No. 09-6381

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN LEWIS,

Plaintiff-Appellant,

v.

HUMBOLDT ACQUISITION CORPORATION d/b/a
HUMBOLDT MANOR NURSING CENTER,

Defendant-Appellee.

On Rehearing *En Banc* of an Appeal from the United States District Court for the Western District of Kentucky at Jackson

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION
OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL
CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent
Business Small Business Legal Center

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae*
Equal Employment Advisory
Council

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

August 10, 2011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 09-6381 Case Name: Lewis v. Humboldt Acquisition Corp.

Name of counsel: Rae T. Vann

Pursuant to 6th Cir. R. 26.1, Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Chamber of Commerce of the United States of America make the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

CERTIFICATE OF SERVICE

I certify that on August 10, 2011, the foregoing document was filed with the Clerk of the Court. The Court's ECF system will send notification to all parties in the appeal.

/s/ *Rae T. Vann*
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae*
Equal Employment Advisory Council

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent Business
Small Business Legal Center

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted:

/s/ *Rae T. Vann*

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business
Small Business Legal Center

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae* Equal Employment Advisory Council

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337
Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

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The Equal Employment Advisory Council (EEAC), National Federation of Independent Business (NFIB) Small Business Legal Center and Chamber of Commerce of the United States of America (Chamber) respectfully submit this brief as *amici curiae* contingent upon the granting of the accompanying motion for leave to file. The brief urges the *en banc* Court to affirm the district court's decision below and thus supports the position of Defendant-Appellant Humboldt Acquisition Corporation d/b/a Humboldt Manor Nursing Center.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 of the nation's largest private sector companies, collectively providing employment to roughly 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of *amici's* members are employers subject to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, as well as other labor and employment statutes and regulations. As employers, and as potential defendants in ADA actions, *amici's* members have a direct and ongoing interest in the issue presented in this appeal regarding the proper standard of proof applicable to claims of disability discrimination under the ADA.

Because of their interest in the application of the nation's fair employment laws, EEAC, NFIB and/or the Chamber have filed numerous briefs as *amicus curiae* in cases before this Court, the U.S. Supreme Court and other courts of appeals involving the ADA and other employment law issues.[1] Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

Amici seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters,

[1] *See, e.g.*, *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551 (6th Cir. 2009); *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009), *rev'd*, 131 S. Ct. 863 (2011); *EEOC v. Sundance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006); *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005); *Clark v. UPS*, 400 F.3d 341 (6th Cir. 2005); *Hoffman v. Professional Med. Team*, 394 F.3d 414 (6th Cir. 2005); *White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006); *Cavin v. Honda Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003).

amici are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Plaintiff-Appellant Susan Lewis worked for Defendant-Appellant Humboldt Acquisition Corporation d/b/a/ Humboldt Manor Nursing Home (Humboldt) as a registered nurse from July 2004 through March 20, 2006. *Lewis v. Humboldt Acquisition Corp.*, 634 F.3d 879, 880, *vacated and reh'g en banc granted*, 2011 U.S. App. LEXIS 11941 (6th Cir. June 2, 2011). In September 2005, Lewis developed a mobility impairment that required her to take a one-month leave of absence. *Id.* When she returned to work, she sometimes used a wheelchair. *Id.*

On March 15, 2006, Lewis was involved in a verbal altercation with staff during which she criticized her supervisors, raised her voice, and used profanity. *Id.* Lewis admitted being upset, but denied engaging in inappropriate behavior. *Id.* She was fired on March 20. *Id.*

Lewis sued Humboldt in federal court, claiming that her discharge violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* *Id.* Specifically she claimed that her employer "exaggerated the severity of her behavior" on March 15 as a pretext for discrimination based on her perceived disability. *Id.* The trial court refused her request for a "motivating factor" instruction, instead instructing the jury that in order for Lewis to prevail, she must

demonstrate that her perceived disability was the "sole reason" for the termination decision. *Id.* In doing so, it followed binding precedent established by the Sixth Circuit in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996), which applies a sole cause, rather than motivating factor, test in such cases. *Id.*

