *McDonnell-Douglas*³⁴ framework, can be used to prove a violation. In addition, the bill would have other important effects:

- The bill would apply to the ADA and other Federal employment discrimination laws, thus ensuring more uniform standards and protection across various statutes.
- The bill would apply to prohibitions against retaliation, including the protections against retaliation contained in title VII.
- The bill would ensure that where an employer shows that it would have taken the same action in the absence of discrimination, plaintiffs will be entitled to the same remedies in mixed-motives cases under the ADEA and other employment discrimination laws as title VII plaintiffs now may recover.

The EEOC believes, however, that a bill like S. 1756 is just the first step that is needed to ensure that older workers are protected against age discrimination. As already noted, *Gross* reflects the general view of the Supreme Court that age discrimination claims are qualitatively different than race or sex discrimination claims, and that protections and legal standards under the ADEA are not the same as those in title VII. For example, the Supreme Court recognized in *Smith v. City of Jackson* that the disparate impact theory of liability is available to age discrimination plaintiffs, but at the same time also determined that the scope of disparate impact liability is narrower under the ADEA than under title VII.³⁵ Similarly, while the Supreme Court has held that a policy that facially discriminates on the basis of sex is unlawful even if an employer has benevolent motives for the policy,³⁶ the Court upheld, in *Kentucky Retirement System v. EEOC*, a disability retirement plan that was explicitly based on age, reasoning that the differences in treatment were not “actually motivated” by age.³⁷ These decisions have placed victims of age discrimination at a legal and practical disadvantage compared with victims of other forms of discrimination, and thus have impeded effective enforcement of the ADEA.

THE EEOC’S RESPONSE AND ENFORCEMENT ROLE

As the Nation’s chief enforcer of protections against age-based employment discrimination, the EEOC is especially concerned by these developments. In response, we have sought to determine how best to use our limited resources to counteract (or at least contain) the damage done by the deteriorating legal landscape for victims of age discrimination.

The recent spate of case law restricting the rights of age discrimination plaintiffs, coupled with the rise in age discrimination charges, prompted the EEOC to hold a public Commission meeting on these issues in July 2009.³⁸ At this meeting, wit-

³² *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 964 (7th Cir. 2010).

³³ See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting the “important similarities” between the two statutes, “both in their aims—the elimination of discrimination from the workplace—and in their substantive provisions”).

³⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³⁵ 544 U.S. at 240.

³⁶ *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199–200 (1991).

³⁷ 128 S. Ct. 2361, 2367 (2008).

³⁸ The transcript and other materials from this meeting can be found at <http://www.eeoc.gov/eeoc/meetings/7-15-09/index.cfm>.

nesses discussed Supreme Court decisions, including *Gross*, that have significantly undermined the protections that Congress intended to confer when it enacted the ADEA. Experts at the meeting urged a variety of potential enforcement and policy solutions to counteract these adverse rulings, such as issuing regulations to fully define the components and burdens of pleading and proof of the “reasonable factor other than age” defense to an ADEA disparate impact claim, developing policy guidance to make uniform the relevance and weight of ageist comments, and using the EEOC’s rulemaking authority under the ADEA to clarify the factors announced by the Supreme Court in *Kentucky Retirement*.

The EEOC is carefully evaluating these and other ideas, and implementing them as appropriate. In February 2010, the Commission issued a notice of proposed rulemaking to address an employer’s “reasonable factors other than age” defense to an ADEA disparate impact claim. This proposed regulation clarifies the circumstances under which an employer may adopt a facially neutral policy that disproportionately harms older workers. It also explains the steps that employers need to take to minimize the potential for age-based stereotyping when managers are granted wide discretion to engage in subjective decisionmaking.³⁹

The Commission will continue to use all available means at its disposal—including issuing regulations and policy guidance, providing outreach and training, conducting administrative enforcement, and litigating ADEA cases—to safeguard equal employment opportunity for older workers. However, these tools alone may no longer be sufficient to the task. As some of the experts at the EEOC’s recent public meeting noted, a legislative response now is needed to overcome recent legal setbacks, and to restore the original potency and promise of the ADEA.

To that end, the Commission stands ready and eager to help this committee with technical assistance on S. 1756—and on any future related legislation.

CONCLUSION

Thank you again for inviting me here today to testify on this very important issue. I look forward to your questions.

The CHAIRMAN. Thank you very much, Ms. Berrien.

Let me turn to a part of your testimony and—I just want to get it straight here—that the Supreme Court—I’m referring to your written testimony.

Ms. BERRIEN. Yes.

The CHAIRMAN. The Supreme Court, as you said, subsequently held that a title VII plaintiff could rely on either direct or circumstantial evidence to request this mixed-motives instruction. That was in *Desert Palace, Inc. v. Costa*, a 2003 case.

Then, you go on to point out that lower courts were split as to whether ADEA plaintiffs needed to present direct evidence to obtain a mixed-motives instruction.

Is that not the reason that the court granted cert in the first place—

Ms. BERRIEN. That’s correct.

The CHAIRMAN [continuing]. Was to see whether or not they should be parallel with title VII in terms of direct or circumstantial evidence?

Ms. BERRIEN. In that regard, yes. Yes, sir.

The CHAIRMAN. Then I read in the next paragraph that the court didn’t even reach that question.

Basically, you’re saying that this issue—the “but-for” issue, the one that comes before that—

Ms. BERRIEN. Yes.

The CHAIRMAN [continuing]. Was not even presented to the court. It was never briefed by the parties or amicus curiae briefs, and the

³⁹These proposed regulations are available at <http://edocket.access.gpo.gov/2010/2010-3126.htm>.

counsel for the United States urged the court, during oral argument, not to reach that issue.

Ms. BERRIEN. That's correct. The solicitor general in the argument before the court did raise the fact that the issue, but for causation, was not briefed and properly before the court and raised concerns about the decision or a possible decision that was based on that ground.

The CHAIRMAN. I just wanted to clear that up just for the record.

Now I want to get more into what's happening out there. You say that there's a big surge in ADEA charges and the increasing prevalence of age discrimination. Do you have good data on that at EEOC? I mentioned that there's been a three-fold increase. Is that correct?

Ms. BERRIEN. Yes. What our charge data shows is that, from the decade between 1999 and 2009, age discrimination charges, as a percentage of all charges of discrimination filed with the commission, have risen from about 18 percent of the charges we received to now being roughly one in four of the charges we have received or 25 percent.

And perhaps of greatest interest, in relation to this bill, there has been a very dramatic increase in the number of age charges that stem from a firing or a discharge or a termination of employment, and that figure has increased 50 percent.

The CHAIRMAN. Why does the EEOC need S. 1756? I know you're supporting it, but can't you do this without this bill? Can't you take care of this at the EEOC?

Ms. BERRIEN. We have concerns. I would say they are two-fold.

One, beyond our immediate cases or impact on immediate cases that the commission is litigating, more broadly, we do follow the trends and developments in the law. And in the year since the *Gross* decision was announced, there are two worrisome developments from the standpoint of the commission and signs that the *Gross* decision not only will impact age-discrimination plaintiffs by raising the standards under which they must litigate, but also that it may affect other people who are victims of discrimination of other forms.

Particularly the Seventh Circuit's decision in the Serwatka case indicates that the *Gross* holding might now be applied in Americans With Disabilities Act cases.

I also noted, in both my written testimony and my statement today, that there have been some courts that have moved from the *Gross* standard—which we believe is already demanding enough, more demanding than the prior standard—and have even elevated it further to say that age must be the sole cause for a discharge or for an adverse employment action.

And one consequence of that is that people who have been discriminated against on multiple illegal grounds—for example, race and disability and age—are being forced, essentially, to choose and to abandon age claims, even if they might otherwise be valid claims.

The CHAIRMAN. Thank you very much, Ms. Berrien.

Ms. BERRIEN. Yes.

The CHAIRMAN. Senator Enzi.

Senator ENZI. Yes. Thank you. Your testimony is very helpful.

Ms. BERRIEN. Thank you.

Senator ENZI. You gave the percentages there. It would be helpful if we had some more exact percentages and actual numbers as well.

Ms. BERRIEN. Of course.

Senator ENZI. I find sometimes when the economy is changing that some of those numbers are kind of forced, particularly in the percentage category.

Ms. BERRIEN. Of course. We would be happy to provide any information you would like, Senator.

Senator ENZI. Thank you.

I do have a question that I am going to be asking people whenever we are having a labor issue, and that question is have you acted as an employer, manager in a private-sector, non-governmental-funded workplace?

Ms. BERRIEN. I was a manager in the non-profit sector.

Senator ENZI. OK. Thank you.

As S. 1756 appears to provide that, even in a mixed-motive case where the employee has no remedy because the employer has proven it would have taken the complaintive action in any case, the employer's lawyer may still be entitled to an award of his or her legal fees.

Do you think there may be a risk that a provision awarding attorneys' fees, even when the attorney has obtained no relief for his or her client, could artificially increase the amount of litigation or artificially reduce the likelihood of settlement?

Ms. BERRIEN. Senator, I believe that the standard that would apply in order for a plaintiff's lawyer to recover fees is that they had to establish—they have to be a prevailing party on a question of law in the case, although they may not receive monetary relief.

In fact, in the commission's cases, monetary relief is often a small part relative to the other forms of relief—injunctive relief, orders from courts or settlement agreements that are essentially designed to change practices going into the future.

The lack of non-monetary relief is not at all, in my view—or in the view of the law, more importantly—equivalent to no relief. I think there may be a confusion of the standard in that respect.

Senator ENZI. Appreciate that. I'll take a closer look at it.

Title VII cases and Age Discrimination in Employment Act—ADEA—cases, are both within the purview of the EEOC, but a number of statutes that would be affected by S. 1756 plainly are not, on its face, as S. 1756 would effect statutes such as the National Labor Relations Act that are enforced by independent agencies and the Family Medical Leave Act that are enforced by Cabinet-level departments.

Do you think it's prudent to consider legislation effecting all these agencies and departments without their input?

Ms. BERRIEN. Senator, the testimony here concerns this legislation, and we have, indeed, indicated that if there is any form of assistance that we can provide to the committee, if any clarification would be useful or any additional concerns are raised, we stand ready to do that.

I believe that this legislation really does go precisely to the issues that were raised in the *Gross* case in the age-discrimination context.

Senator ENZI. OK. To change again, can employment statistics alone constitute sufficient circumstantial evidence to prove an improper motive and under what circumstances?

Ms. BERRIEN. I am sorry, Senator. I didn't hear your question.

Senator ENZI. Can employment statistics alone constitute sufficient circumstantial evidence to prove an improper motive?

Ms. BERRIEN. No. And that is not the case in any of the existing law. The statistics are relevant. And the statistics may raise an inference of discrimination, but courts require more than a mere statistical showing, recognizing that the Congress has consistently indicated concerns about employers over-correcting and doing things that might be discriminating against other people in the workplace.

Senator ENZI. Really appreciate your concise answers.

I would mention that Senator Harkin earlier used statistics. That's one of the reasons for this question. He said that older people have higher unemployment numbers.

I remember when I was mayor—that was clear back when I was 30—that most of the people that came to Gillette, Wyoming, which was having a boom, were young people. And I was kind of curious about that.

The reason, as it turned out, is that most people that are older already have a house, have a lot of friends in the community that they are in and expect to be the first hired back. So they don't move to where the job is. They stay where the unemployment is, and that drives up the statistics a little bit, too.

I appreciate the chance to ask questions, and I am going to have to leave for another meeting.

I would just say, my friend, that in cases like this, other things, the closer the statistics get to 100 percent, the more relevant they are.

[Laughter.]

The CHAIRMAN. Senator Casey.

SENATOR CASEY

Senator CASEY. Thank you very much.

I wanted to say, first of all, thank you for your testimony and your work.

Just by way of background—and it informs some of the lines of questioning that I will pursue in the short amount of time we have—when I was a young lawyer, one of the first sets of cases that I worked on were cases like age cases or were age cases, were cases involving discrimination.

At that time, I was working with a senior member of a small law firm in my home town of Scranton, Pennsylvania, and didn't develop an expertise in this area, but was exposed enough to these kinds of cases that I had a sense of the statutory basis for age-discrimination cases, some of the case law.

What really became apparent to me at that time—and I think it is relevant to this discussion—is how difficult these cases were to litigate from the perspective of the plaintiff all those years ago—

this would be in the early 1990s—even under the old standard where you didn't have the case that we are discussing today.

I want to first of all highlight one statement from your testimony. It is in the second paragraph, and I want to highlight this to make sure I understand this.

Based upon your analysis of the state of law after *Gross*—you say, in the middle of that second full paragraph “—even if a defendant admits, ‘admits’, that it took an adverse employment action in part, “in part”, because of the plaintiff’s age—unless the plaintiff can show that the defendant would not have made the same decision anyway—” that is the current state of the law.

In other words, even if the plaintiff admitted that age was part of their decision-making process, that is not enough for the plaintiff to prevail. Is that correct?

Ms. BERRIEN. That is correct. The defendant in the age case now could even admit that age was a factor, but if it is one among a number of factors, the plaintiff is still required to show that the decision would—It is very difficult to describe it concisely, but, essentially, the burden still remains with the plaintiff to essentially isolate age as the reason.

The standard, before *Gross*, recognized that, where age was a motivating factor, that the burden ought to then be the employer’s to prove that it was not the reason for the action.

Many employment cases do not present as there is only one reason or it is clear to isolate the reason and the discriminatory reason is alone and stands alone.

As you will hear, I believe, from Mr. Gross, in his case, age was one of the reasons, but there were also other reasons cited, and it is that citation of other reasons that, in the past, would have shifted the burden to the employer and now remains the burden of the plaintiff.

In effect, the plaintiff has to prove a negative, which is very difficult.

Senator CASEY. As I said before, these are tough cases from the plaintiff’s side, even under the old standard. I think maybe the popular image of this kind of a case is that papers are filed at a courthouse and before you know it, you are in front of a jury and the rest is history.

You have to file papers and you have to get a lawyer to do that before you file and then you have to be able to expend money ahead of time—either you or your lawyer—for discovery costs.

The other thing, which is sometimes skipped over, is the fact that you do not just file in Federal court and then you are off to the races. You have to exhaust all your remedies. You have to file with the EEOC and go through that process—or with the relevant State agencies. So it’s a long process.

Some may say, on the other side, well, that happens with a lot of cases. The length of the case does not tell you enough about it.

One of the things which I think is not clear in the popular notion of what this is all about is you rarely have that statement that just jumps off the page in a deposition transcript where the employer says, I did not hire John because he was too old. It is always very subtle.

I think it is over time that a practiced or learned behavior by some employers—not all, but some employers—to avoid using language which is pretty clearly discriminatory.

I think—and I am running out of time—but I have at least three problems with where the state of the law is.

First of all, these cases are complex to begin with, even under the old standard.

Secondly, have the economic trauma that workers are living through right now where older workers are losing their jobs at higher numbers and likely being discriminated against to a greater degree.

The third complicating factor is, of course, the decision. I think what you said in your testimony—and I will end with just reading this, because I know we are out of time—but you said—in analyzing why we need this bill, you said, “S. 1756 would legislatively overturn *Gross* to ensure that ADEA plaintiffs receive the same core protection and are subject to the same basic standards of causation with respect to disparate treatment claims as title VII plaintiffs.”

In essence, what we are trying to do is be consistent with other cases, principally title VII cases. We are returning to an old standard. The bill is not creating a new standard. It is really returning to an older standard, which I think even that standard was pretty tough for plaintiffs.

Thank you for your testimony.

Ms. BERRIEN. Thank you.

The CHAIRMAN. Thank you, Senator Casey.

Senator FRANKEN.

Senator FRANKEN. Thank you, Ms. Berrien, for your work.

Ms. BERRIEN. Thank you.

Senator FRANKEN. I am going to do a hypothetical. You were saying that in the Seventh Circuit that they were applying the *Gross* standard to claims of discrimination because of disability.

Ms. BERRIEN. Yes, in one case they have.

Senator FRANKEN. And they have held that that was OK.

Ms. BERRIEN. Yes.

Senator FRANKEN. Let me do a hypothetical. Let us say you go in there and the employer says, in cross examination, Was there any reason for firing this person because of their age?

Oh, yes, yes. That was about probably 30 percent of it.

How about because of their disability?

Oh, yes, that, too. That was about 30 percent.

What was the other 40 percent?

Inability to adapt. Social networking was not working well enough. Sales down. Something like that.

Could that person, then, under the *Gross* ruling, just say, OK. You don't prevail?

Ms. BERRIEN. Senator, I think the way that it would often present is that a person will come in. They will file their charge with the commission. If and when they reach court and the case has not settled in the period it was with the commission, they will get to court and they will say, I was fired. I believe it was because of my age. And then they will present a range of evidence that they believe supports that claim.

They may say, for example, the kinds of statements that I included in my testimony earlier. I was regularly called the old guy in the office. The managers and the people who fired me said that I was not keeping up with the times and they needed some younger folks around to do that. That kind of evidence is one type of evidence.

Senator FRANKEN. Yes. I am talking here about where the employer even acknowledges it, but he is saying it was not 100 percent. It seems, the logic of the Seventh Circuit and of the *Gross* decision that the employee would not be ruled in his favor.

Ms. BERRIEN. Right. Before *Gross*, the kinds of facts you just suggested would have left the door open for the plaintiff's lawyer to ask for—if it was a jury trial—a jury to be instructed about mixed-motives, meaning for the jury to hear that if age was one of the reasons—it doesn't have to be the only reason—then you can find for this plaintiff.

Senator FRANKEN. Right. But now—

Ms. BERRIEN. Now, the standard, in the face of that same evidence, would be, if the employer is able to show that they would have made the same decision anyway—Yes, there was this agist comment, or, Yes, there was other evidence presented that age discrimination occurred, or that some action happened because of the plaintiff's age, but, in fact, there was another problem, there was—

Senator FRANKEN. The other problem was a disability, but, still, that was not enough, because the disability was not the “but-for” problem either.

Ms. BERRIEN. If the employer—

Senator FRANKEN. What I am saying is the logic of this seems pretty perverse.

Let me move on to something. Last year, I passed an amendment to the Defense appropriations bill that prohibits taxpayer money from going to contractors who force their employees to arbitrate discrimination claims. This came out of the story of Jamie Leigh Jones, a young Texas woman who was gang raped by her coworkers while working for KBR in Iraq.

Then she was told that she could not sue KBR for sexual assault and sexual harassment. She had to arbitrate it in a secret tribunal paid for by KBR.

Does the EEOC have a position on mandatory arbitration of civil rights claims? I think it is harmful to enforcement of civil rights claims, as almost anything else is, the mandatory arbitration. Does EEOC have an opinion on that?

Ms. BERRIEN. Yes. We have issued statements about mandatory arbitration and about the risk of rights—that mandatory arbitration agreements could interfere with the appropriate vindication of rights and the appropriate protection of rights under Federal law.

Senator FRANKEN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Hagan.

SENATOR HAGAN

Senator HAGAN. Thank you. Thank you, Mr. Chairman.

Mrs. Berrien, thank you for being here.

Ms. BERRIEN. Thank you, Senator.

Senator HAGAN. I am concerned about how that the laws passed by Congress can impact small business, which are at this point in time, certainly the drivers of the economic growth and job creation. And some people believe that the *Gross* decision would actually be good for small business.

My question is, in your opinion, how do you think the proposed legislation would impact small business, and could there be more paperwork, litigation, expense? Are there other ways that this legislation might actually impact small business, from your perspective?

Ms. BERRIEN. In our experience, both small business and larger industries or employers look to the commission for guidance about how to comply with the laws that Congress has passed. We have a very targeted and widespread outreach program to try to reach those businesses, to try to inform them about what the law requires.

One of the risks, frankly, of the *Gross* decision is it makes those standards more confusing. It sets one standard for age cases. It sets different standards for race, national origin, religion cases, for example.

For a small business, that sort of difference in what kind of conduct would be possibly illegal or what kind of conduct might subject them to liability in court is actually a confusing possibility.

We do aggressive outreach to try to make sure that all businesses understand what is required under all the laws we enforce, and I believe that businesses of all size are not only aware, but often in complete accord with us that workplaces that are inclusive and do not exclude employees for arbitrary reasons are what are ultimately best for business.

Senator HAGAN. We certainly do not want age discrimination in small business at all, but I am glad to hear about your outreach, although I guess I am not that familiar with it. How prevalent is it?

Ms. BERRIEN. We actually did many events that were specifically targeted to educating businesses and the public about age discrimination specifically. I would be happy to provide specific data about the number of events we have done around the country and in your State as well.

Senator HAGAN. I think that that is good, because I think we have got to help educate especially the small businesses in this area.

Ms. BERRIEN. I agree.

Senator HAGAN. Sometimes businesses make a calculation to offer early retirement incentives to older workers when the businesses need to downsize. I believe it is important to give workers the ability to make their own financial calculations and leave the final decision up to the worker in those situations.

Could this court case become a factor when companies are deciding about whether to offer early retirement plans or what kind of packages to offer? And, in this economy, I certainly would not want to see companies offer less generous early retirement packages to their older employees.

Ms. BERRIEN. Yes.

Senator HAGAN. Can you comment on that?

Ms. BERRIEN. One of the reasons we believe that the number of age charges has risen is in part because people are working longer, sometimes out of complete choice—free choice—sometimes out of economic necessity. And so we do have more older workers in the workforce.

Your concern is an important one, and one of the things that the Age Discrimination in Employment Act recognizes is, first of all, while it is sometimes true that older workers are the top compensated workers or people for whom there may be economic interest in moving to a retirement status, that is not always true. There are older workers who are less well compensated. There are younger workers who are sometimes compensated more highly.

The core of the Age Discrimination Act is that age is not the proxy for making what is essentially an economic decision, if that is what happens.

Finally, there are protections, and employers are able, for example, to seek waivers where an employee chooses to retire or to accept some sort of an incentive retirement package and they do not have to do that at the risk of a later lawsuit if they obtain an appropriate waiver and the employee is informed properly about that. So there are protections, I believe, on both sides.

Obviously, the laws in this area are balancing some very important interests, the legitimate employer prerogatives and economic interests on the one hand, but the right of the employees and workforces to be free from illegal discrimination.

Senator HAGAN. Thank you.

The CHAIRMAN. Thanks, Senator Hagan.

Ms. Berrien, thank you very much for being here. Thank you for your testimony and in answering these questions.

Ms. BERRIEN. Thank you.

The CHAIRMAN. Moreover, I personally want to thank you for your great leadership at the EEOC. Keep up the good work.

Ms. BERRIEN. Thank you very much. Thank you for the opportunity to be here.

The CHAIRMAN. Thanks, Ms. Berrien.

I will now turn to our second panel, and that is Mr. Jack Gross, Ms. Helen Norton, Gail Aldrich and Eric Dreiband (Dree-band) or Dreiband (Dry-band). I will have to ask him exactly how to pronounce that.

I will introduce the panel then. Mr. Jack Gross was born and has lived his entire life in Iowa. He is a graduate of Drake University and worked for the Iowa Farm Bureau for over 30 years.

He is here to testify about, obviously, his first-hand experience with age discrimination and his case that went before the Supreme Court.

Ms. Helen Norton. Professor Norton is an Associate Professor at the University of Colorado School of Law. Prior to that, Professor Norton served as Deputy Assistant Attorney General for Civil Rights at the U.S. Department of Justice where she managed the Civil Rights Division's Employment Litigation, Educational Opportunities and Coordination Review Sections.

Gail Aldrich is a member of the AARP Board of Directors. Prior to joining AARP, Ms. Aldrich served as Chief Membership Officer for the Society for Human Resource Management and was Senior

Vice President and Chief Administrative Officer of the California State Automobile Association.

Eric—is that Dreiband (Dree-band) or Dreiband (Dry-band)?

Mr. DREIBAND. Dreiband (Dry-band).

The CHAIRMAN. Dreiband. Eric Dreiband is a partner at the law firm of Jones Day. From 2003 to 2005, Mr. Dreiband served as a general counsel of the EEOC. Prior to becoming EEOC general counsel, Mr. Dreiband served as Deputy Administrator of the U.S. Department of Labor's Wage and Hour Division.

I thank you all for being here. Your written testimonies will be made a part of the record in their entirety, and I would like to ask if you could just sum up in 5 minutes as we go down the panel.

First, we turn to Mr. Gross. I know you wish it were otherwise, but your name has now become—how would I say—engraved in those infamous—in the litany of Supreme Court cases that people refer to that changed some settled law and has now become the focus of legislative interest in changing and overcoming that Supreme Court decision.

Mr. Gross, thank you for being here and please proceed.

**STATEMENT OF JACK GROSS, CPCU, CLU, ChFC,
DES MOINES, IA**

Mr. GROSS. Thank you, chairman and committee members. I would like to say again, Senator Harkin, how pleased and proud I am to have a fellow Iowan leading the charge on this important cause.

It is an honor for me to be here and to be given an opportunity to speak out on behalf of millions of older workers, all too many of whom, like myself, have experienced age discrimination.

