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

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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

Wednesday, May 5, 2010
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] presiding.

Present: Representatives Andrews, Hare, Tierney, Kucinich, Fudge, McCarthy, Holt, Loebsack, and Price.

Staff Present: Aaron Albright, Press Secretary; Andra Belknap, Press Assistant; Jody Calemine, General Counsel; David Hartzler, Systems Administrator; Sadie Marshall, Chief Clerk; Megan O'Reilly, Labor Counsel; Rachel Racusen, Communications Director; James Schroll, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Matt Walker, Policy Advisor, HELP; Kirk Boyle, Minority General Counsel; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Brian Newell, Minority Press Secretary; Jim Paretti, Minority Workforce Policy Counsel; Ken Serafin, Minority Professional Staff Member; and Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairman ANDREWS. Ladies and gentlemen, the committee will come to order.

Welcome. We are pleased to have our witnesses with us this morning and ladies and gentlemen of the public as well. The crowd is small in quantity, but it will be great in quality, I assure you. There is no question about that. And other Members are expected to join us.

We would like to thank the witnesses for their astute preparation for this morning.

I think most Americans—Democrat, Republican, liberal, conservative—no matter where they are from, if they heard the following story, would think that something was a little off. If you took a person that had worked for an employer for a very long time and, for 13 years running, had scored at the very top of employment evaluations, the top 3 to 5 percent of people in this person's field, and the employer that the person works for merges with another company, and when the merger takes place—they have a field office in Kansas and a field office in Iowa. And what they essentially do is to

say that all the people over 50 in the Kansas office we will offer an early buyout so they can leave, and people over 50 in the Iowa office we will essentially demote. And, as I understand it, only one person who was under 50 is demoted, and that person is near 50 at the time.

So the person who is affected by this, after 13 consecutive years of scoring at the top of the list on achievement, sues and claims, under the age discrimination statute, that he was demoted because of his age. There is a trial that takes place in Federal court in front of a jury. The jury listens to the evidence in the case, deliberates for a week, comes back and says, "Yeah, we think that the employer violated the law here and that this individual is entitled to recovery." I think most people would say, okay.

The next thing that happens is the case goes up to the court of appeals, and the court of appeals rules for the employer, saying the jury was told the wrong thing that it should look at in determining whether the plaintiff or defendant was going to win.

And so the case goes up to the Supreme Court at that point, and the Supreme Court looks at the issue and says, "You know what? The appellate court didn't even get the question right." So, when the question before the appellate court was when does the burden of proof shift to the employer to show that they weren't discriminating based on age, the Supreme Court says that is not really the right question, because the way the law is written, the burden of proof never—never—shifts to the defendant, and unless the plaintiff can show that he was the victim of discrimination, he loses.

Now, the question becomes, how do you show that? How do you show that?

And I come at this issue from the belief that the vast majority of employers in America are good-spirited, law-abiding people who have no intention whatsoever to practice discrimination against anybody and, in fact, who don't practice discrimination against anybody. I think the majority of employers in this country understand that you pick the best person, whether the person is 61 or 21; whether the person is African American, Asian American, Hispanic; whether the person is old, young, male, female; someday whether the person is gay or straight, you pick the best person. And failing to do that is not very good for business.

But, you know, you have a situation here now where employers I think have been given a road map as to how to make it look like you are not making a decision based on age discrimination and get away with it. And the way you do it is to manufacture a rationale that says, well, this is about productivity, or this is about the hours of effort that someone can put in, or this is about some standard that doesn't look like it is based on age but sure does have that effect.

The story that I tell is not hypothetical; it is Mr. Gross's story. And he is here to testify about it this morning, about what happened to him in his attempt to redress what he believes and what I believe was a wrong that was done to him.

But the story really goes well beyond Mr. Gross to millions of other Americans who are supposed to be protected by the age discrimination statutes that govern employment. The question really becomes, if you have to find a smoking gun, if you have to find the

foolish e-mail or foolish conversation or foolish oral statement that was made that says, "Yeah, we have had enough of these old people here, they cost too much, their benefits are too expensive, we have had enough of them; we want to shift to a younger group because it is cheaper to run our business that way," if you run into the rare foolish employer who makes a statement like that, you can win. But it is a very open question about what happens in the other 99-and-a-half percent of the time when you don't run into a record that looks like that. What are the ground rules for proving that you have been a victim of age discrimination?

This is a very subtle and abstract legal issue, but it sure isn't subtle and abstract in its effect on millions of people in the workplace and in the country. I would be willing to posit this morning that there is not a member of this committee who believes that age discrimination is a proper practice in the workplace. I know the ladies and gentlemen on both sides of the dais, and I don't think anybody believes that. And I don't think any witness believes that either; I am sure no witness believes that.

But how we establish the ground rules for proving age discrimination are very, very important. It is my belief that the decision, which unfortunately bears the name of Mr. Gross, unwillingly, subverts the opportunity for people to prove they have been discriminated against when, in fact, they have been discriminated against on the basis of their age.

Chairman Miller, Chairman Conyers, myself, Mr. Nadler, and some others have introduced legislation in an attempt to, we believe, come up with a more fair standard that is consistent with the law that has governed this country for a very long time.

Basically, that idea is that if you, as a person who believes you have been discriminated against, can show evidence that would raise that presumption, the burden then shifts to the defendant to show that the defendant did not, in fact, base their decision on age discrimination.

Now, we are going to have a vigorous discussion of whether that is a good idea or a bad idea. And it is a discussion that will commence today and, I think, go on into the future.

So I don't think the issue before the committee this morning is whether people support age discrimination or not. I don't think anyone here does. The issue, though, is what to do about that. And I think we had an effective statute on the books for a long time that was successful in achieving justice for those who deserved it. And I think the decision of the Supreme Court undercuts that decision and needs to be addressed by the committee in that way.

I am now going to turn to turn to my friend who is the senior Republican ranking member on the committee, Dr. Price, for his opening statement.

Mr. PRICE. Thank you, Mr. Chairman.

I am privileged to serve as the ranking member of this committee with a chairman that can spin all sorts of wonderful yarns, and sometimes they actually bear some resemblance to the truth. I won't opine as to whether or not the one that you just heard did or not, but I will say and echo his comments, and that is that this is an important issue. And so I want to thank the witnesses for

joining us today and to present your experience, the information that you have. And, Mr. Gross, we look forward to your testimony.

The issue before us today, as I mentioned, is truly an important one. And to put it mildly, it is more than a little complicated, especially for those of us who aren't lawyers. As a physician, the first tenet of medicine is: First, do no harm. And that is not oftentimes followed here in Washington, so I think one of the concerns that I have, that we have, is to make certain that we don't do harm, that we don't march down a road that would result in significant unintended consequences. Especially when an issue is so complicated and touching on a matter as important as our civil rights laws, a close and thorough examination is certainly warranted.

The bill before us comes in response to last year's Supreme Court decision in Gross v. FBL Financial Services. In Gross, the court held that, as a matter of the plain language of the statute, a certain standard contained in Title VII of the Civil Rights Act was not applicable to plaintiffs bringing claims of age discrimination under a different statute, the Age Discrimination in Employment Act.

And I think one can argue whether the Gross case was properly decided by the Supreme Court. It was a narrowly divided decision, as we all know, and included a very strong dissent. Good minds can and will disagree over whether or not the majority's holding was the correct one.

Now, what is beyond dispute, however, is that, despite its title, the "Protecting Older Workers Against Discrimination," this legislative remedy goes far beyond simply amending the Age Discrimination in Employment Act in reversing the Gross decision.

Make no mistake: This bill is not simply a, quote, "restoration," unquote, of where the law stood the day before the Gross case was decided. Instead, the bill before us purports to apply to a vast and undefined range of laws, Federal and possibly State, which might be characterized as protecting against employment discrimination retaliation or participation in workplace investigations.

We are deeply concerned that the vague and expansive reach of this law will undo years of unsettled case law and practice under statutes wholly unrelated to the Gross case or to the protection of older workers. Indeed, in too many ways, this legislation makes broad, substantive changes to our Nation's civil rights laws under the facade of narrowly reversing a single Supreme Court case.

With that in mind, I am truly interested in hearing from our witnesses what the practical effects of the Gross decision have been and what the practical application of the bill before us might be. Is the bill properly drafted? Should it be more narrowly targeted? Unintended consequences? What are we overlooking, given the broad scope of the bill? And, at the end of day, will the bill truly protect workers from discrimination or simply be another boon for the trial lawyers?

I want to thank the chairman for organizing this hearing, and I look forward to the testimony of the witnesses.

[The statement of Mr. Price follows:]

Prepared Statement of Hon. Tom Price, Ranking Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good morning and thank you, Chairman Andrews. I would like to begin by thanking our distinguished panel for appearing today. We appreciate that they have taken time out of their busy schedules to share their experiences and expertise with us.

The issue before us is an important one, and, to put it mildly, more than a little complicated—especially for those of us who are not lawyers. But especially when an issue is so complicated—and touching on as important a matter as our nation's civil rights laws—a close and thorough examination is warranted.

The bill before us comes in response to last year's Supreme Court decision in Gross v. FBL Financial Services. In Gross, the Court held that as a matter of the plain language of the statute, a certain standard contained in Title VII of the Civil Rights Act was not applicable to plaintiffs bringing claims of age discrimination under a different statute, the Age Discrimination in Employment Act.

Now one can argue whether the Gross case was properly decided by the Supreme Court—it was a narrowly-divided decision, and included a strong dissent. Good minds can and will disagree over whether the majority's holding was the correct one. What is beyond dispute, however, is that despite its title, "Protecting Older Workers Against Discrimination," this legislative remedy goes far beyond simply amending the Age Discrimination in Employment Act and reversing the Gross decision.

Make no mistake, this bill is not simply a "restoration" of where the law stood the day before the Gross case was decided. Instead, the bill before us purports to apply to a vast and undefined range of laws, federal and possibly state, which might be characterized as protecting against employment discrimination, retaliation, or participation in workplace investigations.

I am deeply concerned that the vague and expansive reach of this law will undo years of settled case law and practice under statutes wholly unrelated to the Gross case, or to the protection of "older" workers. Indeed, in too many ways, this legislation makes broad substantive changes to our nation's civil rights laws under the facade of narrowly reversing a single Supreme Court case.

With this in mind, I am interested in hearing from our witnesses what the practical effects of the Gross decision have been, and what the practical application of the bill before us might be. Is the bill properly drafted, or should it be more narrowly targeted? Unintended consequences—what are we overlooking given the broad scope of the bill? And, at the end of the day, will the bill truly protect workers from discrimination, or simply be another boon to trial lawyers?

Thank you, Chairman, and I look forward to hearing from our witnesses and exploring these matters further in the questioning period.

Chairman ANDREWS. Thank you.

Without objection, opening statements from any of the subcommittee members will be part of the record.

Here is how we are going to proceed. I am going to read the biographies of our witnesses this morning. Without objection, your written statements have been entered into the record and made available to the Members, so we would ask each of the witnesses to provide a 5-minute oral synopsis of their testimony. After that, we will have rounds of questioning from the members of the committee so we can engage in dialogue and learn more about what you have to educate us about.

I am going to introduce the witnesses. And then, Mr. Gross, we are going to start with you once the introductions are done.

Mr. Jack Gross recently retired from FBI Financial Services after 29 years. Mr. Gross is the plaintiff in the case we will examine today.

In 2003, he filed an age discrimination suit against his employer, FBI Financial Services. A jury found that FBI had discriminated against Mr. Gross when it demoted him because of his age and awarded him—FBL, excuse me—FBI, Freudian slip here.

The Supreme Court reversed that decision in 2009 and, in doing so, overturned longstanding precedent. The bill before us, H.R. 3721, would restore the law up to what it was prior to the Supreme Court decision in Gross v. FBL Financial Services.

Mr. Gross has a BS from Drake University. He has two beautiful grandchildren, he tells me. He made a particular sacrifice to be here this morning. His wife of 43 years had an emergency appendectomy very recently. And thank God she is doing okay. But please tell her we hope she gets better. And we appreciate your sacrifice in being here this morning.

Mr. GROSS. Appreciate it.

Chairman ANDREWS. Ms. Gail Aldrich is a member of the Board of Directors for AARP and an experienced executive with expertise in human resource management. She served previously as chief membership officer for the Society for Human Resource Management, or SHRM.

Ms. Aldrich earned her BA from Eastern Michigan University, has completed the Advanced Executive Program at UCLA, and has been certified as a senior professional in human resources by the Human Resource Certification Institute.

Welcome, Ms. Aldrich. We are glad that you are with us.

Mr. Eric Dreiband—did I pronounce your name correctly?

Mr. DREIBAND. Yes.

Chairman ANDREWS [continuing]. Is a partner at the Jones Day Law Firm, where he represents companies in all aspects of civil rights, employment discrimination, and wage and hour litigation.

Prior to joining Jones Day, Mr. Dreiband served as the general counsel of the United States Equal Employment Opportunity Commission and deputy administrator for the U.S. Department of Labor's Wage and Hour Division.

Mr. Dreiband has his JD from Northwestern University, an MTS from Harvard University, and a BA from one of the finest institutions in America, Princeton University, which Mr. Holt is very glad to hear about and represents and has been associated with.

Welcome, Mr. Dreiband. I think you have been with us before. It is good to have you with us again.

Mr. DREIBAND. Thank you.

Chairman ANDREWS. Mr. Michael Foreman is a clinical professor and director of the Civil Rights Appellate Clinic at the Dickinson School of Law at Penn State. He previously served as acting deputy general counsel for the U.S. Commission on Civil Rights. Professor Foreman has a JD degree from Duquesne University and a BA from Shippensburg University.

Welcome, Mr. Foreman.

Well, ladies and gentlemen, we are going to proceed with the testimony.