After a two-day trial, the jury found that although Lewis was "regarded as" being disabled, she was not unlawfully discriminated against on that basis in violation of the ADA. *Id.* It therefore returned a verdict for Humboldt. *Id.* Lewis appealed, raising only the issue of the appropriate standard of proof applicable to ADA discrimination claims. *Id.* While conceding that the trial court properly instructed the jury using the "sole cause" standard based on established Sixth Circuit precedent, she nevertheless argued for adoption of a "motivating factor" test. *Id.* A three-judge panel of the Sixth Circuit affirmed. *Id.* at 881. Lewis filed a petition for rehearing *en banc*, which this Court granted on June 2, 2011.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, does not expressly contain, and cannot reasonably be construed as incorporating, a motivating factor theory under which employers may be held liable for unlawful discrimination. Because ADA plaintiffs must demonstrate that disability was the "but for" reason for the contested employment decision in order to recover under

the Act, the district court below thus properly refused to permit Appellant to proceed under a motivating factor framework.

On its face, the relevant text of the ADA prohibits workplace discrimination against a "qualified individual with a disability *because of* the disability of such individual ...." 42 U.S.C. § 12112(a) (emphasis added). Unlike Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, the ADA was never amended to incorporate a motivating factor test, and in that regard is similar to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, which 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." 29 U.S.C. § 623(a) (emphasis added).

The U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), which held that the motivating factor test does not apply to claims brought under the ADEA, thus casts considerable doubt as to its availability under the ADA. Indeed, since *Gross* was decided, the U.S. Court of Appeals for the Seventh Circuit and several federal district courts have held that the motivating factor test is inapplicable to claims brought under the ADA. This Court should follow suit, declining Appellant's invitation to authorize a mixed motives test in the absence of express, textual support for its use in ADA cases.

Strict adherence to the actual text of the ADA and the Supreme Court's teachings in *Gross* is particularly important now in light of enactment of the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which has resulted in a significant increase in ADA litigation. Permitting ADA plaintiffs to proceed under a motivating factor framework in the absence of express statutory authorization would encourage frivolous lawsuits, only adding to an already heavy litigation burden placed on defendants and the courts in the wake of the ADAAA.

ARGUMENT

I. PLAINTIFFS ALLEGING DISCRIMINATION UNDER THE ADA MUST DEMONSTRATE, BY A PREPONDERANCE OF THE EVIDENCE, THAT DISABILITY WAS *THE* REASON FOR, NOT MERELY A "MOTIVATING FACTOR" IN, THE CONTESTED ADVERSE EMPLOYMENT ACTION

A. The Plain Text Of The ADA, Which Prohibits Discrimination "Because Of" Disability, Precludes Application Of A "Motivating Factor" Theory Of Liability

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, prohibits discrimination "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).[2] This provision is very similar to that contained in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, which makes it unlawful for an employer to, *inter alia*, "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a), and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits an employer from discriminating against an employee or applicant "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

1. The motivating factor test, derived from the Supreme Court's *Price Waterhouse* decision and expressly incorporated into Title VII in 1991, is not similarly contained in the ADA

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the U.S. Supreme Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII. 490 U.S. at 250. Under those circumstances, the employer can avoid liability only if it proves,

[2] The ADA was amended by the ADA Amendments Act of 2008 (ADAAA), Pub. L. 110-325, 122 Stat. 3553 (2008). The minor revisions made to Section 12112(a) as a result of the ADAAA are not relevant to this appeal and are not reflected above.

by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id*. at 249.

This method of proof has come to be referred to as the "mixed-motive" analysis, *id.* at 246, which recognizes the relatively rare circumstance in which there actually exists direct, "smoking gun" evidence of discrimination, yet the employer contends that it would have taken the same employment action in any event. *Id.* at 247. Under that test, once the plaintiff persuades the trier of fact that an illegitimate factor actually was considered, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246.