You invited me here to share my story, since I have become the name associated with age discrimination. Talk about unintended consequences. I certainly never imagined that my case would end up here.

I would like for you to keep in mind that while I think my case is personal and unique, in effect, it is one that is being duplicated millions of times around the country almost every day and ask that you envision those millions of people, who are also depending on you, as standing behind me, at least in spirit.

Seven years ago, much to my surprise, my employer, Farm Bureau Insurance or FBL suddenly demoted all claims employees who were 50 and over and who were supervisors and above.

I was included in that sweep, even though I had 13 consecutive years of performance reviews in the top 3 to 5 percent of the company and had dedicated most of my career to making Farm Bureau a better company. My contributions were exceptional that were well documented and a jury had a chance to hear all of those.

Since age was the obvious reason, I filed a complaint, and 2 years later, a jury spent an entire week listening to all of the testimony, seeing all the evidence and being instructed on the law as you wrote it.

The verdict came back in my favor, in spite of what my attorneys called a scorched-earth defense, and I thought the ordeal was over in 2005. As we now know, that was just the beginning.

After that, FBL appealed and got my jury verdict overturned. Even though I had proved my case by a preponderance of the evidence, the appeals court said that, in their opinion, I did not show the right kind of evidence or, as they said, so-called direct evidence. I am still not sure I know what all that means.

That left us no choice but to appeal it to the Supreme Court, and we were obviously thrilled because getting to the Supreme Court is pretty hard to do, and when they accepted certiorari on our case, we were, quite frankly, very optimistic knowing that 30 decades of court precedent and legislative action had done nothing but reinforce the laws on age discrimination.

When we got there, however, the Supreme Court broke with their own protocol and allowed defense to advance an entirely new argument when it had not been briefed, nor had we been given an opportunity to prepare a rebuttal.

In other words, they hijacked my case as a vehicle to water down the Age Discrimination in Employment Act, a law written by the branch of government closest to the people when I was 19 years old.

My wife and I—Marlene—came to DC last year believing our highest court would uphold the rule of law and consistently apply it to all areas of discrimination. Instead, in effect, they created an anarchy of discrimination, where title VII cases were one level or one tier and all other types of discrimination, including age, were a second lower tier and required a different level of proof.

To me, discrimination is discrimination and it feels pretty much the same regardless of whether it was because of gender or race or because you happened to grow old, all things beyond a worker's control. We interpreted the law to mean that there should be equality in the workplace as long as you are willing and able to do the job, regardless of circumstances that are beyond your control.

Since the Supreme Court's decision in my case, I have been particularly distressed over the collateral damage that has now been inflicted on others because of the court's ruling. I hate having my name associated with the pain and injustice now being inflicted on older workers because it is nearly impossible to provide the level of proof now required by the court.

I have to keep reminding myself that I am not really the one who changed the law. Five Supreme Court Justices did, and since it was a five-four split, you could probably argue one person actually changed it.

I believe Congress has a long history of working together on a bipartisan basis to create and maintain a level playing field in the workplace. The ADEA is but one example. It simply states that everyone has a right to be treated equal in employment.

I am here to urge you, on behalf of myself and millions of older Americans who want to continue working to pass this bill in the same bipartisan spirit you have shown in the past.

I grew up in a small town in southern Iowa. My dad was a highway patrolman, my mother a school teacher. I overcame 25 years of chronic health problems to achieve my education and success.

Marlene, my wife and I—to whom I have been married for 43 years—started off with absolutely nothing but a strong work ethic and a determination to build a good life, and we did, against all

odds. We have two wonderful grown children and two delightful grandchildren who are the joys of our life.

Frankly, I agonized over this decision from the start. My wife and I set down, we prayed about it. We decided it had to be done, that we left the outcome in God's hands. And if my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life, and, by extension, perhaps also for yours.

My advice from the folks back home was to just come out here and tell you to just get her done, and message delivered.

Thank you very much.

[The prepared statement of Mr. Gross follows:]

PREPARED STATEMENT OF JACK GROSS, CPCU, CLU, ChFC

I am honored to be here and to be given an opportunity to speak out on behalf of the baby boomer generation, many of whom like me, have experienced age discrimination. You invited me here to share my story since I have, because of a Supreme Court ruling, become the new name associated with age discrimination. I am happy to do so.

To me, of course, my story is personal and unique. I ask you to keep in mind, however, that key aspects of my story have, and are being duplicated millions of times across this country. Please, envision those millions who are depending on you standing behind me today. In spirit, they are.

I certainly never imagined that my case would end up here when it all started over 7 years ago. That is when my employer, Farm Bureau Insurance, or FBL, merged with the Kansas Farm Bureau. Apparently not wanting to add any more older workers, they offered the Kansas claims employees who were over 50 a buyout to purge them from the company. At the same time, they just demoted all claims employees in the Iowa operation who were 50 and over and had supervisory or higher positions. Only one person who was under 50, but approaching it, was demoted.

Being 54 at the time, I was included in that sweep, even though I had 13 consecutive years of performance reviews in the top 3-5 percent of the company, and had dedicated most of my working career to making Farm Bureau a better company. My contributions were exceptional and well documented. Not least was managing what Farm Bureau called its biggest undertaking ever. In 1997, I was asked to take all of our existing property and casualty policies, re-write them in a way they could be easily understood, and combine them into a totally unique package policy unlike anyone else had in our market. And, they asked me to do it in a year. I did, and it is still their exclusive and very popular modular product, upon which they are basing their future. That was only one of many valuable contributions I made to FBL, but my time is limited. The jury that decided my case heard all about them.

Since age was the obvious reason, I filed a complaint, and 2 years later a Federal jury spent a week listening to all the testimony, seeing all of the evidence, and being instructed on the ADEA. They were also instructed to rule in my favor if I had proved by a preponderance of evidence that age was a motivating factor, and also that they should rule in favor of FBL if they could find any reason, other than age, for my demotion. The verdict came back in my favor, and I thought the ordeal was over in 2005. As we now know, it was just the beginning.

After that, FBL appealed and got my jury verdict overturned on what I consider a technicality in the jury instruction. Apparently, most courts said that, in a so-called mixed motive case, any kind of evidence was sufficient. But, the 8th Circuit said I had to have so-called "direct" evidence. That left us no choice but to appeal it to the Supreme Court.

We were optimistic and grateful when the court accepted cert on whether direct evidence was required to get a mixed-motive instruction. Precedent and legislation, we felt, were overwhelmingly on our side. At the hearing, however, the Supreme Court broke their own protocol and allowed the defense to advance an entirely new argument. It had not been briefed, nor had we been given an opportunity to prepare a rebuttal. To make a long story short, the court essentially hijacked my case and used it as a vehicle to water down the ADEA, a law written by the branch of government closest to the people. Editorials and bloggers dubbed me this year's Lily Ledbetter. (I take that as a compliment.)

My wife and I came to this town last March expecting to see our high court at its best. We believed in the rule of law and its consistent application to all areas of discrimination. Needless to say, we were disappointed, disillusioned, and quite frankly embarrassed by the arrogance we witnessed. I felt the High Court had pulled a “bait and switch” on me.

As it stands now, I have a new trial scheduled for November of this year, nearly 8 years after the unjustified and unlawful demotion. In that time, witnesses have moved out-of-state, memories have faded, and the court has changed the rules. My trust in the judicial system is shattered. I used to believe that our courts tried to uphold and sanctify the decisions of our citizen juries, instead of second-guessing their ability to understand the letter and spirit of the law.

That is the story of my discrimination experience. I do not have time to share much of my personal background, so I will be very brief. I grew up in a small town in southern Iowa. My dad was a highway patrolman and my mother a school teacher. I overcame chronic health problems to achieve my education and success. My wife, to whom I have been married for 43 years, and I started with absolutely nothing but a determination to build a good life, and we did against all odds. We have two wonderful grown children and two grandchildren who are the lights of our lives. I am very proud of my family and of my professional accomplishments.

Since I was integrally involved in defending FBL for many years as a claims manager, I am probably an unlikely candidate to be here. We believe that is the reason FBL has defended this case so aggressively, and that it explains the intensity of the retaliation I endured over the past 7 years while the litigation proceeded. I finally retired last December because the stress of that retaliation was causing me health problems.

Since the Supreme Court’s decision in my case, I have been particularly distressed over the collateral damage that is being inflicted on others because of the Court’s ruling. I hate having my name associated with the pain and injustice now being inflicted on older workers, because it is nearly impossible to provide the level of proof now required by the Court. I have to keep reminding myself that I am not the one who changed the law. Five powerful men in black robes did it.

As a citizen, I believe this body—Congress—has a long history of working together, on a bi-partisan basis, to create and maintain a level playing field in the workplace. The ADEA, and the ensuing legislation that reinforced its intent, is but one example. As a citizen, it clearly says to me that Congress intended to put an end to discrimination in employment practices. I believe the same is true for most jurors. We do not parse individual words the way judges and some attorneys do. We know what “is” is. The ADEA simply states that it shall be unlawful to discriminate because of age. We get it. This Supreme Court apparently does not. Justice Thomas challenged you to state that age has to be “a motivating factor” if that is what you intended. The Protecting Older Workers Against Discrimination Act does that, and I urge you, on behalf of myself and the millions of baby boomers behind me who have been paying the bills for a generation and want to continue working, to pass it in the same bipartisan spirit you have shown in the past.

Finally, one of my jurors, during voir dire, said that she just could not understand how a man could sue a company that gave him a job. Her words resonated with me. I agonized over the decision to pursue this. The folks standing behind me understand. My wife and I prayed about it, decided it had to be done, and then we left the outcome in God’s hands. If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God’s plan for my life.

Thank you.

The CHAIRMAN. Mr. Gross, thank you very much, a very poignant and straightforward presentation.

Ms. Norton, welcome and, again, please proceed.

STATEMENT OF HELEN NORTON, PROFESSOR, UNIVERSITY OF COLORADO LAW SCHOOL, BOULDER, CO

Ms. NORTON. Good morning. Thank you, Mr. Chairman, and thank you, Senator Franken, for the opportunity to join you today.

The Supreme Court’s 2009 decision in *Gross* significantly undermines older workers’ ability to enforce their rights under the ADEA, and it threatens to do the same for workers seeking to en-

force their rights under a wide range of other Federal employment laws.

In response, S. 1756 would replace the court's new rule in *Gross* with title VII's longstanding causation rule, a rule that more effectively furthers Congress' interest in removing and deterring barriers to equal employment opportunity.

As you know, current Federal law prohibits job discrimination because of certain characteristics. For example, the Age Act prohibits employers from discriminating against an individual because of such individual's age, and these causation provisions require proof of a nexus or a connection between the defendant's discriminatory behavior and the adverse action experienced by the plaintiff.

Employment decisions, like so many human decisions, are sometimes driven by multiple motives, and these mixed-motive cases raise a challenging causation question: When multiple factors motivate an employment decision, some of which are discriminatory and some of which are not, under what circumstances should we conclude that the employer made that decision because of discrimination, in violation of Federal law?

In answering this question, the Supreme Court's decision in *Gross* departed from 20 years of precedent to articulate a brand new causation standard for the ADEA. Under the court's new rule, which adopts an approach that had been rejected both by an earlier Supreme Court in 1989 in *Price Waterhouse*, and by Congress in the Civil Rights Act of 1991.

Under the *Gross* rule, instead, the burden of persuasion always remains on the plaintiff, not only to prove that age motivated the decision, but also to prove that age was the "but-for" cause of the decision.

Proving that age was the "but-for" cause of an action requires us to imagine a situation identical to the identical facts that really happened, except that we remove the defendant's wrongful behavior—here it is age discrimination—and then we ask whether the employer would have taken the same action even if it had behaved correctly in not considering age.

Requiring the plaintiff to bear the burden of reconstructing that sort of hypothetical scenario is especially difficult after the fact when the defendant is in a much better position than the plaintiff to show how it would have acted and what was in its mind at the time of the decision.

Here is an example: An older worker applies for a job for which she is qualified only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them less creative, less energetic and less productive.

Suppose, too, that the employer ultimately hires another applicant who is arguably even more qualified than the plaintiff for the position. Under the court's new rule, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes—and, in fact, in response to Senator Franken's question, even if the employer admits that it relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject the plaintiff—under the *Gross* rule, the employer will entirely escape liability, unless the plaintiff can also prove that the employer would not have made the same decision absent age discrimination.

By permitting the employer to escape liability altogether for its proven discrimination, and thus giving the employer no incentive to refrain from similar behavior in the future, the *Gross* rule undermines Congress' efforts to stop and deter workplace bias.

Not only does *Gross* significantly narrow the scope of protections available to older workers under the ADEA, it threatens workers' rights to be free from discrimination and retaliation in a wide range of other contexts. Lower courts have already begun to apply the court's new standard in *Gross* to claims involving other Federal employment protections.

S. 1756 would replace the *Gross* standard with a uniform standard that furthers Congress' interest in preventing and deterring workplace bias. More specifically, S. 1756 would apply the standard adopted by Congress with respect to title VII and the Civil Rights Act of 1991, a standard proven workable after nearly two decades in operation, to other Federal laws that prohibit job discrimination and retaliation.

S. 1756 would thus make clear that a plaintiff establishes a violation of the ADEA or any other Federal employment anti-discrimination or anti-retaliation statute by proving that age or another protected characteristic was a motivating factor for an employment decision.

The burden would then shift to the employer to prove that it would have taken the same action even absent discrimination. And if the employer satisfies that burden, a court cannot order hiring, reinstatement, promotion, back pay or damages.

The employer, however, would still remain liable for declaratory and certain injunctive relief along with part of the plaintiff's fees and costs, and, most importantly, this includes something that is valuable both to the plaintiff and to the public at large. This would empower the court to issue an injunction ordering the defendant to cease and desist from continuing to engage in discrimination in the future.

If our focus is, as it should be, on stopping discrimination, empowering courts to enjoy continuing discrimination is one of the most important powers Congress can confer.

As Congress recognized in enacting the Civil Rights Act of 1991, this approach helps prevent and deter discrimination by ensuring that an employer proven to have engaged in discrimination cannot completely escape liability for their actions while leaving employers free to make decisions based on ability or any other non-discriminatory factor.

I thank you for the chance to join you today.

[The prepared statement of Ms. Norton follows:]

PREPARED STATEMENT OF HELEN NORTON

SUMMARY

The Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* significantly undermines older workers' ability to enforce their rights under the Age Discrimination in Employment Act, and threatens to do the same for workers seeking to enforce their rights to be free from discrimination and retaliation under a wide range of other Federal employment laws. Under the Court's new rule—which adopts an approach rejected both by the Supreme Court's earlier decision in *Price Waterhouse v. Hopkins* and by Congress in the Civil Rights Act of 1991—the burden of persuasion remains on the plaintiff not only to prove that age motivated the deci-

sion, but also to prove that age was the “but-for” cause of the decision. Moreover, lower courts have already begun to apply the Court’s new standard in *Gross* to claims under other Federal employment laws, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the burden of proving that such discrimination was the “but-for” cause of the decision.

S. 1756 would replace the causation rule articulated by the *Gross* Court with the causation standard long in place under title VII pursuant to the Civil Rights Act of 1991. More specifically, S. 1756 would make clear that a plaintiff establishes an unlawful employment practice under the ADEA (and any other Federal employment antidiscrimination or antiretaliation statute) by proving that age (or other protected characteristic) was a motivating factor for an employment decision. The burden of proof then shifts to the employer to establish that it still would have taken the same action absent its discrimination. If the employer satisfies that burden, it will be liable only for declaratory relief, certain injunctive relief, and part of the plaintiff’s attorney’s fees and costs, and a court may not order the hiring, reinstatement, or promotion of the individual, nor the payment of back pay to the individual. As Congress recognized in enacting the Civil Rights Act of 1991, this approach—which shifts the burden of proof to the employer to limit remedies rather than to defeat liability entirely—best achieves antidiscrimination laws’ key purposes of preventing and deterring future discrimination by ensuring that employers proven to have engaged in discrimination cannot completely escape liability for their actions. Indeed, this approach enables Federal courts to retain judicial power to order correction of the wrongful conduct in the form of declaratory and certain injunctive relief. Once the plaintiff proves that the employer engaged in discrimination and thus violated Federal law, the employer may still substantially limit the available remedies, however, by showing that it would have made the same decision in a workplace free from discrimination.

Thank you for the opportunity to join you today. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton administration, where my duties included supervising the Civil Rights Division’s employment discrimination enforcement efforts.

The Supreme Court’s 2009 decision in *Gross v. FBL Financial Services, Inc.*¹ significantly undermines older workers’ ability to enforce their rights under the Age Discrimination in Employment Act, and threatens to do the same for workers seeking to enforce their rights to be free from discrimination and retaliation under a wide range of other Federal employment laws. S. 1756 would replace the causation rule articulated by the *Gross* Court with the causation standard long in place under title VII that more effectively furthers Congress’ key interest in removing and deterring barriers to equal employment opportunity.

“CAUSATION” IN THE CONTEXT OF FEDERAL ANTIDISCRIMINATION LAW

Current Federal law prohibits job discrimination “because of” certain specified characteristics, such as race, color, sex, national origin, religion, age, genetic information, and disability.² The Age Discrimination in Employment Act (ADEA), for example, provides that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual’s age.*”³ Federal employment laws also frequently include antiretaliation provisions that prohibit an employer from discriminating against an individual “because” that individual reported potentially unlawful behavior, filed a charge of discrimination, or otherwise engaged in activity protected from retaliation under the statute.⁴ In short, these causation provisions require proof of a nexus or connection between the defendant’s discriminatory behavior and the adverse employment action experienced by the plaintiff.

In many discrimination cases, the competing parties agree that a single factor “caused” an adverse employment decision, but vigorously disagree in identifying that factor. This is the case, for example, when the plaintiff contends that his employer discharged him “because of” his age, while the employer contends instead

¹ 129 S. Ct. 2343 (2009).

² See 42 U.S.C. § 2000e-2 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101 et seq. (Americans with Disabilities Act); 42 U.S.C. § 2000ff-1(a) (Genetic Information Nondiscrimination Act).

³ 29 U.S.C. § 623(a)(1) (emphasis added).

⁴ See, e.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA).

that it acted “because of” some nondiscriminatory reason like performance. In such cases, the plaintiff bears the ultimate burden of persuading the factfinder that the decision was made “because of” age.⁵

Employment decisions—like so many decisions made by human beings—are sometimes driven by multiple motives. “Mixed-motive” claims thus raise a challenging causation question: when multiple motives inform an employment decision—some of which are discriminatory and some of which are not—under what circumstances should we conclude that the employer made such a decision “because of” discrimination in violation of Federal law?

The Supreme Court first addressed this question in 1989 in *Price Waterhouse v. Hopkins*,⁶ where six Justices interpreted title VII’s statutory language prohibiting job discrimination “because of” race, sex, color, religion and national origin to prohibit adverse employment actions motivated in whole or in part by the plaintiff’s protected characteristic. In that case, more specifically, they concluded that a plaintiff successfully proves that an employer discriminated “because of sex” when he or she has proven that sex was a motivating or a substantial factor in the employer’s decision.⁷ Upon such a showing, they further ruled, the burden of persuasion then shifts to the employer, who may escape liability “only by proving that it would have made the same decision even if it had not allowed gender to play such a role.”⁸

Congress then addressed this issue, along with several others, with the enactment of the Civil Rights Act of 1991 and its series of amendments to title VII. Congress adopted the *Price Waterhouse* Court’s burden-shifting framework, agreeing that the burden of proof should shift to the employer when the plaintiff proves that discrimination based on a protected characteristic was a motivating factor in the employer’s decision. Congress and the *Price Waterhouse* Court thus both concluded that the defendant employer is in a better position than the plaintiff employee to reconstruct history and prove whether an employer who has been proven to have engaged in discrimination would have taken the same action in a workplace uninfected by bias.

Expressing concern, however, that the *Price Waterhouse* rule still did not sufficiently deter employers from discrimination, Congress further amended title VII to make clear that a plaintiff has established a violation once he or she proves that race, sex, color, religion, or national origin was a motivating factor in the employer’s decision.⁹ Upon such a showing, the burden of proof shifts to the employer not to escape liability but to substantially reduce the plaintiff’s relief. An employer that then proves that it would have made the same decision even absent discrimination can limit available remedies to declaratory relief, certain injunctive relief, and part of the plaintiff’s attorney’s fees and costs—relieving the employer from exposure for back pay, damages, or reinstatement.¹⁰ This framework ensures both that a plaintiff is no better off than he or she would have been absent any discrimination *and* that Federal courts retain the power to enjoin the defendant’s proven discrimination through declaratory and injunctive relief, thus encouraging equal employment opportunity in the future.

The 1991 Act’s amendments with respect to title VII causation, however, did not expressly apply to the ADEA. For the approximately 20 years between *Price Waterhouse* and *Gross*, lower courts thus routinely interpreted the ADEA and other

⁵ See, e.g., *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 143 (2000).

⁶ 490 U.S. 228 (1989).

⁷ *Id.* at 241 (plurality opinion) (“It is difficult for us to imagine that, in the simple words ‘because of,’ Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision. . . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of sex’ and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.”); see also *id.* at 259–60 (White, J., concurring); *id.* at 265 (O’Connor, J., concurring).

⁸ *Id.* at 244–45 (plurality opinion); see also *id.* at 259–60 (White, J., concurring); *id.* at 261 (O’Connor, J., concurring).

⁹ See, e.g., H.R. REP. NO. 102-40(I), at 47 (1991), reprinted at 1991 U.S.C.C.A.N. 549, 585 (“If Title VII’s ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes this fundamental principle.”); S. REP. NO. 315, 101st Cong., 2nd Sess. 48–49 (1990) (describing Congressional intent to replace the *Price Waterhouse* causation standard with one that better deters discrimination).

¹⁰ See 42 U.S.C. § 2000e-2(m) (providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”); 42 U.S.C. § 2000e-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations under § 2000e-2(m) when the defendant proves that it would have taken the same action in the absence of the impermissible motivating factor).

employment discrimination statutes that borrowed title VII's language prohibiting discrimination "because of" a protected characteristic in a manner consistent with the Court's interpretation of that identical language in *Price Waterhouse*. For example, during that time, lower courts uniformly understood *Price Waterhouse* as providing the causation standard for the ADEA's prohibition of job discrimination "because of" age, thus permitting a plaintiff who proves that age was a motivating factor in an employer's decision to establish liability unless the employer could then prove that it would have made the same decision in a workplace free from age discrimination.¹¹

THE DAMAGING CONSEQUENCES OF THE SUPREME COURT'S DECISION IN *GROSS V. FBL FINANCIAL SERVICES, INC.*

The Supreme Court's 5–4 decision in *Gross v. FBL Financial Services, Inc.*¹² brought a dramatic—and unwelcome—change to this landscape. After receiving instructions consistent with *Price Waterhouse* and nearly 20 years of case law, a jury concluded that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately \$47,000 in lost compensation. The Supreme Court, however, vacated his award. Departing from 20 years of precedent, it articulated a brand-new causation standard for the ADEA that erects substantial barriers in the path of older workers seeking to enforce their right to be free from discrimination.¹³

The *Gross* Court first characterized Congress' 1991 decision to amend title VII's causation standard—but not that of the ADEA—as evidence that Congress intended the two statutes to provide different levels of protection.¹⁴ Next, after strongly suggesting that *Price Waterhouse* was wrongly decided,¹⁵ the *Gross* Court limited *Price Waterhouse* in any event as applicable only to title VII.¹⁶ It then insisted upon a new interpretation of the identical language under the ADEA, holding that the burden of persuasion never shifts to the defendant even after the plaintiff proves that age was a motivating factor in the decision. Under the Court's new rule—a rule rejected both by the *Price Waterhouse* Court¹⁷ and by Congress in the Civil Rights Act of 1991—the burden of persuasion always remains on the plaintiff not only to

¹¹For examples of lower courts' application of the *Price Waterhouse* causation standard to the ADEA in the years before *Gross*, see *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000); *Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171 (2nd Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3rd Cir. 1995); *EEOC v. Warfield-Rohr Casket Co.*, 364 F. 3d 160 (4th Cir. 2004); *Rachid v. Jack in the Box, Inc.*, 376 F. 3d 305 (5th Cir. 2004); *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003); *Hutson v. McDonnell Douglas Corp.*, 63 F. 3d 771 (8th Cir. 1995); *Lewis v. YMCA*, 208 F.3d 1303 (11th Cir. 2000).

¹²129 S. Ct. 2343 (2009).

¹³For additional discussion of the *Gross* decision and its implications, see Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POLY J. 253, 263–73 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399 (2009).

¹⁴See *Gross*, 129 S. Ct. at 2349 (“We cannot ignore Congress’ decision to amend title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”).

¹⁵See *id.* at 2351–52 (“[I]t is far from clear that the Court would have the same approach were it to consider the question today in the first instance.”).

¹⁶See *id.* at 2352 (“Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.”).