Mr. Gross, you are up first. There is this battery of lights in front of you. When the green light goes on, you are on. When the yellow light appears, you have about a minute left to go. And, in your case, please relax and don't let the lights bother you, finish your story. When the red light appears—Mr. Gross has been told a trapdoor would open under his chair. I don't know where that vicious rumor got started. But, in your case, we have locked the trapdoor and it will not open when you finish.

Thanks for coming, Mr. Gross. You are on.

STATEMENT OF JACK GROSS, PLAINTIFF IN GROSS V. FBL FINANCIAL SERVICES

Mr. GROSS. Thank you, Chairman Andrews, Ranking Member Price, and committee members. It is, indeed, an honor for me to be here today and to be given an opportunity to speak out on behalf of not only myself but millions of other older Americans, all too many of whom have, like me, experienced age discrimination in their work.

You invited me here to tell my story since I have become the new name associated with age discrimination. While I am here to tell you about the roller-coaster ride I have been on, I ask that you remember that my story is being duplicated millions of times across this country and ask you to envision the millions who are depending upon your actions and standing behind me today in spirit. I know they are.

I certainly never imagined that I would be here, that my case would end up here, when it all started 7 years ago. That is when my employer, Farm Bureau Insurance, or FBL, suddenly demoted all claims employees who were over 50 and had supervisory or higher positions.

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 working career to making Farm Bureau a better company. My contributions were exceptional, they were well-documented, and the jury heard all about them.

Since age was the obvious reason, I filed a complaint, and 2 years later we had a very aggressive trial. The jury spent a week listening to all the testimony, hearing all the evidence, and being instructed on the law, your law. 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, Farm Bureau appealed and got my verdict overturned. Apparently, the court, the Eighth Circuit, felt that, even though I had proved by a preponderance of the evidence, I didn't produce the right kind of evidence by their standards. They said that I had to have so-called "direct evidence." We are not sure, even today, what that meant. But that left us no choice but to appeal it to the Supreme Court.

We felt honored and privileged. We know that there are some 10,000 appeals to the Supreme Court each year, and they can accept about 70. So we were pretty excited when we got to be one of those 7O. And we were, frankly, very optimistic. We knew that we had a lot of core precedents, we had a lot of ensuing legislation beyond the original ADA, all working in our favor. And we, frankly, came to Washington, D.C., expecting to win at that level.

We got a shock. At the Supreme Court, our attorney made a 15-minute presentation; the solicitor general made a 15-minute presentation on our behalf. And then the Supreme Court did something totally unexpected: They broke with their own protocol and allowed the defense to advance an entirely new argument, one that had not been advanced before. It had the not been briefed. We had no chance to prepare a rebuttal. And rather than answer the question

that we had submitted and that they had agreed to hear, they basically asked their own question and answered their own question in a way that went totally beyond what was ever envisioned.

And the net effect, as far as we were concerned, was to water down the Age Discrimination in Employment Act as it was written by this branch of government, the branch closest to the people, and what we thought we clearly understood it was designed to do. So, needless to say, we were disappointed and disillusioned when they did that.

Since the Supreme Court's decision in my case, I have been particularly distressed over the collateral damage that has been inflicted on other older workers because of the Court's ruling. I hate having my name associated with the pain and injustice now being inflicted on other older workers because it is now nearly impossible to provide the level of proof that is required by this Court. I have to keep reminding myself that I am not one who changed your law. Five justices, maybe one justice, was the one that actually changed everything.

I believe Congress has a long and distinguished history of working together on a very bipartisan basis to create and maintain a level playing field in the workplace. The ADEA is just one example. And, to me, that just simply states that everyone has the right to be judged based on their ability on the job regardless of the number of gray hairs, number of birthdays that they have celebrated. And I am here to urge you, on behalf of myself and the millions who are behind me, to continue working in that same bipartisan spirit to pass this bill, the Protecting Older Workers Against Discrimination Act, in the same bipartisan spirt that you have shown in the past.

I grew up in a small town in southern Iowa in which has traditionally been called the poverty county of the State. It is the only county that doesn't have a single stoplight. It is a farm community, very close-knit. Everybody knows everybody. My wife is from the same area, and we started going together in 1967—I was 19 years old—the same year you passed the Age Discrimination Act.

My early life was pretty much defined by some chronic health problems. I developed chronic colitis at age 5 and endured that until I was 30. We had to overcome a lot. We started off our married life with absolutely nothing but a strong work ethic and a determination to build a good life together, and we did so against all odds. As was said, we have two wonderful grown children, two adorable grandchildren who are the lights of our lives.

I am before you today as a man who agonized over the decision to pursue this case. It wasn't like me. One of the prospective jurors during voir dire made the comment that she just couldn't understand how anybody could sue anybody who would give them a job, and her words resonated with me very strongly. We agonized. We thought about it. We sat down and we prayed about it. We decided it had to be done. 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 for yours.

Thank you.

[The statement of Mr. Gross follows:]

Prepared Statement of Jack Gross, CPCU, CLU, ChFC

Thank you Chairman.

I'm 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 seven 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% 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 it's 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 two 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 eight 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 don't have time to share much of my personal background, so I'll 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've 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 seven 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'm 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 it's 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 don't 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 doesn't. 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 bi-partisan spirit you've shown in the past.

Finally, one of my jurors, during voir dire, said that she just couldn't 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

Chairman ANDREWS. Well, Mr. Gross, thank you very much. That was a very moving and heartfelt statement, and we appreciate the way you have brought your personal experiences to bear. As I said to you when I met you this morning, I am sorry you are here. I wish that the circumstances that led to your appearance had not happened.

And you were doing very well until you mentioned the, sort of, gray hair test, which a lot of us on the committee take a little personally. And so you did well up to that point, but I think we will forgive you for that.

Ms. Aldrich, you are up.

STATEMENT OF GAIL E. ALDRICH, MEMBER, BOARD OF DIRECTORS, AARP

Ms. ALDRICH. Thank you.

Good morning, Chairman Andrews and Ranking Member Price. My name is Gail Aldrich. I am an AARP board member, and I am pleased to testify today on behalf of older workers.

Older workers have long been an AARP priority. And roughly half of all 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. We annually rec-

ognize best employers for workers over age 50. And we organize 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 of the Society for Human Resource Management, and I have been the top HR officer for three organizations. As a result, I am very familiar with the challenges of addressing age and other discrimination claims by employees.

I want to thank you and all members of this Education and Labor subcommittee 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 very troubling decision last year in Gross v. FBL Financial Services.

AARP thinks the 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 that has not been seen since the late 1940s. This decision takes away a vital legal protection at the very time that the economy does not give older workers the luxury of ignoring the 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, older workers or older job seekers face a prolonged and often discouraging job search. The average duration of unemployment has soared since the start of the recession and is substantially higher for older job seekers. Over half of job seekers over age 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 younger unemployed to stop looking for work and to 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 our research at AARP 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 training investments. And, finally, some employers have outdated notions that older workers are unable to adapt in industries like computers and information technology. This, despite us baby boomers who are enthusiastic about embracing all kinds 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 benefits to be paid. Eliminating discrimination is critical if older workers are to delay their date of retirement. Working longer is good for society because 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 that they have to finance. And it is good for employers, who retain skilled and experienced employees.

AARP strongly favors and endorses H.R. 3721. It would eliminate the second-class status for victims of age bias that the Court in the Gross decision 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 statement of Ms. Aldrich follows:]

Prepared Statement of Gail Aldrich, Member, Board of Directors, AARP

GOOD MORNING CHAIRMAN ANDREWS AND RANKING MEMBER PRICE: 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 Education and Labor Subcommittee on Health, Employment, Labor and Pensions 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 FY 2008 and FY 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 plaintiff 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 plaintiff's 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", H.R. 3721, 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 reces-

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[1] M. 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).

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

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

sion 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 two 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 two years earlier and far more than it had in the two years before December 2007. (See Table 1.)

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 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

[4] R. 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).

[5] EBRI, "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.

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. But we also believe that the ADEA and other civil rights law must be preserved so that they act as a real deterrent, and 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 Serwatka 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), H.R. 3721, 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.

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
Total	50.6	52.6	64.7

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

Chairman ANDREWS. Ms. Aldrich, thank you for your testimony and your participation this morning.

Mr. Dreiband, welcome to the committee.

STATEMENT OF ERIC S. DREIBAND, FORMER GENERAL COUNSEL, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PARTNER, JONES DAY LAW FIRM

Mr. DREIBAND. Good morning, Chairman Andrews, Ranking Member Price, and members of the subcommittee. I thank you and the entire committee for affording me the privilege of testifying today. My name is Eric Dreiband, as you mentioned, Chairman An-

drews, and I am a partner at the law firm of Jones Day here in Washington, D.C.

I am here today 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 stay 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 any 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, deprived entities that engage in age discrimination of this defense.

For this reason, since the Gross decision was issued, 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, Fifth, Sixth, Seventh, Eighth, Ninth, 10th, and 11th Circuits have relied upon the Gross decision to issue decisions in favor of plaintiffs.

Second, the bill will restore the same action defense eliminated by the Gross decision. Discrimination victims may prove that a protected trait, such as age, was a motivating factor for a particular practice complained of, yet still lose their case. This is because the bill would deprive discrimination victims of any meaningful remedy in so-called "same action" cases. Their lawyers may receive payment for fees directly attributable to the pursuit of a motivating factor claim, but the alleged victim will get nothing—no job, no money, no promotion, nothing.

Mr. Gross, for example, will receive nothing if he proves upon retrial that age motivated his employer to demote him and his employer establishes its same action defense. He may win a moral victory, perhaps, but nothing else. And 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.

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 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 solely to the Age Discrimination in Employment Act, which was the only statute at issue in Mr. Gross's case, or, at a minimum, listing the laws that Congress intends to amend. The recently acted Lilly Ledbetter Fair Pay Act of 2009 specifically identified the laws it amended, and Congress can do the same here.

Thank you, and I look forward to your questions.

[The statement of Mr. Dreiband follows:]

Prepared Statement of Eric S. Dreiband, Partner, Jones Day Law Firm

I. Introduction

Good morning Chairman Andrews, Ranking Member Price, 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, D.C.

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, H.R. 3721. 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 became 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 cases. 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 [plaintiff's] 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 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 claims[22] 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 administration 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 proved 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 proved by a 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.[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 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[ied] on misconceptions 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 two 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]

Several other courts, including the Third, Fifth, 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 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 twelve 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 pur-

ports 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.

ENDNOTES

[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 brash 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.").

[4] Secretary 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).

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

[7] Id. at § 623(a).

[8] 411 U.S. 792 (1973).

[9] Id. at 802.

[10] Id.

[11] Id. at 804.

[12] 490 U.S. 228 (1989).

[13] Id. at 233-34.

[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] 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.

[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 Inst. p. 16, filed Oct. 25, 2005.

[27] Id. Final Jury Instr. No. 11.

[28] Id. at *1-14.

[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 gen-

erally"); 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)).

[38] Protecting Older Workers Against Discrimination Act, H.R. 3721, 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'l 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 Reg'l 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).

[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); Phillps 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, H.R. 3721, 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, H.R. 3721, 111th Cong. § 3 (2009) (proposed to be codified at 29 U.S.C. § 623(g)(5)(B)).

[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).

Chairman ANDREWS. Thank you very much for your testimony. We appreciate it.

Mr. Foreman, welcome.

STATEMENT OF MICHAEL FOREMAN, CLINICAL PROFESSOR AND DIRECTOR OF THE CIVIL RIGHTS APPELLATE CLINIC, DICKINSON SCHOOL OF LAW, PENN STATE UNIVERSITY

Mr. FOREMAN. Thank you, Chairman Andrews, Ranking Member Price——

Chairman ANDREWS. Can you pull the microphone a bit closer to you there and turn it on?

Mr. FOREMAN. Is that better?

Chairman ANDREWS. Thank you.

Mr. FOREMAN. Thank you for convening this very important hearing.

I think as you mentioned in your opening statement, it raises a very fundamental issue, I think, before Congress. And I think that fundamental issue is, when Congress passes a statute that says it is unlawful to do something because of race, sex, national origin, in this case age, how much discrimination is the Congress willing to allow? How much discrimination does that type of statute tolerate?

And I think Congress sought to answer to that question. I know we thought you answered that question. And the answer was pretty straightforward: none. These laws don't tolerate some level of allowable discrimination. But, unfortunately, the Gross decision changed all that. And the bill that you have before you is a balanced response to Gross, it is a fair response to Gross, and, indeed, it is a conservative response to Gross. And I can talk more about why I believe that as we move forward.

Now, my colleague indicates that it will do nothing to help workers. And I think his comment was, it is a moral victory, nothing more. I think you want to ask Mr. Gross about that. Because, under the very standard this bill proposes, Mr. Gross won. He would win again, under that standard, because the jury found that age was a motivating factor and that the employer could not prove that they would have taken the same action anyhow; that it was, in fact, a violation of the law. And the jury awarded him $46,000. I don't believe he views that as just a moral victory. The law has teeth, it has meaning.

Now, what did the Gross decision really do? Number one, it ignored interpretations of every circuit court of appeals that had addressed this decision since Price Waterhouse was handed down in 1989. It was a consistent view of all the courts that there was a motivating factor causation standard within the ADEA, but the Court ignored that. The Supreme Court ignored that and said, no, the age law tolerates more discrimination than Title VII tolerates unless you, Congress, make it very, very, very clear that you are not going to tolerate any type of discrimination like that.

So, number one, the question is: This is for Congress to fix. And, in fact, Justice Thomas in his opinion says, "This is Congress's issue. If you want us to protect, then you need to tell us explicitly."