In enacting § 107 of the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), Congress sought to partially overrule *Price Waterhouse* by creating and codifying a "motivating factor" test applicable to mixed motive cases brought under Title VII. Specifically, § 107(a) amended Title VII to provide:

> 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.

42 U.S.C. § 2000e-2(m). Section 107(b) continues:

> 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 may grant declaratory

> relief, injunctive relief, and attorney's fees . . . and shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . .

42 U.S.C. § 2000e-5(g)(2)(B).

On its face, § 107 applies only to cases of discrimination on the basis of race, color, religion, sex or national origin; it does not extend to causes of action for discrimination based on disability or any other characteristic elsewhere statutorily protected. Indeed, "there is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010). Congress thus consciously and conspicuously chose not to apply the "motivating factor" burden-shifting analysis applicable to Title VII mixed-motive cases to claims brought under the ADA.

If the plain text of § 107 were not enough, the legislative history of the CRA confirms that the motivating factor amendment was intended to apply only to Title VII. Preliminary versions of the bill contained a "Rules of Construction" provision that provided:

> In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and *disability*, courts and administrative agencies shall not rely on the amendments made by the Civil Rights and Women's Equity in Employment Act of 1991 *as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by such act*."

H.R. Rep. No. 102-40, pt. 1, at 12 (1991) (emphasis added). That language was dropped and never became part of the final bill. In a section-by-section analysis of what *was* to become the 1991 CRA, Senator Dole described § 107 as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).

2. Congress also amended the ADA in 1991, and again in 2008, but declined each time to include a motivating factor test

Therefore, while Congress may have spoken about mixed motives under the ADA in discussions leading to enactment of the 1991 Amendments, it ultimately failed to adopt language incorporating the motivating factor test into the statute. Appellant correctly points out that the ADA "expressly incorporates by reference a provision of Title VII that relies on the burden of proof allocation in *Price Waterhouse*." Br. Appellant, 17. Section 107(a) of the ADA provides, in relevant part:

> The powers, remedies, and procedures set forth in section 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter…concerning employment.

42 U.S.C. § 12117. Significantly, however, "although section 12117(a) cross-references the *remedies* set forth in section 2000e-5(g)(2)(B) for mixed-motive cases, it does not cross-reference the provision of Title VII, section 2000e-2(m), which renders employers *liable* for mixed-motive employment decisions." *Serwatka*, 591 F.3d at 961 (emphasis in original). Specifically, Section 2000e-4 establishes the Equal Employment Opportunity Commission; Section 2000e-5 sets forth the Commission's enforcement authority and range of remedies available to victims of unlawful discrimination; Section 2000e-6 describes the enforcement authority of the Attorney General; Section 2000e-8 governs the manner in which administrative charge investigations are to be conducted; and Section 2000e-9 provides that "[f]or the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. § 161) shall apply." 42 U.S.C. § 2000e-9. Congress's decision to carry some of Title VII's remedial provisions over to the ADA, but not Section 2000e-2, the section that imposes *liability* based on motivating factors, further confirms that its application to the ADA context is improper.

Nor can it be said that Congress's failure to incorporate into the ADA Section 2000e-2's motivating factor test was inadvertent or unintentional, because it has had a number of opportunities in the twenty years since the Amendments

were enacted to do so. In 1991, for instance, Congress amended the ADA (like Title VII) to provide for compensatory and punitive damages, and to establish a "good faith" affirmative defense to employer liability for failure to provide reasonable accommodations. 42 U.S.C. § 1981a(a)(3).

The ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), brought about additional, sweeping changes to the Act. The legislative history of the ADAAA states that its main purpose is to "lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA ... ." H.R. Rep. No. 110-730 (2008). Indeed, as one commentator observed, "The primary purposes of the ADAAA are to 'make it easier' for people with disabilities to obtain protection under the law and to provide a broad scope of protection and expansive coverage to the maximum extent permitted by the act." Mark C. Travis, *A New Direction: Amendments Put Americans With Disabilities Act Back On Path Of Tackling Discrimination*, 47 Tenn. B.J. 12, 13 (June 2011) (footnote omitted). Over the course of several months of intense, substantive debate, the question of including a motivating factor test in the ADAAA never arose, despite the fact that this Court and others long had taken the position by then that a mixed motive framework is not available in ADA cases. *See, e.g., Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th

Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995); *see also Serwatka*, 591 F.3d at 962.