¹⁷Indeed, the *Price Waterhouse* Court explicitly rejected such a “but-for” standard when interpreting title VII’s parallel prohibition of job discrimination “because of” sex:

We take these words to mean that gender must be irrelevant to employment decisions. To construe the words ‘because of’ as colloquial shorthand for ‘but-for’ causation . . . is to misunderstand them. But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs [in title VII] in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made*.

Price Waterhouse, 490 U.S. at 240–41 (plurality opinion) (emphasis in original).

prove that age motivated the decision, but also to prove that age was the “but-for” cause of the decision.¹⁸

Proving that age was the “but-for” cause of an action requires us to imagine a situation identical to the actual facts, except that we remove the defendant’s wrongful behavior—its age discrimination—and then ask whether the employer would have taken the same adverse action against the plaintiff even if it had behaved correctly. Requiring the plaintiff to bear the burden of reconstructing such a decision-making scenario is especially difficult after the fact, as the defendant is in a better position than the plaintiff to show how it would have acted in such a hypothetical situation. As Justice Breyer explained in his *Gross* dissent: “The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.”¹⁹

Consider an example: An older worker applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them to be less energetic, less creative, and generally less productive. Suppose too that the employer ultimately hires another applicant who was arguably even more qualified than the plaintiff for the position. Under the Court’s new rule in *Gross*, even if the plaintiff can prove that the employer relied on inaccurate and stigmatizing age-based stereotypes in its decision to reject her,²⁰ the employer will escape ADEA liability altogether if the plaintiff cannot also prove that the employer would have made the same decision even absent age discrimination. In this way, the *Gross* rule permits an employer to avoid liability altogether for its proven discrimination—indeed, even when there is “smoking gun” direct evidence of discrimination—when the challenged action, though infected by discrimination, is also supported by nondiscriminatory reasons. By permitting employers to escape liability altogether for such discriminatory conduct, with no incentive to refrain from similar discrimination in the future, the *Gross* rule thus undermines Congress’ efforts to stop and deter workplace discrimination through the enactment of Federal antidiscrimination law.

Not only does *Gross* significantly narrow the scope of protections available to older workers under the ADEA,²¹ it threatens workers’ rights to be free from discrimina-

¹⁸*Gross*, 129 S. Ct. at 2352 (“We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”).

¹⁹*Id.* at 2359 (Breyer, J., dissenting); see also *id.* (explaining that *Price Waterhouse* permitted the employer an affirmative defense to liability, “not because the forbidden motive, age, had no role in the actual decision, but because the employer can show that he would have dismissed the employee anyway in the hypothetical circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation.”) (emphasis in original).

²⁰See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. . . . Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”).

²¹See, e.g., *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 455 (7th Cir. 2009) (“And if there were any doubt that Martino cannot survive summary judgment, it evaporates completely in the wake of the Supreme Court’s decision in *Gross*. The Court held that in the ADEA context, it’s not enough to show that age was a motivating factor. The plaintiff must prove that, but for his age, the adverse action would not have occurred. Martino cannot handle that. At best, he has done no more than show that his age possibly solidified the decision to include him in the RIF. But a reasonable jury could only conclude that he would have been fired anyway; age was not a but-for cause.”) (citations omitted; emphasis in original); *Geiger v. Tower Automotive*, 579 F.3d 614, 621 (6th Cir. 2009) (“*Gross* overrules our ADEA precedent to the extent that cases applied title VII’s burden-shifting framework if the plaintiff produced direct evidence of age discrimination.”); *Fuller v. Seagate Technology*, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009) (“[T]his Court interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant’s decision to terminate him. Instead, Plaintiff must present evidence establishing that age discrimination was the ‘but for’ cause of Plaintiff’s termination.”).

Some lower courts have relied on *Gross* to narrow the protections available for older workers even more dramatically. For example, some have misinterpreted the Court’s requirement that the plaintiff prove that age was the “but-for” cause of the adverse employment action to mean that the plaintiff must prove that age was the sole reason for the adverse action. See, e.g., *Culver v. Birmingham Bd. Of Education*, 646 F. Supp. 2d 1270, 1271–72 (N.D. Ala. 2009) (“*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that

tion and retaliation in a wide range of other contexts as well. Although *Gross* binds lower courts only with respect to the ADEA, the Court clearly signaled its unwillingness to interpret other statutes in a manner consistent with the *Price Waterhouse* Court's interpretation of identical language, thus destabilizing courts' longstanding expectation that Congress incorporated the same language in different employment laws because it intended consistent interpretation of those laws.²² For this reason, lower courts have already begun to apply the Court's new standard in *Gross* to claims under other laws, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the burden of proving that such discrimination was the "but-for" cause of the decision. These include cases alleging job discrimination because of disability in violation of the Americans with Disabilities Act,²³ job discrimination because of protected speech under 42 U.S.C. § 1983,²⁴ interference with pension rights in violation of ERISA,²⁵ and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.²⁶ Other courts have speculated about the application of the *Gross*

the fact he is over 40 years old was the *only* or the *but for* reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that 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); *Wardlaw v. City of Philadelphia*, 2009 WL 2461890 at *7 (E.D. Pa. 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. Even if Wardlaw's assertion that the City's motion for summary judgment rests solely on unsubstantiated evidence is correct, the City has no burden to refute her claim until she presents direct evidence that her age was the sole reason for the discrimination and retaliation she alleges to have experienced. . . . Because she cites multiple bases for her discrimination claim, including her gender, race, and disability, Wardlaw is foreclosed from prevailing on a claim for age-related discrimination."); see also *Bell v. Raytheon, Co.*, 2009 WL 2365454 at *5 (N.D. Tex. 2009) ("[T]he court will not shift the burden to the defendant to articulate a legitimate nondiscriminatory reason unless the plaintiffs show that age was the 'but-for' cause of any adverse employment actions.").

²²See *Gross*, 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (citation omitted).

²³*Serwatka v. Rockwell Automation, Inc.* 591 F.3d 957, 961 (7th Cir. 2010) ("Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into title VII suggests that when another anti-discrimination law lacks comparable language, a mixed-motive claim will not be viable under that statute.").

Note that the ADA, properly construed, authorizes mixed motive claims consistent with the standards identified in the Civil Rights Act of 1991. The ADA's enforcement provisions specifically incorporate the powers, remedies and procedures of title VII, including the title VII provision authorizing certain remedies where the plaintiff has proven mixed motive discrimination. 42 U.S.C. §12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment."). Thus, Congress clearly envisioned that relief would be available for mixed motive discrimination under the ADA, just as it is available under title VII. In addition, in amendments to the ADA in 2008, Congress changed the Act's employment provisions to bar discrimination "on the basis of disability" rather than "because of" disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, §5(a) (codified at 42 U.S.C. §12112(a)). This change to the ADA's causation language was intended to align the ADA even more clearly with title VII. See, e.g., Senate Statement of Managers for Pub. L. No. 110-325; H. REP. NO. 110-730 (I), at 6 (2008). Despite these indications of congressional intent in both the original ADA, and the ADA Amendments Act, the Seventh Circuit, as noted above, relied on *Gross* to conclude that the original ADA does not permit such claims because the ADA's employment title does not directly mirror title VII's explicit scheme concerning mixed motive claims. The court noted, however, that it was not deciding whether the ADA Amendments Act of 2008 necessitated a different result, since the amendments did not control the case before it. *Serwatka*, 591 F.3d at 962 n.1.

²⁴e.g., *Fairley v. Andrews*, 578 F. 3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to public employees' claims under 42 U.S.C. §1983 and characterizing *Gross* as holding that, "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating 'but-for' causation is part of the plaintiff's burden in all suits under federal law.").

²⁵*Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010) (observing that, in light of *Gross*, "plaintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants' implementation of the spin and attendant policies. The court agrees with defendants that the *Gross* line of cases stands for the proposition that, unless a statute such as Title VII of the Civil Rights Act specifically provides for liability in a 'mixed motive' case, the prohibited motivation must be the motivating factor, rather than simply a motivating factor.") (citation omitted).

²⁶*Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) ("Thus, under *Gross*, Dr. Jackson must prove by a preponderance of the evidence that she was 'excessed' [invol-

Continued

standard to still other Federal laws providing important employment protections, such as 42 U.S.C. § 1981 and the Family and Medical Leave Act.²⁷

S. 1756 WOULD REPLACE THE GROSS STANDARD WITH A UNIFORM STANDARD THAT FURTHERS CONGRESS' INTEREST IN PREVENTING AND DETERRING JOB DISCRIMINATION AND RETALIATION

S. 1756—the “Protecting Older Workers Against Discrimination Act”—would apply the standard adopted by Congress with respect to Title VII in the Civil Rights Act of 1991 to make clear that a plaintiff establishes an unlawful employment practice under the ADEA (and any other Federal employment antidiscrimination or antiretaliation statute) by proving that age (or other protected characteristic) was a motivating factor for an employment decision.²⁸ The burden of proof then shifts to the employer to establish that it still would have taken the same action absent its discrimination. If the employer satisfies that burden, it will be liable only for declaratory relief, certain injunctive relief, and part of the plaintiff's attorney's fees and costs,²⁹ and a court may not order the hiring, reinstatement, or promotion of the individual, nor the payment of back pay to the individual.³⁰

As Congress recognized in enacting the Civil Rights Act of 1991, this approach—which shifts the burden of proof to the employer to limit remedies rather than to defeat liability entirely—best achieves antidiscrimination laws' key purposes of preventing and deterring future discrimination by ensuring that employers proven to have engaged in discrimination cannot completely escape liability for their actions.³¹ Indeed, this approach enables Federal courts to retain judicial power to order correction of the wrongful conduct in the form of declaratory and certain injunctive relief. Once the plaintiff proves that the employer engaged in discrimination and thus violated Federal law, the employer may still substantially limit the available remedies, however, by showing that it would have made the same decision in a discrimination-free environment.

Return to our earlier example of an older worker who is rejected for a job opportunity because of invidious age discrimination but who nonetheless would not have been hired for other nondiscriminatory reasons as well. S. 1756 would provide a tool for remedying such proven discrimination by empowering the Federal court to enjoin the employer from engaging in such discrimination in the future, thus serving the important deterrent functions of antidiscrimination law, while leaving employers free to make decisions based on ability or any other nondiscriminatory factor.

In enacting the Civil Rights Act of 1991, Congress wisely clarified the causation rule to be applied to title VII and its prohibition of discrimination because of race, color, gender, religion, and national origin. S. 1756 would apply the same causation standard—proven workable under title VII after nearly two decades in operation—to other Federal laws that that prohibit job discrimination because of age and other protected characteristics. Moreover, ensuring that the standard for proving unlawful disparate treatment under the ADEA (and other antidiscrimination and

untarily transferred to a less desirable position] 'by reason of her jury service—that is, that jury service was the 'but-for' cause of the decision to excess her. The Court has no doubt that Dr. Jackson's jury service was a motivating factor behind Ms. Warley's acceptance of the loss of a guidance counselor, who otherwise is of particular assistance to a principal in dealing with behavior and other student problems. What is lacking is any evidence that her jury service was the "but-for" cause, of the decision...' (emphasis in original).

²⁷See, e.g., *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 187 (3rd Cir. 2009) (Jordan, J., concurring) (“[I]t seems quite possible that, given the broad language chosen by the Supreme Court in *Gross*, a critical re-examination of our [section 1981] precedent may be in order.”); *Crouch v. J.C. Penney Corp., Inc.*, 337 Fed. Appx. 399, 402 n.1 (in the context of an FMLA case, noting that “[t]he Supreme Court's recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework”) (citation omitted).

²⁸S. 1756, § 3 (“[A] plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that . . . an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice.”).

²⁹The availability of limited attorney's fees and costs encourages individuals to act as private attorneys general in the public interest to vindicate Congress' commitment to equal employment opportunity. See *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that “the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988 over and above the value of a civil rights remedy to a particular plaintiff. . . .”) (citations omitted).

³⁰*Id.*

³¹See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (identifying title VII's “primary purpose” as “prophylactic” in removing barriers that have operated in the past to limit equal employment opportunity).

antiretaliation laws) tracks that available under title VII—as S. 1756 would do—also offers great practical value by establishing a principle of uniformity. Such a consistent approach to causation, moreover, is especially helpful in cases involving claims under multiple statutes—such as an older African-American plaintiff who brings claims under both title VII and the ADEA—by ensuring that the jury will receive the same “motivating factor” instruction for all claims.

S. 1756 ALSO CLARIFIES FEDERAL ANTIDISCRIMINATION LAW IN OTHER IMPORTANT WAYS

S. 1756 also addresses an important question left unanswered by the Supreme Court’s opinion in *Gross*. The *Gross* Court actually granted certiorari to decide an issue that had divided lower courts: whether a plaintiff must present direct evidence of age discrimination to obtain a mixed-motive instruction under the ADEA or whether instead circumstantial evidence could suffice.³² The Court’s ultimate decision in *Gross*, however, failed to address this question and instead decided a very different matter that significantly undercut protections for older workers without the benefit of briefing by the parties or any development by the lower courts.³³

S. 1756 provides valuable clarification of the law by finally answering the question that the *Gross* Court failed to address, making clear that plaintiffs seeking to prove discrimination in violation of the ADEA (or other Federal antidiscrimination or antiretaliation law) “may rely on any type or form of admissible circumstantial or direct evidence” to prove their claims.³⁴ This standard tracks that under title VII, as confirmed by a unanimous Supreme Court in *Desert Palace, Inc. v. Costa*.³⁵ As the Court observed in that case, circumstantial evidence is of great utility in discrimination cases and elsewhere: “The reason for treating circumstantial evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.’”³⁶ Indeed, as a practical matter, direct evidence is quite rare in discrimination cases, as employers who engage in discrimination rarely confess their bias and instead work hard to hide it. By codifying the traditional legal rule permitting plaintiffs to rely on any available probative evidence—circumstantial as well as direct—to establish discrimination, S. 1756 again not only ensures uniformity in the standards to be applied to Federal antidiscrimination laws, but provides the standard that most effectively advances the purposes of such laws.

Finally, S. 1756 addresses an additional ambiguity created by the *Gross* Court’s suggestion that the application of *McDonnell Douglas*³⁷ evidentiary framework outside the context of title VII remains an open question.³⁸ By making clear that the Supreme Court’s familiar *McDonnell Douglas* framework remains available for disparate treatment claims under the ADEA and other Federal laws that prohibit job discrimination and retaliation,³⁹ S. 1756 would eliminate any confusion in the lower courts on this issue.⁴⁰

³² *Gross*, 129 S. Ct. at 2348. Indeed, the Supreme Court has granted certiorari on two different occasions on this question whether heightened evidentiary requirements should be applied to mixed-motive cases: in *Desert Palace* (with respect to title VII) and in *Gross* (with respect to the ADEA). Lower courts’ division on this issue has been driven largely by the questions created by Justice O’Connor’s concurring opinion in *Price Waterhouse* that suggested the importance of direct evidence to a plaintiff’s ability to bring a mixed-motive claim under antidiscrimination law. See *Price Waterhouse*, 490 U.S. at 276 (O’Connor, J., concurring) (“In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.”).

³³ See *Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting) (“[T]he Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested amici curiae. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.”).

³⁴ S. 1756, § 3.

³⁵ 539 U.S. 90 (2003).

³⁶ *Id.* at 99–100 (citation omitted); see also *id.* (noting also that “we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.”).

³⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that the plaintiff’s demonstration of a prima facie case under title VII shifts the burden of production to the defendant to articulate a legitimate nondiscriminatory reason for its action, although the burden of persuasion remains on the plaintiff to prove that discrimination was the real reason).

³⁸ *Gross*, 129 S. Ct. at 2349 n.2 (“[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in title VII cases is appropriate in the ADEA context.”) (citation omitted).

³⁹ S. 1756, § 3.

⁴⁰ See, e.g., *Geiger v. Tower Automotive*, 579 F.3d 614, 622 (6th Cir. 2009) (“The Supreme Court [in *Gross*] expressly declined to decide whether the *McDonnell Douglas* test applies to the

In sum, S. 1756 rejects the *Gross* Court's significant narrowing of workers' rights under the ADEA, along with the decision's potential to do the same for a wide range of other Federal employment laws. S. 1756 would thus replace the causation rule articulated by the *Gross* Court with the causation standard long in place under title VII that more effectively furthers Congress' key interest in removing and deterring barriers to equal employment opportunity.

The CHAIRMAN. Thank you, again, very much, Ms. Norton, for your testimony, and for being here.

Now, we'll turn to Ms. Aldrich. Ms. Aldrich, please proceed.

**STATEMENT OF GAIL ALDRICH, BOARD OF DIRECTORS, AARP,
GENOA, NV**

Ms. ALDRICH. Good morning, Chairman Harkin and Senator Franken. My name is Gail Aldrich and I am an AARP board member. I am pleased to testify today on behalf of older workers.

Older workers have long been an AARP priority, and roughly half of AARP members are employed either full- or part-time. We advocate for older workers in Congress and before the courts to combat age discrimination.

In addition, AARP participates in the Senior Community Service Employment Program, annually recognizes best employers for workers over age 50 and organizes job fairs allowing employers and older workers to find one another.

Before I became an AARP board member, I was a business executive responsible for applying Federal and State employment laws on a day-to-day basis. I previously served as chief membership officer for the Society for Human Resource Management, and I have been the top HR leader for three organizations. As a result, I am familiar with the challenges of addressing age and other discrimination claims by employees.

I want to thank you and all the members of the Health, Education, Labor, and Pensions Committee for extending AARP this opportunity to speak on the issue of protecting older workers against age discrimination and about the proposed legislation to address the U.S. Supreme Court's troubling decision last year in *Gross v. FBL Financial Services*.

AARP thinks this decision is wrong and that the court's interpretation of what Congress meant when it enacted the ADEA is inaccurate. Unless corrected, this decision will have devastating consequences for older workers.

The decision could not have come at a worse time for older workers who are experiencing a level of unemployment and job insecurity not seen since the late 1940s. This decision takes away vital legal protection at the very time that the economy does not give older workers the luxury of ignoring discrimination and simply finding another job.

The unemployment rate for people over 55 has more than doubled since the start of the recession, rising from 3.2 percent in December of 2007 to 6.9 percent in March of 2010. Once out of work,

ADEA."); *Bell v. Raytheon, Co.*, 2009 WL 2365454 at *4 (N.D. Tex. 2009) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell Douglas* approach should be applied in ADEA cases."); *Holowecki v. Federal Express Corp.*, 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (observing that "whether *Gross*, by implication, also eliminates the *McDonnell Douglas* burden-shifting framework in ADEA cases was left open by the Court").

older job seekers face a prolonged and often very discouraging job search.

The average duration of unemployment has soared since the start of the recession and is substantially higher for older workers. Over half of job seekers over 55 are found among the long-term unemployed, those who have been out of work for 27 weeks or more. Once out of work, older persons are more likely than the younger unemployed to stop looking for work and drop out of the labor force.

Older workers need effective age-discrimination laws when employers choose to displace them based on their age due to stereotypes rather than performance or other legitimate business reasons.

And, clearly, unfounded stereotypes about older workers linger. AARP attorneys have battled employer perceptions that older workers have less energy and are less engaged despite AARP research showing that actually older workers are more engaged in their jobs and are more reliable.

Some employers believe older workers are a poor investment for participation in training. However, AARP research shows that they are more loyal to their current employers and may be better bets in terms of training investment.

And, finally, some employers have outdated notions that older workers are unable to adapt in industries like computers and information technology, this despite baby boomers' enthusiastic embrace of virtually all forms of rapidly-changing IT products and services.

Failing to allow older workers a fair chance to fight age discrimination is directly contrary to other Federal policies envisioning that Americans will work longer. For instance, the 1983 Social Security Amendments increased the age of eligibility for full Social Security benefits to be paid. Eliminating discrimination is critical if older persons are to delay their date of retirement.

Working longer is good for society as earners typically pay more in taxes than retirees. It is also good for workers who have more years to save and less time in retirement to finance, and it is good for employers who retain skilled and experienced employees.

AARP strongly endorses S. 1756. It would eliminate the second-class status for victims of age bias that the court, in *Gross*, seemed to embrace. In the worst economic conditions in decades for older workers, Congress should act now to correct this misguided ruling.

Thank you.

[The prepared statement of Ms. Aldrich follows:]

PREPARED STATEMENT OF GAIL ALDRICH

Good morning Chairman Harkin and Ranking Member Enzi. My name is Gail Aldrich. I am a member of the Board of Directors of AARP and I am pleased to testify today on behalf of AARP. Older workers have long been an AARP priority, and roughly half of all AARP members are employed either full- or half-time. On behalf of AARP's members and all older workers, we advocate for older workers both in Congress and before the courts to combat age discrimination. AARP also participates in the Senior Community Service Employment Program (SCSEP) in which we match lower-income older jobseekers and employers with available positions. We also annually recognize "Best Employers" for workers over age 50, and partner with employers stating a commitment to welcome older persons into their workforce as part of an AARP "National Employer Team." We also organize job fairs allowing employers and older workers to find one another.

I want to preface my remarks by noting that before I became an AARP Board member, I was formerly a business executive, responsible for applying Federal and State employment laws on a day-to-day basis. Specifically, I previously served as chief membership officer for the Society for Human Resources Management (SHRM). During my career, I also have been the lead human resources professional for three major organizations: the California State Automobile Association, Exponent, an engineering and scientific consulting firm, and the Electric Power Research Institute. As a result, I am quite familiar with the challenges of addressing age or other discrimination claims by employees.

I want to thank you and all members of the Health, Education, Labor, and Pensions Committee for extending AARP this opportunity to speak on the issue of protecting older workers against age discrimination, and in particular, the topic of proposed legislation to address the U.S. Supreme Court's troubling decision last year in *Gross v. FBL Financial Services, Inc.*, No. 08-441, 129 S. Ct. 2343 (June 18, 2009). In that decision the Supreme Court, by the narrowest of margins, announced 5-4 that older workers challenging unfair treatment based on their age, under the Age Discrimination in Employment Act (ADEA), have lesser protection than other workers protected by Federal law against illegal bias. Older workers, the Court said, have to meet a higher standard to prove discrimination than workers facing bias based on their sex, race or national origin. In effect, the Court said that Congress intended—when it passed the ADEA back in 1967—to place older workers in a second-class category of protection from unfair treatment at work. We at AARP think this decision is wrong, and that the court's understanding of what Congress meant when it enacted the ADEA is inaccurate. Unless corrected, this decision will have devastating consequences for older workers—workers who represent a growing share of the U.S. workforce and are increasingly critical to the Nation's economic recovery.

The Supreme Court's decision in *Gross v. FBL* could not have come at a worse time for older workers, who are experiencing a level of unemployment and job insecurity not seen since the late 1940s. Over the past 28 months (December 2007 through March 2010), finding work has proven elusive for millions of younger and older workers as employers have laid off workers and scaled back hiring due to reduced demand. However, older workers face another barrier—age discrimination. Age discrimination is difficult to quantify, since few employers are likely to admit that they discriminate against older workers. Available research does highlight, however, the extent to which younger job applicants are preferred over older ones, who more often fail to make it through the applicant screening process.¹ Older workers themselves see age discrimination on the job: 60 percent of 45-74-year-old respondents to a pre-recession AARP survey contended that based on what they have seen or experienced, workers face age discrimination in the workplace.² That percentage could well be higher if those workers were asked about age discrimination today. More age discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) in fiscal year 2008 and fiscal year 2009 than at any time since the early 1990s, according to the latest EEOC data.³

One of the ways in which the *Gross* decision already has affected older workers is to make it impossible in some circumstances to bring age discrimination claims. Some courts have interpreted the *Gross* Court's language to require proof that age bias was a "sole cause" of an unfair termination, or as in Jack Gross' case, an unfair demotion. Thus in one recent case in Alabama, the plaintiff alleged both race and age discrimination. *Culver v. Birmingham Bd. of Education*, 2009 WL 2568325 (N.D. Ala. August 17, 2009). Relying on *Gross*, the court ordered Mr. Culver to either abandon his age claim or his race discrimination claim because "*Gross* h[eld] for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact that he is over 40 years old was the only ... reason for the alleged adverse employment action." This was never the law before *Gross*, and it makes no sense now. Surely Congress meant for victims of age and other bias to bring claims on whatever grounds they can assemble proof to support a charge of discrimination. Not to choose between one of several grounds of illegal unfair treatment. Similarly, in a case in Pennsylvania, a Federal court recently relied on *Gross* to force a plain-

¹M. Bendick, L.E. Brown, and K. Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination against Older Workers, *Journal of Aging & Social Policy*, 1999 10(4), 1999, PP. 5-23; J. Lahey, *Age, Women, and Hiring: An Experimental Study* (Chestnut Hill, MA: Center for Retirement Research at Boston College, 2006).

²AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* (Washington, DC: AARP, 2008).

³U.S. Equal Employment Opportunity Commission, April 29, 2010 at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.

tiff to choose between claims of age and sex discrimination. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 (E.D. Pa. Aug. 11, 2009). The court cited the plaintiffs allegations that she was treated less favorably because she was an “older female” to conclude that her age was not the “but-for” cause of the discrimination she complained of. According to this court, “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.” Once again, AARP submits this makes no sense and fundamentally misunderstands the ADEA. We cannot wait for these sorts of rulings to spread. This must end.

