



# Department of Justice

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**STATEMENT OF**

**JOCELYN SAMUELS**

**SENIOR COUNSELOR TO THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS  
DEPARTMENT OF JUSTICE**

**BEFORE THE**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND LIBERTIES  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**CONCERNING**

**H.R. 3721, THE "PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT"**

**PRESENTED**

**JUNE 10, 2010**

**Statement of  
Jocelyn Samuels  
Senior Counselor to the Assistant Attorney General for Civil Rights  
Department of Justice**

**Before the  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
Committee on the Judiciary**

**Concerning  
H.R. 3721, the “Protecting Older Workers Against Discrimination Act”**

**June 10, 2010**

Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee, it is an honor to appear before you today to discuss H.R. 3721, the “Protecting Older Workers Against Discrimination Act.” This bill would overturn the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*<sup>1</sup> In doing so, the bill seeks to serve several critical purposes. The bill would advance Congress’s intent to eradicate age discrimination in the workplace under the Age Discrimination in Employment Act (ADEA)<sup>2</sup> and restore protections against that discrimination that the Supreme Court’s decision substantially undermines. The bill would also effectuate Congress’s intent that the fundamental prohibitions of the ADEA be interpreted and applied consistently with Title VII of the Civil Rights Act of 1964; it would thereby promote unity in the law and avoid the patchwork of inconsistent and unpredictable standards to which the Supreme Court’s decision opens the door. Importantly, the bill would also ensure that persons who face discrimination on the basis of age or other prohibited factors have the same tools that Congress provided to those who are subject to discrimination based on race, color, sex, national origin and religion to challenge the adverse treatment to which they have been subjected.

***The Gross Decision Departed from Settled Precedent***

In 2004, Jack Gross filed suit under the ADEA, claiming that his reassignment within the FBL Financial Services company was an age-motivated demotion. Applying a “mixed motive” approach in assessing the employer’s liability, a jury found that Mr. Gross had proved that age was, indeed, a “motivating factor” in the reassignment and that the company had failed to prove that it would have demoted him even absent the age discrimination. The jury thus awarded Mr. Gross \$46,945 in back pay.

The trial court derived its mixed motive framework of analysis from the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*,<sup>3</sup> in which the Court held that under Title VII, a

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<sup>1</sup>129 S. Ct. 2343 (2009).

<sup>2</sup>29 U.S.C. Sec. 621 *et seq.*

<sup>3</sup>490 U.S. 228 (1989).

plaintiff's showing that discrimination is a "motivating factor" in an employment decision then shifts the burden to the employer to show that it would have made the same decision absent the discriminatory consideration. Under the *Price Waterhouse* decision, the plaintiff prevails – that is, liability is established -- if the employer fails to make this showing.<sup>4</sup>

The Court of Appeals in Mr. Gross's case reversed the jury's verdict, finding that the court's mixed motive instruction to the jury was impermissible in the absence of "direct evidence" of age discrimination – that is, evidence that on its face demonstrated that the employer made its decision, at least in part, on the basis of Mr. Gross's age. The Supreme Court granted certiorari to address the question of whether an age discrimination plaintiff was required to present direct evidence to obtain a mixed motive instruction or could instead rely on either direct or circumstantial evidence.

In a decision that addressed a question that had been neither presented, fully briefed, nor argued to the Court and that upended established precedent, the Supreme Court ruled that age discrimination plaintiffs may not proceed under a mixed motive theory at all. Under the Court's decision, the burden never shifts to an employer to show that it would have made the same decision even absent discrimination; instead, a plaintiff retains the burden of proving in all cases that age was a "but for" cause of the adverse employment decision – in other words, of proving that the employer would *not* have made the same decision if discrimination had not been at play. In reaching this conclusion, the Court disregarded its own prior construction, in the *Price Waterhouse* decision, of the identical language of Title VII; ignored the decision of every court of appeals to have considered whether a mixed motive framework was available under the ADEA; and dismissed its prior recognition, under the Constitution and other laws, that discrimination exists where a prohibited purpose is a "motivating factor" for a decision and that a defendant can avoid liability only if it meets the burden of showing that it would have reached the same decision anyway.