Two, it has caused havoc in the courts. One, it has called into question the McDonnell Douglas standard that has been applied for literally decades, in the age case. Courts are struggling because of what the Supreme Court said. More importantly, it has called into

question what is the appropriate standard of proof under a lot of other statutes, not just the ADEA. The Seventh Circuit says it applies to the ADA because their interpretation of Gross is, unless you, Congress, provide these magic words, the mixed motive type of analysis, then it is but for causation. And so, it applies to any statute that is out there. And, in fact, employers are arguing it applies to every statute that is out there that do not have these words.

That is the reason I say that the bill is a measured response. It reinstates the law to what it was prior to Gross and makes it clear that when Congress says you shouldn't consider something, hey, you should not consider something; that is a violation of the law. It provides the employers with the ability to say, if I would have done that anyhow, they can limit their liability. So it is a measured response.

And it does not tolerate some level of discrimination. Rather, it sends the message that I think you all sent since 1991 and before that, when we pass discrimination law, we are not going to allow some level of discrimination or a little bit of discrimination, that we are here to combat all discrimination.

And I am prepared to answer any questions on the bill or any follow-ups you may have. Thank you.

[The statement of Mr. Foreman follows:]

Prepared Statement of Prof. Michael Foreman, Director, Civil Rights Appellate Clinic, Pennsylvania State University Dickinson School of Law

CHAIRMAN ANDREWS, RANKING MEMBER PRICE AND MEMBERS OF THE SUBCOMMITTEE: Thank you for convening this hearing regarding the impact of the Supreme Court's decision in Gross v. FBL Financial Services, Inc.[1] on employees' right to work free from discrimination based upon age, and the legislative response to this surprising decision.

Unfortunately the Court's decision poses a very fundamental question—what Congress really means when it says it is unlawful to discriminate because of age? Stated alternatively, what is the tolerable amount of discrimination Congress is willing to permit against older workers? I, along with many others, believe that Congress had already answered this question—none—but the Gross decision requires Congress to be more explicit as to what amount of discrimination it will allow.

HR 3721 is a fair, balanced, indeed conservative attempt to return the law to where everyone, the courts included, thought it was. The bill also attempts to stem the confusion created by the decision and provides the explicit statement of congressional intent the Supreme Court in Gross demands.

My name is Michael Foreman. I am the Director of the Civil Rights Appellate Clinic at the Pennsylvania State University Dickinson School of Law where I also teach an advanced employment discrimination course. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal and have represented both employers and employees. It is from this broad perspective that I provide my testimony.[2] Much of my testimony is taken from my more detailed analysis of the Gross decision which will be appearing in in Volume 40, Issue 4, Summer 2010 of the University of Memphis Law Review.

Gross undermined Congress's legislative intent and immediately impacted older workers, relegating them to second-class status among victims of discrimination. It has already been used to erode protections seemingly established under other anti-discrimination laws. The Gross majority made it explicit that it is up to Congress to clarify its intent in extremely precise terms when it amends employment discrimination statutes. Indeed the majority chastises Congress for not being more specific as to its intent and appears to challenge Congress to act.[3]

I. Gross v. FBL Financial Services: the decision

Gross v. FBL Financial Services involved a claim that FBL engaged in ADEA-prohibited age discrimination. In the district court, a jury found that Mr. Gross's age was a motivating factor in FBL's decision to demote him.[4] The district court in-

structed the jury to enter a verdict for Gross if he proved by a preponderance of the evidence that he was demoted and that his age was a motivating factor in the demotion.[5] The district court also explained to the jury that age was a motivating factor if it played a part in the demotion and instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age.[6]

On appeal, the Eighth Circuit reversed and remanded, holding that the district court's mixed-motive jury instruction was flawed because the appropriate legal analysis was the standard established in Price Waterhouse v. Hopkins,7 which shifts the burden of persuasion to the employer only if the plaintiff presents "direct evidence" of age discrimination.[8] Gross petitioned for certiorari on this narrow issue of whether direct evidence was required in age cases.[9] In a surprising 5-4 decision, the Supreme Court held that a mixed-motive jury instruction is never proper under the ADEA because the ADEA's prohibition against discrimination "because of" an individual's age requires plaintiffs to prove that age was the "but-for" cause of the employer's decision.[10]

The Supreme Court stated 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 employment action.[11] According to the Court, 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 evidence that age was one motivating factor in the decision.[12]

The majority believed the language of the ADEA is clear. In their view, the plain meaning of the ADEA's requirement that an employer's adverse action was "because of" age means that age was "the reason" the employer decided to act.[13] In other words, the burden of persuasion necessary to establish employer liability is the same in mixed-motives cases as in any other ADEA disparate-treatment action: the plaintiff must prove by a preponderance of the evidence, either direct or circumstantial, that age was the "but-for" cause of the challenged employer decision.[14] The Court concluded that because it held that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, it did not have to address whether plaintiffs must present direct evidence to obtain a burden-shifting instruction.[15]

A. The Gross Majority Decided An Issue Not Presented To The Court

Neither the parties to Gross nor the interested amici curiae were given notice the Court would be considering whether a mixed-motive instruction was available under the ADEA.[16] The issue presented and on which the Supreme Court granted certiorari was whether, under the ADEA, a plaintiff is required to present "direct evidence" of age discrimination to obtain a mixed-motive jury instruction.[17] Parties on both sides proceeded with the understanding that the Price Waterhouse motivating-factor type of analysis was applicable to ADEA claims until FBL filed its brief at the Supreme Court questioning the utility of Price-Waterhouse.[18] The majority, rather than determining whether a Price-Waterhouse-type of mixed motive analysis applied, determined that it must reach a much more fundamental issue—whether any type of mixed-motive analysis applies to ADEA claims.[19]

At oral argument, the Office of the Solicitor General pleaded with the Court not to take up an issue that was not briefed by the parties or the United States.[20] The five-member Gross majority decision prompted the four justices in dissent to note that the majority was unconcerned that the "question it chooses to answer has not been briefed by the parties or interested amici curiae," and that the majority's "failure to consider the views of the United States, which represents the agency charged with administering the ADEA [was] especially irresponsible."21 Ultimately, the Court avoided the issue on which it granted certiorari and held that the ADEA does not authorize a mixed-motive discrimination claim.

B. The Gross Majority Ignored Precedent That Had Interpreted Similar Language To Allow Mixed-Motive Liability

The Gross decision stands in stark contrast to the Court's precedent and a body of uniform circuit court decisions. In Price Waterhouse, the Court examined Title VII and determined that the words "because of" prohibit adverse employment actions motivated, in whole or in part, by prohibited considerations.[22] Considering the relationship between Title VII and the ADEA, circuit courts consistently adopted the Price Waterhouse standard in the context of ADEA claims for nearly twenty years without issue.[23]

For example, in Febres v. Challenger Caribbean Corp., the United States Court of Appeals for the First Circuit applied the Price Waterhouse standard to an ADEA claim.[24] The First Circuit explained that in a mixed-motive case the burden of persuasion does not shift merely because the plaintiff introduces sufficient direct evidence to permit a finding that a discriminatory motive was at work.[25] The burden

shifts only if the direct evidence actually persuades the jury that a discriminatory motive was at work.[26] In sum, "the burden of persuasion does not shift unless and until the jury accepts the 'direct evidence' adduced by the plaintiff and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision."27 In Gross, however, the Court determined that "because of" means something different for victims of age discrimination.[28]

The relevant language of Title VII and the ADEA use identical "because of" terminology, and "[the Court has] long recognized that [its] 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.'"[29] The majority appeared unconcerned by Congress' use of identical language and instead focused on what Congress did not explicitly do when it enacted the Civil Rights Act of 1991.[30] The ADEA's text does not specifically reference a mixed motive type of claim as Title VII does as amended in 1991.[31] The majority found it significant that Congress did not add this specific language to the ADEA when it amended Title VII, even though it contemporaneously amended the ADEA in several ways.[32] However, the Gross majority never explained why identical "because of" language in the two statutes should have different meanings.

Rather than justifying its departure from Price Waterhouse, the majority merely characterized its holding as a decision not to extend Price Waterhouse to the ADEA.[33] The Court reasoned that it would not ignore Congress' decision to amend Title VII's relevant provisions but not to make similar changes to the ADEA.[34] According to the Court, when Congress amends one statutory provision but not another, it is presumed to have acted intentionally.[35] Again, the Court was unconcerned that its interpretation was in direct conflict with the understanding that the Courts of Appeals have unanimously accepted since 1991.[36]

C. Gross Undermines Congressional Intent To Eliminate Discrimination In The Workplace

The increased burden Gross imposes upon older workers contravenes the clear intent of Congress to prohibit age discrimination in the workplace. Just a few years after Price Waterhouse, Congress passed the 1991 amendments to Title VII to codify the Court's "motivating factor" test and to clarify that a same-decision defense went only to damages—not liability.[37] This amendment reflected Congress' continued commitment to eradicating discrimination in employment.[38] Rather than recognizing this express congressional approval of mixed-motive liability, the Gross majority misconstrues the amendment by inferring congressional intent to exclude mixed-motive claims from employment discrimination statutes it did not simultaneously amend.[39] Such an inference appears misplaced when the Court is interpreting amendments designed to counteract "Supreme Court decisions that sharply cut back on the scope and effectiveness of [civil rights] laws."40

The Courts of Appeals had universally recognized Congress' express approval of the motivating factor test, and, therefore, consistently applied that test in ADEA claims for nearly twenty years.[41] But now, having determined that Congress did not intend these consistent interpretations, the five Justices have sent a clear message that if Congress wants to eliminate the consideration of age in employment decisions, it must explicitly say so.

II. The fundamental lessons of the Gross decision

A. If Congress Wants To Provide Protections Against Discrimination, Congress Must Be Clear—Very Very Clear

The prohibitions against age discrimination in the workplace have never been viewed as providing less protection for older workers, or stated alternatively, as allowing more discrimination against older workers than the protections under Title VII of the Civil Rights Act of 1964. Yet this is effectively Gross's outcome. The majority's decision has made it significantly more difficult to bring an age discrimination claim and requires employees who are victims of age discrimination to meet a higher burden of proof than someone alleging discrimination based upon race, color, religion, sex, or national origin under Title VII.

In Gross the Court concluded that even though age was a "motivating" factor for the adverse employment action, as the jury determined in Mr. Gross's case, this is not enough to prove a violation of the ADEA.[42] Congress has never said or implied that age discrimination is any less pernicious than discrimination against Title VII-protected groups, or that age discrimination should be harder to prove. Congress has been unequivocal about its desire to eliminate all discrimination in the workplace—including age discrimination.[43] Likewise, Congress modeled the ADEA on Title VII.[44]

The majority based its holding on the notion that the prohibitions against discrimination in the ADEA and Title VII need not be treated consistently unless Congress states this explicitly.[45] Because of identical language in both statutes, the majority requires an employee claiming age discrimination to prove more: they must now prove "but-for" causation. This standard was rejected by the Court in Price Waterhouse v. Hopkins,[46] as well as by Congress in the 1991 Amendments to the Civil Rights Act.

B. Gross Increases The Burden Of Proof For Older Employees

The impact of Gross—that older workers attempting to prove unlawful discrimination have a much higher burden—was immediately recognized:

• "The 'but-for' causation standard * * * makes it much more difficult for plaintiffs to prevail in age discrimination cases * * *. [I]t is not enough to show that age may have influenced the employer's decision." "[A] significant victory for employers."[47]

• "Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA"[48]

• Without the "traditional 'mixed motive analysis,' * * * [plaintiffs'] job in court [will be] much more difficult."[49]

• A "sea change in current law [which] might even indicate a seismic shift in the Supreme Court's interpretation of statutes that deal with employment."[50]

• "* * * It's becoming increasingly difficult for workers to prove their claims. * * * Gross found that older workers bringing age discrimination claims must meet a higher standard to prove their claims than others who have been subject to unfair discrimination at work."[51]

This was not simply a "sky is falling" reaction by the media. Courts immediately understood Gross's importance, and that it significantly changed the rules of the game for those attempting to prove age discrimination:

• "In the wake of [Gross] 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."[52]

• "The 'burden of persuasion does not shift to the employer to show that they 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.'"[53]

• "[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."[54]

• The burden of persuasion does not shift to the employer "even when plaintiff has produced some evidence that age was one motivating factor in that decision."[55]

• Pursuant to the Supreme Court's recent decision in Gross v. FBL Financial Services, Inc., a claimant bringing suit under the ADEA must demonstrate that age was not just a motivating factor behind the adverse action, but rather the 'but-for' cause of it. Title VII, on the other hand, does authorize a 'mixed motive' discrimination claim.[56]

• "Before the Supreme Court's decision in Gross, 'the employee could prevail if the evidence, viewed in the light most favorable to the plaintiff, would permit a jury to find that her dismissal was motivated at least in part by age discrimination.' Gross changed 'the latter part of this formulation by eliminating the mixed-motive analysis that circuit courts had brought into the ADEA from Title VII cases.'"[57]

Under the increased burdens imposed by the "but for" standard, courts are already dismissing age claims for failure of proof based upon Gross.[58]

C. This "But-For" Causation Standard Imposes An Onerous Burden On Victims of Age

The Court's "but-for" causation requirement places a significant hardship on victims of age discrimination and permits consideration of age under a statute that Congress intended to eradicate age discrimination in employment. Employees face a heavy burden at trial because showing the employer improperly considered age in the employment decision is no longer a sufficient basis to establish liability.[59] A jury determination that age is not only a factor, but the motivating factor for an adverse employment action, as the jury found in Mr. Gross's case, is no longer sufficient to prove an ADEA violation.[60]

But-for causation may largely nullify the ADEA, limiting relief to only the most extreme cases of discrimination. Most employment actions have several causes; this is especially true when adverse employment actions occur in a down economy. Proving that one of several factors in the employer's decision was the "but-for" cause of the decision is particularly difficult, particularly where evidence of the employer's intent is usually within the sole control of the employer. Employers who improperly

consider age may now escape liability if they are able to point to additional factors they considered when making the decision. Moreover, employers can easily create some rationale for the adverse action, and employees will have little chance of showing that bias, not the employer-asserted rationale, was the "but-for" cause.

