STATE OF MICHIGAN

IN THE SUPREME COURT

PENNIE MARIE DAVIS,

Plaintiff-Appellee,

v.

JACKSON PUBLIC SCHOOLS,

Defendant-Appellant.
_____/

Supreme Court No. 161836
COA No. 344203
LC No. 16-000344-CZ

MOTION OF THE MICHIGAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

BRIEF AMICUS CURIAE ON BEHALF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

SUBMITTED BY:

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The Michigan Association for Justice, through counsel, hereby moves this Honorable Court to grant it leave to file the attached Amicus Curiae Brief, and in support thereof states:

1. The Michigan Association for Justice ("MAJ") is an organization of Michigan attorneys engaged primarily in litigation, trial practice and appellate work on behalf of individuals who have been physically injured and are otherwise victims of economic injustice, negligent conduct and unfair practices.
2. MAJ is compromised of roughly 1,300 members. The organization and the members recognize an obligation to assist this Court on important issues of law that substantially affect the orderly administration of justice in the State of Michigan.
3. This Court granted Mini Oral Argument on the Application (MOAA) in this matter and ordered supplemental briefing. The Court permits the filing of amicus curiae briefs at the MOAA stage. MSC IOP 7.305(G)[1][c]
4. While the MAJ is aware that others have filed amicus curiae motions and briefs in this matter, the MAJ members, as the primary voices representing plaintiffs in civil litigation

matters, including fair employment practices matters, feel compelled to act in support of the issues raised by the Plaintiff-Appellee.

5. The MAJ believes that the jury verdict and the Court of Appeals' decision should be upheld pursuant to the long-standing jurisprudence of our state.

WHEREFORE, the Michigan Association for Justice prays that this Honorable Court grant this Motion for Leave to File Amicus Curiae Brief[1].

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Dated: December 2, 2021

[1] Pursuant to MCR 7.312(H)(4), no counsel for a party to this appeal authored the brief in whole or in part nor made any monetary contribution intended to fund the preparation or submission of the brief. Any money contribution intended to fund the preparation or submission of the brief came from the Michigan Association for Justice, its members and its counsel.

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STATEMENT OF QUESTIONS INVOLVED

I. Should this Court re-affirm the holding that the words "because of" in the Whistleblower's Protection Act require that the plaintiff show that the protected activity was "a motivating factor" in the adverse employment action?

II. Should this Court decline to impose the "but-for" causation standard articulated by the United States Supreme Court for actions brought under the federal Age Discrimination in Employment Act?

STATEMENT OF INTEREST

The Michigan Association for Justice ("MAJ")'s mission is

> *to promote a fair and effective justice system. We aim to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan's courtrooms, even when taking on the most powerful interests."*

As members of Michigan's bar, and as officers of the court, we recognize our responsibility to help the Court develop the State's jurisprudence; it is our mission to assist the Court in reaching decisions where all voices are heard and represented, in areas of law in which our members devote their professional lives.

While this case has not yet been calendared for full briefing and argument, the MAJ writes at this stage to seek a ruling from this Court re-affirming that the words "because of" in the Whistleblower's Protection Act require that the plaintiff show that the protected activity was "a motivating factor" in the adverse employment action, as has been established through decades of Michigan jurisprudence.

REASONS WHY LEAVE SHOULD BE DENIED

I. DEFENDANT'S PROPOSED CAUSATION STANDARD WOULD DEFEAT THE PURPOSES OF THE WPA AND ELCRA

The Defendant seeks to have this Court overturn decades of jurisprudence in Michigan. It asks the Court to overturn the "a motivating factor" standard for proving the causation element in discrimination and retaliation cases. This would represent a seismic change and would close the courtroom doors to many victims of discrimination and retaliation. The Defendant's argument, at its most basic form, is that employers who are motivated by illegal discrimination and harassment should still be shielded from liability unless the Plaintiff can disprove each and every other reason that the employer raises in defense of its employment decisions. If the Defendant's position is adopted, an employer who is motivated by two reasons, one being a non-discriminatory/retaliatory basis, and the other reason is the employee's race, for example, then there would be no liability. This would subvert the very purpose of the Whistleblower's Protection Act (WPA) and the Elliott Larsen Civil Rights Act (ELCRA).

The WPA is a remedial statute, and thus, is to be liberally construed to favor the persons the legislature sought to benefit. *Shallal v Catholic Soc Servs*, 455 Mich 604, 611, 566 NW2d 571 (1997) The WPA was first enacted by the Michigan Legislature in 1980 to "provide protection to employees who report a violation or suspected violation of state, local, or federal law..." The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations. *See Preamble to WPA, 1980 PA 469 and Dolan v. Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997) As legal practitioners, attorneys and courts often cite the "remedial" nature of a statute that must be "liberally construed". However, those terms are then often ignored in pursuit of particular

conclusions. It is important to truly think about those terms and the reasons behind them. The decisions of employers affect real people, with severe consequences. That is why the legislature and 45 years of jurisprudence instruct that we liberally construe these anti-discrimination and anti-harassment statutes.