As previously noted, the Court in *Gross* flatly refused to apply to the ADEA the interpretation it had given to identical language in Title VII in *Price Waterhouse*. In *Price Waterhouse*, the Court ruled that discrimination is "because of" sex (and, by extension, race, color, religion or national origin) if the prohibited trait at issue motivated the adverse action – even if other permissible factors also motivated the action – and that the employer is liable for the discrimination unless *it* proves it would have made the same decision anyway. In *Gross*, by

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<sup>4</sup>The Court in *Price Waterhouse* also held that if the employer does succeed in making a "same decision" showing, there is no statutory violation. Congress reversed this aspect of *Price Waterhouse* in the Civil Rights Act of 1991. Now, a Title VII violation occurs any time a plaintiff proves that an impermissible criterion is a motivating factor in the adverse action – even if the defendant *also* proves that it would have taken the same action anyway. 42 U.S.C. Sec. 2000e-2(m). In such cases, however, plaintiffs will be entitled only to declaratory relief, injunctive relief and attorneys' fees and will not be eligible to receive monetary damages or equitable relief such as reinstatement. 42 U.S.C. 2000e-5(g)(2)(B).

contrast, the Court construed the ADEA's "because of" language to require a plaintiff to prove that her employer would *not* have made the challenged decision but for age discrimination. This departure from longstanding precedent was particularly troubling given that, as Justice Stevens noted in his dissent, the Court had "long recognized that [its] interpretations of Title VII's language apply 'with equal force in the context of age discrimination.'"<sup>5</sup>

It was this understanding of the applicability of Title VII precedent that had informed the holdings of the courts of appeals that considered the availability of a mixed motive analysis under the ADEA prior to the *Gross* decision. Indeed, every appellate court to address the question had applied the *Price Waterhouse* mixed motive theory of causation to ADEA claims.<sup>6</sup> Moreover, the mixed motive framework has been based not solely on the Court's understanding of statutory language barring discrimination "because of" prohibited factors; it is also grounded in the Court's longstanding treatment of Constitutional violations. In a First Amendment retaliation case, for example, the Court ruled that a plaintiff must show that his constitutionally-protected conduct was a "motivating factor" in the challenged decision; to avoid liability, the defendant then has the burden to show that it would have "reached the same decision . . . even in the absence of the protected conduct."<sup>7</sup> Similarly, the Court has applied the mixed motive analysis under the National Labor Relations Act,<sup>8</sup> holding that once a plaintiff shows that his protected conduct was a motivating factor in the employer's decision, the employer may then avoid liability only by showing "that the employee would have lost his job in any event."<sup>9</sup> As the Court recognized, this allocation of the burdens is reasonable because

[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.<sup>10</sup>

For all of these reasons, the Court's decision in *Gross* was an outlier in the Court's own well-established precedent on causation and burdens of proof in cases of intentional discrimination. The impact of this departure from precedent is troubling on numerous grounds.

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<sup>5</sup>*Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2354 (Stevens, J., dissenting) (citations omitted).

<sup>6</sup>See *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2354 n.5 (Stevens, J., dissenting) (listing cases).

<sup>7</sup>*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>8</sup>29 U.S.C. Sec. 151 *et seq.*

<sup>9</sup>*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

<sup>10</sup>*Id.* at 403.

## *The Impact of the Gross Decision is Troubling and Broad-Based*

The *Gross* decision has several troubling consequences, all of which weaken the efficacy of anti-discrimination laws. Most directly, by making the plaintiff's burden more onerous in ADEA cases, the decision reduces protections against age discrimination in the workplace and limits courts' ability to enjoin biased decisionmaking. The decision also threatens the interpretation of laws well beyond the ADEA and seems likely to create a patchwork of unpredictable and inconsistent legal standards that undermine the unity of anti-discrimination law.