III. Gross is creating a confusion and unsettling impact in the courts

Gross was a substantial departure from prior judicial interpretations of the ADEA, and its effects have already impacted ADEA litigation in the lower courts. Moreover, the decision's effects extend well beyond the ADEA, as it has created uncertainty and eroded the protections of similar antidiscrimination legislation.

A. Gross Raised Uncertainties About The Continued Use Of The McDonnell Douglas Evidentiary Framework In Summary Judgment

The Gross decision created confusion in the lower courts regarding the plaintiff's burden at the summary judgment stage of litigation. While the Gross Court determined the burden of persuasion never shifts to the employer in ADEA cases, the majority left open the question of whether the evidentiary framework of McDonnell Douglas v. Green [61] is appropriate under the ADEA.[62] This framework addresses the burden of production in Title VII cases, and courts have consistently adopted it in the ADEA and other antidiscrimination statutes.[63] In the wake of Gross, however, lower courts feel compelled to reexamine this settled precedent.

Long before Price Waterhouse and the 1991 amendments to Title VII, the Supreme Court recognized the challenges employees face in proving discriminatory animus on the part of their employer. In 1973, the Court established an evidentiary framework to help sort through the difficult task of determining discriminatory intent in employment cases in McDonnell Douglas.[64] Under this framework, once a plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action.[65] If the defendant articulates a legitimate reason, the McDonnell Douglas presumption falls away, and the burden of production shifts back to the plaintiff to demonstrate the defendant's proffered reason was a pretext to mask unlawful discrimination.[66]

Though the ultimate burden still lies with the plaintiff, the McDonnell Douglas framework assists plaintiffs by forcing the employer to articulate a nondiscriminatory reason for the action, so the plaintiff can disprove the proffered reason or prove it is only a pretext for discrimination.[67] Courts have applied this standard in thousands of ADEA cases.[68] Indeed, several of the Supreme Court's seminal employment discrimination cases, such as Kentucky Retirement Systems v. EEOC, discuss the McDonnell Douglas standard in claims of age discrimination.[69]

Interestingly enough, the Supreme Court, within the Gross opinion, makes the observation that it has never formally held that the McDonnell Douglas standard applies in the context of the ADEA.[70] So the Supreme Court raises another issue not presented by the parties, specifically, whether the McDonnell Douglas framework applies in ADEA cases. However, the Supreme Court opts not to answer the question of whether the framework applies to ADEA cases. By raising the issue but not answering it, the Court added no clarity to the law and only created more confusion.

To add to the confusion caused by the Supreme Court after Gross, lower courts have questioned the continuing viability of McDonnell Douglas or have felt compelled to reflect on, or alter the framework to reflect, Gross's ultimate causation standard. In Smith v. City of Allentown,[71] the Third Circuit observed that "although Gross expressed significant doubt about any burden-shifting under the ADEA, we conclude that the but-for causation standard required by Gross does not conflict with our continued application of the McDonnell Douglas paradigm in age discrimination cases." [72] The Smith court continued to explain:

Gross stands for the proposition that it is improper to shift the burden of persuasion to the defendant in an age discrimination case. The McDonnell Douglas standard, however, imposes no shift in the burden of persuasion but instead on the burden of production. Throughout the shifts, the burden of persuasion remains on the employee. Therefore, Gross, which prohibits shifting the burden of persuasion to an ADEA defendant, does not forbid our adherence to precedent applying McDonnell Douglas to age discrimination claims.[73]

Other circuit decisions are in accord with the Third Circuit, including the Second Circuit in Leibowitz v. Cornell University [74] and Hrisinko v. New York City Department of Education,[75] the Sixth Circuit in Geiger v. Tower Automotive,[76] and the Seventh Circuit in Martino v. MCI Communications Services, Inc.[77] While these courts continue to apply the McDonnell Douglas framework, the majority's unanswered observation in Gross is, at a minimum, causing the parties and the courts to reexamine this application.[78]

B. The Gross Ruling Is Impacting The Burdens Of Proof Under Other Laws Prohibiting Discrimination In Employment

Hundreds of federal, state, and local laws prohibit discrimination in employment. Many use language identical or similar to the "because of" standard codified in Title VII and the ADEA. Courts have interpreted language in antidiscrimination statutes consistently, recognizing that Congress understood judicial statutory interpretations when it chose to model one statute after the other.[79] Under Gross, however, courts are cautioned, and in some cases believe they are obligated, to reconsider the propriety of applying rules applicable under one statute to a different statute.[80] The result will be confusion and increased litigation over the burdens of proof under all of these statutes.[81]

The Gross majority reasoned its conclusion through a negative legislative inference: Congress must not have intended the Price Waterhouse standard to apply under the ADEA because Congress failed to amend the ADEA when it amended Title VII to expressly codify the Price Waterhouse motivating-factor standard.[82] This reasoning ignores a significant line of cases holding that courts should consistently interpret and apply the language of both statutes with equal force.[83] Moreover, Gross opens the door for courts to impose the same elevated standard under any antidiscrimination statute that was not similarly amended, even where the statute was clearly modeled after Title VII. This method of statutory construction cripples congressional functions because it implies that anytime Congress acts to codify existing case law, which had previously been interpreted as applying to other similar statutes, Congress's action has no impact on these other comparable statutes unless they were simultaneously amended—even if these other statutes were modeled on the amended statute and interpreted in a manner consistent with the amended statute. This rationale places an unreasonable burden on Congress to identify every statute potentially affected by legislation.

At least one Court of Appeals has embraced this expansive application of Gross. The Seventh Circuit has held that, "After Gross, plaintiffs in federal suits must demonstrate but-for causation unless a statute (such as the Civil Rights Act of 1991) provides otherwise."[84] Applying this standard, the Seventh Circuit overruled precedent expressly adopting the motivating factor standard in prior cases and extended the "but-for" causation requirement to cases where the statutes included did not have the precise motivating factor language used in the Civil Rights Acts of 1991.[85] Such a broad application of Gross leaves virtually all federal antidiscrimination and antiretaliation legislation open to new interpretation, despite the precedent and cannons of construction upon which Congress, plaintiffs, and employers have rightfully relied.

Considering the indisputable connections between the various state and federal antidiscrimination statutes, the Gross holding has prompted the lower courts to revisit the causation standards of many antidiscrimination laws. In a recent Fifth Circuit case filed under the ADA and the Family Medical Leave Act, Crouch v. J C Penney Corp., Inc.,[86] the court cautioned that "the Supreme Court's recent opinion in Gross v. FBL Financial Services, Inc. raises the question of whether mixed-motive framework is available to plaintiffs alleging discrimination outside the Title VII framework."[87]

Later, in Smith v. Xerox,[88] the Fifth Circuit refused to extend Gross to retaliation claims under Title VII. Despite noting that while the considerations present in the retaliation analysis are "similar to the Supreme Court's reasoning in Gross,"[89] the majority believed such a simplified explanation of Gross was incorrect.[90] The dissent, however, relying on Seventh Circuit case law and its view of the Gross holding, argued that the courts must apply Gross to Title VII retaliation claims and chastised the majority's arguments as a "meaningless distinction indeed."[91]

As discussed, the Seventh Circuit did not avoid the issue of how the Gross analysis impacts causation standards under other antidiscrimination laws. In Serwatka v. Rockwell Automation Inc.,[92] the court examined the pre-amended language of the ADA, which prohibited discrimination "because of" an individual's disability or perceived disability.[93] The court determined that "the importance Gross attached to the express incorporation of mixed-motive in Title VII suggests that when another antidiscrimination statute lacks comparable language, mixed-motive claims will not be viable."[94]

Although provisions of the ADA specifically incorporate Title VII's mixed-motive remedies, the Seventh Circuit was unconvinced and refused to recognize the motivating-factor test absent express language in the statute or explicit reference to Title VII's motivating-factor standard.[95] Decisions such as this indicate that, at least in the Seventh Circuit, any plaintiff whose discrimination claim falls outside the Title VII protected classes must prove "but-for" causation in every case.

To date, district courts have applied Gross to require but-for causation under state antidiscrimination statues,[96] eliminated the mixed-motive theory under the Juror Protection Act,[97] and solidified a decision to require but-for causation under the anti-retaliation provision of Title VII.[98] For decades there has been an accepted standard for how plaintiffs prove discrimination under employment discrimination laws and recognition that comparable statutes involve comparable burdens and methods of proof. Gross has now opened the door for increased litigation over the appropriate burden and methods of proof under all the statutes prohibiting discrimination in employment, even if they were expressly modeled after Title VII. Title VII makes it clear after the 1991 amendments that these discrimination laws were intended to protect workers from adverse actions motivated, in whole or in part, by improper considerations. Under the Gross decision, every statute must be examined anew to determine just how much discrimination that statute will permit. Gross's ramifications extend far beyond the ADEA, and this decision is having an immediate and detrimental effect on plaintiffs bringing non-age-based employment discrimination claims. Unless Congress acts to specifically express its intent, the courts will continue to narrowly construe the ADEA and similar statutes in a way that enables workplace discrimination by increasing the costs of litigation and placing insurmountable burdens upon plaintiffs.

C. Some Courts Are Even Reading Gross As Requiring Age To Be The Sole Cause, Leading To Nonsensical Results And Practical Pleading Confusion

Though they face a difficult obstacle at trial, plaintiffs who defeat summary judgment obviously fare better than many plaintiffs who will be unable to bring their claims to trial. A number of lower courts, interpreting Gross, now require proof that age was the sole cause of an employer's decision, and have dismissed plaintiff's ADEA claims who plead additional discriminatory causes for an employer's adverse action.[99] In these districts, plaintiffs are confronted with impractical difficulties initiating an ADEA claim, as the mere pleading of another discriminatory basis risks automatic dismissal of the age claim.

For example, in Culver v. Birmingham Board of Education, the plaintiff brought both Title VII and ADEA claims.[100] The court dismissed the ADEA claim, finding that Gross holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that * * * [age] * * * 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.[101]

In other words, some courts do not allow an ADEA plaintiff to plead duel claims; to do so would admit that another motive was at play, which, under this court's interpretation of Gross, would foreclose the age claim.

Decisions like these are a harsh reality for older workers who, prior to Gross, had the opportunity to show age was a consideration in the employment decision. While raising the bar for older workers, Gross lowers employers' standards of behavior by sending a message that age may be a factor in employment decisions, so long as it is not the determining factor. Moreover, as most courts continue to apply the McDonnell Douglas burden-shifting standard, the Gross decision has failed to clear the murky waters of burden-shifting in ADEA cases.[102] Gross has the true effect of circumventing Congress' intent to eliminate age as a factor in employment decisions by increasing the burden on older employees, creating confusion in the lower courts, and increasing litigation costs.

IV. HR 3721: Protecting Older Workers Against Discrimination Act

Congress was unequivocal about its desire to eliminate all discrimination in the workplace—including age discrimination.[103] Likewise, Congress modeled the ADEA on Title VII of the Civil Rights Act,[104] and the courts have long recognized the fundamental relationship that exists between the statutes. Yet, the Gross decision sent a message to Congress that if it wants the Supreme Court to provide protections against discrimination, it must be specific. Congress must act to ensure the ADEA is not stripped of all its intended power and protect older employees' fundamental right to nondiscriminatory treatment. Presently, the Protecting Older Workers Against Discrimination Act has been proposed to restore the intended protections of the ADEA.[105]

The preceding discussion highlights in detail the issues with the Gross decision. HR: 3721 is a balanced response to it by returning the law to the status quo. It also eliminates the confusion created by Gross. Indeed, some say it does not go far enough because it still allows employers who have considered age to limit their damages if they can show they would have taken the same action anyhow.

The Protecting Older Workers Against Discrimination Act overrules Gross and expressly addresses issues the Gross Court ignored or misinterpreted. The amendment largely mirrors the 1991 amendments to Title VII, which codified the Price Waterhouse motivating-factor theory and transformed its "same decision" affirmative defense into a limitation on remedies. In its current form, the amendment:

• Restores the motivating factor test to ADEA claims by specifying that a plaintiff establishes an unlawful employment practice by demonstrating either age was "a motivating factor for the practice complained of, even if other factors also motivated that practice, or the questionable practice would not have occurred in the absence of an impermissible factor." [106]

• Clearly establishes the motivating factor standard as the congressionally intended standard in all federal discrimination statutes absent an explicit statement adopting another proof standard.[107]

• Adopts Title VII's same-decision limitation on remedies.[108] This allows juries to find employers liable for considering a protected characteristic while limiting the available remedies when the employer can show that it would have taken the adverse action even without considering the characteristic.

• Expressly preserves the evidentiary framework set forth in McDonnell Douglas.[109]

• Answers the issue actually presented in Gross by clarifying that a plaintiff may demonstrate mixed-motive liability by relying on "any type or form of admissible circumstantial or direct evidence." [110]

• Preserves and/or restores the mixed-motive test in any Federal law forbidding employment discrimination; any law forbidding retaliation against an individual for engaging in federally protected activity; and any provision of the Constitution that protects against discrimination or retaliation.[111]

Essentially, this amendment restores the protections afforded under the ADEA prior to the Gross decision and ensures courts will interpret similar statutes accordingly. Employers will no longer be able to defeat the victim's discrimination claims with a mere showing that some other reason was a factor in their decision. The statute makes it clear that there is no tolerable level of discrimination in employment.

Gross runs contrary to our national commitment to equality. Thus, Congress should take positive steps to ensure that our civil rights and employment laws protect all American workers. At the very least, Congress must stem the "Gross" implication that congressional action to strengthen one statute may be deemed to weaken other statutes dealing with similar issues but not simultaneously amended. This was clearly not the intent of Congress in 1991 when it amended Title VII to reflect its approval of Price Waterhouse's "because of" interpretation. And just as Congress, in response to Supreme Court decisions, acted in 1991 to reaffirm its intention "to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions," [112] Congress must now act to restore those protections for our older workers.