Thus, AARP strongly endorses the Protecting Older Workers Against Discrimination Act or “POWADA”, S. 1756, of which many members of this committee are a sponsor. POWADA would correct the wrong turn in the law that the *Gross* decision represents. It would eliminate the second-class status for victims of age bias that the Court in *Gross* seemed to embrace. It would tell lower courts not to treat older workers who face discrimination law differently, in key respects, than they treat workers who face bias on grounds of race or sex under Title VII of the 1964 Civil Rights Act. Congress, after all, consistently has followed title VII as the model for other employment discrimination laws, like the ADEA and the Americans with Disabilities Act.

Let me say a few more words about the impact on older workers of this Court decision. It takes away a vital legal protection at the very time that the economy does not give older workers the luxury of ignoring discrimination and simply finding another job.

The unemployment rate for persons aged 55 and over has more than doubled since the start of the recession, rising from 3.2 percent in December 2007 to 6.9 percent in March 2010. Although the unemployment rate for this age group has traditionally been and remains lower than that for younger persons, the increase in unemployment for older persons has been greater, thus significantly narrowing the age gap in unemployment.

Once out of work, older job seekers face a prolonged and often discouraging job search. Newspapers and news programs have profiled many older jobs seekers who report sending out hundreds of resumes and receiving few if any responses from employers. Statistics back up the anecdotes of the job-seeking frustrations of older workers. Average duration of unemployment has soared since the start of the recession and is substantially higher for older job seekers than it is for their younger counterparts—38.4 weeks verse 31.1 weeks in March—a difference of nearly 2 months. In December 2007, average duration of unemployment for older persons was 20.2 weeks.

Older workers also are more likely to be found among the long-term unemployed—those who have been out of work for 27 or more weeks. Just over half (50.6 percent) of job seekers aged 55 and over and 42 percent of those under age 55 could be classified as “long-term” unemployed in March. Once out of work, older persons are more likely than the younger unemployed to stop looking for work and drop out of the labor force. If they do find work, they are more likely than younger job finders to earn less than they did in their previous employment.

Today, older workers are more likely than younger workers to be displaced. As of December 2009, 78 percent of unemployed workers aged 55 and over were out of work because they lost their jobs or because a temporary job ended. This compares to 65 percent of the unemployed under age 55. Job loss has risen substantially for both age groups since the start of the recession 2 years earlier and far more than it had in the 2 years before December 2007. (See Table 1.)

Table 1.—Percent of Workers Giving Job Loss or End of Temporary Job as the Reason They Were Unemployed, by Age, December 2005, December 2007, and December 2009

Age and Reason for Unemployment	December 2005	December 2007	December 2009
Aged 55+			
Job loser/on layoff	21.0	23.8	14.0
Other job loser	33.8	36.8	55.8
Temporary job ended	8.3	8.2	8.6
Total	63.1	68.8	78.4
Under Age 55			
Job loser/on layoff	13.7	13.2	11.0
Other job loser	25.9	26.9	43.9
Temporary job ended	11.0	12.5	9.8

Table I.—Percent of Workers Giving Job Loss or End of Temporary Job as the Reason They Were Unemployed, by Age, December 2005, December 2007, and December 2009—Continued

Age and Reason for Unemployment	December 2005	December 2007	December 2009
Total	50.6	52.6	64.7

Source: AARP PPI calculations of data in the Current Population Survey.

Hence, older workers need effective age discrimination laws when employers choose to displace them based on their age, due to stereotypes or other forms of bias, rather than their performance or other legitimate business reasons. And there can be no doubt that unfounded stereotypes about older workers linger. In cases in which AARP has played a role over the last decade, AARP attorneys have battled employer perceptions that older workers have less energy and are less engaged, despite AARP research data showing that on the contrary, older workers are more engaged in their jobs, as well as more reliable (*i.e.*, less likely to engage in absenteeism). Some employers also still believe older workers are a poor investment and are disinclined to include them in training programs. Again, AARP research shows that older workers are more loyal to (*i.e.*, less likely to leave) their current employers, and thereby may be better bets in terms of employer investments in training. And finally, some employers have outdated notions of older workers as incapable of adapting in industries—such as computers and information technology—requiring acquisition of new skills, despite Baby Boomers’ enthusiastic embrace of virtually all forms of rapidly changing IT products and services.

Research also shows why failing to protect older workers from discriminatory exclusion from employment is not only unjust but also counterproductive for a nation facing enormous challenges supporting a growing aging population. That is, there is growing evidence that older persons need to work and that they would benefit financially from working longer: millions lack pension coverage, have not saved much for retirement, have lost housing equity, and have seen their investment portfolios plummet. Many have exhausted their savings and tapped their IRA and 401(k) accounts while unemployed. Some workers seem to be opting for Social Security earlier than they might have otherwise. The Urban Institute (UI), for example, points to a surge in Social Security benefit awards at age 62 in 2009. To a large extent, this is a result of a sharp rise in the aged 62 population. However, the UI reports that the benefit take-up rate was substantially higher in 2009 than in recent years, which they say is likely due to an inability to find work.⁴ One out of four workers in the 2010 Retirement Confidence Survey maintains that their expected retirement age has increased in the past year, most commonly because of the poor economy (mentioned by 29 percent) and a change in employment situation (mentioned by 22 percent).⁵

Failing to allow older workers a fair chance to fight age discrimination is directly contrary to other Federal policies envisioning that Americans will work longer. Public policies such as the 1983 Social Security amendments that increased the age of eligibility for full benefits and the benefits for delaying retirement, as well as legislation in 2000 that eliminated the Social Security earnings test for workers above the normal retirement age, were designed to encourage longer work lives. Eliminating discrimination is critical if older persons are to push back the date of retirement.

Working longer is good for society as earners typically pay more in taxes than retirees and contribute to the productive output of the economy. It is also good for workers, who have more years to save and less time in retirement to finance. And it is good for employers who retain skilled and experienced employees. This last advantage may be less clear in a deep recession; however, the economy will recover eventually—we hope sooner rather than later! With the impending retirement of the boomers, many experts predict sizable labor and skills shortages in many industries.

In closing, I want to emphasize AARP’s commitment to vigorous enforcement of the ADEA and other civil rights law as one part of a broad-based strategy to serve the needs and interests of older workers consistent with the overall public interest. We recognize that prudent employers, indeed we hope most employers, follow the law and respect the rights of older workers. We also believe that the ADEA and other civil rights law must be preserved so that they act as a real deterrent, and

⁴R.W. Johnson and C. Mommaerts, *Social Security Retirement Benefit Awards Hit All-Time High in 2009*, Fact Sheet on Retirement Policy (Washington, DC: Urban Institute, 2010).

⁵EBRI, “The 2010 Retirement Confidence Survey: Confidence Stabilizing, but Preparations Continue to Erode,” *EBRI Issue Brief*, No. 340, March 2010 at www.ebri.org/pdf/briefspdf/EBRI_IB_03-2010_No340_RCS.pdf.

if need be, a tool for redress, when employers are tempted to discriminate or actually violate the rights of older workers. Unless POWADA returns the law to the state of affairs that existed before the *Gross* decision, legal advocates will have a very hard time defending older workers who encounter workplace bias. And we also urge Congress to make sure that POWADA protects older workers from the expansion of the reasoning in *Gross* to other employment laws. For instance, we are aware of decisions restricting application of other laws important to older workers—such as the ADA and ERISA, see *Serwathka v. Rockwell Automation, Inc.*,—F.3d—, 2010 WL 137343 (7th Cir., January 15, 2010) (NO. 08-4010)(ADA) and *Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010)—based on the flawed logic of the narrow Supreme Court majority in *Gross*.

We believe the Protecting Older Workers Against Discrimination Act (POWADA), S.1756, is a vital and reasonable effort to restore the law to the state of play prior to the *Gross* decision. At that time, employers were able to manage their proof obligations in ADEA cases. Virtually no court in the U.S. believed age had to be the *only* reason for an employer terminating an older worker for the worker to have a claim under the ADEA. But now, based on *Gross*, some courts have been embracing this new and onerous interpretation. And the same view has been applied to other civil rights laws, to the detriment of older workers and other discrimination victims. This is not right. In the worst economic conditions in decades for older workers, Congress should act now to correct the misguided ruling in the *Gross* decision and pass POWADA.

Thank you.

The CHAIRMAN. Thank you very much, Ms. Aldrich.
Mr. DREIBAND.

**STATEMENT OF ERIC DREIBAND, PARTNER, JONES DAY,
WASHINGTON, DC**

Mr. DREIBAND. Good morning, Chairman Harkin and Senator Franken. My name is Eric Dreiband and I thank you and the entire committee for affording me the privilege of testifying today.

I am here at your invitation to speak about the proposed Protecting Older Workers Against Discrimination Act. I do not believe the bill would advance the public interest. In particular, the bill, as drafted, will do nothing to protect workers from age discrimination, other forms of discrimination, retaliation or any other unlawful conduct. I say this for three reasons.

First, the bill incorrectly asserts that the decision by the Supreme Court of the United States in *Gross v. FBL Financial Services* eliminated protection for many individuals. The *Gross* decision, however, does not eliminate protections for victims.

Before the decision, age-discrimination defendants could prevail, even when they improperly considered a person's age, if they demonstrated that they would have made the same decision or taken the same action for reasons unrelated to age. The court's decision stripped away this so-called same action or same decision defense and it therefore deprives entities that engage in age discrimination of this defense. For this reason, since the *Gross* decision issue, the Federal courts have repeatedly ruled in favor of discrimination plaintiffs and against defendants.

In fact, the United States Courts of Appeals for the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have issued decisions in favor of discrimination plaintiffs and relied upon the *Gross* case to do so.

Second, the bill will restore the so-called same-action defense eliminated by the Supreme Court in the *Gross* case. Discrimination victims, under the bill, may prove that a protected trait, such as

age, was a motivating factor for the practice complained of, yet still lose their case.

This is because the bill would deprive discrimination victims of any meaningful remedy in these same-action cases. Though lawyers may receive payment for fees directly attributable to a motivating-factor claim, but the alleged victim will get nothing—no job, no money, no back pay, no front pay, no damages, no promotion, nothing.

For example, Mr. Gross' case is going to be retried after the Supreme Court's decision and he will receive nothing even if he proves that age motivated his employer to demote him if his employer establishes its same-action defense.

Now, the bill may enable some lawyers to earn more money, but who does this benefit? The answer is lawyers, not victims of discrimination, not unions and not employers.

Third, the bill is overly broad, vague and ambiguous and may open up a Pandora's Box of litigation. It purports to apply to any Federal law forbidding employment discrimination, and several other laws, but the bill does not identify which laws it will amend.

As a result, discrimination victims, unions, employers and others will unnecessarily spend years or decades and untold amounts of money fighting in court about whether the bill changes particular laws. The public will have to wait years or decades until the matter trickles up to the Supreme Court to settle the question case by case about one law after another.

In the meantime, litigants in courts will waste time, money and resources litigating this issue with no benefit for anyone. The threat of decades of litigation about these issues is not merely hypothetical. Note in this regard that it took 38 years of litigation before the Supreme Court of the United States finally decided, in 2005, that the Age Discrimination in Employment Act permits claims for unintentional age discrimination.

Congress can fix this vagueness problem rather easily by amending the bill to apply it solely to the Age Discrimination in Employment Act, which is the only statute at issue in Mr. Gross' case, or, at a minimum, listing the laws that Congress intends to amend. The recently enacted Lilly Ledbetter Fair Pay Act of 2009 specifically identified the laws Congress intended to amend and Congress can do the same here.

Thank you and I look forward to your questions.

[The prepared statement of Mr. Dreiband follows:]

PREPARED STATEMENT OF ERIC S. DREIBAND

I. INTRODUCTION

Good morning Chairman Harkin, Ranking Member Enzi, and members of the committee. I thank you and the entire committee for affording me the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm Jones Day here in Washington, DC.

I previously served as the General Counsel of the United States Equal Employment Opportunity Commission ("EEOC" or "Commission"). As EEOC General Counsel, I directed the Federal Government's litigation of the Federal employment discrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases.

During my tenure at the EEOC, the Commission continued its tradition of aggressive enforcement. We obtained relief for thousands of discrimination victims, and the EEOC's litigation program recovered more money for discrimination victims

than at any other time in the Commission's history. The Commission settled thousands of charges of discrimination, filed hundreds of lawsuits every year, and recovered, literally, hundreds of millions of dollars for discrimination victims.

I am here today, at your invitation, to speak about the proposed Protecting Older Workers Against Discrimination Act, S. 1756. I do not believe that the bill would advance the public interest.

First, the bill incorrectly asserts that the decision by the Supreme Court of the United States in *Gross v. FBL Financial Services, Inc.* eliminated "protection for many individuals whom Congress intended to protect." In fact, the *Gross* decision will not eliminate protections at all. Before the *Gross* decision, age discrimination defendants could prevail, even when they improperly considered a person's age, if they demonstrated that they would have made the same decision or taken the same action for additional reasons unrelated to age. The Court in the *Gross* case eliminated this so-called "same decision" or "same action" defense. For this reason, since the *Gross* decision issued, the Federal courts have repeatedly ruled in favor of age discrimination plaintiffs and against defendants.

Second, the bill as proposed will enable age discrimination and other victims to prove a violation if an impermissible factor "was a motivating factor for the practice complained of, even if other factors also motivated that practice." It will also restore the "same action" defense and may render the "motivating factor" standard nearly irrelevant. The proposed bill would deprive discrimination victims of any meaningful remedy in "same action" cases. Their lawyers may receive payment for fees "demonstrated to be directly attributable only to the pursuit of" a "motivating factor" claim. But the alleged victim will get nothing—no job, no money, no promotion. Mr. Gross, for example, will receive nothing if he proves age motivated his employer to demote him and his employer establishes its same action defense. His lawyer, though, will receive some money. As a result, if enacted in its current form, the bill may enhance protections for lawyers, but do nothing for individuals.

Third, the bill is overly broad, vague, and ambiguous. It purports to apply to "any Federal law forbidding employment discrimination," and several other laws, but the bill does not identify which laws the bill will amend. As a result, discrimination victims, unions, employers, and others will unnecessarily spend years or decades, and untold amounts of money, fighting in court over whether the bill changes particular laws. This will have no positive consequences for anyone. Congress can fix this vagueness problem rather easily by amending the bill to apply solely to the Age Discrimination in Employment Act—the only statute at issue in the *Gross* case—or at a minimum listing the laws that Congress intends it to apply.

II. BACKGROUND

A. Age Discrimination in Employment Act of 1967

Congress enacted the Civil Rights Act of 1964 to make unlawful race and other forms of discrimination in employment and other areas. Title VII of that act prohibits employment discrimination based on race, color, religion, sex and national origin).¹ Title VII also prohibits discrimination against any individual who has opposed unlawful discrimination or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or title VII hearing.

Title VII also created the EEOC. EEOC enforcement authority over title VII is plenary, with the exception of litigation against public employers. EEOC also enforces several other Federal employment discrimination laws, including the employment provisions of Americans with Disabilities Act, the Equal Pay Act, and the Age Discrimination in Employment Act ("ADEA").

During the debate that led to title VII's enactment, Congress considered whether or not to include age as a protected class under title VII. Congress determined that it did not have sufficient information about age discrimination to legislate on the issue.² So, Congress directed the Secretary of Labor to study the issue and to report to Congress.³

Then-Secretary of Labor W. Willard Wirtz studied age discrimination in employment, and on June 30, 1965, he issued his report to the Congress. The report be-

¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.

² See 110 CONG. REC. 2597 (1964) (remarks of Representative Celler ("[Congress] do[es] not have sufficient information, concerning discrimination based on age, to act intelligently. I believe . . . it would be rather rash to rush into this situation without having sufficient information to legislate intelligently upon this very vexatious and difficult problem.")).

³ See H.R. Rep. No. 88-914, pt.1, at 15 (1963) ("Sec. 718. The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.").

came known as the “Wirtz Report.”⁴ The Wirtz Report found that little age discrimination arose from dislike or intolerance of older people, but that arbitrary age discrimination was then occurring in the United States. Secretary Wirtz concluded that there was substantial evidence of arbitrary age discrimination, which he defined as “assumptions about the effect of age on [an employee’s] ability to do a job *when there is in fact no basis for these assumptions*,” particularly in the hiring context.⁵

Secretary Wirtz suggested that Congress deal with the problem of arbitrary age discrimination by enacting a bill called “The Age Discrimination in Employment Act of 1967.” President Lyndon Johnson and majorities of both Houses of Congress agreed, and President Johnson signed the bill into law at the end of 1967.

The ADEA prohibits employment discrimination based on age.⁶ Specifically, the ADEA makes it unlawful for employers, unions, and others to:

- (1) fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;
- (2) limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or
- (3) reduce the wage rate of any employee in order to comply with the ADEA.⁷

The ADEA also contains protections against retaliation. The ADEA has never had any mixed motive provision.

B. *The Mixed Motive Doctrine*

There are two general ways to prove individual title VII claims. The Supreme Court established the first in 1973 when it decided *McDonnell Douglas Corporation v. Green*.⁸ In that case, an African-American employee of a manufacturing company alleged that his discharge and his employer’s general hiring practices were racially motivated and violated title VII. The Supreme Court in *McDonnell Douglas* clarified the proof structure that applies to a private, non-class action title VII case. The Court explained that a plaintiff in a title VII case must first establish a “prima facie” case of discrimination by proving that:

- (i) the plaintiff is a member of a protected class;
- (ii) the plaintiff applied and was qualified for a job for which the employer was seeking applicants;
- (iii) despite the plaintiff’s qualifications, the employer rejected the plaintiff; and
- (iv) after the employer rejected the plaintiff, the position remained open and the employer continued to seek applicants from persons of the plaintiff’s qualifications.⁹

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate “some legitimate, nondiscriminatory reason for the employee’s rejection.”¹⁰ The plaintiff then must be “afforded a fair opportunity to show that [the employer’s] stated reason for [plaintiffs] rejection was in fact pretext.”¹¹

In 1989, the Supreme Court established another way for a title VII plaintiff to prove a title VII violation. In *Price Waterhouse v. Hopkins*, the Court considered the case of Ann Hopkins.¹² Ms. Hopkins was a female senior manager at an accounting firm. She alleged that the firm denied her a promotion because of her sex. Ms. Hopkins was very accomplished and competent. The Company cited her lack of interpersonal skills and abrasiveness as the reasons for its decision not to promote her.¹³

The Supreme Court in *Price Waterhouse* explained that a plaintiff may prove a title VII violation when a challenged decision is the product of both permissible and impermissible considerations. When a title VII plaintiff proves that an illegitimate factor such as race or sex plays a motivating or substantial part in the employer’s decision, the Court decided, the burden of persuasion shifts to the defendant to show by a preponderance of evidence that it would have made the same decision even in

⁴Secretary of Labor, *The Older American Worker: Age Discrimination in Employment 1* (1965).

⁵*Id.* at 2, 5 (emphasis in original). See also *Smith v. City of Jackson*, 544 U.S. 228, 254–55 (2005) (discussing Wirtz Report).

⁶Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 to 634.

⁷*Id.* at § 623(a).

⁸411 U.S. 792 (1973).

⁹*Id.* at 802.

¹⁰*Id.*

¹¹*Id.* at 804.

¹²490 U.S. 228 (1989).

¹³*Id.* at 233–34.

the absence of the illegitimate factor.¹⁴ The Court also determined that to shift the burden of persuasion to the employer, the employee must present “direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision.”¹⁵

The “same decision” defense created by *Price Waterhouse* was a complete defense to liability. The Court explained:

[W]hen a plaintiff in a title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.¹⁶

Two years after the Court decided *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991. As part of the 1991 Act amendments, Congress codified the mixed motive concept first described by *Price Waterhouse*. Congress added the following to title VII:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.¹⁷

The Civil Rights Act of 1991 modified the *Price Waterhouse* “same action” defense slightly, as follows:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).¹⁸

The Civil Rights Act of 1991 also amended the ADEA.¹⁹ It did not add any “motivating factor” claim or “same action” defense to the ADEA, nor has Congress ever done so.

Nine years later, in 2000, the Supreme Court decided *Reeves v. Sanderson Plumbing Products, Inc.* and applied the *McDonnell Douglas* burden shifting framework to the ADEA.²⁰ In *Reeves*, a discharged employee alleged that his employer unlawfully fired him because of his age. The Court recognized that “Courts of Appeals . . . have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence.”²¹ The Court assumed that the *McDonnell Douglas* framework applies to ADEA claims²² and addressed “whether a defendant is entitled to judgment as a matter of law when the plaintiff’s case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant’s legitimate, nondiscriminatory explanation for its action.”²³ The Court concluded that the employee presented sufficient evidence to show that the defendant violated the ADEA.²⁴

C. *Gross v. FBL Financial Services, Inc.*

Jack Gross sued his employer, FBL Financial Group, Inc. for alleged ADEA violations. Mr. Gross alleged that his employer violated the ADEA when it demoted him in January 2003 because of his age.

Mr. Gross began his employment with the Company in 1971, and he received several promotions over the years. By 2003, he held the position of claims administra-

¹⁴ *Id.* at 258.

¹⁵ *Id.* at 276 (O’Connor, J., concurring).

¹⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

¹⁷ 42 U.S.C. § 2000e-2(m).

¹⁸ 18 42 U.S.C. § 2000e-5(g)(2)(A).

¹⁹ *See, e.g.*, Pub.L. 102–166, Title I, § 115, Nov. 21, 1991, 105 Stat. 1079 (eliminating tolling period).

²⁰ 530 U.S. 133 (2000).

²¹ *Id.* at 141.

²² *Id.* at 142.

²³ *Id.* at 137.

²⁴ *Id.* at 146–48.

tion director. In that year, when he was 54 years old, the Company reassigned Mr. Gross to the position of claims project coordinator. At that same time, FBL transferred many of his job responsibilities to a newly created position—claims administration manager. The Company gave that position to Lisa Kneeskern, a former subordinate of Mr. Gross. Ms. Kneeskern was also younger than Mr. Gross. She was then in her early forties. Mr. Gross and Ms. Kneeskern received the same pay, but Mr. Gross considered the reassignment a demotion because FBL reallocated his former job responsibilities to Ms. Kneeskern.

Mr. Gross sued FBL in 2004. Before the case went to the trial, counsel for both sides asked the trial judge to instruct the jury about the burden of proof. FBL's lawyer requested that the judge tell the jury the following:

Your verdict must be for Plaintiff if both of the following elements have been proven by the preponderance of the evidence:

- (1) Defendant demoted Plaintiff to claims project coordinator effective January 1, 2003; and
- (2) Plaintiff's age was the determining factor in Defendant's decision.

If either of the above elements has not been proven by the preponderance of the evidence, your verdict must be for Defendant.

"Age was a determining factor" only if Defendant would not have made the employment decision concerning plaintiff but for his age; it does not require that age was the only reason for the decision made by Defendant.²⁵

Mr. Gross' attorney asked the trial judge to tell the jury the following:

Your verdict must be for plaintiff on plaintiff's age discrimination claim if all the following elements have been proven by the preponderance of the evidence:

- First*, defendant demoted plaintiff; and
- Second*, plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.

However, your verdict must be for defendant if any of the above elements has not been proven by a preponderance of the evidence, or if it has been proven by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.²⁶

The trial judge generally agreed with Mr. Gross' lawyer and told the jury the following:

Your verdict must be for the plaintiff if all the following elements have been proved by a preponderance of the evidence:

- First*, defendant demoted plaintiff to claims project coordinator effective January 1, 2003; and
- Second*, plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by the preponderance of the evidence, or if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.²⁷

The jury found in favor of Mr. Gross and awarded him \$46,945. After the trial, FBL asked the trial judge to overturn the jury's verdict. The court declined.²⁸ The court applied a *McDonnell Douglas* analysis and upheld the jury's verdict. The court found that Mr. Gross had established a prima facie case of age discrimination, that FBL had presented a legitimate, nondiscriminatory reason for the change in Mr. Gross' responsibilities, and that the jury nonetheless could have reasonably found that FBL's stated reason for the demotion was not credible.

FBL appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed and remanded for a new trial because it found that a mixed motive jury instruction was not proper. The court applied *Price Waterhouse* and held

²⁵ Eighth Circuit Model Jury Instruction 5.11A (applying to determining factor cases); *Gross v. FBL Financial Services, Inc.* No. 4:04-CV-60209, 2006 WL 6151670 (S.D. Iowa June 23, 2006), Def. Proposed Jury Instr. No. 10, filed Oct. 30, 2005.

²⁶ Eighth Circuit Model Jury Instruction 5.11B (applying to motivating factor/same decision cases); *Gross*, 2006 WL 6151670, Pl. Proposed Jury Instr. p. 16, filed Oct. 25, 2005.

²⁷ *Id.* Final Jury Instr. No. 11.