### *The Gross Decision Reduces Protections Against Age Discrimination*

As an initial matter, the *Gross* decision narrows the scope of protections available to older workers under the ADEA and deprives them of a critical tool to hold their employers accountable for age bias. As courts have recognized, *Gross* "elevat[ed] the quantum of causation required under the ADEA,"<sup>11</sup> and prevents an employee from demonstrating age discrimination – even in cases in which there is "smoking gun" evidence of discriminatory animus – unless the employee can *also* demonstrate that the adverse action would not have occurred absent that animus. By significantly increasing a plaintiff's burden of proof to hold an employer liable for discrimination, the Court's opinion enshrines in law the principle that certain employment decisions that are admittedly tainted by age bias are nonetheless permissible – a principle that can undermine the deterrent effect of the law. The decision also places those subject to age discrimination in the untenable position of having to prove a hypothetical that relies on evidence often exclusively within the employer's possession: that the employer would *not* have made the challenged decision had it *not* taken the employee's age into account. Not surprisingly – and as was addressed eloquently in testimony provided by the Chair of the Equal Employment Opportunity Commission, Jacqueline Berrien, to the Senate Committee on Health, Education, Labor & Pensions -- this holding has led numerous courts to dismiss ADEA claims for a failure of proof.<sup>12</sup>

The availability of a mixed motive framework for proof of discrimination presents far more than a technical question about how a court will conduct a trial of discrimination claims, moreover. Indeed, courts' experience with mixed motive analysis under Title VII demonstrates

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<sup>11</sup>*Fuller v. Seagate Technology*, 651 F. Supp. 2d 1233, 1248 (D. Colo. Aug. 19, 2009).

<sup>12</sup>*See, e.g., Kelly v. Moser, Patterson & Sheridan, LLP*, No. 08-3318, 2009 WL 3236054 (3d Cir. Oct. 9, 2009) (unpublished) (finding no liability where plaintiff established that age discrimination was only a "secondary consideration" in employer's decision); *Wellesley v. Debevoise & Plimpton, LLP*, No. 08-1360, 2009 WL 3004102 (2d Cir. Sept. 21, 2009) (dismissing ADEA claim where plaintiff failed to prove that age discrimination was a but-for cause of decision); *Anderson v. Equitable Resources, Inc.*, No. 08-952, 2009 WL 4730230, at \*14-15 (W.D. Pa. Dec. 4, 2009) (insufficient to carry plaintiff's burden of proof where plaintiff demonstrated that age played a role in the decision but not a determinative one).

that that analysis, and its shifting burdens of proof, can be significant in enabling a plaintiff to hold an employer liable, and thus accountable, for discrimination. In the *Price Waterhouse* case itself, for example, Ann Hopkins prevailed in her lawsuit challenging the company's failure to make her a partner because Price Waterhouse failed to "separate out those comments tainted by sexism from those free of sexism for the purpose of demonstrating that nondiscriminatory factors alone" could explain the decision. The court there noted that, because the company had allowed gender stereotyping to play a role in its decision, it was fair for the defendant to "bear the risk that the inference of illegal and legal motives cannot be separated."<sup>13</sup>

Similarly, in *Costa v. Desert Palace, Inc.*,<sup>14</sup> Catherina Costa was able to prevail in, and receive damages for, her sex discrimination claim where her employer had -- but failed to carry -- the burden of proving that it would have made the decision to discharge her in the absence of the discrimination. Costa was the sole female warehouse worker at Caesars, a Las Vegas casino, driving trucks and operating heavy equipment like forklifts and pallet jacks to retrieve food and beverage orders. Her work had been characterized as both "excellent" and "good," but she was disciplined more harshly than her male coworkers, was singled out for "stalking" by her supervisor, and was denied overtime opportunities awarded to men at the casino. Supervisors also used and tolerated sex-based slurs. Although the employer claimed that it had discharged her because of her disciplinary history, the court found that that history was itself infected by sex discrimination and that the jury had permissibly concluded that "Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex."<sup>15</sup>

*The Gross Decision Undermines Congress's Intent that the ADEA and Other Anti-Discrimination Laws be Interpreted Consistently with Title VII*