Because the ADA does not contain any provision authorizing the motivating factor framework in disability discrimination cases, the district court below properly declined to provide such an instruction to the jury.

B. The U.S. Supreme Court's *Gross* Decision Casts Further Doubt As To The Availability Of Title VII's Motivating Factor Test In ADA Cases

1. Interpreting identical "because of" language, the Supreme Court in *Gross* held that the motivating factor framework does not apply to ADEA claims

In *Gross v. FBL Financial Services*, the U.S. Supreme Court held that plaintiffs alleging intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, cannot proceed under a mixed-motive theory because doing so would impermissibly relieve them of the ultimate burden of proving that the challenged employment action was taken "because of" age. 129 S. Ct. 2343 (2009). The Court found particularly persuasive the fact that Congress declined to amend the ADEA, as it did Title VII, to include a motivating factor test:

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

> We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

Gross, 129 S. Ct. at 2349.

Like the ADEA and unlike Title VII, the ADA does not contain, and never was amended to incorporate, a motivating factor test. Therefore, applying *Gross*, this Court also should find that in the absence of express language authorizing its use, the motivating factor test is not available under the ADA.

2. The Seventh Circuit, relying on *Gross,* has now held that the motivating factor test is similarly inapplicable to claims brought under the ADA

In *Serwatka v. Rockwell Automation, Inc.*, the only federal appeals court ruling to date that analyzes the availability of the mixed-motive test under the ADA post-*Gross*, the Seventh Circuit held that a plaintiff alleging unlawful disability discrimination under the ADA was not entitled to a mixed-motive jury instruction, because unlike Title VII, the text of the statute does not expressly authorize a mixed-motive theory of liability. 591 F.3d 957, 961 (7th Cir. 2010). Relying on *Gross,* it found that in the absence of such express language, an ADA plaintiff, in order to prevail, must prove that his or her disability was the "but for" cause of, not simply a motivating factor in, the complained-of employment decision.

The Seventh Circuit observed, "Although the *Gross* decision construed the ADEA, the importance that the Court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute." 591 F.3d at 961. In finding that ADA plaintiffs may not proceed under a mixed-motive theory, the court reversed its own pre-*Gross* precedent that permitted mixed-motive jury instructions in ADA cases, finding it no longer viable in light of *Gross*. *Id.* at 962. It concluded, "*Gross* makes clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute's 'because of' language demands proof that a forbidden consideration…was a 'but for' cause of the adverse action complained of." *Id.*

Several federal district courts also have held that *Gross* bars application of the motivating factor standard in ADA discrimination claims. *See Badri v. Huron Hosp.*, 691 F. Supp. 2d 744, 760 n.11 (N.D. Ohio 2010) ("the existence of multiple reasons for Plaintiff's discharge would preclude Plaintiff from recovering under the ADA, unless he could prove that 'but-for' the alleged disability he would not have lost his privileges, inasmuch as mixed motive claims are not viable under the ADA"); *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484, 503 (E.D. Pa. 2010) ("*Gross* bars mixed-motive retaliation claims under the ADA"); *Ross v.*

Independent Living Res. of Contra Costa County, 2010 U.S. Dist. LEXIS 73886, at *19, 23 Am. Disabilities Cas. (BNA) 730 (N.D. Cal. 2010) ("the standard enunciated in *Gross*—requiring a plaintiff to prove 'but-for-causation in a mixed-motive case under the ADEA in lieu of the *Price Waterhouse* framework—must also apply to the ADA"); *but compare Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) ("because of" language of Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a), would require but-for showing in light of *Gross*, except for 2007 amendments expressly incorporating a "contributing factor" test). Even the dissent in *Everson v. Leis*, 412 Fed. Appx. 771 (6th Cir. Feb. 10, 2011), which Appellant cites favorably in her brief, concedes that "it is unclear whether a mixed-motive standard is proper under the ADA in light of the Supreme Court's decision in *Gross.*" 412 Fed. Appx. at 786 n.8 (Moore, J., dissenting).