In passing the ELCRA, the legislature was removing improper motivations from employment decisions; motivations based upon race, color, sex, national origin, religion, marital status, height and weight. In passing the WPA, the legislature was removing the improper motivation of retaliation for reporting illegal conduct. To now shield an employer who is "only motivated" by one of these impermissible factors from liability would be anathema to the aims of these two statutes.

II. FEDERAL PRECEDENT IS NOT BINDING ON THIS COURT AND THE GROSS AND NASSAR STANDARDS FOR CAUSATION SHOULD NOT BE ADOPTED

The Defendant asks this Court to adopt the United States Supreme Court's causation standard set forth in *Gross v. FBL Fin Servs, Inc.* 557 US 167 (2009). *Gross* was a case brought under the federal Age Discrimination in Employment Act (ADEA). The Supreme Court extended that causation standard to retaliation cases brought under Title VII of the Civil Rights Act. *University of Texas Southwestern Med Ctr v. Nassar*, 570 US 338 (2013) That standard requires that a plaintiff prove that the adverse employment action would not have occurred "but-for" the protected activity. This has had the effect of eliminating "mixed motive" cases[2], at least under the ADEA.

However, this Court is not compelled to follow federal precedent. *Radtke v Everett*, 442 Mich 368, 381–382, 501 NW2d 155 (1993 See also *Garg v. Macomb Co Community Mental Health*

[2] Mixed motive cases are characterized by proofs showing that the employer was motivated by both discriminatory/retaliatory reasons and non-discriminatory reasons.

Servs, 472 Mich 263, 283; 696 NW2d 646 (2005) ("federal precedent … cannot be allowed to rewrite Michigan law") In *Garg,* this Court held:

> While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis. *Garg* at 283

The quality of the analysis in the *Gross* case is not persuasive and should not be adopted by this Court. Even the *Gross* Court recognized that "when conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross* at 174, citing *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

Gross found that the "because of" language in the ADEA required a *but-for* causation analysis, but a dissent authored by Stevens, Souter, Ginsburg, and Breyer reasons that the same "because of" language exists in Title VII, and in *Price Waterhouse*, the Court found that "when 'an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Gross* at 183, citing *Price Waterhouse v. Hopkins,* 490 US 228, 241 (1989)

In fact, this Court has refused to adopt federal precedent regarding the very issue presented in this appeal: the causation standard for retaliation claims. The federal courts have held that close temporal proximity alone is sufficient to establish the causal nexus required in retaliation cases. *Montell v Diversified Clinical Servs*, 757 F3d 497, 505–508 (6th Cir 2014); *Lindsay v Yates*, 578 F3d 407, 418–419 (6th Cir 2009); *Mickey v Zeidler Tool & Die Co*, 516 F3d 516 (6th Cir 2008); *Asmo v Keane, Inc*, 471 F3d 588, 594 (6th Cir 2006) This interpretation of the proofs

necessary for the causal nexus element has survived the "but-for" standard established in *Gross* and *Nassar*. See *EEOC v New Breed Logistics*, 783 F3d 1057 (6th Cir 2015)

However, this Court has specifically rejected that argument, holding that "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action" in cases brought under the state statute. *West v. General Motors Corp.,* 469 Mich 177, 186; 665 NW2d 468 (2003) Therefore, Michigan has demonstrated that it does not find federal precedent with regard to the interpretation of the causal nexus element particularly persuasive.

In addition, other states have refused to adopt the "but-for" causation analysis from *Gross* and *Nassar* on state law grounds. *See Dietz v. Zodiac Seats U.S.* 2020 WL 867977 at *5 (E.D. Tex. Feb. 4, 2020). ("The Texas Supreme Court has consistently held that the TCHRA is 'effectively identical' to the ADEA and other federal employment discrimination statutes, and thus, the ADEA and the cases interpreting it guide Texas courts' reading of the TCHRA…However, the THCRA and the ADEA involve different causation inquiries as part of the *McDonnell-Douglas* analysis. Under the TCHRA, a plaintiff 'need only show that age was a 'motiving factor' in the defendant's decision,' as opposed to the 'but for' causation standard used under the ADEA."); *See also Gonska v. Highland View Manor, Inc*. No. CV126030032S, 2014 WL 3893100, at 8 (Conn. Super. Ct. June 26, 2014), 2014 WL 3893100 at *7 ("This court has previously found "compelling reasons to believe that our state appellate courts would not choose to follow the 'but for' causation standard articulated by the United States Supreme Court in the *Nassar* and *Gross* cases, in connection with ... state ... retaliation statutes."; *Bissonnette v. Highland Park Market, Inc.,* Superior Court, judicial district of Hartford, Docket No. CV–10–6014088–S (January 28, 2014, Peck, J.). ("As noted in several decisions, our own Supreme Court is the ultimate authority on interpreting Connecticut

statutes including our fair employment practices statutes; *Vollemans v. Wallingford,* 103 Conn.App. 188, 199–200, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008) ("[W]hile often a source of great assistance and persuasive force ... it is axiomatic that decisions of the United States Supreme Court are not binding on Connecticut courts tasked with interpreting our General Statutes. Rather, Connecticut is the final arbiter of its own laws") (Citation omitted; internal quotation marks omitted.)