In enacting the ADEA, Congress intended to "promote employment of older persons based on their ability rather than age[, and] to prohibit arbitrary age discrimination in employment."<sup>16</sup> As the Supreme Court has recognized, Congress intended the ADEA to be a vital part of its ongoing "effort to eradicate discrimination in the workplace," reflecting "a

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<sup>13</sup>*Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206-1207 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

<sup>14</sup>299 F.3d 838 (9th Cir. 2002) (*en banc*). The case had gone to the Supreme Court at an earlier stage, resulting in the Court's opinion that mixed motive claims under Title VII may be based on either direct *or* circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

<sup>15</sup>299 F.3d at 863. Plaintiffs have also been able to withstand motions for summary judgment where they have produced sufficient evidence to allow a jury to determine that a prohibited factor was a motivating factor for their employers' decision. See, *e.g.*, *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir 2008); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061 (9th Cir. 2003).

<sup>16</sup>29 U.S.C. 621(b).

societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.”<sup>17</sup>

These purposes are undermined where the Court interprets the law, as it did in *Gross*, in ways that hinder employees’ attempts to hold their employers accountable for discrimination. Indeed, the Court’s *Gross* decision ignores legislative history explicitly manifesting Congress’s intent to extend the mixed motive approach to ADEA claims. In the Civil Rights Act of 1991, in which Congress amended Title VII to codify the shifting burdens of proof of the mixed motive framework, a key Congressional report stated that a

number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), are modeled after, and have been interpreted in a manner consistent with, Title VII. . . . [T]hese other laws modeled after Title VII [should] be interpreted in a manner consistent with Title VII as amended by this Act.<sup>18</sup>

More generally, moreover, as Justice Stevens recognized in his dissent in *Gross*,

[t]he relevant language [in Title VII and the ADEA] is identical, and we have long recognized that our interpretations of Title VII’s language apply ‘with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.’<sup>19</sup>

In addition, *Gross* calls into question the longstanding canon of construction that Congress intends identical language in similar anti-discrimination statutes to be construed in the same way.<sup>20</sup> *Gross* suggests that absent specific statutory language directing a particular approach to an issue, the Court will be reluctant to borrow accepted principles from identically worded laws in order to effectuate Congress’s clear intent and broad anti-discrimination goals. As the Seventh Circuit has stated, for example, its decisions adopting a mixed motive theory “do not survive *Gross*, which holds that, *unless a statute (such as the Civil Rights Act of 1991) provides*

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<sup>17</sup>*McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357 (1995).

<sup>18</sup>H.R. Rep. No. 40, Part 2, 102d Cong., 1<sup>st</sup> Sess. 4 (1991) (citations omitted); *see also Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2356 n.6 (2009) (Stevens, J., dissenting) (pointing to this legislative history as “some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well”).

<sup>19</sup>129 S.Ct. at 2354 (Stevens, J., dissenting) (citations and internal quotation marks omitted).

<sup>20</sup>*See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 233-34 (2007) (“we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes”); *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (similarity of language in two statutes “is, of course, a strong indication that the two statutes should be interpreted *pari passu*”).

otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."<sup>21</sup> The *Gross* decision thus undermines the principle that anti-discrimination statutes with similar or identical language should be interpreted in a unified way, and could impose on Congress the burden to provide explicit statutory authorization for every principle that it intends to have courts extend beyond Title VII.