²⁸ *Id.* at *1-14.

that a mixed motive jury instruction was improper because Mr. Gross did not present “direct evidence” of age discrimination.²⁹ According to the court, the trial judge should have instructed the jury consistent with the *McDonnell Douglas* framework.³⁰

The Supreme Court granted certiorari and vacated and remanded the Eighth Circuit’s opinion. The Court decided that a plaintiff who brings an intentional age discrimination claim must prove that age was the “but-for” cause of the challenged adverse employment action.³¹ The Court determined that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.³²

The Court identified the issue as “whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.”³³

The Court held that the burden does not shift. Title VII explicitly sets forth the motivating factor and same action burdens, but, the Court explained, the ADEA says nothing about any motivating factor or same action defense. The Court observed that when Congress amended title VII in 1991 and added the motivating factor and same action provisions, it did not add those provisions to the ADEA, even though it made other changes to the ADEA.³⁴

The Court observed that the ADEA makes it “unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.”³⁵ The Court then applied what it said was the ordinary meaning of “because of,” and reasoned that the ADEA’s “because of” standard requires a plaintiff who alleges intentional age discrimination to “prove that age was the ‘but-for’ cause of the employer’s adverse action.”³⁶

The Court rejected the contention that *Price Waterhouse’s* “motivating factor,” “same decision,” and “direct evidence” standards should govern ADEA cases. The Court observed that *Price Waterhouse’s* burden-shifting framework is “difficult to apply” and that the “problems” associated with *Price Waterhouse’s* “application have eliminated any perceivable benefit to extending its framework to ADEA claims.”³⁷

III. THE PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

If enacted in its current form, the Protecting Older Workers Against Discrimination Act will do nothing to protect workers from age discrimination, other forms of discrimination, retaliation, or any other unlawful conduct. Individual employees who prove an unlawful motive will win nothing when the defendant establishes the same action defense. They will “win” a moral victory, perhaps, but nothing else. The bill may enable some lawyers to earn more money, but who does this benefit? The answer is: lawyers, not discrimination victims, not unions, and not employers. Furthermore, the bill will hurt victims, unions, employers, and others because it will force these individuals and entities to spend years or decades fighting in court about whether the bill applies to what the bill vaguely describes as various laws that “forbid[] employment discrimination.” The bill will thus help empty the bank accounts of plaintiffs and defendants alike, and it will unnecessarily consume the limited resources of the Federal courts.

Section 2—Findings and Purpose. The bill asserts that the *Gross* decision “has narrowed the scope” of the ADEA’s protection and that *Gross* “rel[ie]d] on misconcep-

²⁹ *Id.* at 359–60.

³⁰ *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356 (2008).

³¹ *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

³² *Gross*, 129 S.Ct. at 2352.

³³ *Gross*, 129 S.Ct. at 2348.

³⁴ *Id.* at 2348–49.

³⁵ *Id.* at 2350–51 (quotations omitted and emphasis added).

³⁶ *Id.*

³⁷ *Id.* at 2352 (citing *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (referring to “the murky water of shifting burdens in discrimination cases”); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (en banc) (Flaum, J., dissenting) (“The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally”); and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47, (1977) (reevaluating precedent that was subject to criticism and “continuing controversy and confusion”); and *Payne v. Tennessee*, 501 U.S. 808, 839–844 (1991) (Souter, J., concurring)).

tions about the [ADEA].”³⁸ These assertions are incorrect. Nothing in the text or legislative history of the ADEA authorizes mixed-motive discrimination claims.³⁹ The ADEA prohibits employment discrimination “because of” an individual’s age.⁴⁰ And, because *Gross* actually strips away the same action defense, *Gross* deprives entities that engage in age discrimination from a defense previously thought available.⁴¹

The bill also asserts that unless Congress takes “action,” age discrimination victims will “find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable.”⁴² This assertion is also incorrect. The “but for” causation standard does not render discrimination victims helpless, nor does that standard mean that victims will lose their cases.

For example, in the *Gross* case itself, the trial judge applied the *McDonnell Douglas* standards after the trial, overruled the defendant’s request the court overrule the jury, and sustained the verdict. Moreover, since the *Gross* decision issued, the Federal courts have repeatedly ruled in favor of age discrimination plaintiffs.⁴³ Consider:

- In *Hrisinko v. New York City Department of Education*, decided 2 months ago, the United States Court of Appeals for the Second Circuit reversed the district court’s grant of summary judgment and ruled in favor of an age discrimination plaintiff. The court noted that the plaintiff “faced changes in the terms and conditions of her employment that rise to the level of an adverse employment action,” and therefore she “has set forth a prima facie case of age discrimination [under the *McDonnell Douglas* framework].”⁴⁴

- In *Mora v. Jackson Memorial Foundation, Inc.*, also decided this year, the United States Court of Appeals for the Eleventh Circuit observed that *Gross* established that “no ‘same decision’ affirmative defense can exist.” The court reversed the district court’s grant of summary judgment in favor of the employer and instead ruled in the plaintiff’s favor.⁴⁵ The court concluded that “a reasonable juror could accept that [the employer] made the discriminatory-sounding remarks and that the remarks are sufficient evidence of a discriminatory motive which was the ‘but for’ cause of [the plaintiff’s] dismissal.”⁴⁶

- Last year, the United States Court of Appeals for the First Circuit similarly reversed a district court’s pro-employer summary judgment decision and found in favor of the plaintiff. In *Velez v. Thermo King de Puerto Rico, Inc.*, the court applied the *McDonnell Douglas* framework,⁴⁷ and noted that that “several aspects of the evidence . . . are more than sufficient to support a factfinder’s conclusion that Thermo King was motivated by age-based discrimination These include Thermo King’s shifting explanations for its termination for Velez, the ambiguity of Thermo King’s company policy . . . , and, most importantly, the fact that in response to arguably similar conduct by younger employees, Thermo King took no disciplinary action.”⁴⁸

- In *Baker v. Silver Oak Senior Living Management Company*, the United States Court of Appeals for the Eighth Circuit reversed the district court’s pro-employer grant of summary judgment, cited *Gross* decision, and ruled for the plaintiff. The court concluded that “[the plaintiff] . . . presented a submissible case of age discrimination for determination by a jury” when she introduced evidence that senior executives stated that they had a “preference for younger workers.”⁴⁹

³⁸ Protecting Older Workers Against Discrimination Act, S.1756, 111th Cong. §2(a)(4)-(5) (2009).

³⁹ 29 U.S.C. § 623; *Gross*, 129 S. Ct. at 2350–51; Secretary of Labor, The Older American Worker: Age Discrimination in Employment 21–22 (1965).

⁴⁰ 29 U.S.C. § 623(a)(1)-(2), (b), (c)(1)-(2).

⁴¹ See *Gross*, 129 S. Ct. at 2350-51 & n.5.

⁴² Protecting Older Workers Against Discrimination Act, S.1756, 111th Cong. §2(a)(6) (2009).

⁴³ Federal courts of appeal have also applied *Gross* in favor of plaintiffs alleging discrimination under other employment statutes. See, e.g., *Serafinn v. Local 722, Int 1 Bhd. Of Teamsters*, 597 F.3d 908, 914–15 (7th Cir. 2010) (Labor Management Reporting and Disclosure Act; citing *Gross* to reject defendant’s challenge to jury instructions); *Fleming v. Yuma Regl Med. Ctr.*, 587 F.3d 938, 943–44 (9th Cir. 2009) (Rehabilitation Act; citing *Gross* to conclude that § 504 covers independent contractors).

⁴⁴ No. 08-6071, 2010 WL 826879, at *2-*3 (2d Cir. Mar. 11, 2010).

⁴⁵ 597 F.3d 1201, 1202 (11th Cir. 2010).

⁴⁶ *Id.* at 1204.

⁴⁷ 585 F.3d 441, 447 n.2 (1st Cir. 2009).

⁴⁸ *Id.* at 449.

⁴⁹ 581 F.3d 684, 688 (8th Cir. 2009).

Several other courts, including the Third, Sixth, Seventh, Ninth, and Tenth Circuits, relied upon *Gross* to rule in favor of plaintiffs.⁵⁰

Section 3—Standard of Proof. The Protecting Older Workers Against Discrimination Act would amend the ADEA to make an employment action unlawful if a plaintiff proves that an improper factor such as age motivated the employment action, even if other, legitimate factors were also motivators.⁵¹ But if a defendant can show that it would have taken the same action despite the improper factor, the plaintiff loses his or her right to damages, reinstatement, hiring, promotion, or payment.⁵² In the end, only the lawyers win; the Protecting Older Workers Against Discrimination Act would allow courts to award certain attorney’s fees and costs and would do nothing to enhance the ADEA’s protections of victims of discrimination.⁵³

Title VII cases provide sobering examples of how the mixed motive framework turns winning plaintiffs into losers. Like the bill, title VII’s mixed motive framework contains a same action defense and prevents victims from receiving a job, money, or anything else, other than money for their lawyers.⁵⁴ The types of injunctive relief that plaintiffs want, such as a job or back pay, are expressly excluded.⁵⁵ And, in fact, since the 1991 amendments to title VII, mixed motive plaintiffs have received nominal injunctive relief, or nothing.⁵⁶ Some plaintiffs “won” only a hollow declaration that he or she prevailed.⁵⁷ To add insult to injury, former employees are unlikely to receive any form of meaningful relief at all, as courts have found that even injunctive relief is not warranted when the plaintiff is a former employee.⁵⁸ And, while some courts have suggested that injunctive relief may be appropriate when there is widespread discrimination or an employer maintains a discriminatory policy, the courts may issue only an order to comply with the law—something the law already requires even if no such order issues.⁵⁹

Section 3—Application of Amendment. The Protecting Older Workers Against Discrimination Act does not identify the laws to which it applies. Section 3 of the bill simply states that the mixed motive proof structure would apply to “any Federal law forbidding employment discrimination.”⁶⁰ This language is hopelessly

⁵⁰ *Serafinn v. Local 722, Int’l Bhd. Of Teamsters*, 597 F.3d 908 (7th Cir. 2010); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d Cir. 2010); *Bolmer v. Oliveria*, 594 F.3d 134 (2d Cir. 2010); *Fleming v. Yuma Reg’l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009); *Leibowitz v. Cornell Uni.*, 584 F.3d 487 (2d Cir. 2009); *EEOC v. TIN, Inc.*, 349 F. App’x 190 (9th Cir. Oct. 20, 2009); *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009); *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009); *Hunter v. Valley View Local Schs.*, 579 F.3d 688 (6th Cir. 2009). The following courts cited *Gross* and found in favor of the defendant: *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010); *Reeder v. Wasatch County Sch. Dist.*, No. 08-4048, 2009 WL 5031335 (10th Cir. Dec. 23, 2009); *Senske v. Sybase, Inc.*, 588 F.3d 501 (7th Cir. 2009); *Philips v. Centrix Inc.*, 354 F. App’x 527 (2d Cir. Dec. 1, 2009); *Spencer v. UPS*, 354 F. App’x 554 (2d Cir. Dec. 1, 2009); *Kelly v. Moser, Patterson & Sheridan, LLP*, 348 F. App’x 746 (3d Cir. Oct. 9, 2009); *Milby v. Greater Phila. Health Action*, 339 F. App’x 190 (3d Cir. July 27, 2009).

⁵¹ Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. § 3 (2009).

⁵² *Id.* § (3); *cf. id.* § 2(b).

⁵³ *Id.* § (3); *cf. id.* § 2(a).

⁵⁴ 42 U.S.C. § 2000e-5(g)(2)(B).

⁵⁵ *Id.* § 2000e-5(g)(2)(B)(ii).

⁵⁶ *See, e.g., Coe v. N. Pipe Products*, 589 F. Supp. 2d 1055, 1097–98 (N.D. Iowa 2008) (“Thus, although the trier of fact may well find liability on a ‘mixed motives’ claim, the plaintiff may ultimately recover nothing if the trier of fact also finds for the defense on the ‘same decision’ defense. When faced with the real possibility of passing through the gauntlet of an employment discrimination trial, this court doubts that many plaintiffs would be willing to run the risk of prevailing on liability, but still receiving no monetary compensation for their efforts. This court also doubts that many plaintiffs would be happy to find that insult is added to injury, when they will receive nothing, but their lawyers will be compensated by the employer.”).

⁵⁷ *See, e.g., Thibeaux v. Principi*, No. 04-1609, 2008 WL 2517170, at *5 (W.D. La. June 20, 2008) (finding injunctive relief inappropriate because employee no longer reported to supervisor about whom she complained and did not allege any ongoing discrimination); *Crosby v. Mobile County*, No. 04-0144, 2007 WL 4125885, at *3 (S.D. Ala. Nov. 14, 2007) (“declaratory and injunctive relief is granted only to the extent that the court will declare that [defendant] engaged in discriminatory conduct . . .”); *Templet v. Hard Rock Constr. Co.*, No. 02-0929, 2003 WL 22717768, at *1 (E.D. La. Nov. 17, 2003) (finding that plaintiff is entitled to a judgment declaring that defendant violated law but finding no injunctive relief appropriate).

⁵⁸ *See, e.g., Cooper v. Ambassador Personnel, Inc.*, 570 F. Supp. 2d 1355, 1359–60 (M.D. Ala. 2008) (holding that no injunctive relief is appropriate because plaintiff is no longer employed at the company).

⁵⁹ *See id.* at 1360 (stating that “injunctive and declaratory relief might be appropriate . . . where, for example, the company engaged in widespread gender discrimination of the type challenged or had an official policy for such or where the company continued to engage in such gender discrimination”).

⁶⁰ Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. § 3 (2009) (proposed to be codified at 29 U.S.C. § 623(g)(5)(B)).

overbroad, vague and ambiguous, and would open up a Pandora's Box of litigation dedicated to deciphering this section.

For example, will the bill cover the Fair Labor Standards Act, which prescribes standards for the basic minimum wage and overtime pay? Or, will it cover only Section 15 of the Fair Labor Standards Act because that is the only section of the act that uses the word "discriminate?"⁶¹

Consider also the Family and Medical Leave Act. That law, known as the "FMLA," provides eligible employees with up to 12 weeks of unpaid leave each year for several reasons, including for the birth and care of a newborn child of the employee; placement with the employee of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; to take medical leave when the employee is unable to work because of a serious health condition; or for qualifying exigencies that occur because the employee's spouse, son, daughter, or parent is on active duty or is called to active duty status as a member of the National Guard or Reserves in support of a contingency operation.⁶²

The FMLA's terms are gender neutral, and the act protects both men as well as women.⁶³ Is the FMLA a "Federal law forbidding employment discrimination" under the Protecting Older Workers Against Discrimination Act? If the bill is enacted in its current form, the public will have to wait years or decades until the issue trickles up to the Supreme Court to settle the issue. In the meantime, litigants and courts will waste time, money, and resources litigating this issue, with no benefit for anyone.

The threat of decades of litigation about these issues is not merely hypothetical. Note in this regard that it took 38 years of litigation before the Supreme Court finally decided, in 2005, that the ADEA permits claims for unintentional age discrimination in certain circumstances.⁶⁴ The Protecting Older Workers Against Discrimination Act, as currently proposed, will create litigation, confusion, and needless wasted resources and money because it does not precisely identify the laws it purports to amend. No victim of employment discrimination will benefit from any of this, and many will be hurt as will unions and employers. At a minimum, the bill should identify specifically the laws that it amends. The recently-enacted Lilly Ledbetter Fair Pay Act of 2009 specifically identified the laws it amended, and Congress can do the same here.⁶⁵

IV. CONCLUSION

I respectfully suggest that Congress re-examine the bill and its impact on Mr. Gross and other litigants. The bill will not restore any pre-*Gross* protections because *Gross* did not narrow the ADEA's protections. In fact, Mr. Gross already lost under those standards: the U.S. Court of Appeals for the Eighth Circuit applied the *Price Waterhouse* standard and overturned the jury's verdict in Mr. Gross' favor. Mr. Gross and many others will likewise gain nothing if the bill passes in its current form. The bill may provide greater income for some lawyers, but it will do so at a terrible cost. Discrimination victims, unions, employers, and others will become embroiled in years of unnecessary litigation about the bill's meaning. None of this is necessary, and I request that the Congress resist the urge to enact the bill as proposed.

The CHAIRMAN. Well, thank you very much, Mr. Dreiband. Mr. Dreiband, I'll start with you then. You state that my bill will actually harm, not help, plaintiffs because the bill would apply the same standard that Congress enacted on a bipartisan basis as part of the 1991 Civil Rights Act, whereby a plaintiff who proceeds in a mixed-motive case is only eligible for injunctive relief and attorneys' fees.

I want to emphasize that under my bill the plaintiff has a choice of whether to proceed with the traditional causation standard or

⁶¹ 29 U.S.C. § 215.

⁶² 29 U.S.C. § 2612(a).

⁶³ *Nevada v. Hibbs*, 538 U.S. 721, 737 (2003) ("By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes").

⁶⁴ *Smith v. City of Jackson*, 544 U.S. 228 (2005).

⁶⁵ Pub. L. No. 111-2, § 3-5, 123 Stat. 5, 5-7 (2009).

proceed as a mixed-motive case where remedies, as you know, would be limited. Is your issue not with my legislation but rather with the compromise that was forged as part of the 1991 Civil Rights Act?

Mr. DREIBAND. No. The mixed-motive provision of title VII has largely become a dead letter. I will tell you I have been litigating cases, both on behalf of the United States Government, when I served at the Equal Employment Opportunity Commission, and in private practice on behalf of both plaintiffs and defendants, and in nearly 20 years since that bill was amended, plaintiffs have almost never invoked the mixed-motive framework, and the reason they've not done that is because the affirmative defense deprives them of any meaningful remedy, even if they win.

Even with respect to injunctive relief, the Federal courts have routinely held that in cases in which former employees are involved—that is, somebody gets fired—that injunctive relief is not appropriate for them. And so, as a result, what we see in title VII cases since the 1991 Act is that the mixed-motive framework is almost never invoked.

I mean, I can tell you in hundreds of cases that I litigated when I served as EEOC's general counsel, I was not aware of—and I was involved in many of them—not a single case in which the EEOC itself asserted a mixed-motive claim in a title VII case, and the reason for that is simply there is no remedy available or limited remedies available if you win.

The CHAIRMAN. Let me ask then, Would you be in favor of compensatory and punitive damages for suits under both ADEA as well as title VII?

Mr. DREIBAND. Certainly Congress could amend the Age Discrimination in Employment Act to provide for those damages. Right now, the Age Discrimination in Employment Act provides for full back pay, front pay and liquidated damages, and that's the remedy that has been available since the law was enacted.

The CHAIRMAN. How about in title VII cases? Would you be in favor of compensatory and punitive damages, then, to make them even?

Mr. DREIBAND. Title VII currently permits compensatory and punitive damages under certain circumstances.

The CHAIRMAN. And you say that should apply to ADEA also.

Mr. DREIBAND. The Congress can certainly do that and I would leave that to you to decide whether you think that's in the public interest or not.

The CHAIRMAN. Let me go to Ms. Norton. Mr. Dreiband has raised some issues here which I think need to be looked at. Basically, the bill, S. 1756, would return the law to what it was last June, apply the standard that has been in place for 20 years and remains in place for claims under Title VII in the Civil Rights Act.

The heart of the bill is modeled on the Civil Rights Act for 1991 which codified the motivating factor framework for race, sex, national origin, and religion discrimination under title VII.

Now, you heard Mr. Dreiband's explanation there. Can you address yourself to that and to whether or not we are actually harming plaintiffs under this bill?

Ms. NORTON. You are not, chairman. Let me give you a couple of examples. We can start with Mr. Gross himself. Under the *Price Waterhouse* standard that was in effect for 20 years, Mr. Gross won. If S.1756 were in effect at the time of his trial, Mr. Gross would have won.

Only under the Supreme Court's new rule did Mr. Gross lose his verdict, and now he faces the prospect of a new trial in which he will bear the burden of proving what was not in his employer's mind at the time of his decision.

A couple of other examples since *Gross*. The Federal Jury System Improvement Act prohibits employers from punishing employees for engaging in their civic duty of jury service. Plaintiff brought a claim under that case. The trial court applied *Gross*, found that the plaintiff was more credible than her employer, found that the plaintiff had proved that her jury service was a motivating factor in her decision, but, nonetheless, applying *Gross*, found that the plaintiff could not prove that other factors also motivated the decision.

Under *Gross*, she gets nothing. Under S.1756, at a minimum, she would get declaratory relief, injunctive relief, a court order enjoining the defendant from engaging in future discrimination against folks for serving jury duty, and she would bear the prospect of additional relief, depending on whether the employer could bear its burden of proving that it would have made the same decision absent discrimination. We've seen similar outcomes under the Americans With Disabilities Act and other statutes as well.

The CHAIRMAN. I am going to ask Mr. Dreiband to respond to that.

Mr. DREIBAND. All right. Certainly, the notion that the *Price Waterhouse v. Hopkins* case was some great boon to plaintiffs, I think, is proven exactly by Mr. Gross' case that it was not.

In Mr. Gross' case, the United States Court of Appeals of the Eighth Circuit applied the *Price Waterhouse* standard—that's a 1989 Supreme Court case that established the mixed-motive framework—and concluded that, under that standard, that Mr. Gross had failed to present direct evidence of discrimination, which is what, according to the court, his lawyer conceded at oral argument.

As a result, the employer completely escaped liability, despite the fact that the jury had found that the employer had discriminated against him.

I think, no. 1, I would say that the *Price Waterhouse* standard wasn't, in my view, any great benefit to victims of discrimination, and the 1991 amendments certainly partially abrogated the decision in *Price Waterhouse*. But because they have stripped away any meaningful remedy, plaintiffs rarely, if ever, pursue it. Rarely.

I think the other thing I would say is that, since the *Gross* decision, what we have seen is that because employers no longer have this so-called same-action defense under the age-discrimination law, the United States Courts of Appeals are frequently and routinely ruling in favor of plaintiffs.

What happened before the *Gross* decision was very often that Federal district courts would rule in favor of defendants and say that the employer had established, as a matter of law, its same-

action defense and the plaintiff could not even get a jury trial out of it.

Now, the courts are saying that that defense is no longer available to employers and so the case should be scheduled for trial.

The other thing I would say is the notion that “but-for” causation has something—requires that age or the other characteristic be the only factor is simply untrue. The standard—and it’s included as described by the Supreme Court in the *Gross* case—is that determining factor, and that can be one of other factors, including—At issue in the decision itself, the court stressed there was no heightened burden for plaintiffs in age-discrimination cases.

The CHAIRMAN. Ms. Norton, I feel like I am back in law school. [Laughter.]

Ms. NORTON. A couple of points, Mr. Chairman. First, I want to be very clear about what happened in Mr. Gross’s case. The trial court applied *Price Waterhouse* to his claim and he won.

The CHAIRMAN. Right.

Ms. NORTON. The Eighth Circuit ruled that the *Price Waterhouse* instruction was inappropriate because he did not have direct evidence, and the Supreme Court took cert on that issue, whether or not he should have gotten the *Price Waterhouse* instruction absent direct evidence. If the Supreme Court had answered the question on which it granted cert, I very much doubt that we would be here today.

Instead, the Supreme Court articulated a brand new rule that not only stripped Mr. Gross of his verdict but imperiled the verdicts of many other plaintiffs as well.

Mr. Dreiband seems to be arguing—quarreling with S. 1756 in that it does not go far enough in terms of providing damages to plaintiffs, and I certainly would be open to enhancing the damages available to victims of discrimination.

If instead what we are posed with a choice of today is the choice between S. 1756 or the status quo under *Gross*, is there any question about which standard is better for employment victims, victims of employment discrimination? Absolutely none. S. 1756 dramatically improves the protections available to those victims.

The CHAIRMAN. Thank you both. I have some questions for Mr. Gross, also Ms. Aldrich, but I have gone over my time. I would recognize the Senator from Minnesota, if you want to jump in on this.

Senator FRANKEN. Yes. I would like to ask Mr. Gross, are you surprised by Mr. Dreiband’s assertion that you are better off because of the decision in your case?

Mr. GROSS. First of all, I am not an attorney. I stayed at Holiday Inn once, but this is a little bit beyond my level of understanding, although, you know, I studied the situation—

Senator FRANKEN. Your case, I would think.

Mr. GROSS [continuing]. Of every case.

Senator FRANKEN. Yes.

Mr. GROSS. Yes, I am quite surprised by that because I agree that if the Supreme Court had answered the question that was brought before it that my verdict would have been reinstated, and I cannot see how I can be anything but better off if that had happened.

Senator FRANKEN. An interesting thing, Ms. Norton, is that the case that was brought before the court that they took cert on was different than what they decided on, right?

Mr. GROSS. That's right.

Senator FRANKEN. Ms. Norton?

Ms. NORTON. Yes, Senator, that's quite right. The court granted cert on the question that had divided the lower courts, whether or not a plaintiff, a victim like Mr. Gross, needed to have direct evidence of discrimination before he could get the *Price Waterhouse* instruction or whether circumstantial evidence would suffice.