The Gross decision has detrimentally affected plaintiffs' ability to access the courts and to obtain relief for employment discrimination. If Congress wishes to secure the rights it thought it guaranteed in the civil rights laws, it must act to clarify that intent.[113] As the Supreme Court has said, "It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes." [114] As Justice Ginsburg noted in Ledbetter v. Goodyear Tire & Rubber Co.,[115] "Once again, the ball is in Congress' court." [116].

ENDNOTES

[1] 129 S. Ct. 2343 (2009).
[2] A copy of my biography is attached.
[3] Referring to a broader interpretation of the ADEA, the Gross majority said, "[T]hat is a decision for Congress to make." Gross, 129 S. Ct. at 2349 n.3. The five justices in the majority hung their hat on what they deemed was Congress's failure to act.
[4] Id. at 2347.
[5] Id.
[6] Gross at 2344-2345.
[7] 490 U.S. 228 (1989).
[8] Id.
[9] Gross at 2346.
[10] Id. at 2351.
[11] Id. at 2344.
[12] Id. at 2352.
[13] Gross at 2350.
[14] Id. at 2351.
[15] Id. at 2351, n.3.
[16] Id. at 2353 (Stevens, J. dissenting).

[17] Gross at 2346.
[18] Id. at 2348, 2353.
[19] Id. at 2350.
[20] Gross Tr. of Oral Arg. 20—21, 28—29.
[21] Id. at 2353 (Stevens, J., dissenting).
[22] See Price Waterhouse v. Hopkins, 490 U.S. 228, 244-247 (1989)(plurality opinion)(concluding that the words "because of" such individual's [protected classification] mean that [the protected classification] must be irrelevant to employment decisions).
[23] "* * * the Courts of Appeals to have considered the issue unanimously have applied Price Waterhouse to ADEA claims." Gross at 2354-55, n.5 (Stevens, J., dissenting)(citing numerous circuit court opinions applying Price Waterhouse to ADEA claims.).
[24] 214 F.3d 57 (1st Cir. 2000).
[25] Febres at 64.
[26] Id.
[27] Id.
[28] "Under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action." Gross at 2351.
[29] Gross at 2354 (Stevens, J. dissenting).
[30] Id. at 2349.
[31] See 42 USC §§2000e-2(m), 2000e-5(g)(2)(B).
[32] Gross at 2350-51.
[33] "This Court has never held that the burden-shifting framework [of Title VII] applies to ADEA claims. And we decline to do so now." Gross at 2349.
[34] Id. at 2349.
[35] Id.
[36] See n.23 supra.
[37] See 42 USC §§2000e-2(m), 2000e-5(g)(2)(B).
[38] In addition to the logical conclusion that Congressional codification of the motivating-factor test evinced Congressional approval of the test, Justice Stevens pointed out in his dissent that "There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H. R. Rep., pt. 2, at 4 (noting 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," and that "these other laws modeled after Title VII [should] be interpreted consistently in a matter consistent with the Title VII as amended by this Act," including the mixed-motive provisions.)" Gross at 2356 (Stevens, J. dissenting).
[39] Gross at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. ").
[40] H. R. Rep. No. 102-40, pt.2, p.2 (1991).
[41] See n.23 supra.
[42] Id. at 2347.
[43] In McKennon v. Nashville Banner Publ'g Co., the majority stated, "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a 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." 513 U.S. 352, 357 (1995).
[44] Lorillard v. Pons, 434 US 575, 584 (1978).
[45] Id. at 2350.
[46] 490 U.S. 228, 249-50 (1989) (plurality opinion); id. at 259-60 (White, J., concurring in the judgment); id. at 261 (O'Connor, J., concurring in the judgment).
[47] Supreme Court EEO Decisions Present Mixed Results for Employers, 25 No. 7 TERMINATION OF EMP. BULL. 1 (July 2009) (emphasis added).
[48] Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA, 23 No. 6 EMP. L. UPDATE 1 (June 2009).
[49] Timothy D. Edwards, Supreme Court Rejects Mixed-Motive Jury Instruction in Age Discrimination Case, 18 No. 8 WIS. EMP. L. LETTER 4 (Aug. 2009).
[50] Michael Newman & Faith Isenhath, Supreme Court Gives Mixed-Motive Analysis a Mixed Review, 56 FED. LAW. 16 (Aug. 2009).
[51] Laura Bassett, Older Jobseekers Face an Uphill Climb, The Huffington Post, *<http://news.yahoo.com/s/huffpost/20100427/cm—huffpost/553882>* (April 27, 2010).
[52] Martino v. MCI Commc'ns Servs., Inc., 574 F.3d 447, 454 (7th Cir. 2009).
[53] Geiger v. Tower Automotive, No. 08-1314, 2009 WL 2836538, at *4 (6th Cir. Sept. 4, 2009).
[54] Fuller v. Seagate Technology, No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).
[55] Woehl v. Hy-Vee, Inc. No. 08-19, 2009 WL 2105480, at *4 (S.D. Iowa, July 10, 2009).
[56] Leibowitz v. Cornell Univ., 584 F.3d 487, n.2 (2d Cir. 2009).
[57] Philips v. Pepsi Bottling Group, 2010 U.S. App. LEXIS 8391, at *7 (10th Cir. 2010)(citing Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010).
[58] In Wellesley v. Debevoise & Plimpton, LLP, a Second Circuit panel cited Gross and held that since the plaintiff did not provide evidence of "but-for" age discrimination, her claims should be dismissed. No. 08-1360, 2009 WL 3004102, at *1 (2d Cir. Sept. 21, 2009). Similarly, in Guerro v. Preston, the court cited Gross and dismissed the plaintiff's claims because she failed to satisfy "but-for" causation. No. 08-2412, 2009 WL 2581569, at *6 (S.D. Tex. Aug 18, 2009). Finally, in Fuller v. Seagate Technology, the court dismissed a plaintiff's ADEA claim, because he failed to prove direct causation. No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).
[59] See Anderson v. Equitable Resources, Inc., 2009 U.S. Dist. LEXIS 113256, at *45 (W.D. Pa. 2009)(granting summary judgment for employer where plaintiff proffered sufficient evidence to

show that age was a factor in his termination, but not a determinative one); Kelly v. Moser, Patterson & Sheridan, LLP, 2009 U.S. App. 22352, at *13 (3rd Cir. 2009)(finding it insufficient, under Gross, to show that age was a secondary consideration in the employer's decision, not a determinative "but for" factor); Woods v. The Boeing Company, 2009 U.S. App. LEXIS 26717 (10th Cir. 2009)(Anderson, J., concurring)(emphasizing to the trial court that the plaintiff must persuade the jury that, all things being equal expect for age, the employer would have hired the plaintiff if he had been younger).

[60] Gross at 2347.

[61] 411 U.S. 792 (1973).

[62] Gross at 2349, n.2.

[63] McDonnell Douglas at 802; Arroyo-Audifred v. Verizon Wireless, Inc., 527 F.3d 215, 218 (1st Cir. 2008); D'Cunha v. Genovese/Eckerd Corp., 479 F.3d 193, 194-95 (2d Cir. 2007); Pipen v. Burlington Res. Oil & Gas Co., 440 F.3d 1186,1193 (10th Cir. 2006); see also Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000)(assuming arguendo that the McDonnell Douglas framework applies to an ADEA claim, and applying it to such claim, "[b]ecause the parties do not dispute the issue. ").

[64] McDonnell Douglas at 802.

[65] Id.

[66] Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 143 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[67] See Burdine at 253(elaborating on the burden-shifting framework established in McDonnell Douglas).

[68] To give an example of McDonnell Douglas's wide spread acceptance, a LexisNexis search between 2007 and 2010 identified 1,977 cases where the McDonnell Douglas standard was discussed in the context of ADEA claims. (LexisNexis Federal and State Cases, Combined>Terms & Connectors Search> McDonnell Douglas and ADEA or age discrimination or Age Discrimination in Employment Act or A.D.E.A. and date aft 2007.)

[69] 128 S.Ct. 2361 (2008).

[70] Gross at 2349, n.2.

[71] 589 F.3d 684 (2009).

[72] 589 F.3d 684 (2009).

[73] Id. at 691.

[74] 584 F.3d 487 (2009).

[75] 2010 U.S. App. LEXIS 5180.

[76] 579 F.3D 614 (2009).

[77] 574 F.3D 447 (2009).

[78] Furthermore, it seems as though the confusion surrounding the application of Gross even in the age context will persist. Despite the holding in Gross, at least one district court recently held that a mixed motive analysis is still applicable in ADEA claims within the federal sector. In Fuller v. Gates, the court stated that a plaintiff who is lacking direct evidence of age discrimination may proceed under either a pretext theory or mixed motive theory, or both.2010 U.S. Dist. LEXIS 17987.

[79] "The 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 ad haec verba from Title VII.'" Gross at 2354 (Stevens, J., dissenting)(citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)((quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)). See also n.9 supra.

[80] Gross at 2349.

[81] A recent Third Circuit decision under 42 U.S.C. § 1981 also exemplifies the confusion the courts now confront. While the majority in Brown v. J. Katz, Inc., did not believe that Gross had any impact on the litigation of Section 1981 mixed-motive claims, the concurring opinion pointed out that simply continuing to use Title VII analysis for Section 1981 mixed-motive claims "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." 581 F.3d 175, 182 (3d Cir. 2009).

[82] Gross at 2349.

[83] Id. at 2351. (Stevens, J. dissenting).

[84] Gunville v. Walker, 583 F.3d 979 (7th Cir. 2009)(citing Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009).

[85] Fairley v. Andrews, 578 F.3d 518(7th Cir. 2009)(stating that "[7th Circuit decisions adopting the motivating factor standard] do not survive Gross, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law. "); Serwatka v. Rockwell Automation Services, Inc. 2010 U.S. App. LEXIS 948 (7th Cir. 2010).

[86] 337 Fed. Appx. 399 (2009).

[87] Crouch v. J C Penney Corp. Inc., 2009 U.S. App. LEXIS 14362 (5th Cir. 2009). See also Hunter v. Valley View Local Sch., 579 F.3d 688 (6th Cir. 2009)(stating that Gross requires the court to revisit the propriety of applying Title VII precedent to the FMLA by deciding whether the FMLA authorizes motivating-factor claims, and holding that it does).

[88] 2010 U.S. App. LEXIS 6190.

[89] 2010 U.S. App. LEXIS 6190 at 18.

[90] 2010 U.S. App. LEXIS 6190 at 19.

[91] 2010 U.S. App. LEXIS 6190 at 45.

[92] 2010 U.S. App. LEXIS 948 (7th Cir. 2010).

[93] Id. at *11. [The version of the ADA applicable to the Serwatka case in relevant part provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring,

advancement or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2008). Pursuant to the ADA Amendments Act of 2008, Congress has made substantial changes to the ADA, which took effect on January 1, 2009. The language of the statute has been modified to prohibit an employer from discriminating against an individual "on the basis of disability." 42 U.S.C. § 12112(a) (2009). The Seventh Circuit concluded that whether "on the basis of" means anything different from "because of", and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, were not questions it needed to consider in the Serwatka appeal. Serwatka at 962-63.]

[94] Id. at *10.

[95] Id. at *13-14.

[96] See Kozlosky v. Steward EFI, LLC, 2009 U.S. Dist. LEXIS 77605 (W.D. Tex. 2009)(holding that Gross applies to age discrimination claims under the Texas Labor Code); Cormack v. N. Broward Hospital Dist., 2009 U.S. Dist. LEXIS 76396 (S.D. Fl. 2009)(holding that Gross applies to age discrimination claims under the Florida Civil Rights Act).

[97] Williams v. District of Columbia, 646 F. Supp. 2d 103 (D.C. 2009).

[98] Beckford v. Timothy Geithner, Secretary of the Treasury, 2009 U.S. Dist. LEXIS 96038 (Dist. Columbia, Oct 15, 2009).

[99] See Love v. TVA Board of Directors, No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009) (dismissing plaintiff's ADEA claim reasoning that, under Gross, since race had been a factor, plaintiff could not prove that age was the sole factor); see also Wardlaw v. City of Philadelphia Streets Department, Nos. 05-3387, 07-160, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009) (dismissing plaintiff's ADEA claim because plaintiff had alleged discrimination on other protected basis; thus, she could not show that age was the sole factor).

[100] 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009).

[101] Id.; but see Belcher v. Service Corp. International, 2009 U.S. Dist. LEXIS 102611 (E.D. Tenn. 2009)("While 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. ").

[102] The Gross majority suggested that burden-shifting, at least of the Price Waterhouse variety, has been difficult to apply in practice and that its cumbersome nature has "eliminated any perceivable benefit to extending its framework to ADEA claims." Gross at 2352.

[103] In McKennon v. Nashville Banner Publ'g Co., the majority stated, "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a 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." 513 U.S. 352, 357 (1995).

[104] Lorillard v. Pons, 434 U.S. 575, 584 (1978).

[105] The House version of the bill was introduced on October 6,2009, H.R. 3721, 111th Congress (2009). The Senate version of the bill was introduced on October 6th, 2009, S 1756, 111th Congress (2009). The language of the bills track each other. For ease of discussion we will reference the house bill.

[106] H.R. 3721, §3(g)(1)

[107] H.R. 3721, §3(g)(5)

[108] H.R. 3721, §3(g)(2)

[109] H.R. 3721, §3(g)(4)

[110] H.R. 3721, §3(g)(3)

[111] H.R. 3721, §3(g)(5)

[112] H.R. Rep. No. 102-40, pt. 2, at 17 (1991).