### *The Gross Decision Threatens the Interpretation of Laws Beyond the ADEA*

As noted above, the *Gross* decision most directly weakens the protections available to older workers. But the decision has also been applied to bar mixed motive claims – and to require plaintiffs to prove that discrimination was a “but for” cause of an adverse decision -- under numerous other laws as well. *Gross* has been used to prohibit the mixed motive method of proof, for example, in cases challenging employment discrimination based on disability in violation of the Americans with Disabilities Act;<sup>22</sup> job discrimination because of protected speech under 42 U.S.C. 1983;<sup>23</sup> interference with pension rights in violation of the Employee Retirement Income Security Act of 1974;<sup>24</sup> and job discrimination based on an employee's jury service in violation of the Jury Systems Improvement Act.<sup>25</sup>

Courts have further questioned whether *Gross* should be read to bar mixed motive claims under other laws, including 42 U.S.C. 1981 and the Family and Medical Leave Act.<sup>26</sup> And even

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<sup>21</sup>*Fairley v. Andrews*, 578 F.3d 518, 525-526 (7th Cir. 2009) (emphasis added), *cert. denied*, 2010 WL 2025147 (May 24, 2010); *see also 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.”).

<sup>22</sup>42 U.S.C. 12101 *et seq.*; *Serwatka*, 591 F.3d 957.

<sup>23</sup>*Fairley*, 578 F.3d at 525-526.

<sup>24</sup>29 U.S.C. 1001 *et seq.*; *Nauman v. Abbott Laboratories*, No. 04-7199 (N.D. Ill. April 22, 2010).

<sup>25</sup>28 U.S.C. 1875; *Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) (“[t]he Court has no doubt that [plaintiff's] jury service was a motivating factor behind [the employer's decision to transfer her]. What is lacking is any evidence that her jury service was ‘the “but-for” cause’ of the decision”).

<sup>26</sup>*Brown v. J. Kaz, Inc.*, 581 F.3d 175, 186 (3d Cir. 2009) (Jordan, J., concurring) (continuing to apply a Title VII mixed motive analysis under 42 U.S.C. 1981 “ignores the fundamental instruction in *Gross* that analytical constructs are not to be simply transposed from one statute to another without a thorough and thoughtful analysis”); *Crouch v. JC Penney Corp., Inc.*, 337 F. App'x. 399, 402 n.1 (5<sup>th</sup> Cir. 2009) (stating, in a case arising under the Family and Medical Leave Act, 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).



where courts have not yet reached the inquiry, the interpretation of anti-discrimination statutes that use the same language as Title VII and that have previously been construed to permit a mixed motive analysis – such as the Fair Housing Act – may well be at risk.<sup>27</sup>

In addition to extending *Gross* beyond the ADEA, moreover, some courts have distorted its holding to require plaintiffs to prove not only that age was a “but for” cause of the adverse action taken against them but that it was in fact the *sole* basis for the consequences they suffered. Indeed, this reasoning has been applied to dismiss age discrimination claims where a plaintiff alleges that the adverse decision was the product of both age and a factor *proscribed by another law*. In one case, for example, the plaintiff was forced to choose between his Title VII and his ADEA claim. Because the court interpreted *Gross* to require the plaintiff to show that age was the “only” reason for the adverse decision, it held that the plaintiff could not claim that the decision was based on age while simultaneously claiming that the employer also had another unlawful motive.<sup>28</sup> These cases amply illustrate the need for legislation to overturn the *Gross* decision.

*The Gross Decision Risks Creating a Patchwork of Unpredictable and Inconsistent Standards*

*Gross* also creates confusion and unpredictability in the law that could take years to resolve. It is unclear, for example, what standard of causation a court will apply in cases where a plaintiff alleges that the same facts make out violations of two separate statutory schemes – race discrimination in violation of both Title VII and Section 1981, for example. The problem is particularly acute where a plaintiff alleges intersectional discrimination, in a case claiming, for example, that an employer has unlawfully discriminated against older women in violation of both Title VII and the ADEA. Even assuming that the ADEA claim survives in this situation (which, in the decisions cited above, it apparently would not), it is unclear whether courts would be prepared to apply a mixed motive analysis in such cases.

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<sup>27</sup>The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, prohibits housing discrimination “because of” various prohibited characteristics – the identical language used under both Title VII and the ADEA. Cases interpreting the law prior to *Gross* had made clear that a mixed motive framework was available. See, *e.g.*, *United States v. Big D. Enterprises, Inc.*, 184 F.3d 924, 931 (8<sup>th</sup> Cir. 1999) (under FHA, plaintiff need prove only that impermissible consideration was a motivating factor); *Cabrera v. Jackabovitz*, 24 F.3d 372, 382-82 (2d Cir. 1994) (same).