That question had divided the lower courts, and guidance from the Supreme Court on that would have been most welcome. Instead, they decided a very different question and articulated a rule that is much more punishing of age-discrimination victims.

Senator FRANKEN. Is it unusual for the Supreme Court to make a decision based on an issue that has not even been briefed?

Ms. NORTON. It is unusual. The issue was raised for the very first time by the defendant's brief in the Supreme Court. After Mr. Gross' attorney had already submitted their briefs, after the United States Government had already submitted its amicus brief, after the AARP had already submitted their amicus brief, the defendants offered that argument for the very first time.

And as the chair of the EEOC noted, the solicitor general noted this at oral argument and urged the court not to address an issue that had not been fully and adequately briefed.

Senator FRANKEN. Now, it seems to me that, given the decision by the Supreme Court, that it is hard for a worker to prove what an employer was thinking, but, now, after the *Gross* decision, the worker has to present some sort of smoking gun to show that age was the determinative factor for the firing or the demotion.

As an attorney who has litigated these cases, can you tell me what the smoking gun looks like, what it is supposed to look like, what it has to look like? Because most people do not write memos, And we fired Jane because she has a sick granddaughter, but mostly because she was old. How do you find a smoking gun?

Ms. NORTON. You are quite right. It is rare. I think what is especially pernicious about the *Gross* decision is that even if you have a smoking gun as a plaintiff, you may still lose.

For example, I offered the example—and this is borne out by the anecdotes that Chair Berrien offered. If an employer admits that it rejected an employee because of its stereotypes that older workers are less productive than others, even—that is smoking-gun evidence, a confession.

Even if that plaintiff has that, he or she will still lose and get nothing unless he or she can also prove that the employer had no other non-discriminatory reason that would have justified the decision at the same time. And it is very hard for that plaintiff to go into that employer's head and explain what was not there at the time of the decision.

Senator FRANKEN. It just seems like to me that there is a higher wall to climb. And that is why I was so taken that Mr. Dreiband seemed to be saying that, after *Gross*, that plaintiffs have been advantaged, and he seemed to present some sort of evidence of that.

Did the evidence that he presented seem anecdotal or was it based on some kind of statistics—

Ms. NORTON. I hope very much that he was not saying that *Gross* advantaged plaintiffs, because that is certainly not the case. I understood him to be saying that some age-discrimination plaintiffs still do win after *Gross*, and I would agree with that. Some age-discrimination victims still do win, but many more do not. It is harder for them to do so.

Senator FRANKEN. He seemed to be saying that actually they had been advantaged by it. Is that what you were saying, sir?

Mr. DREIBAND. I think it depends on the case, but there are cases that have come down since the *Gross* decision happened where the Federal courts of appeals have concluded that the standard is more favorable to plaintiffs than to defendants under the decision issued by the Supreme Court—

Senator FRANKEN. Would those be greater than the number of cases under which the opposite is true? Because I think that is part of the issue here. I mean, in your testimony, you seemed to be implying that it is a lower bar now and that the number of decisions for the plaintiff have increased rather than decreased, and there seemed to be a number of subsets here.

It feels to me, while there may be a subset where the plaintiffs have prevailed under this new standard where they may not have before, that that subset is much smaller than the subset of plaintiffs who have not prevailed because of this. Which would you say is the greater subset, sir?

Mr. DREIBAND. What I have seen is that the majority of Federal court of appeals cases decided since the *Gross* decision have been more favorable to plaintiffs.

Senator FRANKEN. And is that—

Mr. DREIBAND. Including non-Federal circuit courts out of 12.

Senator FRANKEN. [continuing]. Is that your experience, as you read it, Ms. Norton?

Ms. NORTON. No. If you look at those cases, it is true that, in those cases, the age-discrimination victim won, but it is not because the *Gross* rule helped them win. They won despite the *Gross* rule, not because of the *Gross* rule. I think that is very different than saying that the *Gross* rule advantages plaintiffs just because a few plaintiffs can still survive it.

Senator FRANKEN. OK. Is there a statistical way of doing some kind of analysis on that? Because I just want to see who—

Ms. NORTON. I am saying there is no subset in which plaintiffs are advantaged by *Gross*. So the statistics are easy from my standpoint.

Senator FRANKEN. OK. I would love to see some statistical analysis of Mr. Dreiband's assertion. Is that OK? From both of you? Would both of you agree to do that?

Mr. DREIBAND. Certainly. I am happy to provide any information I can to the committee.

Senator FRANKEN. Thank you. I really would appreciate that.

Mr. DREIBAND. In terms of statistical analysis, what kind are you asking for?

Senator FRANKEN. I was talking about two subsets. One was a subset of which plaintiffs have been clearly advantaged because of

the *Gross* standard. And the other is where they have been disadvantaged. Your very strong assertion was that the first subset is much larger than the second.

Ms. Norton's assertion is that the first subset is non-existent.

[Laughter.]

I think it should be pretty easy to establish whose testimony is more persuasive, shall we say?

Thank you very much.

The CHAIRMAN. Let's try to get a little bit further on on what Senator Franken brought up here and what I think Mr. Dreiband talked about earlier, about who is disadvantaged and who is not disadvantaged. I want something cleared up for the record here for me personally.

When Mr. Gross brought his case—when the jury decided for Mr. Gross, Mr. Gross got compensatory damages, I believe. I don't know if you got punitive damages.

Mr. GROSS. No.

The CHAIRMAN. Compensatory damages?

Mr. GROSS. Yes.

Ms. NORTON. Lost compensation.

The CHAIRMAN. Pardon?

Ms. NORTON. Sir, not pain and suffering damages. Lost compensation.

The CHAIRMAN. Lost compensation.

Was there also injunctive relief, too, or just compensatory damages, but not injunctive relief—

Ms. NORTON. I actually don't recall if there was injunctive relief. And, again, I don't mean to quibble, but compensatory damages, pain and suffering damages are not available under the Age Act. He did get damages for his lost pay raises and lost stock options.

The CHAIRMAN. Isn't that compensatory—

Ms. NORTON. Technically, compensatory means pain and—non-economic damages.

The CHAIRMAN. I mean economic damages.

From hearing what Mr. Dreiband said, under S. 1756 Mr. Gross would not be eligible to get lost wages, and my counsel says that that is not so. Mr. Gross would still be able to get those kinds of damages. Can you enlighten me on that?

Ms. NORTON. Yes, absolutely. So Mr. Gross received the *Price Waterhouse* instruction, the 20-year-old *Price Waterhouse* instruction, which required him to prove—to persuade the jury that age was a motivating factor in his decision, and he did so convince the jury.

Then the defendant was permitted to try to prove—to try to persuade the jury that it would have made the same decision even absent age discrimination, and the defendant did not so persuade the jury. That's *Price Waterhouse*.

Under S. 1756, same set of instructions, first, Jury, do you find that Mr. Gross has proved that age was a motivating factor in your demotion?

Jury says, Yes. That means that, under your bill, for sure now we know that Mr. Gross will get declaratory and injunctive relief and part of his fees and costs.

Then the jury is asked a second question: Jury, do you find that the defendant proved, nonetheless, that it still would have demoted Mr. Gross absent age discrimination?

Presumably the same answer, no. So he gets to keep—Also, then he is entitled to whatever back pay and other relief he can prove under your bill. Exactly the same result under your bill.

The CHAIRMAN. Well, you disagree with that, Mr. Dreiband?

Mr. DREIBAND. The way Professor Norton described it, no, I don't agree. I do agree entirely with what she just said. What I don't think we would agree about, though, is why any plaintiff would pursue a mixed-motive theory under the bill.

The reality is, under title VII, which has very similar language, a plaintiff can pursue a claim for what—the because-of standard described by *Gross* under Section 703 of Title VII and not invoke the mixed-motive provision of title VII, which is a separate section.

In my experience both as general counsel of the Equal Employment Opportunity Commission and representing plaintiffs and defendants in title VII cases, plaintiffs or victims of title VII discrimination almost never—and, in my experience, never—invoke the mixed-motive, burden-shifting scheme, because there is a risk that, even if they prove discrimination happened, there is the chance that the defendant can prove this defense and then they get nothing.

As a result, what happens in the real practice of law is that plaintiffs tend not to pursue that theory. The cases are extremely rare as a result and it is because of the defense that that has made available.

The CHAIRMAN. Still, under S. 1756 they have that choice, right?

Ms. NORTON. Of course. I guess a lot depends on what we are comparing this to. Could you come up with a bill that has even greater damages for plaintiffs? You bet.

The CHAIRMAN. Sure.

Ms. NORTON. Is this bill better than *Gross*? You bet. It is also an improvement on *Price Waterhouse*. It is more plaintiff-friendly than *Price Waterhouse* is. And Mr. Gross sought a *Price Waterhouse* instruction.

We saw folks seeking *Price Waterhouse* instructions under the ADEA case that you mentioned with respect to the Seventh Circuit. They lost under *Gross*, under the jury case that I asked—a *Price Waterhouse* mixed-motive instruction. There is no reason to believe they wouldn't also seek that instruction under your bill.

The CHAIRMAN. I just want to understand. Our bill does not take that right away from them.

Mr. DREIBAND. Let me give you—if I could, Senator Harkin—give an example. In the case of Josephine Mora, her case went to the United States Court of Appeals, to the Eleventh Circuit, just this year.

She worked for her employer and the chief executive officer of that company said to her, I need someone younger who I can pay less. Also said to her, allegedly, You are very old. You are very inept. What you should be doing is taking care of old people.

The employer asserted, as a defense, that her performance was poor, and, under the *Price Waterhouse* mixed-motive standard, that

it had a—even if it considered age of Ms. Mora—that it would have taken the same action because of her poor performance.

The district court in that case threw the case out at the summary-judgment stage. Said there was not even enough evidence, despite these statements by the chief executive officer of the company, because, under the *Price Waterhouse* standard—that is, the so-called same action—that the employer would have taken the same action—she loses.

The United States Court of Appeals for the Eleventh Circuit this year, a couple of months ago, read the *Gross* decision and reversed the district court's decision in favor of the defendant and ruled in favor of Josephine Mora, because the court said that the *Gross* decision removed this so-called defense that employers have.

If I could just clear up one other point very quickly that Senator Franken made, I did not mean to suggest that Mr. Gross is better off because he lost in the Supreme Court or in the United States Court of Appeals for the Eighth Circuit. He would have been better off if the *Price Waterhouse* decision had not required direct evidence of discrimination. And, in my view and my review of the record, it looked to me like harmless error.

I think the real problem in the case was the concession at the court of appeals that there was no direct evidence, and the whole issue was framed in that basis, rather than the fact that there was admissible evidence of discrimination that he and his lawyers presented at the trial. So I just wanted to clear that point up. Thank you.

The CHAIRMAN. I hate to keep this ping-pong game going, but, Ms. Norton, do you have a response on that?

Ms. NORTON. I do wish that the Supreme Court had actually answered the question that it had taken cert on, because I actually am quite confident—who knows. I would predict that the Supreme Court, again, would side with Mr. Gross to rule that direct evidence is not required, because it is so unusual in the law to require unusual types of evidence, and the court is very reluctant to require that unless and until Congress instructs it to do so.

There's nothing in the Age Act that requires direct evidence as opposed to circumstantial evidence. And your bill would fix that.

The CHAIRMAN. Mr. Gross, you have been listening to all this back and forth on this and the legal ramifications of it. You are going back to another trial this November, right?

Mr. GROSS. That's right.

The CHAIRMAN. You are not a lawyer. I understand that. It seems to me under the Supreme Court decision now, you have to prove that age discrimination was really—what?

Ms. NORTON. The “but-for”. He certainly can prove that it was a motivating factor. He has done it already, but then he must also prove that the employer would not have made the same decision even absent age discrimination. He has to explain what was in the employer's head, along with age discrimination, and how that motivated the decision.

The CHAIRMAN. That but for his age, the employer would not have made that decision.

Mr. GROSS. Yes.

The CHAIRMAN. How do you prove that? I mean, I do not know how you prove something like that. You are almost trying to prove a negative.

Mr. GROSS. That is the problem with the whole definition of direct evidence and what is a smoking gun.

We did have a memo that had been produced, I think about a year before, identifying people who were going to get demoted, and we noticed that there was only one common denominator. We were all over 50.

The CHAIRMAN. Yes.

Mr. GROSS. That evidently was not a smoking gun. We did not know about it. There is nothing we could have done to have changed it performance-wise.

The CHAIRMAN. Yes. I think that, to me, distills it down, Mr. Dreiband, and that is that, in these cases you have cited—that one you just cited and read from—not too often do you really have that smoking gun. Maybe in a few cases you do, and, obviously, those seem to be the cases that made it to the circuits where you really had a definite smoking gun. In most cases, you do not have that.

What you have done is you set this really high bar. If you have a smoking gun, you are going to win, even under the *Gross* decision.

That does not happen that often.

What we have said in the past is that if you can show that age was one of the factors—if you can show that—and that is a burden on the plaintiff. They have to show that. They showed it because all of the people that had been demoted were over the age of 50. That was the one characteristic they had in common.

The burden then goes to the employer to say, We have this evidence. The employer has all the documentation. You have the records. You have their performance standards. You have all this stuff on your employees. You can come back in and show that that was not the decisive factor. There were other reasons why you demoted Mr. Gross.

They can do that. They have all of the data. But for Mr. Gross to show that “but-for” that they would have made a different decision, that is almost impossible, unless he has a smoking gun.

It seems to me—from a layman’s standpoint, that is the difference between your approach and Ms. Norton’s approach or, I think, perhaps our approach here. We do not want to just limit this to smoking-gun cases. We want this more broadly applied, because we know, in real life—in real life—you do not often get that smoking gun.

Therefore, we have said if you can show that this was a factor, burden shifts. Employer, you show, now, that it was not just “but-for” his age that you demoted or fired Mr. Gross. Isn’t that really the essence of what we are talking about?

Mr. DREIBAND. With all due respect, Senator Harkin, no, I am not suggesting and do not mean to imply that a plaintiff in a discrimination case needs some kind of smoking gun in order to prevail.

The Supreme Court of the United States, in 1973, established the burdens and the burden shifting that happens in title VII cases that courts have applied to age-discrimination cases in cases in

which there is not a smoking gun. Litigants have been operating under that standard, under this so-called because-of race or sex standard, for nearly 40 years and have been winning cases without any kind of smoking gun. Typically, the evidence includes things of the sort that Mr. Gross presented in his case.

For example, in Mr. Gross' case, according to the district court's opinion, there was evidence that a former subordinate of Mr. Gross was put in the position that he held, that a former supervisor testified that, in Mr. Gross' case, Mr. Gross was much more qualified than that younger former subordinate. Mr. Gross provided similar testimony. So the evidence may not have included a smoking gun or what the court of appeals described as direct evidence.

Under that standard, Mr. Gross prevailed in front of the jury. I think he would prevail again if the evidence is as described by the district court. And so I did not, in any way, mean to imply that a smoking gun is necessary.

The point I would make, though, is that because of the framework of the bill, no. 1, it fails to identify the laws that the Congress proposes to amend. Litigants, including victims, are going to be left fighting over that issue unnecessarily for many years.

No. 2, because there is no meaningful remedy available, if an employer proves this so-called same-action defense, in the same way that title VII does not provide that kind of meaningful remedy to victims, most victims of discrimination will not pursue the mixed-motive framework. That is what we have seen under title VII, and I think that is what we will see if the bill is enacted in its current form.

The CHAIRMAN. It is like preponderance of evidence. The preponderance in this case, of the legal experts that my counsel has talked to—who is also a pretty good legal expert in his own right—and others say that Mr. Gross is not in as good a position going back into the trial as he was before. You were saying he is actually in a better position.

As I said, almost all the legal experts in the EEOC and others that we have contacted about this in drafting this legislation said this will put Mr. Gross in a better position. It will put him in at least an equal position to what he was before.

Am I wrong in that, Ms. Norton? Will S. 1756—if we could pass it today and get the president to sign it, would this put him basically in a similar kind of a situation he was before or will he be in a worse position?

Ms. NORTON. He will certainly be in a—

The CHAIRMAN. He's going back to trial in November. OK?

Ms. NORTON. Yes. If you pass this before he goes back to trial, he will be in a better position than he is today, under *Gross*. That is absolutely true.

The CHAIRMAN. That is what I keep hearing from everybody, but you do not agree with that.

Mr. DREIBAND. No. Maybe I have not been clear. I mean, what I would encourage the committee to do is go ask the EEOC how many mixed-motive cases under title VII they have litigated since 1991. You are going to find that the answer is almost none. And the question I would have is why.

The answer is because neither the government nor victims of discrimination can prevail, even if they win—or at least the possibility is they will not prevail, because even if they prove discrimination, there are no damages available—no back pay, no front pay, no job, no reinstatement, nothing.

As a result, most victims of discrimination, given the choice, will pursue the other alternative framework under title VII.

The CHAIRMAN. Mr. Dreiband, are you in disagreement—maybe I am wrong—that under S. 1756, if it were passed, Mr. Gross could still get—maybe I am wrong in my use of terms, not compensatory damages, but could get back pay and loss of wages and that kind of thing. Am I wrong on that?

Mr. DREIBAND. He could get liquidated damages and back pay only if the employer fails to prove the defense. So that is true.

Ms. NORTON. That is what happened before at trial.

The CHAIRMAN. That is what happened.

Ms. NORTON. That is what happened at trial.

Mr. DREIBAND. Right.

The CHAIRMAN. That is what happened in the first trial.

Mr. DREIBAND. It did happen. And the question, though, is—

The CHAIRMAN. Why wouldn't that happen again?

Mr. DREIBAND. It may happen again.

The CHAIRMAN. Then, why would he be disadvantaged under S. 1756?

Mr. DREIBAND. Because it may not happen. Whereas, if you can—

The CHAIRMAN. It may not happen. I will tell you what, under the law right now—the Supreme Court decision, not our law, but the Supreme Court decision—he is going to have a dickens of a time proving his case. How can he prove this? He can't.

Mr. DREIBAND [continuing]. He will bring in the same evidence that was brought in—Look, let me say this: He would have been better off if his verdict had not been reversed. I do not mean to suggest otherwise. If the U.S. Court of Appeals had not reversed the verdict, he would be in a better position, but—

The CHAIRMAN. OK. What we are trying to do with S. 1756 is to put it back sort of the way it was before. You are saying we are not doing that?

Mr. DREIBAND [continuing]. The bill does not exactly mirror the standards that governed at the time of the jury trial in this case. There are changes. For example, I think as Professor Norton mentioned—or somebody mentioned—there's no longer the direct-evidence requirement in a mixed-motive case, that the bill would change. The question, though, is why someone would want to pursue it.

It is true that the jury did reject, in this case, the employer's same action defense and may do so again.

The CHAIRMAN. I do not think Mr. Gross—I don't know. I am not his lawyer. He is not going to pursue a mixed-motive case, is he? [Discussion off the record.]

The CHAIRMAN. We don't know. I don't know. I mean, that is up to him and his attorney, whether he is going to pursue a mixed-motive course of action.

I assume in the previous case it was a mixed motive or was it just simply straightforward age discrimination?

Mr. GROSS. It was a mixed-motive instruction—

The CHAIRMAN. To the jury.

Mr. GROSS [continuing]. Yes. Accompanied by that, and from a lay perspective, they also got an instruction that said if Farm Bureau could show any evidence—any evidence—that they would have taken the same action in absence of my age, then they should find in favor of Farm Bureau.

Now, to me, that—as a lay person, that is a “but-for” causation.

The CHAIRMAN. That is right.

Mr. GROSS. I am not sure I, as a lay person, understand, the intricacies of the way this language is getting parsed back and forth.

The CHAIRMAN. Um-hum.

Ms. NORTON. I will just add that is a very good question, and the burden of proof matters. It mattered that, at trial, the employer had the burden of proof.

Gross flips that such that the burden of proof never shifts to the employer, even if the plaintiff can prove discrimination.

Your bill would return it to the status quo, where once the plaintiff—like Mr. Gross—proves that discrimination played a role in the decision, the burden of proof shifts to the employer, and that matters.

The CHAIRMAN. What would the instructions to the jury be under the Supreme Court decision right now?

Ms. NORTON. Under the Supreme Court decision?

The CHAIRMAN. Right. As it stands right now, what would their instructions to the jury be?

Ms. NORTON. Do you find that Mr. Gross proved, by a preponderance of the evidence, that age was the “but-for” cause of your demotion?

The CHAIRMAN. But for that, he would not have been demoted. Would a jury understand that? I have a hard time understanding that.

Mr. DREIBAND. Well, Senator Harkin, if I could clarify a little bit on that question, the defense lawyers in the case did propose a so-called “but-for” causation standard, the model jury instruction by the U.S. Court of Appeals in that circuit, and that instruction explains that so-called “but-for” causation does not mean that age, in this case, has to be the only reason for the decision. Rather, the jury instruction explains it has to be a determining factor. What you ultimately are arguing about is is it determining factor or motivating factor and whether or not there is a difference between those two standards.

Discrimination plaintiffs have been winning cases for decades under the determining-factor standard that the *Gross* decision sets, and this notion that it somehow has created this impossible burden is simply untrue. It is not what we are seeing in the courts, and it is not true under title VII.

Ms. NORTON. Just to briefly respond, I guess we can take solace in the fact that we do know how the Civil Rights Act of 1991 standard has worked.

The CHAIRMAN. I am sorry. Say that again.

Ms. NORTON. The standard that you are proposing is one that has been in place for 20 years under title VII. So we know how it has worked. It has been in place for 20 years.

I know, too, that it was also the position taken by the Reagan Department of Justice during the *Price Waterhouse* litigation. They adopted the standard that you are proposing in the briefing of the *Price Waterhouse* case in 1988.

And, of course, the first President Bush also endorsed the same standard in enacting the Civil Rights Act of 1991. It appropriately balances the interests of both employees to be free from discrimination and the interests of employers in considering non-discriminatory factors in making employment decisions.

The CHAIRMAN. Ms. Aldrich, you have been very patient with all this going on here.

Ms. ALDRICH. Yes. I also am not an attorney by background, but I would say that, from my perspective in looking at this, it just seems, thinking about all the potential employees who have age-discrimination cases, this sets a tougher and different standard for those cases.

You have heard from Mr. Gross how difficult it is to come forward on age-discrimination cases, the pressure, the loyalty. Older workers are my loyal. Older workers have a hard time coming forward anyway, and then to have to make a tougher standard seems to me to be very unfair. I also think it is important for us to put it in the context of what is going on right now.

We did a survey at AARP—this is a pre-recession. I am sure the numbers would be higher now—where older workers said that they have seen or experienced discrimination in the workplace. These are workers between 45 and 74. Sixty percent said—

I think age discrimination is extremely important, and I would like to see us restore the standard that is similar for other discrimination cases.

The CHAIRMAN. I think that is really what we are trying to do here. I was quite taken aback to think that what we were doing was not helping, and that somehow older workers are in much better position because of the Supreme Court decision. I just find that very hard to understand, Mr. Dreiband.

I know these are fine legal points, but it comes down to that trial court and what the instructions to the jury are. It seems to me the instructions to the jury, under the previous law, were much more clear cut. It did put the burden on the defendant after he proved—after he got over the first hurdle, and the jury said no, they did not show that there was any other reason, that age was the factor.

Now, it is all on him as he goes back to trial court. The Defendant does not have to do anything. The plaintiff just has to show everything. And I suppose if he has a letter from his employer saying, You old goat, we want you out of here, you know, that could be a smoking gun, I suppose, or something like the things you said that were in these other cases, but that just does not happen that often.

As for the other reason that Ms. Aldrich pointed out, how tough it is for older workers who have been in a company a long time and loyalty and you have friends there, you know, to raise that bar up again, it would seem to me it would tend—just the way things are right now—would tend to say to an older employee who is facing

that kind of discrimination that, you know, better not to fight. Better just to leave and do something else and not put up a fuss about it.

That is not the right way to do things. I mean, that would just be giving in to discrimination. You have to have people with the guts and the courage of their convictions, like Mr. Gross, who understands it is not just about him. It is about a lot of other people, too.

Ms. ALDRICH. About a lot of other people.

The CHAIRMAN. A lot of other people getting hit by this. There are a lot of other people, other than Mr. Gross, who are effected by this, but, for whatever reason, they decided not to go forward.

I do not mean to look into anybody's motives, but I think Mr. Gross understood, if I do not do this, if I do not stand up, who is going to stand up?

Mr. GROSS. That is right.

The CHAIRMAN. Who is going to go up and say, Wait a minute, this is wrong. This is not the right way to proceed in our society, and that the laws ought to mean something if they are going to protect people against discrimination.

This is why I think we have to get back to where we were, back to a semblance of where someone like a Mr. Gross can come forward, even though he does not have a smoking gun, but he has a preponderance of evidence and he can show that age was a factor.

Then let the defendant—as we have said in the past—show that that was not the overriding—there were other reasons, all these other reasons why they demoted or fired or got rid of somebody.