[113] This is not a new issue for Congress, as just last year Congress reversed the same majority's decision in by passing the Lilly Ledbetter Fair Pay Act In Ledbetter v. Goodyear Tire & Rubber Co., the Court held that "an employee wishing to bring a Title VII lawsuit must first file an EEOC charge within * * * 180 days 'after the alleged unlawful employment practice occurred,'" and that new violations did not occur because of non-discriminatory acts (here, the issuing of paychecks). 550 U.S. 618, 621 (2007). The Ledbetter dissent specifically called upon Congress to act to correct the "Court's parsimonious reading of Title VII." Id. at 661 (Ginsburg, J., dissenting). Congress indeed responded by passing the Lilly Ledbetter Fair Pay Act, which clarified that the 180-day statute of limitations resets each time "a discriminatory compensation decision * * * occurs * * *." Pub. L. No. 111-2, 123 Stat. 5 (2009).

[114] Circuit City, 532 U.S. at 120.

[115] 550 U.S. 618 (2007)

[116] 550 U.S. at 661 (Ginsburg, J., dissenting).

Chairman ANDREWS. Thank you, Mr. Foreman.

We thank each of the four of you. You did a very good job in educating the committee. We are going to try to get now to the questions.

Mr. Dreiband, on page 9 of Justice Thomas's majority opinion, he says that the law now is the plaintiff has to retain the burden of persuasion to establish that age was the but for cause of the employer's adverse action.

I want to give you these facts. Let's assume that a sales employer comes up with a productivity standard, number of sales per employee per year. And they apply the standard, and 80 percent of the people over 50 get fired because they don't meet the standard and 80 percent of the people under 50 keep their jobs because they do. And one of the people over 50 files an age discrimination lawsuit under the statute in front of us today.

So the record is that there is this productivity standard, there are these results when it is applied, and that is it. There is no other discovery, no other information that would show any intention by the employer. The defendant moves for directed verdict after the plaintiff's case in chief is put on.

In your opinion, under the Gross decision, what does the court do with that motion?

Mr. DREIBAND. Well, I think it would depend on the totality of the evidence, of course.

Chairman ANDREWS. What else do you want to know?

Mr. DREIBAND. I am sorry, what was that?

Chairman ANDREWS. What else do you want to know about the evidence?

Mr. DREIBAND. Well, it sounds like what you described is simply a policy and statistics about rates of satisfying the productively standard.

Chairman ANDREWS. Right. Assume that is the entire record in front of you.

Mr. DREIBAND. Yeah. And so, presumably then, we are envisioning a trial in which each side, I guess, would put up an expert who would say that the statistics show what they show——

Chairman ANDREWS. Right.

Mr. DREIBAND [continuing]. And no other witness——

Chairman ANDREWS. So let's say you have an expert witness for the plaintiff who says, this is not really a valid standard of measuring productivity. And you have an expert witness for the defendant who says it is. And you have the statistical result that I just posited. Who wins the motion for directed verdict, under Gross?

Mr. DREIBAND. Well, it is impossible to say from that limited amount of information, number one.

Number two, it would depend on the theory that the plaintiff was pursuing. For example, if the plaintiff was pursuing a pattern or practice of discrimination claim on behalf of a class of victims——

Chairman ANDREWS. No, say it is just one plaintiff, not a class action, one plaintiff. One of the people who is over 50 gets fired, says, "I got fired because I am over 50, and this is my proof. This statistical evidence is my proof."

Mr. DREIBAND. And so that is it?

Chairman ANDREWS. Yep.

Mr. DREIBAND. Well, I guess what I would say is, first of all, that is not the way cases get litigated, normally. I have never heard of a case in that fashion——

Chairman ANDREWS. Well, okay. Of course, the normal has now changed because of the Gross decision. But——

Mr. DREIBAND. Well, I don't think the Gross decision changes at all the——

Chairman ANDREWS [continuing]. The question is, who wins the motion for directed verdict?

Mr. DREIBAND. Well, I can't answer the question under the facts as presented.

Chairman ANDREWS. What other facts would you like to hear?

Mr. DREIBAND. I would like to know what the plaintiff testified about and what——

Chairman ANDREWS. The plaintiff says, "I did well for 15 years. I got great employee evaluations. One day, they called me in and said, 'Under this productivity standard, you don't measure up. You are fired.' "

Mr. DREIBAND. I think what we would have to know then is exactly whether there was any evidence that what the employer said was untrue, whether the employer selectively applied——

Chairman ANDREWS. The employer applied it to everybody in the company. The employer says, "Look, we did a productivity study. We care about how many units you sell per employee. That was the standard, and that is what we did."

Mr. DREIBAND. And so, under this hypothetical, the employer simply fired everybody in the company who didn't satisfy the standard. There is no other evidence otherwise.

Chairman ANDREWS. Yes. And 80 percent of those over 50 get fired, 80 percent of those under 50 get kept. There is a motion for directed verdict by the defendant. Who wins?

Mr. DREIBAND. And this is a single plaintiff case?

Chairman ANDREWS. Yep.

Mr. DREIBAND. No evidence to show that the employer selectively applied it. This is a claim for intentional——

Chairman ANDREWS. Well, let's stop on that for a minute. What might that evidence look like? What evidence might validate the point you just made, that the employer selectively applied this? What would the plaintiff have to prove?

Mr. DREIBAND. Well, there are times when employers have standards, productivity standards for example, by way of example, in which the employer applies them to people of one category, let's say in this case older people, but do not apply the standards in the same way to younger people. And if that were the case, then I would expect the district court judge would deny the motion.

Chairman ANDREWS. Okay. Assume here it isn't, though, that it was not selectively applied. Who wins?

Mr. DREIBAND. I would have to understand what theory the plaintiff was pursuing in the case. For example, the Supreme Court has established that a plaintiff can pursue what is called a disparate impact theory of discrimination——

Chairman ANDREWS. True. But assume that this is a disparate treatment case.

Mr. DREIBAND. It sounds like, from what—the facts that you have described do not suggest that—unless I am missing something, other than the statistical evidence, you are saying there is no other evidence of any kind of disparate treatment against anybody.

Chairman ANDREWS. That is it. This is a smart employer who knows not to leave a smoking gun. So the employer says, clean up the record, this is what we are going to say. They had these con-

versations with their lawyer. There is no smoking gun here, it is what they say. Who wins the motion for directed verdict?

Mr. DREIBAND. There normally is not a smoking gun at all.

Chairman ANDREWS. Okay, but who—I understand that. But who wins the motion for directed verdict?

Mr. DREIBAND. I can't answer the question based on the hypothetical, because, number one, a hypothetical assumes a trial that, in my experience in nearly 20 years of practicing law, has never happened.

Chairman ANDREWS. Well, all of which was pre-Gross. So you don't have an opinion who wins?

Mr. DREIBAND. I am sorry, what?

Chairman ANDREWS. You don't have an opinion who wins that motion for a directed verdict?

Mr. DREIBAND. You know—I can't answer the question based on the hypothetical you have presented, because it assumes an unrealistic way of litigating a case that has never been done in my experience. I have never heard of such a case. I——

Chairman ANDREWS. I am over my time, but I would just ask you, what facts do you think would be added in the case that you have experienced? What do you think——

Mr. DREIBAND. Well, for example, what I would like to know is, why does the employer have the standard that you identified?

Chairman ANDREWS. Their testimony is that we wanted to improve our sales productivity.

Mr. DREIBAND. That what?

Chairman ANDREWS. We wanted to improve our sales, we wanted to sell more of our product.

Mr. DREIBAND. Yeah, and it is very possible that that is a legitimate reason that the employer implemented the practice. It is also possible——

Chairman ANDREWS. Right.

Mr. DREIBAND [continuing]. That the employer did it because the employer wanted to find a reason to eliminate older workers. I think——

Chairman ANDREWS. How would we prove that? How would we put evidence on the record to support that possibility? What evidence would the plaintiff adduce to prove that possibility?

Mr. DREIBAND. Well, we could demonstrate—it depends. I mean, we would demonstrate, for example, as you pointed out, there could be statistical evidence of the sort that you mentioned. Presumably, the plaintiff would not only himself testify or herself testify, other people would testify about the fact that the productivity standard was not designed or did not, in fact, increase productivity or it was not done so with a legitimate business purpose.

You know, it would really have to depend on the evidence that the plaintiff was able to produce at a trial, and the district court judge——

Chairman ANDREWS. But we have posited that the plaintiff has produced that statistical evidence, and the testimony of the employer is that there were, you know, no negative comments made to the employee. What else would the plaintiff adduce that would help to prove that possibility of bias?

Mr. DREIBAND. Well, there could be many other——

Chairman ANDREWS. Like what?

Mr. DREIBAND [continuing]. Types of evidence. For example, as I mentioned, there could be anecdotal evidence of other people treated differently. There could be——

Chairman ANDREWS. Well, but is that relevant? Because this case was about the plaintiff, not about other people. Wouldn't that be irrelevant?

Mr. DREIBAND. No. It depends on the plaintiff's theory of the case. If the plaintiff's theory of the case is that the employer implemented a standard to govern many people, in this case, the company or a whole category of people or something like that, then the plaintiff would introduce, under your hypothetical, both statistical and anecdotal evidence to demonstrate, number one, that the practice was put in place without a legitimate business purpose if it was; that, in fact, the employer selectively applied it to people and, in fact, did so to favor younger employees. And if that——

Chairman ANDREWS. I apologize for going over my time. I would just conclude with this comment. I think that what the Gross decision does is give the plaintiff an unreachable burden of proof. Because I think what this dialogue shows is the plaintiff is going to have to come up with oral or written representations by the employer to someone that they were motivated by some bias or animus here. Foolish employers don't do that—foolish employers do, but smart employers don't.

And I think the whole purpose for the burden shifting is to recognize the reality of the workplace, where the employee doesn't have access to that sort of thing. And I think that is the flaw in your argument. But I am sure there will be other chances to discuss that.

Dr. Price, I am sorry for going over. I will give you similar dispensation.

Mr. PRICE. Thank you, Mr. Chairman.

That may have made good theater. I guess the honest answer to it is that the judge decides, you know, based upon the evidence, right? But what——

Mr. DREIBAND. That is correct, yeah.

Mr. PRICE. So I guess that the plaintiff needs to have Mr. Andrews as his counsel, and then we will be able to get to the right answer in all of this.

I want to thank the witnesses for their testimony, as well. And I am struck by some discrepancy in some of the testimony. I have heard from Mr. Foreman that the Gross case has resulted in havoc in the courts and that it reinstates the law prior to that of Gross. And then, Mr. Dreiband, from you I have heard that findings have largely been in favor of the plaintiffs since then and that there hasn't been significant disruption in the courts.

I would ask you, one, to comment on that. And then, two, if we were to adopt and this bill were to be signed into law, what laws would be affected by the bill as it is written before us?

Mr. DREIBAND. Well, on the first question about whether the decision has created havoc in the courts, as I mentioned, 10 of the 12 circuit courts of appeals have issued decisions that favor plaintiffs, number one. And, number two, the decision did strip away the

so-called "same decision" or "same action" defense, which previously was available to employers.

In terms of restoring the law to what it was before Gross, the bill does not do that either. In fact, the bill would change the law. I would point out, in that respect, that the Court of Appeals in Mr. Gross's case considered the laws that existed, you know, before the Supreme Court's decision, applied the Price Waterhouse v. Hopkins decision, a 1989 Supreme Court case, and concluded that Mr. Gross lost under that standard because he conceded, or at least his lawyer did on his behalf, that he did not present any direct evidence of discrimination. That is what his lawyer apparently told the court of appeals, and, under the Price Waterhouse standard as it existed at the time, that the so-called mixed motive instruction was improper.

With respect to the laws affected by the bill, my view of that is that the bill is vague and ambiguous because it does not define the laws. And so what I think we are left with is enormous uncertainty about which laws would be amended. And this is something that Congress can easily fix simply by amending the bill to list the laws it intends to amend. If the Congress doesn't do that and enacts the bill in its current form, I think what we will see are years or decades of litigation about what laws, in fact, are changed by this bill.

Mr. PRICE. So if I were to ask what is wrong with having this single standard across the board, the answer to that is that it results in litigation as to whether or not it applies to the whole array of laws out there; is that correct?

Mr. DREIBAND. There is nothing wrong with having a single standard, a burden of proof standard, for example. The Supreme Court established that standard in 1973 in a case called McDonnell Douglas v. Green, and certainly the Congress could endorse that for particular statutes.

I think the confusion, though, is that the bill does not identify which laws it would seek to amend. I mean, we know, for example, that it would amend the Age Discrimination in Employment Act. We know that there are some laws that unambiguously are employment discrimination laws. But there are several laws in which we simply don't know—or, rather, I would say, that litigants will argue about.

Let me give you one example, the Family and Medical Leave Act. That law is neutral in terms of how it is written, and it provides for 12 weeks of unpaid leave for various family reasons related to, for example, to care for a sick family member or the birth or adoption of a child or for other medical reasons. The Supreme Court of the United States has described that law as something that helps women because women, according to the Court, tend to be caregivers more than men. But the law is drafted in a neutral fashion, and so, on its face, it does not appear to be an employment discrimination law.

But what we can expect is, if the bill passes in its current form without identifying the laws that it covers, litigants will spend several years or decades litigating whether or not that law and several others are covered by this bill or not. And that is something, as I say, in the same way that Congress listed the laws that it intended

to amend when it enacted the Lilly Ledbetter Fair Pay Act, that is something Congress can easily correct with this bill.

Mr. PRICE. And that is why you believe the bill as written would result in significant increased litigation; is that correct?

Mr. DREIBAND. That is correct, on that issue, yes.

Mr. PRICE. Just one final question, if I may, Mr. Chairman.

Many have claimed, in the wake of this Gross case, that a plaintiff can only prevail on a claim of age discrimination if the plaintiff's age was the single and only reason for an employment action. Is that your understanding of what the Gross decision means?

Mr. DREIBAND. No.