<sup>28</sup>*Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009). See also *Love v. TVA Board of Directors*, No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009); *Wardlaw v. City of Philadelphia Streets Dep’t*, 2009 WL 2461890, at \*7 (E.D. Pa. Aug. 11, 2009), *aff’d*, No. 09-3666, 2010 WL 1718714 (3d Cir. April 29, 2010); cf. *Belcher v. Service Corp. Int’l*, 2009 U.S. Dist LEXIS 102611, at \*8 (E.D. Tenn. Nov. 4, 2009) (“[w]hile *Gross* arguably makes it impossible for a plaintiff to ultimately recover on an age and a gender discrimination claim in the same case, the undersigned does not read *Gross* as taking away a litigant’s right to plead alternate theories under the Federal Rules”).

More broadly, the law should not create a hierarchy of plaintiffs where those subject to certain kinds of discrimination are entitled to more protection than those subject to other kinds of unlawful conduct. Age-based animus is no less disturbing or unacceptable than animus based on sex or national origin; protections available to victims of unlawful discrimination should be consistent and clear. *Gross* ignores this fundamental understanding, and legislation is necessary to fully realize this principle.

### ***The “Protecting Older Workers Against Discrimination Act” Would Overturn the Gross Decision***

For all of the reasons set forth above, legislation like H.R. 3721 is necessary to provide to ADEA plaintiffs the same core protections and standards of causation that are available to those subject to discrimination on the bases of race, color, national origin, sex and religion. Most centrally, the bill would make clear that plaintiffs may establish a violation of the ADEA by demonstrating that age was a “motivating factor” in the employer’s decision, even if other factors also motivated the decision.<sup>29</sup> The bill would also clarify that a plaintiff may rely on any evidence, whether direct or circumstantial, in meeting this burden,<sup>30</sup> but allow an employer motivated in part by age to nonetheless limit the remedies available to the plaintiff where it can show it would have taken the adverse action even absent the prohibited consideration.<sup>31</sup> Finally, although the bill is generally couched in terms of an amendment to the ADEA, we note that there is broader language at one point that suggests application to all Federal laws and constitutional provisions barring employment discrimination and retaliation.

Codifying the mixed motive framework embodied in Title VII, as amended by the Civil Rights Act of 1991, for ADEA and other anti-discrimination claims would strike a careful and appropriate balance between preventing and deterring future violations of the law, on the one hand, and ensuring that employers are free to make nondiscriminatory choices in their employment practices, on the other. Such a codification would make clear that the law forbids *any* reliance on age or other prohibited factors in employment decision making and would provide to courts the authority to enjoin and correct the employer’s unlawful practices; it would thus enhance the deterrent impact of the law that is so crucial to achievement of its purposes. At the same time, H.R. 3721 would limit the remedies available where an employer could demonstrate that it would have made the same decision even absent the discrimination; a plaintiff in this situation would be entitled to no back pay or damages and could not seek reinstatement to her position. This approach mirrors the workable, appropriate framework that has been applied under Title VII since enactment of the Civil Rights Act of 1991, and would ensure that all victims of discrimination, on all of the bases prohibited under the Federal anti-discrimination laws, would have the same protections from intentional discrimination.

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<sup>29</sup>H.R. 3721, Sec. 3(g)(1).

<sup>30</sup>H.R. 3721, Sec. 3(g)(3).

<sup>31</sup>H.R. 3721, Sec. 3(g)(2).

The *Gross* decision undermines this country's basic commitment to equality and to the principle that employers should be held accountable whenever they make employment decisions with discriminatory intent. Legislation like H.R. 3721 is critical to restore the ability of older workers and others to effectively challenge discrimination against them and to realize the law's promise of true equality of employment opportunity. The Department of Justice looks forward to providing technical assistance on the bill and to working with the Committee to achieve this goal.

Thank you again for inviting me to testify today. I look forward to your questions.