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Rationing Retaliation Claims

Daiquiri J. Steele

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Rationing Retaliation Claims

Daiquiri J. Steele*

“Revenge is a kind of wild justice; which the more man’s nature runs to, the more ought law to weed it out; for as for the first wrong, it doth but offend the law, but the revenge of that wrong putteth the law out of office.”

—Sir Francis Bacon

According to the U.S. Supreme Court, the rising number of workplace retaliation claims is a problem, one warranting more stringent requirements for employees to successfully bring claims. The Court’s principal justification for this restrictive approach is a fear of “opening the floodgates” of litigation. This Article critically assesses the Court’s fear of opening the floodgates of retaliation claims, evaluates the Court’s evidence, and argues that such concerns are overstated and misplaced. Rather than a cause for concern, the rise in retaliation claims reflects rising intra-organizational conflict. Social scientists have demonstrated that, as the American workforce becomes more diverse, intra-organizational conflict increases, and the propensity for civil rights violations grows. In other words, claims are on the rise because retaliation is on the rise. Employment discrimination and other related statutes are aimed at mitigating the harms of this expected rise in intra-organizational conflict.

The Article further argues that considerations of judicial economy are particularly misplaced in workplace retaliation cases. Retaliation protections are crucial to the private enforcement scheme Congress developed for civil rights laws generally and employment discrimination laws in particular. Attempting to limit judicial caseloads through restrictive interpretations of anti-retaliation laws eviscerates private enforcement, producing under-enforcement of these core civil rights protections. To remedy the Supreme Court’s wrong turn on retaliation, Congress should act. This Article proposes that Congress adopt a rule of construction mandating broad interpretation of all workplace anti-retaliation statutory provisions. This provision would strengthen critical civil rights safeguards for employees by restoring the optimal and essential function of retaliation provisions.

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INTRODUCTION

Claims of employer retaliation are on the rise and have now outpaced discrimination claims.¹ The increase in the number of retaliation claims being filed should neither be unexpected nor unwanted. Social science research shows that as the U.S. labor force becomes more diverse with respect to race/ethnicity, gender, disability, and age, intra-organizational conflict and discrimination are likely to increase.² Congress has created employment discrimination statutes designed to prohibit discrimination in the workplace and remedy any discrimination that may occur. Moreover, Congress has enacted minimum labor standards legislation that imposes certain labor standards upon employers. While minimum labor standards statutes apply to employees generally, they have particular significance with respect to employees in certain protected classes.³ To help enforce these provisions,

1. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N [hereinafter *EEOC Charge Statistics*], <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020> [<https://perma.cc/AZ9K-6DAK>] (last visited Mar. 7, 2023).

2. *See infra* Part II.

3. *See infra* Section IV.A.

Congress has included an anti-retaliation provision in each of these statutes. These prohibitions against retaliation are vital because Congress has erected a private enforcement scheme with respect to these laws.

Fears of actual and threatened retaliation continue to prevent workers from asserting workplace rights and/or reporting workplace misconduct. These fears of retaliation lead to underreporting of workplace violations and can contribute to the proliferation of a myriad of workplace law violations including discriminatory hiring, firing, and promotion decisions; harassment; pay inequity; wage theft; occupational safety and health hazards; and family and medical leave encroachments.

Instances of workplace retaliation are pervasive. The U.S. Supreme Court is well aware of the chilling effect retaliation can have on victims. In *Crawford v. Metropolitan Government of Nashville and Davidson County*,⁴ a retaliation case brought under Title VII of the Civil Rights Act of 1964 (Title VII),⁵ the Court recognized that “fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”⁶ These fears are warranted, as studies show that employees who report wrongdoing in the workplace face retaliation at alarming rates.⁷

Given the prevalence of retaliation in employment settings, the number of retaliation cases being filed should come as no surprise. The percentage of retaliation charges that are filed with the U.S. Equal Employment Opportunity Commission (EEOC) is higher than status-based charges, and the percentage of

4. *Crawford v. Metro. Gov’t of Nashville and Davidson Cnty.*, 555 U.S. 271 (2009).

5. 42 U.S.C. §§ 2000(e)-2 to 2000(e)-17 (2018).