I would point out that, in Mr. Gross's case, the alternative jury instruction at issue defined "but for causation" as simply something that determined the outcome, in this case the alleged demotion, and other factors can play a role in the decision.

And I would note, as well, that the Supreme Court in the Gross decision clarified that there is no heightened evidentiary burden on plaintiffs in discrimination cases. And I think that is why we have seen the United States courts of appeals issue so many decisions in favor of plaintiffs since the decision came down.

Mr. PRICE. Great.

Thank you, Mr. Chairman.

Chairman ANDREWS. Thank you.

The chair recognizes the gentlelady from New York, Ms. McCarthy, for 5 minutes.

Mrs. MCCARTHY. Thank you, Mr. Chairman. And thank you for holding this hearing.

Listening to the debate—and I am not a lawyer, but going through some of the written testimony from the dissent, Justice Stevens wrote that the majority had engaged in unnecessary lawmaking. And I guess some of us sitting here are wondering or worrying that we are seeing more and more of this on the Court.

But I guess the question I want is, to Mr. Foreman, what are the dangers of letting the Gross stand and other workplace discrimination law? Are they in jeopardy now too?

Mr. FOREMAN. Absolutely. And I think that is when I said in my opening remarks about wreaking havoc, Ranking Member Price, I think you indicated in your opening statement that a physician's advice is, "Do no harm." We wish the Supreme Court would have followed that, but the harm has already been done through the Gross decision.

And what is happening is, throughout the courts, the courts are now taking established precedent under the ADA—Mr. Dreiband mentioned the FMLA. There were court cases prior to Gross that said, mixed motive applies in the FMLA. Now it is being litigated, so all this litigation is occurring because of Gross.

In the cases that he is relying on, the 10th Circuit, that cite Gross, that is all they do. It is a motion for summary judgment that goes up on appeal, and they say Gross is now the law, we believe McDonnell Douglas applies, we are going to allow the plaintiff to have their day in court under the Gross standard. But make no mistake, the Gross standard is much higher.

And I will just—I don't want to take your time, but the Second and the 10th Circuit addressed that specifically and said before the

Supreme Court in Gross the employer could prevail if age—if it was at least motivated in part by age. After Gross, they can no longer do that. And every circuit that has addressed that has made it clear that after Gross there is a higher standard. There is a higher standard to prove age discrimination than there is to prove race discrimination, sex discrimination.

And that is the concern and why the bill is drafted in what you believe is a broader language. Because if you don't fix it, it will be litigated until the cows come home to determine how far Gross goes.

Mrs. MCCARTHY. With a follow-up on that, with the legislation that the majority on the Education Committee have introduced, do you see that correcting the problems that the Supreme Court put forward to us to correct it? Do you see that that piece of legislation will correct everything that we are trying to do?

Mr. FOREMAN. Yes, it directly addresses that. And the only outlier is the need to have the broader language to cover all discrimination laws so we don't have continuing litigation. But what it does is it says, motivating factor applies to any law; number two, that if employers can prove that they would have done this even though they took into account age, they will have a limitation on damages; three, that any type of evidence can be used to prove these cases. So it actually answers the question that was presented in Gross and not answered by the Supreme Court.

So it directly addresses that. And I don't want to be in a situation to try to remind, but it is patterned after the 1991 law, which Congress passed I believe it was 300 and some to 40 or 50. Don't quote me on that exactly, but it was fairly—and the Congress, 90 to a very few people, that it passed with overwhelming support. And what it does is take the 1991 law that applies to race and Title VII and applies it in the age context.

Mrs. MCCARTHY. Thank you.

Mr. Gross, I want to thank you for persevering even though you lost the case. I think this is something that we consider a moral victory for you because you are going to be helping many people behind you. As you have mentioned, certainly quite a few of us are the baby boomers now, and so we want to do whatever we can to protect not only the future but, certainly, all my friends that are working right now. And I think that is an important thing, so I thank you.

I yield back, Mr. Chairman.

Chairman ANDREWS. I thank the gentlelady.

The chair recognizes the gentleman from Massachusetts, Mr. Tierney, for 5 minutes.

Mr. TIERNEY. I thank the chair.

I won't take the 5 minutes except to say that I think this has been a good hearing. I appreciate the witnesses that were selected and their contributions to it.

Mr. Gross, I appreciate your circumstances and your willingness to come forward, as well.

I get pretty much what is going on here. And having dealt in this area for a number of years before coming to Congress, I don't think I need to ask any more questions. But I appreciate the fact that you have had this hearing.

I will yield to the——

Chairman ANDREWS. Would the gentleman yield?

I wanted to ask Mr. Gross a question. And if your judgment is that you don't want to answer it because your case is still pending, please take that prerogative. But did anyone ever say to you from your employer that you were demoted because of your age?

Mr. GROSS. No.

Chairman ANDREWS. Did any of your fellow employees ever tell you that they were told they were demoted because of their age?

Mr. GROSS. No, not specifically.

Chairman ANDREWS. Did anyone ever give you a letter or e-mail or written communication that suggested that people were being demoted because of their age?

Mr. GROSS. I had received access to a memo that had been written a year before identifying people who they intended to demote. There was a big argument over whether I should have had that or not.

Chairman ANDREWS. No, I understand.

Mr. GROSS. But it did identify every person who was going to be demoted. And every person on that memo was over 50. That jumped off the page at us. It wasn't quite a smoking gun, but we thought it was——

Chairman ANDREWS. What led you to believe that you were being demoted because of your age? Why did you think that?

Mr. GROSS. Because, number one, when they merged with Kansas, they virtually purged everybody over 50 before they brought them into the organization. And, at the same time, every single person over 50 at our organization who was supervisory and above was demoted, all at the same time, totally regardless of performance, past contributions, current contributions. The only common denominator was our age.

Chairman ANDREWS. Was there anybody under 50 demoted?

Mr. GROSS. One. But that person was, I believe, 48 at the time and——

Chairman ANDREWS. Almost as good, huh?

Mr. GROSS. Yeah. And that was the only person under 50 who was demoted.

Chairman ANDREWS. Okay.

The chair recognizes the gentlelady from—oh, I am sorry, Ms. Aldrich.

Ms. ALDRICH. I just wanted to add that this is a specific situation but that our AARP studies show that 60 percent of 45- to 74-year-olds believe that they have either experienced or seen age discrimination in the workplace. I just think that is a, kind of, overwhelming statistic. And that was pre-recession.

Chairman ANDREWS. Thank you.

The chair recognizes the gentlelady from Ohio, Ms. Fudge—is she here?

Okay. The chair recognizes the gentleman from Illinois, Mr. Hare, for 5 minutes.

Mr. HARE. Thank you, Mr. Chairman.

And, for the record, you can represent me any time. Hopefully, it won't be a bad one, but—yeah.

Mr. Dreiband, you state in your testimony that "this legislation will give, at best, a moral victory to workers." I am a little baffled by the reasoning and clearly understand that this is based on your belief, and I quote, that "the law will force these individuals and entities to spend years or decades fighting in court." So I am unclear as to what exactly you are missing here.

But let me ask you this simple question, if I might. Would the clients that you advocate for avoid emptying their bank accounts even, you know, if they simply avoided any act that could be interpreted even in the slightest as discrimination? And would that make your whole argument about emptying the bank accounts disappear?

Mr. DREIBAND. I am not sure I fully understand the question. In terms of the concern about emptying bank accounts, the concern is the fact that the bill does not list the laws that Congress intends to amend. And, as a result, both discrimination victims—employers, unions, and others—who find themselves embroiled in these disputes will have to spend time and money and resources fighting in court on that question, when Congress could easily clarify it by amending the bill.

Mr. HARE. Uh-huh.

If I could, Mr. Foreman, I noticed that when my friend from Georgia was asking Mr. Dreiband a question about these cases in the different circuits, your head was shaking, you know, "No, no, no, no, no." I was wondering if you would like to respond to what Mr. Dreiband was saying. You didn't get a chance to, so this would be an opportunity, if you wouldn't mind doing that. You clearly had a difference of opinion there.

Mr. FOREMAN. Yes, thank you. And I was shaking my head because I may have already indicated that the cases he is relying on are simply citing the Gross opinion. The Gross opinion is the law of the country now. It is not saying anything different than: Gross now applies.

As I indicated, most of those cases are dealing with this issue of—the Supreme Court dropped the footnote in their opinion that said, we are not making a determinative statement whether McDonnell Douglas, the standard by which you prove discrimination cases in one sense, applies. And it applied for decades, literally decades. But they dropped this footnote; they don't answer it.

And many of the Court of Appeals are saying, the Supreme Court said this about McDonnell Douglas, we think it still does apply, so we will send it back down. We will let the plaintiff have their day in court, but, again, to prove but for causation, not motivating factor.

And one important thing that I think we all need to focus on is the motivating factor. The way the law was written in 1991 and the way this law is written, all it is doing is saying, if an employer considers this, if it is a motivating factor, you violated the law. We will then shift the burden of proof to the employer to prove that they would have taken this action anyhow. So there is a shift of the burden of proof, which is very important litigation.

Under the Gross standard—and they make it very clear—the burden of proof never shifts to the employer. It is always the plaintiff's burden. And that is the reason we continually come back to

the point that it has raised the level of proof for plaintiffs, or it eliminates one way of proving discrimination in the age context.

Mr. HARE. Okay.

Mr. Gross, let me just, you know, thank you for doing what you did. I know that that had to be difficult for you and your family. And, you know, I am sorry you didn't prevail, but, you know, we will get this through and you will eventually. I believe you will.

I wanted to ask you just one quick question. After you filed the suit, how did your employer treat you?

Mr. GROSS. I was essentially ostracized. I stayed with them for 7 more years and endured what I felt was pretty intense retaliation.

Mr. HARE. Such as?

Mr. GROSS. Well, I had been integrally involved in a lot of operations, on several corporate committees. I had actually been on the defense side defending Farm Bureau because I was a claims executive, and I think I was considered somewhat of a turncoat. And now I think they wanted to make an example out of me.

I was immediately taken off all communications. My access to any of the computer programs, software was eliminated. I was not included in any department correspondence. I was basically set aside and ignored. I knew that my friends were endangered if they were seen talking to me, so I told them, "Cover yourselves. I will eat lunch by myself now instead of at the big table."

Mr. HARE. And you did that for 7 additional years?

Mr. GROSS. I complained every year to human resources about being given nothing to do and that I felt that it was retaliation. I got no response until the last couple of years. And then they finally started giving me some light clerical work to do, which consisted primarily of taking numbers from one report and putting them onto another report.

I think they wanted to make my life miserable enough——

Mr. HARE. Sounds like they did.

Mr. GROSS [continuing]. That I would walk away, and I didn't want to give them that satisfaction.

Mr. HARE. Well, thank you, Mr. Gross.

I yield back.

Chairman ANDREWS. Thank you.

The chair recognizes the gentleman from Iowa, Mr. Loebsack, for 5 minutes.

Mr. LOEBSACK. Thank you, Mr. Chair.

I do want to thank Mr. Gross for taking the time to be here today. A native of Iowa, obviously, my home State, in Des Moines. It is really good to see you here. We don't have a lot of Iowans come in here and testify, so I really appreciate seeing you here today.

I think it is very good, too, that we are holding this hearing, especially at the beginning of Older Americans Month.

Just a little bit about Iowa and our home State. We rank about fourth highest in the percentage of population age 65 and older around the country. And according to census data, this legislation would apply to about 40 percent—40 percent—of my State's population, potentially. So that is pretty significant. I don't know how

the States compare, but that is very, very important, as far as I am concerned.

I was going to ask you about how you were treated, but my good friend Phil Hare preempted me on that. But did you want to elaborate at all? You gave us a pretty, I think, pretty stunning response as far as what happened to you.

Mr. GROSS. Well, I did finally last December—it was stressful, obviously, and I was starting to have some health problems that were resulting from it. And my wife and I—in fact, I went to a stress counselor, and we went through, you know, "Really, why are you doing this? Is it a life-and-death matter for you?" And I said, "No, but I just don't like to walk away from a fight, I guess." And he said, "Well, you really need to ask yourself if shortening your life is worth continuing the fight."

And that made a lot of sense. And so, as of December, I did go ahead and retire, 4 years earlier than I had intended. I had thoroughly intended my entire career to go to age 65 or 66 to maximize my Social Security.

I think there is a lot of anecdotal evidence, a lot of people I know who are also drawing Social Security much earlier than they intended because they are in similar situations. And I could give you anecdote after anecdote of my personal experiences and acquaintances that have undergone this type of thing. But it is becoming rampant out there, and I think you are probably hearing that back in the field, back in your own districts.

Mr. LOEBSACK. And that alone is cause for tremendous concern, obviously, when there is that retaliation and coercion on the part of an employer. And I am very sorry that that happened, obviously, to you.

I have a question which maybe goes to Mr. Foreman more than anyone, but anyone can respond. Given Mr. Gross's situation as an example, can you give us an idea of what information would have to be provided to prove discrimination under the Supreme Court's ruling compared to what information you had to provide previously under Congress's original intent of ADA protections?

If you would like to respond to that, Mr. Gross, or maybe Mr. Foreman or Ms. Aldrich.

Mr. FOREMAN. I think the Court, the majority in Gross made it very clear that it must be but for causation, which is a very high level. So you are really looking for a smoking-gun comment that in corporate America you do not see.

There was one question whether it was a sole cause determination. I think an accurate reading of the Supreme Court's decision is that it is not sole cause. But there are several district courts that have interpreted it exactly in that manner, to say, for instance, if I allege age and race discrimination, while that is a mixed motive, therefore my age case fails. And it is thrown out on a motion to dismiss because you have alleged another classification.

So, again, it goes back to how this is causing confusion in the court. In the bill, is it trying to get us back to step one and say, let's all work off the same standard?

Mr. LOEBSACK. Uh-huh.