II. PERMITTING ADA PLAINTIFFS TO PROCEED UNDER A MOTIVATING FACTOR FRAMEWORK WOULD ENCOURAGE FRIVOLOUS LAWSUITS, THUS INCREASING SUBSTANTIALLY AN ALREADY HEAVY LITIGATION BURDEN PLACED ON DEFENDANTS AND THE COURTS SINCE ENACTMENT OF THE ADAAA

Because the ADAAA now makes it far easier for more individuals to claim the statute's protections, there has been a substantial increase in ADA charge activity and federal court litigation. "While many practitioners in the plaintiff's employment law bar had been shying away from ADA cases, many see this as a

potential sea change for their practice. Perhaps the best indicator of this comes from the federal government's gatekeeper -- the EEOC." Mark C. Travis, *A New Direction: Amendments Put Americans With Disabilities Act Back On Path Of Tackling Discrimination*, 47 Tenn. B.J. 12, 13 (June 2011). In Fiscal Year (FY) 2010 (October 1, 2009 – September 30, 2010), for instance, EEOC received over 25,160 charges alleging disability discrimination, representing a 17.3 percent increase over the number of charges filed in FY 2009 (October 1, 2008 – September 30, 2009).[3] Permitting ADA plaintiffs to pursue claims under a mixed-motive theory, a significantly less onerous standard that shifts the burden of proof to the employer upon a showing by the employee that both lawful and disability-related considerations played a role in the adverse action, would only add to the substantial increase in potentially frivolous ADA litigation.

In arguing for adoption of a motivating factor test under the ADA, Appellant suggests that any more stringent a standard would defeat the "overarching purpose" of the ADA and "create a gaping hole" in the statute's anti-discrimination enforcement scheme. Br. Appellant, 8. She asserts that "many actions in employment and other areas are the result of several concurrent motives," *id.*, citing to the legislative history of Title VII, as well as to the Supreme Court's

[3] U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1997 Through FY 2010, available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), in which it observed that "it is common for injuries to have multiple proximate causes." *Id.* at 8-9 (quoting *Staub*, 131 S. Ct. at 1192). Not insignificantly, *Staub* involved an interpretation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4311 *et seq.*, which – similar to Title VII – establishes liability whenever anti-military bias was a *motivating factor* in the employer's adverse action. In any event, whether or not the ADA *should* permit recovery under a mixed-motive theory, is for Congress, not the courts, to decide.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the district court below should be affirmed.

Respectfully submitted,

/s/ *Rae T. Vann*

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae*
Equal Employment Advisory Council

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent Business
Small Business Legal Center

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the United States of America

August 10, 2011

CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this Brief *Amici Curiae* of the Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2003 word processing software and contains 4,408 words.

/s/ *Rae T. Vann*
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae*
Equal Employment Advisory Council

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent Business
Small Business Legal Center

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2011, I electronically filed the Brief *Amici Curiae* of the Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance with the Clerk of the Court. Pursuant to 6th Cir. Local Rule 25, the Court's ECF system will send notification to, which constitutes service of, such filing to the following:

Eric Schnapper
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
schnapp@uw.edu

Michael L. Weinman
WEINMAN & ASSOCIATES
Mike@weinmanandassoc.com

James K. Simms, IV
CORNELIUS & COLLINS
jksimms@cornelius-collins.com

Jefferson Cole Dowsley, Jr.
CORNELIUS & COLLINS
jcdowsley@cornelius-collins.com

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION
OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL
CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent
Business
Small Business Legal Center

/s/ *Rae T. Vann*
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
Email: rvann@ntll.com

Attorney for *Amicus Curiae*
Equal Employment Advisory
Council

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America