6. *Crawford*, 555 U.S. at 279 (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

7. See Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCH. 247, 255 (2003) (finding that 75% of employees who reported workplace mistreatment faced some form of retaliation); Ruth Milkman, Ana Luz Gonzalez & Peter Ikeler, *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 INDUS. REL. J. 378, 388 (2012); DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 15, (2017), <https://files.epi.org/pdf/125116.pdf> [<https://perma.cc/WCX8-KUXS>]; ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON & MICHAEL SPILLER, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATION OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 5 (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/XSL5-Y2FL>]; Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1098–99 (2014); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005); Mindy E. Bergman, Regina Day Langhout, Patrick A. Palmieri, Lilia M. Cortina & Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230 (2002); Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983); Michael T. Rehg, Marcia P. Miceli, Janet P. Near & James R. Van Scotter, *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 224 (2008); CHAI R. FELDBLUM & VICTORIA A. LIPNIC, REPORT OF CO-CHAIRS OF SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [<https://perma.cc/CLL2-XADH>].

substantiated cases is higher for retaliation charges than for many other charges.⁸ Making it more difficult for employee-plaintiffs to establish retaliation is counterproductive to the purpose of retaliation provisions in workplace law statutes.

Moreover, research shows that employer retaliation can be disparate, with employers being more likely to retaliate against employees of color and female employees.⁹ This disparity disrupts the conversation about traditional rationales for employer retaliation—i.e., to punish and/or discredit the complainant and deter others from attempting to exercise workplace rights or report misconduct.¹⁰ Instead, it suggests employer bias about who is and is not deserving of statutorily granted workplace rights.¹¹

Congress adopted retaliation prohibitions as a primary mechanism for enforcing statutory protections in all employment statutes. Though the text of these provisions varies from one statute to another, the purpose is the same—to fortify the other protections and entitlements created by the statute. The U.S. Supreme Court has recognized the important role retaliation provisions serve in enforcing the underlying statutes, and the Court’s retaliation jurisprudence has reflected the import of this function for over half a century.¹² However, the courts have started narrowly interpreting anti-retaliation provisions in employment discrimination statutes, invoking a “floodgates argument”¹³ in support of these narrow interpretations to suggest that the constricted interpretation is necessary to avoid opening the floodgates of litigation.

The private enforcement scheme Congress has created is in jeopardy due to the Court’s abrupt pivot from a broad interpretation of anti-retaliation laws to a narrower one due to increased claims. One of the major changes in retaliation jurisprudence came in 2013 when the U.S. Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*¹⁴ established but-for causation as the standard in retaliation claims under Title VII.¹⁵ This is a landmark case in the Court’s retaliation jurisprudence, signaling a sharp and abrupt departure from the Court’s

8. See *infra* Part III.

9. NAT’L EMP. L. PROJECT, SILENCED ABOUT COVID-19 IN THE WORKPLACE (June 2020) [hereinafter NELP STUDY], <https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf> [https://perma.cc/Q2HY-2RSV].

10. Daiquiri J. Steele, *Enduring Exclusion*, 120 MICH. L. REV. 1667 (2022).

11. *Id.*

12. Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RESV. L. REV. 375, 445–46 (2010).

13. A floodgates argument is an assertion that deciding a case in a particular manner will lead to a large number of new case filings. See Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1009 (2013) (“In its most distilled form, a floodgates argument is an argument against a particular decision on the ground that it will lead to a large number of new claims.”); Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 73 (2001) (defining a “floodgates of litigation” argument as one that “asserts that a proposed rule, if adopted, will inundate the court with lawsuits”).

14. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

15. 42 U.S.C. §§ 2000(e)-2 to 2000(e)-17 (2018).

previous practice of broadly construing anti-retaliation provisions in workplace statutes.¹⁶ In the five–four decision, the Court interpreted the term “because” in the retaliation provision of Title VII to require a showing of but-for causation by employee-plaintiffs.¹⁷

Justice Anthony Kennedy, writing for the majority, provided three reasons for the issuance of the heightened causation standard. The first reason is grounded in the plain meaning canon of statutory construction.¹⁸ While this reason has been met with consternation, bewilderment, and concern by many scholars,¹⁹ it is not the focus of this Article.²⁰ Rather, this Article critically assesses the remaining two reasons—that ruling in a manner that does not narrow the interpretation of the anti-retaliation law will cause a flood of retaliation claims generally and that a restrictive interpretation is necessary to avoid a flood of frivolous retaliation claims.²¹