Ms. ALDRICH. I would like to respond to that.

Mr. LOEBSACK. Yeah, please.

Ms. ALDRICH. I would like to say, just from my perspective——

Chairman ANDREWS. Please put your microphone on, Ms. Aldrich.

Ms. ALDRICH [continuing]. It is a tougher standard than for other cases of discrimination.

And it is very concerning, you know, for most older workers—and we have heard Mr. Gross—to even bring these cases forward, with the amount of emotional stress it causes, the difficulty of standing up around other coworkers and challenging the company, the expense of it.

So I think to make it more difficult for older workers than for other cases of discrimination is just wrong.

Mr. LOEBSACK. All right.

And, Ms. Aldrich, one last question. Since this ruling, do you have any idea how many discrimination claims are out there that would have met the previous intent of protection but would now be nearly impossible to prove because of the stricter ruling? Any idea?

Ms. ALDRICH. I am not sure about that. But I do know that, in the last 2 years, in 2008 and 2009, there have been 45,000 age discrimination cases filed with the EEOC, which is more than any other period of time since we have kept track of it. So my sense is that, given the really tough economic times, that there are lots of concerns about age discrimination, and now they are harder to prove.

Mr. LOEBSACK. All right. Okay.

Thank you, Mr. Chair.

And thank you again, Mr. Gross. I really appreciate your being here. Thanks.

Chairman ANDREWS. I thank the ladies and gentlemen of the panel, and we really appreciate your testimony. I know everyone prepared very diligently and I think did a good job educating the committee.

At this point, I would turn to the senior Republican for any closing comments he would like to make.

Dr. Price?

Mr. PRICE. Thank you, Mr. Chairman.

And I, too, want to echo your comments thanking every member of the panel. This has really been a fascinating hearing, and I appreciate your participation and the expertise that you bring to bear.

None of us are in favor of age discrimination, clearly. The question is, how do we get it right and not open Pandora's Box and have things result in just an onslaught of litigation as opposed to actually solving the challenge here?

So I am hopeful that—I think there is a common thread between the two sides. And I am hopeful, Mr. Chairman, that we will be able to work together and come up with a commonsense piece of legislation that actually solves a problem and a challenge out there together.

Thank you.

Chairman ANDREWS. I thank my friend.

I would again like to thank the members of the committee.

Without objection, all Members will have 14 days to submit additional materials for the hearing record.

Were there any other materials you wanted to submit now?

Mr. PRICE. No.

Chairman ANDREWS. Okay.

I want to thank each of the witnesses for a very constructive contribution today.

Mr. Dreiband, I agree with you that ambiguity about which laws the standard that is in the bill would apply to would not be helpful. And I think that your comments were on point as to the way we could sharpen this legislation up and not create ambiguity. I think that is a very important point.

Mr. Foreman, I think that your reading of the distribution of the burden of persuasion is the correct one. It is why we are in front of the Congress with this bill.

Ms. Aldrich, I think you have given us some context to understand this, that age discrimination is always invidious, but it is particularly acute at a time when there is a recession and people are losing their jobs in large number. It really has a devastating effect on the lives of real people.

And, Mr. Gross, unfortunately, you are Exhibit A of that. I doubt very much that Mr. Gross, whose uncle—is it your uncle was the congressman?

Mr. GROSS. Great uncle.

Chairman ANDREWS [continuing]. Great uncle served with great distinction in this body a long time ago, I doubt very much that Mr. Gross thought he would be testifying before a congressional committee all those years when he was doing the work that he was doing so well. And it is a twist in the law that has brought him here that I hope that we can correct.

I would echo what Dr. Price said. I don't think there is a member of this committee who wants to perpetuate discrimination against any person based upon age or any other factor.

One of the things that I learned in law school, maybe the only thing I learned, was: He or she who has the burden of proof usually loses. And I think it is acutely true in this kind of situation where, if you can make a circumstantial case, as I think Mr. Gross has definitively done, that there is a pattern of discrimination against a person based on age, it is very difficult to take the next step and carry the burden that says that that is not just circumstantial and coincidental. It is very difficult because employers are aware of the environment in which they are operating; they are counseled about how to say things carefully. I am not suggesting they are doing anything nefarious, but it is a very difficult burden to carry. And I think, frankly, it is a burden that will not be carried very often or very easily, which will have the effect of expanding an invidious practice that we really want to diminish.

So the committee is going to consider the testimony. We would welcome further comments on the record. We will move forward as we look at these issues. And, again, I very much appreciate everyone's participation here today.

With that, the hearing is adjourned.

[Additional submission of Mr. Andrews follows:]

Prepared Statement of the National Senior Citizens Law Center

The National Senior Citizens Law Center (NSCLC) submits this statement in support of the Protecting Older Workers Against Discrimination Act. NSCLC submits the statement to the House Health, Employment, Labor, and Pensions Subcommittee of the Education and Labor Committee, which convenes a hearing on H.R. 3721, the House version of the bill, on May 5, 2010, and to the Senate HELP Committee, which convenes a hearing on S. 1756, the Senate version, on May 6. The legislation will override a June 2009 Supreme Court decision that stripped older workers of vital protections against bias on which they had relied for over 40 years. In this decision, which the dissenting justices characterized as "unabashed judicial law-making," "irresponsible," and in "utter disregard" of the Court's own precedents and "Congressional intent," a narrow 5-4 majority so weakened the 1967 Age Discrimination in Employment Act (ADEA), that employers are left with little incentive to comply with its equal opportunity mandate. This decision illustrates the accuracy of President Obama's recent observation that we "are now seeing a conservative jurisprudence" that is both "activist" and bent on gutting laws that, like the ADEA, were enacted to protect ordinary people.

The Gross Decision Upended a Fair Jury Verdict and Long-Settled Law

This case arose out of circumstances all too familiar to older workers at all levels in our economy, especially in the hard times from which much of the nation has barely begun to recover. In 2003, Jack Gross, aged 54 and a 32-year employee of FBL Financial, was demoted from his position as claims administration director, and transferred to a newly created position with drastically reduced responsibilities. Gross sued, and at trial introduced "evidence suggesting that his reassignment was based at least in part on his age" (as stated by Justice Clarence Thomas writing for the majority). Gross' employer responded with the claim that the reassignment was part of a "corporate restructuring." The jury found for Gross and awarded him $46,945 in lost compensation, after receiving the judge's instructions that they must rule for the employee if he proved by a preponderance of the evidence that "age was a motivating factor" in his demotion. "However," the judge instructed, the jury must rule for the employer if the employer proves by the preponderance of the evidence that the employer would have demoted Gross "regardless of his age." This instruction tracked settled law, but the Supreme Court majority changed the law, as described above, and held that Gross and others in his situation needed to show that age was the "but for" cause of their adverse treatment, and that evidence that age was a motivating factor would not shift the burden of proof to the employer to prove that the adverse action would have occurred regardless of the employee's age.

A Perfect Storm for Older Workers

After the Supreme Court bounced him back to square one, Mr. Gross testified before Congress that the conservative Justices had "hijacked" his case to make an ideological point. His view cannot be dismissed as sour grapes. On the contrary, this 5-4 reversal of the jury verdict in Mr. Gross' favor creates a veritable perfect storm for older workers. Numerous surveys show that the current financial crisis has forced older workers at all economic levels to shelve plans for retirement, and attempt to stay in, or re-enter the job market. One survey, published in March 2009, reported that 60 percent of workers over 60 have made that decision. 75 percent of the $2.8 trillion that vanished from group (401[k]) and individual (IRA) account assets during late 2007 and 2008 belonged to persons over 50. In addition to the disproportionate impact of this implosion of retirement assets, declining house values and rising health costs have seriously exacerbated the financial squeeze on older workers, and intensified pressure to continue to work.

Or hope to. When recession strikes, employers often target veteran employees in RIFs, and disfavor older candidates for whatever new positions they may need to fill. Driving this pattern, familiar, as Purdue University management expert Professor Michael Campion testified at a July 15 Equal Employment Opportunity Commission (EEOC) hearing, are "common negative stereotypes about older workers," such as that they are "more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, perhaps less competent, and less energetic than younger employees." Such cliches are often inaccurate, as superior experience, maturity, stability, and job commitment may often make more senior workers more productive and better investments than their younger counterparts. Although the ADEA was enacted to eliminate such damaging misperceptions from American workplaces, studies document their resilience. Evidently, their impact is being felt in the market-place now. Age discrimination claims submitted to the EEOC spiked nearly 30% in June 2009 compared with the same month a year earlier.

How the Gross Decision Largely Nullifies the ADEA

For these claimants, the Supreme Court's decision offers a new Catch-22. The aptly named decision guarantees that a vast proportion of age bias complaints will fail, whatever their merit. Justice Clarence Thomas' opinion for the Court majority repeatedly states that a victim of age discrimination, in order to prevail in court, must prove that unlawful bias was the "but-for" cause of adverse treatment. Previously, plaintiffs alleging violations of the Age ADEA had the option of proving that age bias was simply a "motivating factor." The latter remains the applicable standard for claims of discrimination based arising under Title VII of the Civil Rights Act, which include most matters involving race, gender, or other types of workplace discrimination other than age.

Federal lower court decisions confirm that Gross has radically tightened standards for proving workplace age discrimination, to an extent that, if not promptly corrected by Congress, will cause a vast proportion of age bias complaints to fail, whatever their merit. Justice Clarence Thomas' opinion for the 5-4 Court majority repeatedly states that a victim of age discrimination, in order to prevail in court, must prove that unlawful bias was "the but-for" cause of adverse treatment. Previously, plaintiffs alleging ADEA violations had the option of proving that age bias was simply a "motivating factor." The latter remains the applicable standard for claims of discrimination arising under Title VII of the Civil Rights Act, which include most matters involving race, gender, or other types of workplace discrimination other than age.

The Court's new rule will largely nullify the ADEA. This is true, in the first place, because in the real world, most actions have several but-for causes. For example, if an employer decided to fire everyone in a Department over 50, age would be a but-for cause (because if a worker were not over 50 he or she would not have been fired). But working in that Department would also be a but-for cause (because if a worker of any age had not been in that Department, he or she would not have been fired). If victims of this garden-variety type of discrimination must show that age was "the" but-for cause, their cases will be lost before they are filed. Indeed, Justice Thomas' "the but-for cause" standard can be interpreted to require that age bias be the "sole" cause of adverse treatment. In fact, in the first three months after Gross was decided, at least 27 federal courts read the decision to impose this "sole cause" standard or its practical equivalent.

Moreover, even in situations where in fact age bias is the sole cause of passing over for promotion, or demoting, or firing an employee, that fact will rarely be demonstrable. After all, as a practical matter, employers will always create paper trails purporting to justify adverse actions on legitimate business-related grounds. In such circumstances, proving that age was the exclusive, rather than a "motivating" factor will not realistically be possible. Virtually any evidence of any other factors, whether business-related or not, suffices to throw a legitimate age discrimination victim out of court. Employee-side lawyers will know that, so they will rarely waste their time and resources to bring cases when age bias victims come to them for help. Business lawyers will also know that, and will counsel clients that they have nothing to fear if they pay lip-service to the ADEA but ignore it in practice.

Twisting a Law Enacted to Protect Ordinary People

As noted above, President Obama recently underscored the need for judges who combine "a fierce dedication to the rule of law" with "a keen understanding of how the law affects the daily lives of the American people." The President has observed that in contrast with this standard, we "are now seeing a conservative jurisprudence" that is "activist" and "ignores the will of Congress" and "democratic processes." Members of Congress, including Senate Judiciary Committee Chair Patrick Leahy, have similarly observed that "in many cases, the Supreme Court has ignored the intent of Congress, oftentimes turning laws on their heads, and making them protections for big business rather than for ordinary citizens." Few recent decisions illustrate the regrettable accuracy of these observations more precisely than the Gross decision. Not only, as Justice Stevens observed in his dissenting opinion, does this 5-4 decision flout a long-standing major precedent of the Court itself (Price Waterhouse v. Hopkins, 490 U.S. 228 [1989]), by adopting as the law a "but-for" standard of causation that was advanced by the dissent in that case. "Not only," Justice Stevens wrote, "did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII (of the 1964 Civil Rights Act) in 1991." Moreover, the majority's "far-reaching" new rule answered a question completely different from the one the parties had raised with the Court or the courts below and which the Court "granted certiorari to decide." Justice Stevens called out the majority further for its lack of concern that the consequential issue it resolved "had not been briefed by the parties," adding that the majority's "failure to consider

the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible."

Repealing From the Bench and Crippling Congress

Congress needs to respond sharply and swiftly to the Court's de facto repeal from the bench of the ADEA and other safeguards against workplace discrimination. Not only does the decision in Gross thwart Congress' clear intent. If permitted to stand, the decision will cripple Congress' ability to perform its constitutional function. This is because the Gross majority utilized a novel and ill-considered method of statutory construction that would, if generally applied, lead to wholly unreasonable interpretations of numerous federal laws. The Court reasoned that because Congress in 1991 codified and strengthened the interpretation of Title VII found in Price Waterhouse, Congress intended by so doing to indicate that it actually disapproved of the basic rule in Price Waterhouse, and that the allocation of burdens set out in that decision should not be applied to other federal employment statutes. Under this unwarranted method of construction, legislation strengthening any one federal law, or merely codifying in that statute any existing caselaw, would be deemed to weaken all other federal laws dealing with the same type of issue, e.g. employment. That emphatically was not the intent of Congress in adopting the 1991 Civil Rights Act. General application by the courts of this method of construction would complicate exponentially the already complex task of drafting legislation. In every instance in which Congress amended any one law, it would be required to scour the United States Code for all the other laws which would have to be similarly amended to avoid the implications of the Gross rule.

Congress needs to act swiftly to prevent further metastasizing of this threat to the economic security of older Americans and all Americans.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned.]