As noted above, Michigan has specifically rejected at least one causation analysis (temporal proximity) that the federal courts adopted. There is no persuasive aspect of the *Gross* and *Nassar* opinions that dictates that Michigan abandon its current causation standard.

III. THERE IS NO COMPELLING REASON FOR THIS COURT TO OVERTURN APPROXIMATELY 50 YEARS OF JURISPRUDENCE REGARDING THE PROPER STANDARD FOR CAUSATION IN EMPLOYMENT RETALIATION CLAIMS UNDER MICHIGAN LAW

The ELCRA was passed in 1976, and the causation standard that has been applied since that time, 45 years ago, has been that an employer is liable for damages when illegal discrimination or retaliation was "a motivating factor" in an adverse employment action. *See Hazle v Ford Motor Co*, 464 Mich 456, 462, 628 NW2d 515 (2001); *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986); *see also* M Civ JI 105.02 (ELCRA claims); *West v GMC*, 469 Mich 177, 185, 665 NW2d 468 (2003); *Shaw v City of Ecorse*, 283 Mich App 1, 14, 770 NW2d 31 (2009); *Taylor v Modern Eng'g, Inc*, 252 Mich App 655, 660, 653 NW2d 625 (2002); *Terzano v Wayne Cty*, 216 Mich App 522, 533, 549 NW2d 606 (1996); *see also* M Civ JI 107.03 (WPA claims)

In fact, this Court addressed the proper standard for analyzing the causation element in WPA claims four years after the U.S. Supreme Court established the "but-for" standard in *Gross*. *Debano-Griffin v. Lake County,* 493 Mich 167; 828 NW2d 634 (2013) In *Debano-Griffin*, this Court reaffirmed that to meet the causal nexus element, a plaintiff must show "that the plaintiff's

protected activity was a motivating factor for the employer's adverse action". *Debano-Griffin* at 176 The federal court's reasoning and analysis of the phrase "because of" had been in effect for four years when this Court issued its *Debano-Griffin* decision. Had this Court believed that interpretation was consistent with the language in the WPA, it had the opportunity to do so at that time. The failure to adopt that standard must be interpreted as a rejection of the notion that the "but-for" causation standard is proper under the WPA.

IV. THERE IS NO COMPELLING POLICY REASON TO ADOPT A STANDARD WHEREBY AN EMPLOYER MAY HAVE BEEN MOTIVATED BY RETALIATION FOR PROTECTED ACTIVITY, BUT IS NOT LIABLE FOR DAMAGES

The effect of the but-for causation standard is that it would allow an employer to be "motivated" by race (or color, age, sex, religion, national origin, marital status, height or weight), but still avoid liability. MCL 37.2202(1)(a) provides that an employer shall not:

> Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, <u>because of</u> religion, race, color, national origin, age, sex, height, weight, or marital status. (emphasis added)

The legislature included the same "because of" language in both the WPA and the ELCRA. If this Court were to abandon the "motivating factor" standard for the WPA, it would inevitably require the removal of that standard from ELCRA cases. If that occurs, an employer could escape liability even if they are motivated, in part, by illegal discrimination, thereby contravening the legislative intent to remove race, age, etc. from employment decisions. As the dissent in *Gross* noted, "when an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex". *Gross* at 183, citing *Price Waterhouse* at 241

Under Defendant's proposed interpretation, employers would be permitted to admit that they openly discriminated against an employee without any consequence, so long as the employer had at least one other reason for an adverse employment action. This means that if an employer

had, for example, one Black employee and one white employee, and the employees had identical performance issues, the employer would be able to terminate only the Black employee and admit that it was partially because the employee was Black. Under this interpretation, the employer would only have to be able to point to the performance issue to show that race was not the but-for cause of the adverse employment action. This completely subverts the purpose of statutes that seek to protect people who are frequently subjected to invidious discrimination and retaliation.

This interpretation would be inconsistent with Michigan's long-standing policy of trying to eliminate the consideration of improper classifications in employment decisions. As both the Texas and Connecticut courts have done, this Court should adopt standards that are consistent with its own statutes and policies. The adoption of a but-for causation standard, and thereby allowing employers to potentially escape liability even when they are motivated by a protected class, is not appropriate for Michigan and its citizens.

CONCLUSION

The Michigan Association for Justice prays that this Honorable Court issue an opinion re-affirming that the words "because of" in the Whistleblower's Protection Act require that the plaintiff show that the protected activity was "a motivating factor" in the adverse employment action.

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Dated: December 2, 2021