It seems to me that is what we are trying to get to. Am I wrong?

Mr. DREIBAND. Senator Harkin, may I just briefly respond?

The CHAIRMAN. Yes, of course.

Mr. Dreiband. With respect to any of my remarks, I want to be clear, age discrimination in employment is a terrible problem in the United States and has been one for a long time. And I did not, in any way, mean to suggest by any of my remarks that I thought or that I think that age-discrimination victims should have some kind of increased or heightened burden to prove their case.

When I served as the general counsel of the Equal Employment Opportunity Commission, we litigated hundreds of cases. I personally intervened and argued on behalf of victims of age discrimination in several cases, both to authorize those cases on the front end, including several class-action cases against major employers, major law firms.

I argued cases on behalf of victims in the United States Courts of Appeals and worked with the solicitor general on behalf of victims in Supreme Court cases.

We recovered more money for discrimination victims through EEOC's litigation program during my tenure than at any other time before or since in the EEOC's history. I am very proud of that service and feel very honored to have served with many of the people who are still at the EEOC.

I just want to be clear that I did not, in any way, mean to suggest that age discrimination is not a problem or that victims of discrimination should have some onerous burden to prove their case.

That is not what I intended to imply, and I just wanted to make the record clear on that.

Thank you.

The CHAIRMAN. I never inferred that from any of your statements. There seems to be different approaches on how to do this. Our job here is to try to figure out which is the best approach.

I try to go out to all the experts. We go out to different groups and try to figure out what is the best approach. All I can say is that, maybe we can make it tougher. I don't know. I also have to look at the reality of what we can do here in a legislative sense.

It just seems to me that what was happening before, and the fact that you were successful in prosecuting all the cases, that whatever the law was before seemed to work pretty well.

Since the *Gross* decision, it has created a turmoil. It has created a lot of uncertainties, and from what I understand, it is going to create a higher burden of proof for plaintiffs than what we have had in the previous 20 years.

If that is the case, then we want to—I do not want to have a higher burden of proof for plaintiffs. I think they already have a burden of proof. I think the logic of the law that we have had for the last 20 years has been pretty good, seems to me.

But, no, I did not infer that you were anything but opposed to age discrimination. It seems to me two different viewpoints on how to get to the solution of this, which always raises questions around and in our legislative process.

This is very interesting. Do we have anything else that anybody wanted to say before we close?

Mr. DREIBAND. Can I make one small point?

The CHAIRMAN. Sure.

Mr. DREIBAND. Something we have not focused on that I do think the Congress could easily fix is the problem in the bill of ambiguity in terms of which laws the bill would amend.

The law says it would amend or apply to any Federal employment discrimination law, and by not listing those laws, it creates a lot of uncertainty that I think could easily be clarified by the Congress if it wanted to just simply list the laws that Congress intends to amend. I would encourage the committee and the Congress to focus on that.

The CHAIRMAN. I have been through that, Mr. Dreiband. I have been through that. What was the recent case that you told me about that?

[Discussion off the record.]

The CHAIRMAN. My counsel tells me that there was a case where the court decided that it did not apply to the Jury Systems Improvements Act. I never heard of the Jury Systems Improvements Act.

Here is what I remember about specifically. I remember when we were passing the Americans With Disabilities Act. Now, this may not be on point in a legal sense, but I remember when we were passing the Americans With Disabilities Act, there was a move by some that said that we could not leave it as broad as it was. We had to specify every single disability.

That is an impossibility, because there are permutations of all kinds of different kinds of disabilities. Well, it may have been—you

might have listed one, but maybe this was a subset of that that didn't really apply.

It seems to me that if we do not leave this broad and we try to specify every—I will bet we would have not looked at the Jury Systems Improvements Act. Hundreds of different things out there that Congress has passed. What if we forget one? Then we have to come all the way back here and pass another law to cover that?

That is why this idea of specificity and specifying every single law just does not work. That is why we leave it broad, and we leave it up—need I say this?—to the courts to say what was Congress' intent.

We will have plenty of written and also in our record, our hearing records, as I am making today, and we will have it in terms of our report language that we intend to have this applied broadly—broadly.

That is what we said in the Americans With Disabilities Act. We intend for this to be applied broadly in terms of disabilities, and that is what I think we have to do here. As I said, I just don't think we can specify every law. That is my response on that.

Thank you very much. This has been very enlightening. As I said, boy, I wish I would have paid more attention in law school now.

[Laughter.]

It was very enlightening and I thank you very much for this.

The record will be kept open for 10 days for other questions to be submitted by Senators who, for one reason or another, could not be here today.

Thank you, again, very much.

The committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

RESPONSE TO QUESTION OF SENATOR HARKIN BY JACQUELINE A. BERRIEN

Question. In your testimony, you referred to the “surge” in ADEA charges and the increasing prevalence of workers facing age discrimination. Can you describe in more detail the trends the EEOC has seen with respect to age discrimination in the workplace?

Answer. Over the last 5 years, from fiscal year 2005 to fiscal year 2009, there was a 37 percent increase in ADEA charge receipts. The EEOC received 16,585 ADEA charges in fiscal year 2005 and the number climbed to 24,582 charges in fiscal year 2008, with only a slight decline (to 22,778) in fiscal year 2009. This is consistent with the overall 2.2 percent decline in charge receipts between fiscal year 2008 and fiscal year 2009.¹ As a percentage of charges filed, ADEA charges went from 22.5 percent of charge receipts in fiscal year 2005 to 25.8 percent of charge receipts in fiscal year 2008 to 24.4 percent of all charges received in fiscal year 2009. Over the last 10 years, from fiscal year 1999 to fiscal year 2009, there has been a 61 percent increase in ADEA charge receipts. In fiscal year 1999, the Agency received 14,141 ADEA charges, which comprised 18.3 percent of all charges filed.

Of course, charge data only measures the number of filed charges of discrimination. Many victims of age discrimination do not file charges² and not all charges are meritorious. The “merit factor” rate is a closer measure of the percentage of meritorious claims filed with EEOC because it represents all charge resolutions in which the charging party received a benefit (including negotiated settlements, conciliations, and withdrawals where the parties have reached a private settlement). Since fiscal year 2005, the merit factor rate for ADEA charges has averaged 19.2 percent.

On July 15, 2009, the Commission held a hearing on *Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers*, in which witnesses testified that negative stereotypes about older workers are still prevalent in the workplace. However, many researchers have found assumptions about declining productivity of older workers to be false.³ These findings have been consistent since the Department of Labor’s 1965 study that served as the impetus for the ADEA.⁴

¹During the first two quarters of fiscal year 2010, the Agency received 11,381 ADEA charges.

²See, e.g., Vincent J. Roscigno, Sherry Mong, Reginald Byron, Griff Tester, *Age Discrimination, Social Closure and Employment*, 86 SOCIAL FORCES 313, 319 (Sept. 2007) (opining that age discrimination charges, or cause findings, represent a “significant underestimate” of workplace age discrimination).

³Towers Perrin, *The Business Case for Workers Age 50+, Planning for Tomorrow’s Talent Needs in Today’s Competitive Environment* (AARP) (Dec. 2005), at 33–43. (“Mounting evidence—both anecdotal and statistical—demonstrates that older workers bring experience, dedication, focus, stability and enhanced knowledge to their work, in many cases to a greater degree than younger workers;” it is a myth that performance suffers over time; rather, older workers’ “commitment and knowledge that comes with experience are far more important drivers of workplace contribution”); Posthuma & Campion, at 166 (Although some skills may deteriorate with age, older workers’ knowledge and expertise compensate so that productivity generally does not decline with age, and may, in fact, improve.).

⁴REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 8-9 (June 1965) (finding “The competence and work performance of older workers are, by any general measure, at least equal to those of younger workers.”).



U.S. Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964 Charges
(includes concurrent charges with ADEA, ADA and EPA)
FY 1997 - FY 2009

The following chart represents the total number of charge receipts filed and resolved under Title VII.

Receipts include all charges filed under Title VII as well as those filed concurrently under the ADA, ADEA, and/or EPA. Therefore, the sum of receipts for all statutes will exceed total charges received.

The data are compiled by the Office of Research, Information and Planning from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Receipts	58,815	58,124	57,582	59,588	59,631	61,469	59,075	58,328	55,976	56,155	61,159	69,064	68,710
Resolutions	82,533	80,888	89,085	87,138	84,548	86,392	82,227	81,355	88,885	84,228	83,631	88,104	84,304
Resolutions By Type													
Settlements	2,272	2,657	3,748	4,828	4,493	5,382	5,215	5,365	4,991	5,165	6,423	6,418	6,202
	3.6%	4.4%	6.3%	8.5%	8.2%	9.5%	10.0%	10.4%	10.6%	11.7%	12.0%	11.0%	9.8%
Withdrawals w/Benefits	1,924	1,767	2,084	2,251	2,201	2,188	2,188	2,151	2,405	2,373	2,907	3,427	3,542
	3.1%	2.9%	3.5%	3.9%	4.0%	3.9%	4.2%	4.2%	5.1%	5.4%	5.4%	5.9%	5.5%
Administrative Closures	17,405	16,114	14,265	11,439	10,766	9,791	9,225	8,563	7,255	7,143	9,475	9,827	12,104
	27.8%	28.5%	24.1%	20.0%	19.7%	17.4%	17.7%	18.7%	15.5%	18.2%	17.7%	16.8%	18.8%
No Reasonable Cause	38,731	37,792	35,614	33,822	32,075	34,871	32,418	32,646	29,344	27,178	32,123	35,695	39,418
	61.9%	62.1%	60.3%	59.2%	58.8%	61.5%	62.1%	63.8%	62.6%	61.4%	69.9%	61.4%	61.3%
Reasonable Cause	2,201	2,558	3,374	4,798	5,014	4,390	3,181	2,530	2,890	2,426	2,703	2,739	2,948
	3.5%	4.2%	5.7%	8.4%	9.2%	7.8%	6.1%	5.1%	6.2%	5.5%	5.0%	4.7%	4.8%
Successful Conciliations	588	671	859	1,061	1,177	1,060	747	697	798	618	840	841	905
	0.9%	1.1%	1.5%	1.9%	2.2%	1.9%	1.4%	1.4%	1.7%	1.4%	1.6%	1.4%	1.4%
Unsuccessful Conciliations	1,633	1,887	2,515	3,705	3,637	3,320	2,434	1,933	2,102	1,808	1,863	1,889	2,043
	2.6%	3.1%	4.3%	6.5%	7.0%	5.9%	4.7%	3.8%	4.5%	4.1%	3.5%	3.3%	3.2%
Merit Resolutions	6,397	6,982	9,206	11,675	11,708	11,930	10,584	10,146	10,288	9,954	12,033	12,582	12,782
	10.2%	11.5%	15.8%	20.8%	21.5%	21.2%	20.3%	19.8%	21.9%	22.5%	22.4%	21.7%	19.9%
Monetary Benefits (Millions)*	\$88.7	\$78.0	\$113.1	\$142.4	\$141.1	\$141.7	\$138.7	\$128.8	\$146.0	\$126.5	\$220.0	\$201.4	\$214.4

* Does not include monetary benefits obtained through litigation.

The total of individual percentages may not always sum to 100 percent due to rounding.

EEOC total workload includes charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies (FEPAs). Resolution of charges each year may therefore exceed receipts for that year because workload being resolved is drawn from a combination of pending, new receipts and FEPA transfer charges rather than from new charges only.

Definitions of Terms

Historical Data



U.S. Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964 Charges FY 1992 - FY 1996

The following chart represents the total number of charge receipts filed and resolved under Title VII.

Receipts include all charges filed under Title VII as well as those filed concurrently under the ADA, ADEA, and/or EPA. Therefore, the sum of receipts for all statutes will exceed total charges received.

The data are compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System - quarterly reconciled data summary reports.

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996
Receipts	55,391	62,811	61,105	62,159	55,388
Resolutions	47,014	46,176	43,833	64,464	60,944
Resolutions By Type					
Settlements	3,261	2,855	2,510	2,330	1,845
	6.9%	6.2%	5.7%	4.3%	3.0%
Withdrawals w/Benefits	3,031	3,241	3,015	2,872	2,119
	6.4%	7.0%	6.9%	5.3%	3.5%
Administrative Closures	10,646	12,466	14,987	19,073	17,483
	22.6%	27.0%	34.2%	35.0%	28.7%
No Reasonable Cause	28,969	26,554	22,266	29,340	38,335
	61.6%	57.5%	50.8%	53.9%	62.9%
Reasonable Cause	1,108	1,060	1,055	849	1,162
	2.4%	2.3%	2.4%	1.6%	1.9%
Successful Conciliations	401	392	378	300	399
	0.9%	0.8%	0.9%	0.6%	0.7%
Unsuccessful Conciliations	707	668	677	549	763
	1.5%	1.4%	1.5%	1.0%	1.3%
Merit Resolutions	7,400	7,156	6,580	6,051	5,126
	15.7%	15.5%	15.0%	11.1%	8.4%
Monetary Benefits (Millions)*	\$52.5	\$68.5	\$68.6	\$65.1	\$66.4

* Does not include monetary benefits obtained through litigation.

The total of individual percentages may not always sum to 100 percent due to rounding.

EEOC total workload includes charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies (FEPAs). Resolution of charges each year may therefore exceed receipts for that year because workload being resolved is drawn from a combination of pending, new receipts and FEPA transfer charges rather than from new charges only.

Definitions of Terms

Historical Data

RESPONSE TO QUESTIONS OF SENATOR HARKIN BY HELEN NORTON

Question 1. The legislation I introduced, the Protecting Older Workers Against Discrimination Act, is intended to return the law to what it was before the Court's decision in *Gross v. FBL Financial*. The bill would codify the motivating factor standard of causation in mixed motive cases that had been in place since *Price*

Waterhouse v. Hopkins. It is also the standard that remains in place for claims under Title VII of the Civil Rights Act.

Why do you believe the motivating factor standard is the appropriate causation standard for mixed motive cases, including those under the ADEA?

Answer 1. Once the plaintiff has proven that discrimination was a motivating factor in the defendant's employment decision, the "motivating factor" standard shifts the burden of proof to the defendant to show that it would have made the same decision even absent discrimination. Such burden-shifting appropriately recognizes and responds to employers' and employees' asymmetric access to information about the employer's state of mind. Indeed, defendants' greater access to information that is key to proving or disproving an element of a particular claim commonly triggers burden-shifting in many other areas of the law.¹ Such burden-shifting is especially appropriate, moreover, when the uncertainty in determining the "but-for" cause of the decision has been created by the defendant's discriminatory consideration of protected status or activity in its decisionmaking. As Justice Breyer explained in his *Gross* dissent:

It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining or discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.²

Question 2. The Protecting Older Workers Against Discrimination Act makes clear that the motivating factor framework applies to all anti-discrimination and anti-retaliation laws—treating all workers, and all forms of discrimination, equally.

In your testimony, you emphasized that the Supreme Court's decision in *Gross* has been applied to statutes beyond the Age Discrimination in Employment Act (ADEA).

Based on your review of the Court's decision in *Gross*, your knowledge of other civil rights statutes, and application of *Price Waterhouse* and *Gross* by lower courts, why do you think the part of the bill applying it beyond the ADEA is important?

Answer 2. Lower courts now increasingly understand *Gross* to mean that the motivating factor framework is *never* available to plaintiffs under Federal antidiscrimination and antiretaliation statutes unless and until Congress expressly provides otherwise.³ The Seventh Circuit, for example, describes *Gross* as holding that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating "but-for" causation is part of the plaintiff's burden in all suits under Federal law."⁴

¹ See Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE 105 (3d ed. 2003) (describing the appropriateness of shifting the burden of proof to the defendant on a contested issue when the defendant has greater access to evidence probative of that issue).

² *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2359 (2009) (Breyer, J., dissenting) (emphasis in original).

³ Indeed, the *Gross* Court signaled its unwillingness to interpret other statutes in a manner consistent with the *Price Waterhouse* Court's interpretation of identical causation language, thus destabilizing the longstanding expectation that Congress incorporated the same language in different antidiscrimination laws because it intended consistent interpretation of those laws. See *Gross*, 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (citation omitted).

⁴ *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009); see also *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963 (7th Cir. 2010) (emphasizing "the import of explicit statutory language rendering an employer liable for employment decisions that were motivated in part by a forbidden consideration but which the employer still would have made in the absence of that proscribed motive. In the absence of such language, the limited remedies that title VII otherwise makes available to plaintiffs in such cases . . . are foreclosed."); *Serafinn v. Local 722, Int'l Brotherhood of Teamsters*, 597 F.3d 908, 915 (7th Cir. 2010) (holding that, after *Gross*,

For this reason, lower courts now apply *Gross* to a growing number of Federal antidiscrimination and antiretaliation statutes in addition to the ADEA, requiring the plaintiff not only to prove that discrimination or retaliation motivated the decision, but also to bear the additional burden of proving that such discrimination was the “but-for” cause of the decision. Examples include cases alleging job discrimination because of disability in violation of the Americans with Disabilities Act,⁵ job discrimination because of protected speech under 42 U.S.C. §1983,⁶ and job discrimination based on an employee’s jury service in violation of the Jury Systems Improvement Act.⁷ Other courts have speculated about the application of the *Gross* standard to still other Federal laws providing important employment protections, such as 42 U.S.C. § 1981 and the Family and Medical Leave Act.⁸

In these contexts, too, the *Gross* rule has deprived plaintiffs of victory. Consider the experience of Dr. LilliAnn Williams-Jackson, a public school guidance counselor who alleged a violation of the Jury Systems Improvement Act and who successfully proved that her jury service was a motivating factor in her employer’s decision to cut her position. The trial court nonetheless rejected Dr. Williams-Jackson’s claim in light of the more stringent causation standard under *Gross*:

This is a close case of mixed motives leading to the decision to “excess” Dr. Jackson from [the school] and one in which Dr. Jackson’s credibility is distinctly superior to her former principal. Nonetheless, the Court concludes that Dr. Jackson has not carried her burden to prove that her jury service “was the ‘but-for’ cause of the challenged employment action.”

...

[U]nder *Gross*, Dr. Jackson must prove by a preponderance of the evidence that she was “excessed” “by reason of” her jury service—that is, that jury service was the “but-for” cause of the decision to excess her. The Court has no doubt that Dr. Jackson’s jury service was a motivating factor behind [the principal’s] acceptance of the loss of a guidance counselor, who otherwise is of particular assistance to a principal in dealing with behavior and other student problems. What is lacking is any evidence that her jury service was “the ‘but-for’ cause” of the decision”⁹

Under the *Gross* standard, Dr Williams-Jackson receives nothing, and her employer remains unsanctioned even though it was proven to have punished her for her jury service.¹⁰

The Seventh Circuit similarly applied the *Gross* rule in an Americans with Disabilities Act case to strip a plaintiff of relief that she had been awarded by the trial court.¹¹ There the jury concluded that the plaintiff had proven that defendant fired her based on its perception that she had a disability, and also found that the defendant still would have fired her absent her perceived disability. Applying title VII’s motivating factor framework to the ADA,¹² the district court then awarded the plaintiff declaratory and injunctive relief along with some of her attorney’s fees and costs (for a total of approximately \$30,000). The employer appealed this award of

“[m]ixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act’s authorization of claims that an improper consideration was ‘a motivating factor’ for the contested action.”)

⁵ *Serwatka v. Rockwell Automation, Inc.* 591 F.3d 957, 961 (7th Cir. 2010).

⁶ *e.g.*, *Fairley v. Andrews*, 578 F. 3d 518, 525–26 (7th Cir. 2009).

⁷ *Williams v. District of Columbia*, 646 F. Supp. 2d. 103, 109 (D.D.C. 2009).

⁸ *See, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 187 (3rd Cir. 2009) (*Jordan, J.*, concurring) (“[I]t seems quite possible that, given the broad language chosen by the Supreme Court in *Gross*, a critical re-examination of our [section 1981] precedent may be in order.”); *Crouch v. J.C. Penney Corp., Inc.*, 337 Fed. Appx. 399, 402 n.1 (5th Cir. 2009) (in the context of an FMLA case, noting that “[t]he Supreme Court’s recent opinion in *Gross* raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework”) (citation omitted); *Burgess v. JHM Hotels*, 2010 WL 1493132 (D.S.C. 2010) (same).

⁹ *Williams*, 646 F. Supp. 2d. at 106, 109 (quoting *Gross*) (emphasis in original).

¹⁰ In contrast, under S. 1756, Dr. Williams-Jackson would have been entitled to injunctive and declaratory relief and partial attorney’s fees and costs, plus the possibility of additional relief (such as back pay and reinstatement) if the employer could not bear its burden of proving that it would have demoted her regardless of her jury service.

¹¹ *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

¹² The ADA’s enforcement provisions specifically incorporate the powers, remedies and procedures of title VII, including the title VII provision authorizing certain remedies where the plaintiff has proven mixed motive discrimination. 42 U.S.C. § 12117 (“The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment.”).

partial costs, fees, declaratory, and injunctive relief, arguing that the *Gross* causation rule should apply instead. The Seventh Circuit agreed:

[The plaintiff] did not show that her perceived disability was a but-for cause of her discharge. Although the jury agreed with her that [the employer's] perception of her limitations contributed to the discharge, it also found that [the employer] would have terminated [the plaintiff] notwithstanding the improper consideration of her (perceived) disability. Relief is therefore not available to her under the ADA, and [the employer] was entitled to judgment in its favor [I]n view of the Court's intervening decision in *Gross*, it is clear that the district court's decision to award [the plaintiff] declaratory and injunctive relief along with a portion of her attorney's fees and costs cannot be sustained.¹³

Once again, the *Gross* rule left the plaintiff with nothing, and her employer remains unsanctioned even though it was proven to have discriminated against her based on disability.

S.1756 responds by clarifying Congress' commitment to a uniform causation standard, making title VII's longstanding motivating factor framework available under all Federal laws that protect workers from discrimination or retaliation based on a protected characteristic (e.g., age) or protected activity (e.g., engaging in Federal jury service or reporting or challenging discriminatory behavior). For the reasons discussed above, the motivating factor standard not only most appropriately shifts the burden of proof to the party with the best access to the key information, but also best effectuates Congress' commitment to deterring workplace discrimination. Ensuring uniform application of this standard across relevant Federal law, moreover, offers a wide range of practical advantages—for example, by ensuring that courts, litigants, and jurors will proceed under the same “motivating factor” instruction for all claims in cases involving claims under multiple statutes (such as an older African-American plaintiff who brings claims under both title VII and the ADEA).

Question 3. Mr. Dreiband, in his testimony before the committee, wrote that “since the *Gross* decision [was] issued, the Federal courts have repeatedly ruled in favor of age discrimination plaintiffs and against discrimination.” He further stated that courts “have issued decisions in favor of discrimination plaintiffs and relied upon the *Gross* case to do so.”

In support of this notion, he points to several cases, including: *Hrisinko v. New York City Department of Education*, 2010 WL 826879 (2d Cir. Mar. 11, 2010); *Mora v. Jackson Memorial Foundation, Inc.*, 597 F.3d 1201, 1202 (11th Cir. 2010); *Veletz v. Thermo King de Puerto Rico, Inc.*, 585 F.2d 441 (1st Cir. 2009); *Baker v. Silver Oak Senior Living Management Company*, 581 F.3d 684 (8th Cir. 2009).

Do you agree with Mr. Dreiband that *Gross* has been beneficial to age discrimination plaintiffs?

Answer 3. No. Under *Price Waterhouse* and before *Gross*, the ADEA burden of persuasion shifted to the defendant once the plaintiff proved discrimination. As the First Circuit explained, “most plaintiffs perceive the *Price Waterhouse* framework and its concomitant burden-shifting as conferring a profound advantage. In the average case, the employee thirsts for access to it, while the employer regards it as anathema.”¹⁴ In stark contrast, after *Gross* and its rejection of the *Price Waterhouse* framework, the burden never shifts to the defendant—a dynamic that makes it much easier for defendants to prevail.

Indeed, as Mr. Gross's own case makes painfully clear, the *Gross* rule can strip discrimination plaintiffs of hard-fought victories. Mr. Gross won under the *Price Waterhouse* motivating factor standard, and he would have won under S. 1756's motivating factor standard. Only under the *Gross* Court's new “but-for” causation rule did he lose his verdict.

More specifically, recall that Mr. Gross's lawyers requested and received the *Price Waterhouse* motivating factor instruction. A jury then applied those instructions to conclude that Mr. Gross had proved that age was a motivating factor in the defendant's decision to demote him and that the defendant had not proved that it would have demoted him regardless of his age. It thus found that Mr. Gross had established that his employer had violated the ADEA, and awarded him approximately \$47,000 in lost compensation.

On appeal, the defendant employer challenged the trial judge's decision to use the *Price Waterhouse* instruction, arguing that such a motivating factor instruction is

¹³ *Serwatha*, 591 F.3d at 963–64.