These related, but nevertheless distinct floodgates arguments can be viewed as part of the Court’s reasoning or simply seen as dicta.²² Whether dicta or not, the Court’s statements about restrictive interpretations being necessary to avoid opening the floodgates of retaliation claims have been cited by numerous lower courts to issue restricted interpretations of substantive anti-retaliation provisions under Title VII and have even been cited when issuing restrictive interpretations of anti-retaliation provisions of other workplace statutes.²³

Restrictive interpretations of anti-retaliation laws based on floodgates concerns are detrimental to the workplace law regulatory scheme. The Court’s use of a floodgates argument to justify a change to substantive anti-retaliation law is the focus of this Article. To be clear, there is a difference between keeping the floodgates from opening and closing them. The *Nassar* Court seemed to suggest

16. See *infra* Section V.A.

17. *Nassar*, 570 U.S. at 352.

18. *Id.* at 350.

19. Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 42 (2019) (noting that the *Nassar* decision “sets retaliation law on a collision course with the real-world experience of discrimination and retaliation that has been revealed in the #MeToo movement”); Matthew A. Krimski, University of Texas Southwestern Medical Center v. *Nassar: Undermining the National Policy Against Discrimination*, 73 MD. L. REV. ENDNOTES 132, 132 (2014) (asserting that *Nassar* creates an inflexible causation standard that inhibits the ability of employees to prove retaliation claims); Catherine Donnelly, *The Power to Retaliate: How Nassar Strips Away the Protections of Title VII*, 22 WASH. & LEE J. C.R. & SOC. JUST. 411, 419 (2016) (arguing that *Nassar* was decided contrary to the congressional intent behind the Civil Rights Act of 1964); Amber L. Kipfmiller, *Examining Retaliation as a Use of Force: Why State Courts Should Return to the Pre-Nassar, Pro-Plaintiff Framework*, 87 MISS. L.J. SUPRA 1, 2 (2018); see also Moberly, *supra* note 12, at 445 (warning two years before the *Nassar* decision that a but-for causation standard would be “devastating to employees who blow the whistle on illegal conduct”).

20. I have addressed this argument in previous scholarship. See Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891 (2020).

21. See *Nassar*, 570 U.S. at 358.

22. See Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J.C.R. & C.L. 223, 228–29 (2014) (“It could be argued that the Court’s discussion of fakers and floodgates is simply dicta. Support for this argument is found in the Court’s summary, which does not include a reference to fakers and floodgates but rather a discussion of only statutory construction.”).

23. See *infra* Part III.

that a change in the Title VII retaliation causation standard would do both. However, data shows that it has done neither.²⁴ EEOC statistics on retaliation-based charges show that although the number of retaliation charges received by the EEOC decreased from 38,530 in fiscal year (FY) 2013 to 37,955 in FY 2014, coinciding with the timeframe in which *Nassar* was decided, they increased in subsequent years and have not been below the FY 2014 number since.²⁵ The failure of the heightened causation standard to curb the number of retaliation claims per the *Nassar* Court's prediction not only shows the faulty reasoning behind the substantive change in law, but also stokes fears that future substantive anti-retaliation law changes may be enacted to attempt to do what the causation standard change did not.

Floodgates arguments are grounded in notions of judicial economy. The overarching premise of the argument is that an interpretation of the law in a certain manner would cause a wave of litigation, thereby drastically increasing the judiciary's workload, or the workload of the relevant administrative enforcement agency, and rendering it incapable of functioning. However, changing substantive law to decrease workload is itself dysfunctional. There are some cases the courts should take, and to deny justice on the basis that numerous citizens need justice is antithetical to the function of the courts. This Article explores the origins of the floodgates argument and its modern uses. It also critically examines the *Nassar* Court's use of the floodgates argument.