¹⁴ *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000) (internal citations omitted).

appropriate only when the plaintiff has direct evidence of discrimination and that Mr. Gross did not have such evidence. The Eighth Circuit agreed. Note that the Eighth Circuit ruled against Mr. Gross *not* because he could not satisfy the motivating factor standard—in fact he did—but instead because it found that the *Price Waterhouse* motivating-factor instruction is only available in cases when the plaintiff has direct evidence of age discrimination (e.g., where the employer acknowledges its discrimination, which of course is very rare). Other courts had ruled, in contrast, that the *Price Waterhouse* instruction is available in ADEA cases when the plaintiff proves that age was a motivating factor by any available evidence, circumstantial or direct.

The Supreme Court granted certiorari in *Gross* to resolve that controversy. Its actual decision, however, failed to address this question. Instead it vacated Mr. Gross's jury verdict, and articulated a brand-new causation standard that significantly undercut protections for older workers without the benefit of full briefing by the parties or development by the lower courts. Unless this legislation is enacted, upon re-trial Mr. Gross will bear the burden of proving not only that his age was a motivating factor, but additionally that it was the “but-for” factor for his demotion. As explained above, the plaintiff is not as well-positioned as the employer to prove what the employer would have done in a hypothetical workplace without discrimination—so Mr. Gross will be at a disadvantage if his case is re-tried under the Court's new rule rather than under S. 1756.

Lower courts, moreover, have repeatedly observed that *Gross* adds to the challenges faced by workers seeking to enforce their right to be free from discrimination under the ADEA.¹⁵ The Second Circuit, for example, explained *Gross* as imposing “a more stringent causation standard” on plaintiffs than that under *Price Waterhouse*;¹⁶ another Federal court described *Gross* “as elevating the quantum of causation required under the ADEA.”¹⁷

In contrast, the cases listed in Mr. Dreiband's testimony do not support the assertion that *Gross* is beneficial to plaintiffs. Indeed, several of the cases that Mr. Dreiband's written testimony cites as examples of courts that “relied upon *Gross* to rule in favor of plaintiffs” (see pages 10–11 and notes 43 and 50) actually confirm the additional barriers that *Gross* places in the path of workers seeking to vindicate their antidiscrimination rights. These include *Baker v. Silver Oak Senior Living Management, Co.*, in which the Eighth Circuit describes motivating factor causation standards as “less demanding” for age discrimination plaintiffs than the *Gross* “but-for” standard;¹⁸ *Serafinn v. Local 722, International Brotherhood of Teamsters*, in which the Seventh Circuit explains how the “but-for” standard benefits defendants in close cases;¹⁹ and *Bolmer v. Oliveira*, in which the Second Circuit characterizes *Gross* as imposing a “more stringent causation standard” than that under *Price Waterhouse*.²⁰

Mr. Dreiband's written statement also lists as examples of courts that “relied upon *Gross* to rule in favor of plaintiffs” several decisions that in fact ruled for the plaintiff only after distinguishing, and thus refusing to rely upon, *Gross*. These include *Thompson v. Weyerhaeuser Co.*, in which the 10th Circuit refused to rely on

¹⁵ See, e.g., *Marquez v. Drugs Unlimited, Inc.*, 2010 WL 1133803 (D. Puerto Rico 2010) (“The Court declared in *Gross* that this ‘but for’ standard is a much higher standard than that which has been applied in Title VII cases.”); *Miller v. Nat'l Ass'n of Securities Dealers, Inc.*, 2010 WL 1371029 (E.D.N.Y. 2010) (“According to *Gross*, the burden of persuasion required by the ADEA is more onerous” than that under Title VII); *Mojica v. El Conquistador Resort and Golden Door Spa*, 2010 WL 1992575 at *1 (D. Puerto Rico 2010) (observing that *Gross* “in some aspects raised the standard for proving an ADEA claim”); see also *Baker v. Silver Oak Senior Living Management Co.*, 581 F.3d 684, 689–90 (8th Cir. 2009) (describing the motivating factor causation standard under Missouri State antidiscrimination law as “less demanding” for age discrimination plaintiffs than that under the ADEA after *Gross*); *Dudley v. Lake Ozark Fire Protection Dist.*, 2010 WL 1992188 at *5 (W.D. Mo. 2010) (same).

¹⁶ *Bolmer v. Oliveira*, 594 F.3d 134, 148–49 (2nd Cir. 2010).

¹⁷ *Fuller v. Seagate Technology*, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009).

¹⁸ 581 F.3d 684, 689 (8th Cir. 2009) (concluding that the plaintiff's evidence of age discrimination was sufficiently strong to survive summary judgment under either causation standard).

¹⁹ 597 F.3d 908, 914 (7th Cir. 2010) (observing that the defendant's proposed mixed-motive and motivating factor instruction was “ill-advised” because it is “disadvantageous to the local [defendant] if the evidence was in equipoise. Both the but-for instruction and the [defendant's] proposed composite instruction score complete victory for the [defendant] if a jury finds that the [defendant] would have prosecuted [the plaintiff] regardless of his outspoken politics. But whereas the but-for cause instruction maintains the burden of persuasion on the plaintiff, giving a tie to the [defendant], the [defendant's] proposed composite instruction shifts the burden of persuasion to itself, giving a tie to [the plaintiff].”) (citations omitted).

²⁰ 594 F.3d 134, 148–49 (2nd Cir. 2010) (declining to decide whether *Gross* applied to a claim under Title II of the ADA because it concluded that the plaintiff's evidence of disability discrimination was sufficiently strong to survive either causation standard).

Gross in an ADEA pattern-or-practice (as opposed to individual disparate treatment) case;²¹ *Brown v. J. Kaz, Inc.*, in which the Third Circuit applied the motivating factor framework to a section 1981 case after noting that that parties agreed that *Gross* did not apply;²² and *Hunter v. Valley View Local Schools*, in which the Sixth Circuit declined to apply *Gross* to an FMLA case.²³ Another relied on *Gross* only for the proposition that courts should not reflexively apply rules applicable under one statute to another without examination, rather than for any proposition related to causation standards (much less for the proposition that the *Gross* causation standard benefits plaintiffs).²⁴

Moreover, all but one of the remaining decisions cited in Mr. Dreiband's statement as "relying" on *Gross* to find for plaintiffs instead simply cite *Gross* before instead relying on the longstanding *McDonnell Douglas* analysis for pretext cases.²⁵ In other words, these courts relied on the standards in existence before *Gross*, and thus cannot be characterized as cases in which plaintiffs benefited from *Gross*. Indeed, only one of the cases cited in Mr. Dreiband's written statement in fact purports actually to "rely" on the *Gross* causation standard to find for the plaintiff.²⁶ But even in that case, the plaintiff's evidence of age discrimination—which included testimony by the plaintiff and a co-worker that the chief executive told the plaintiff that she was too old and that he needed a younger employee—was sufficiently strong that she should have survived summary judgment under *any* causation standard (and in fact the court characterized mixed-motive cases decided before *Gross* in which the plaintiff prevailed as "instructive" to its finding).²⁷ Winning *after* or *despite* the Court's decision in *Gross* is not the same as winning *because* of it; that some plaintiffs have survived *Gross* does not mean that they have benefited from the decision.

Question 4a. Mr. Dreiband, in his testimony before the committee, wrote that "[i]f enacted in its current form, the Protecting Older Workers Against Discrimination Act will do nothing to protect workers from age discrimination, other forms of discrimination, retaliation, or any other unlawful conduct." He further claims that "[i]n the end, only the lawyers win; the Protecting Older Workers Against Discrimination Act would allow courts to award certain attorney's fees and costs and would do nothing to enhance the ADEA's protections of discrimination." In fact, Mr. Dreiband asserts, "Mr. Gross and many others will gain nothing if this bill passes in its current form." He testified that "though lawyers may receive payment for fees directly attributable to a motivating-factor claim ... the alleged victim will get nothing—no job, no money, no back pay, no front pay, no damages, no promotion, nothing."

Rather than helping age discrimination plaintiffs, Mr. Dreiband testified that the Protecting Older Workers Against Discrimination Act will, in fact, "deprive discrimination victims of any meaningful remedy" in mixed motive cases.

Do you agree with Mr. Dreiband that the Protecting Older Workers Against Discrimination Act will do nothing to protect older workers like Jack Gross? Why or why not?

Answer 4a. No. Under S. 1756, Mr. Gross would have retained the \$47,000 in lost compensation that the jury awarded him because he proved that age was a motivating factor in his demotion and his employer failed to prove that it would have demoted him in the absence of age discrimination. Also under *Gross*, as discussed above, Dr. Williams-Jackson and Ms. Serwatka received nothing even though they proved that discrimination motivated their employers' adverse actions against them. Under S. 1756, in stark contrast, Dr. Williams-Jackson would have been entitled at

²¹ 582 F.3d 1125, 1131 (10th Cir. 2009) ("We are not persuaded by Weyerhaeuser's argument. *Gross* does not involve the pattern-or-practice procedure at issue here.")

²² 581 F.3d 175, 182–83 & n.5 (3rd Cir. 2009) (concluding that the plaintiff survived summary judgment on her claim under 42 U.S.C. § 1981 based on the *Price Waterhouse* motivating factor framework after noting that "the parties agreed that *Gross* ... has no impact on this case").

²³ 579 F.3d 688, 692 (6th Cir. 2009) (distinguishing, rather than relying on, *Gross* as inapplicable to FMLA retaliation claims and concluding that the plaintiff survived summary judgment under the motivating factor standard: "[W]e continue to find *Price Waterhouse*'s burden-shifting framework applicable to FMLA retaliation claims.")

²⁴ *Fleming v. Yuma Regional Medical Ctr.*, 587 F.3d 938, 943–44 (9th Cir. 2009) (concluding that the Rehabilitation Act should not be interpreted to track the ADA's exclusion of independent contractors from its job discrimination provisions).

²⁵ See *Hrisinko v. New York City Dep't of Ed.*, 2010 WL 826879 at * 1–3 (2nd Cir. 2010) (concluding that the plaintiff had sufficient evidence of pretext under *McDonnell Douglas* to survive summary judgment); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447–48 (1st Cir. 2009) (same); *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 106–07 (2nd Cir. 2010) (same); *Liebowitz v. Cornell Univ.*, 584 F.3d 487, 503–05 (2nd Cir. 2009) (same); *EEOC v. TIN*, 349 Fed. Appx. 190 (9th Cir. 2010) (same).

²⁶ See *Mora v. Jackson Memorial Hosp.*, 597 F.3d 1201, 1203–04 (11th Cir. 2010).

²⁷ *Id.* at 1205.

a minimum to injunctive and declaratory relief and partial attorney's fees and costs, plus the possibility of additional relief (such as back pay and reinstatement) if her employer could not bear its burden of proving that it would have demoted her regardless of her jury service. And, under S. 1756, Ms. Serwatka would have retained the relief awarded her by the trial court: declaratory and injunctive relief along with some of her attorney's fees and costs (for a total of approximately \$30,000).

Moreover, S. 1756 additionally protects older workers from discrimination by sending the strong deterrent message that an employer will be liable for its discrimination once the plaintiff has proved that discrimination has played a motivating role in his or her employer's decision. More specifically, S. 1756 ensures that Federal courts retain the power to enjoin the defendant's proven discrimination through declaratory and injunctive relief, thus ensuring equal opportunity in the future.

Question 4b. If the Protecting Older Workers Against Discrimination Act became law, what damages would be available to a plaintiff like Jack Gross?

Answer 4b. If S. 1756 had been in effect at Mr. Gross's trial, the jury would have been instructed that the plaintiff is entitled to full relief under the ADEA if he can prove that age was a motivating factor and if the defendant cannot prove that it would still have demoted him absent age discrimination. Indeed, Mr. Gross's jury so found, and awarded him \$47,000 in lost compensation.

Question 4c. Do you agree with Mr. Dreiband that, rather than helping age discrimination plaintiffs, the Protecting Older Workers Against Discrimination Act will actually hurt victims of age discrimination by "depriv[ing]" them of "any meaningful remedy?"

Answer 4c. No. As discussed above, Mr. Gross would still have his \$47,000 jury verdict if S. 1756 had been law at the time of his trial. Other plaintiffs will similarly be entitled to full relief under the act when they—like Mr. Gross—prove that age was a motivating factor and the defendant fails to bear its burden under S. 1756 of proving that it would still have taken the same action absent age discrimination.

Even when both parties meet their burden under S. 1756 (i.e., when the plaintiff proves that age was a motivating factor *and* the defendant proves that it would have made the same decision even absent age discrimination), the bill ensures the continued availability of injunctive and declaratory relief and partial attorney's fees and costs—remedies that are enormously important in serving the deterrent functions of antidiscrimination law. Indeed, court-ordered injunctions requiring that the defendant cease a particular discriminatory practice have proven a powerful and effective tool throughout the history of the civil rights movement, and thus are among the remedies that Federal enforcement agencies most frequently seek. For this reason, the Supreme Court has repeatedly emphasized the value of injunctive relief in vindicating the important public interest in effective civil rights enforcement: "If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."²⁸ Indeed, as the Court has further observed, "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988 over and above the value of a civil rights remedy to a particular plaintiff . . .'"²⁹

²⁸Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968); see also Blanchard v. Bergeron, 489 U.S. 87, 95–96 (1989) ("The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages.")

²⁹City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (citations omitted). Notes 57–58 of Mr. Dreiband's testimony cites several cases in which the court found that the plaintiff had proved that discrimination was a motivating factor in the employer's decision, but declined to award injunctive relief because the plaintiff was no longer employed by the defendant or because the offending defendant was no longer employed by the employer. But injunctive relief is especially important when the plaintiff is still employed by the defendant or might otherwise face a very real threat of continuing discrimination or retaliation. Note, for example, that Mr. Gross still works for the employer that he proved to have engaged in age discrimination. Moreover, as one of the decisions cited in Mr. Dreiband's testimony observes, "injunctive and declaratory relief might be appropriate . . . where, for example, the company engaged in widespread gender discrimination of the type challenged or had an official policy for such or where the company continued to engage in such gender discrimination." Cooper v. Ambassador Personnel, Inc., 570 F. Supp. 2d 1353, 1360 (M.D. Ala. 2008).

An example helps illustrate the point: An older worker proves that she applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he prefers not to hire older workers because he finds them to be less energetic, less creative, and generally less productive. Suppose too that the employer proves that it ultimately hired another applicant who was even more qualified for the position than the plaintiff. Under the Court's new rule in *Gross*, the employer will escape ADEA liability altogether and the plaintiff gets nothing. Under S. 1756, in contrast, she—and, perhaps more important, the public as a whole—receive something very important: a court order putting a stop to the practice and enjoining its continuation.

Indeed, as the House Committee Report emphasized in explaining the motivating factor framework standard as adopted in the Civil Rights Act of 1991 (the same standard proposed by S. 1756):

[I]t is important to remember the dual purpose of private enforcement of title VII. On the one hand, the object is to make whole the individual victims of unlawful discrimination . . . But this is only part of it. The individual title VII litigant acts as a "private attorney general" to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.³⁰

Question 5. In support of his argument, Mr. Dreiband claims that "Title VII cases provide sobering examples of how the mixed motive framework turns winning plaintiffs into losers."³¹

Do you agree that victims of discrimination under title VII have been disadvantaged by the mixed motive framework enacted as part of the Civil Rights Act of 1991? Why or why not?

Answer 5. No. Plaintiffs can and do prevail and secure full relief under title VII's motivating factor instruction, when they—like Mr. Gross—prove that discrimination was a motivating factor and the defendant fails to bear its burden of proving that it would still have taken the same action absent age discrimination.

The Supreme Court's decision in *Desert Palace, Inc. v. Costa*³¹ offers a particularly helpful illustration of plaintiffs' success under the motivating factor framework enacted in the Civil Rights Act of 1991. At trial, the defendant maintained instead that the plaintiff, Ms. Costa, had been fired for disciplinary infractions.³² The plaintiff offered evidence that she was instead fired because of her sex, including evidence that she was disciplined more harshly than her male counterparts for the same conduct, was treated less favorably than men in overtime assignments, and was the target of repeated gender-based slurs.³³ Over the defendant's objections, the trial court gave the jury the motivating factor instruction under the Civil Rights Act of 1991.³⁴ The jury found that Ms. Costa had proved that sex was a motivating factor in her firing, and that her employer had not proved that it would have fired her absent sex discrimination. It thus awarded her back pay, compensatory, and punitive damages,³⁵ and the Supreme Court ultimately upheld the verdict.³⁶

Question 6. Under the standard announced in *Gross v. FBL Financial*, a plaintiff must establish that a plaintiff's age was the "but for" cause of the adverse employment action complained of. At the hearing, there was a great deal of discussion regarding what type of proof was necessary to meet this standard, including "smoking gun" evidence. At the hearing, you testified, that "what's especially pernicious about the *Gross* decision is that even if you have a smoking gun as a plaintiff, you may still lose."

Why do you believe even so called "smoking gun" evidence would be insufficient under the standard announced in *Gross*?

Answer 6. Recall our earlier example of an older worker who applies for a job for which she is qualified, only to be rejected after being told by her interviewer that he will not hire workers of her age because he finds them to be less energetic, less creative, and generally less productive. This is direct evidence of age discrimination. But under the *Gross* Court's new rule, the plaintiff will lose and the employer will escape ADEA liability altogether unless the plaintiff can also prove that the em-

³⁰H.R. REP. NO. 102-40(I) at 46-47, 1991 U.S.C.C.A.N. at 584-85 (quoting Jane Lang, former General Counsel of the United States Department of Housing and Urban Development).

³¹539 U.S. 90 (2003).

³²*Id.*

³³*Id.* at 96.

³⁴*Id.* at 96-97.

³⁵*Id.* at 97.

³⁶*Id.* at 101-02.

ployer would not have taken the adverse action if it had been free of age discrimination. In other words, *Gross* entirely insulates from liability even an employer who confesses discrimination so long as that employer had another reason for its decision. By permitting employers to escape liability altogether even for a workplace admittedly infected by discrimination, with no incentive to refrain from similar discrimination in the future, the *Gross* rule thus undermines Congress' efforts to stop and deter workplace discrimination.

Question 7. Do you believe the Protecting Older Workers Against Discrimination Act will prevent employers from making legitimate business and cost cutting decisions?

Answer 7. No. Nothing in S.1756 interferes with an employer's ability to make decisions based on nondiscriminatory factors of any type. S.1756 prohibits only employment decisions that are motivated by discrimination (and requires the plaintiff to bear the burden of proving such motivation). Return once again to our example discussed above: even after the plaintiff proves that age was a motivating factor in the decision not to hire her, if the employer can nonetheless show that it would not have hired her in any event because it hired a more qualified candidate, S.1756 would not require the employer to hire or provide back pay to the plaintiff. S.1756 thus strikes an appropriate balance between employers' and employees' rights.³⁷

RESPONSE TO QUESTIONS OF SENATOR ENZI BY HELEN NORTON

Question 1. Please provide the committee with a list of those Federal employment statutes that you believe are affected by S.1756, and another list of those which you believe are not.

Answer 1. The bill's findings and purposes section indicates its intent to cover all Federal antidiscrimination and antiretaliation laws—i.e., those that prohibit discrimination because of an individual's statutorily protected class status (such as age) and those that prohibit discrimination because an individual has engaged in statutorily protected activity (such as reporting potentially unlawful behavior, attempting to assert pension rights, engaging in Federal jury service, taking family or medical leave, etc.). This appropriately responds to lower courts' interpretation of *Gross* to mean that the motivating factor framework is *never* available to plaintiffs under Federal antidiscrimination and antiretaliation statutes unless and until Congress expressly provides otherwise. The Seventh Circuit, for example, characterizes *Gross* as holding that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating "but-for" causation is part of the plaintiff's burden in all suits under Federal law." *Fairley v. Andrews*, 578 F. 3d 518, 525–26 (7th Cir. 2009).

Question 2. Have you acted as an employer or manager in a private sector, non-government funded workplace? Please describe the extent of your personal experience in either developing or implementing personnel policies or decisions with regard to the hiring, firing, disciplining, promoting, demoting, laying off or evaluating of employees, the granting of time-off, the assignment of duties to employees, and any other matters relating to the direction and supervision of any private sector workforce.

Answer 2. I served as Director of Legal and Public Policy for the National Partnership for Women and Families, where I engaged in the day-to-day direction, evaluation, and supervision of attorneys, program staff, and support staff. Together with the organization's President, Executive Vice-President, and General Counsel, I also participated in hiring decisions, and the development and implementation of various personnel policies. Moreover, as President of the Board of Directors of the YWCA of the National Capital Area, I led the board responsible for hiring and evaluating the organization's executive director.

³⁷Note too that the motivating factor framework adopted by Congress with respect to Title VII in the Civil Rights Act of 1991—and proposed in S.1756—was also urged by the Reagan Administration's Department of Justice in its briefing of the *Price Waterhouse* case. See Brief for the United States as Amicus Curiae at 23–24, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87–1167) (citations omitted) ("[I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide back pay to the plaintiff . . .").

Question 3. Can employment statistics alone constitute sufficient circumstantial evidence to prove an improper motive? If you answer that they can, under what circumstances?

Answer 3. The Supreme Court has repeatedly made clear that statistical evidence is a type of circumstantial evidence, and that the strength of any and all types of circumstantial evidence—including, but not limited to, statistical evidence—depends on the circumstances. Whether evidence of any type is sufficient to prove improper motive is subject to rebuttal by the defendant and ultimately remains for the factfinder to assess.

The Supreme Court addressed this question in detail in *Teamsters v. United States*, 431 U.S. 324 (1977). In response to the defendant employer’s contention that “statistics can never in and of themselves prove the existence of a pattern or practice of discrimination,” the Court stated:

[O]ur cases make it unmistakably clear that “(s)tatistical analyses have served and will continue to serve an important role” in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Id. at 339–40 (citations omitted). As the Court explained more specifically:

Petitioners argue that statistics, at least those comparing the racial composition of an employer’s work force to the composition of the population at large, should never be given decisive weight in a Title VII case because to do so would conflict with s 703(j) of the Act. That section provides: “Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.” The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer’s work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though s 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. Considerations such as small sample size may, of course, detract from the value of such evidence, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.

Id. at n.20 (citations omitted). The Supreme Court repeated this observation in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977); *see also* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501–02 (1989) (“In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer’s work force to the racial composition of the relevant population may be probative of a pattern of discrimination.”).

RESPONSE TO QUESTIONS OF SENATOR ENZI BY ERIC S. DREIBAND

Question 1a. Proponents of S. 1756 have argued that the Supreme Court decision in March 2009 makes it extremely difficult to bring and win cases under the Age Discrimination in Employment Act (ADEA).

As a practitioner who follows these types of cases closely, what is your view of that claim?

Answer 1a. I do not believe the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, makes it any more difficult for plaintiffs to bring and win cases under the Age Discrimination in Employment Act than before *Gross* was decided.

Question 1b. Have plaintiff's been able to bring successful age discrimination claims since the decision?

Answer 1b. Yes. Since the *Gross* decision issued, the Federal courts have repeatedly ruled in favor of age discrimination plaintiffs. See *Hrisinko v. New York City Department of Education*, No. 08-6071, 2010 WL 826879, at *2-*3 (2d Cir. Mar. 11, 2010); *Mora v. Jackson Memorial Foundation, Inc.*, 597 F.3d 1201, 1202 (11th Cir. 2010); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447 n.2 (1st Cir. 2009); *Baker v. Silver Oak Senior Living Management Company*, 581 F.3d 684, 688 (8th Cir. 2009). Several other courts, including the Third, Sixth, Seventh, Ninth, and Tenth Circuits, also relied upon *Gross* to rule in favor of plaintiffs in employment cases that did not involve age. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490 (7th Cir. 2010); *Serafinn v. Local 722, Int'l Bhd. Of Teamsters*, 597 F.3d 908 (7th Cir. 2010); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d Cir. 2010); *Bolmer v. Oliveria*, 594 F.3d 134 (2d Cir. 2010); *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009); *Leibowitz v. Cornell Uni.*, 584 F.3d 487 (2d Cir. 2009); *EEOC v. TIN, Inc.*, 349 F. App'x 190 (9th Cir. Oct. 20, 2009); *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009); *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009); *Hunter v. Valley View Local Schs.*, 579 F.3d 688 (6th Cir. 2009).

Question 2. Given that employment cases currently occupy such a large, indeed by some estimates, the largest proportion of our already over-burdened Federal court docket, should we be encouraging even more litigation, particularly where that litigation has no tangible benefit to a given plaintiff, but only seems to profit the plaintiff bar?

Answer 2. Section 8, Article I of the United States Constitution requires, among other things, that the Congress "provide for the common defense and general welfare of the United States." As a result, a law that does not provide for the common defense and general welfare of the United States because it only profits certain members of the bar may run afoul of Section 8, Article I.

Question 3. What other statutes currently provide attorneys' fees to private counsel in cases where the disposition results in no award to the represented plaintiff?

Answer 3. I am not aware of any statutes that provide attorneys' fees to private counsel under these circumstances, other than Title VII of the Civil Rights Act of 1964.

[Whereupon, at 12:17 p.m., the hearing was adjourned.]