The floodgates argument dates back to the early nineteenth century,²⁶ but the frequency of its use by the Court has increased recently.²⁷ In her seminal piece *Judging the Flood of Litigation*,²⁸ Professor Marin K. Levy divided floodgates arguments generally made by the U.S. Supreme Court into three categories—those dealing with intersystemic concerns pertaining to the balance between federal and state courts, those dealing with inter-governmental branch concerns, and those dealing with the volume of cases for the federal judiciary.²⁹

Intersystemic concerns are grounded in the relationship between the federal judiciary and state courts,³⁰ and they can be divided into two sub-categories—those that would burden the federal judiciary with cases that belong in state courts and

24. See *infra* Section II.B.

25. *Retaliation-Based Charges (Charges filed with EEOC) FY1997–FY2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> [<https://perma.cc/C6ZN-75ZT>] (last visited Mar. 7, 2023).

26. See *Delabigarre v. Bush*, 2 Johns. 490, 502 (N.Y. 1807) (noting that the respondent argued that allowing an entire parcel of property to be sold to pay off a debt that amounted to a lower value than the entire property would “only serve to open wider the floodgates of litigation”).

27. Levy, *supra* note 13, at 1008 (“Of the sixty or so cases in which the justices explicitly raised or addressed a so-called floodgates argument, fourteen came between 2010 and 2013 alone.”).

28. *Id.* at 1009.

29. *Id.* at 1012.

30. *Id.* at 1028.

those that would inundate state courts with claims.³¹ Interbranch concerns pertain to how the court's decision will affect another branch of government.³²

The final and most-frequent category involves cases in which a floodgates argument is used due to volume-related concerns for the federal judiciary's docket.³³ The *Nassar* Court's model of using a floodgates argument to alter substantive anti-retaliation law is an instance of the judiciary going against the will of an administrative enforcement agency to protect itself from a higher workload. Floodgates arguments have been previously used by the Court to protect the executive branch, namely, to ensure that executive branch agencies are able to function.³⁴ Floodgates concerns have also been invoked to protect the judiciary from an increased workload. U.S. Supreme Court precedent illustrates the use of the floodgates argument to protect these two branches of government. However, *Nassar* is unique in that it protects the judiciary to the detriment of the administrative agency.³⁵ This is a new floodgates situation, one that protects judges at the expense of the executive branch.

Floodgates arguments are incongruent with anti-retaliation laws. Floodgates arguments are used to avoid creating new causes of action or providing standing to sue to new categories of people or entities.³⁶ Here, the argument does neither. Rather, the floodgates argument as applied to anti-retaliation laws is being used to make it more difficult for existing parties who already have standing to recover under existing causes of action in an attempt to deter them from filing claims. Rather than invoking issues of judicial economy when deciding not to confer new rights, judicial workload is being used here to attempt to thwart the ability of employees to recover for retaliatory actions of their employer. In turn, this decreases the employers' costs of retaliating against employees. This decreased cost coupled with the extant benefits of retaliation to employers—punishing and discrediting the employee complainant while simultaneously deterring other employees from asserting rights or reporting non-compliance—incumbentizes retaliatory behavior to the detriment of the workforce regulatory scheme.

This Article critically examines the Court's concerns that broad interpretations of anti-retaliation laws may open the floodgates for retaliation claims. The Article argues that the courts should not issue restrictive interpretations of substantive anti-retaliation law based on actual or predicted caseload. The Article contends that application of a floodgates argument is incongruent with anti-retaliation law and illustrates how the Court deviated from previous patterns with respect to the application of the floodgates argument.³⁷ Drawing on theories of diversity in social

31. *Id.*

32. *Id.* at 1012.

33. *Id.*

34. *See infra* Part III.

35. *See infra* Section V.D.

36. *See infra* Section II.A.

37. *See infra* Part II.

science literature, this Article contends that workplace laws play a pivotal role in mitigating the negative effects of workplace diversity and that this mitigation will be undermined if employees are not able to enforce these laws due to actual or threatened retaliation.³⁸

This Article critically considers the Court's use of a floodgates argument in deciding substantive anti-retaliation law. It proceeds in five parts. Part I explains the salience of the *Nassar* opinion, detailing why the opinion is a landmark case in anti-retaliation jurisprudence and worthy of scholarly attention. Part II evaluates the evidence that the Court supplies for its contention that restrictive interpretations are needed to control the floodgates and argues that such concerns exaggerate the effects of expanding retaliation. It asserts that floodgates arguments are incongruent with, and should not be applied to, anti-retaliation law and illustrates the mismatch between previous applications of the floodgates argument by the Court and its application to interpretations of anti-retaliation law.

Part III explores the effects of using floodgates concerns to narrowly interpret anti-retaliation laws on different stakeholders, including compliant and non-compliant employers, aggrieved and unaggrieved employees, and administrative agencies. This Part also explores how interpretations of substantive anti-retaliation law can affect agencies that function as gatekeepers, agencies with quasi-gatekeeping responsibilities, and those who function as sole adjudicators of claims with no private right of action.

Part IV examines the ways in which using floodgates concerns to restrict interpretations of anti-retaliation laws undermines the regulatory scheme for workplace law. This Part explains the detrimental effect on workplace law and statutory rights generally after the adoption of a system in which claims are rejected on the fear of a proliferation of suits rather than on the conduct of the parties and the consequences of such conduct. Additionally, this Part explores the relationship between workforce diversity, discrimination, and retaliation. It examines the changes in the American workforce and the social science literature that warns of increasing discrimination and workplace conduct as a result. It illustrates how an increase in the diversity of the American workforce would lead to an increase in discrimination and attempts to thwart minimum labor standards established by Congress. It also explains the crucial role retaliation provisions play in frustrating these attempts.

Finally, Part V calls for legislative intervention through the creation by statute of a rule of construction calling for broad interpretations of anti-retaliation protections. This would effectively amount to an override of *Nassar*. However, this particular legislative intervention would not necessarily override the Court's decision regarding the causation standard. Rather, it would override the principle that anti-retaliation provisions in workplace statutes should be narrowly interpreted due to floodgates concerns. Part V analogizes such a rule of construction to the

38. See *infra* Part IV.

Americans with Disabilities Act Amendments Act of 2008, explores the benefits and limitations of such an intervention, and discusses the plausibility and political viability of the proposed intervention.

I. THE SALIENCE OF *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

Plainly, *Nassar* is a landmark case in anti-retaliation law jurisprudence. With every year that passes, its salience increases as its effects become more pronounced and transparent. Three characteristics of the case make it a landmark decision. First, it signaled an abrupt departure from the previous jurisprudence at a macro and a micro level. Next, the case's reach is pervasive both with regard to Title VII, the statute under which the case was brought, and other labor and employment law statutes. Finally, the floodgates argument espoused by the *Nassar* Court, i.e., that a change in the substantive law is required to deter alleged victims from filing claims, has the ability to transcend workplace law completely and permeate other areas of law.

In *Nassar*, Dr. Naïel Nassar, a physician of Middle Eastern descent, filed a Title VII lawsuit against his former employer, the University of Texas Southwestern Medical Center.³⁹ The University had an affiliation agreement with a local hospital whereby the University's medical students were able to train at the hospital, and the hospital was to offer vacant physician positions to the University faculty.⁴⁰ Nassar was employed as a faculty member at the University and a physician at the hospital.⁴¹ After experiencing harassment based on race and religion, Nassar resigned his position at the University, but sought to retain his employment with the hospital.⁴² The hospital originally told him he would be able to continue working there after he separated from the University.⁴³ However, upon learning of this, an official at the University contacted the hospital administration to protest that Nassar's employment offer from the hospital was a violation of the affiliate agreement since he was no longer a faculty member at the University.⁴⁴ Afterwards, the hospital withdrew its employment offer to Nassar.⁴⁵

Nassar filed a discrimination claim asserting that racial and religious harassment in his workplace led to his constructive discharge and a retaliation claim alleging that the University retaliated against him for complaining about the harassment by preventing the hospital from hiring him. The U.S. Supreme Court granted certiorari to determine the appropriate causation standard in Title VII retaliation cases. Pursuant to the Civil Rights Act of 1991 (1991 CRA), Title VII

39. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343–45 (2013).

40. *Id.* at 344.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 345.

45. *Id.*

plaintiffs who bring status-based discrimination claims need only prove that the unlawful discriminatory motive was a motivating factor in the adverse employment action. Nassar argued that the same motivating factor causation standard used in employment discrimination cases should be used in the analytical framework of employment retaliation cases as well. Notably, the EEOC joined the U.S. Department of Justice in arguing for a mixed motive standard in its amicus curiae brief.⁴⁶ Nevertheless, the Court held that but-for causation is the standard that should be applied to Title VII retaliation claims.⁴⁷

The Court's imposition of a but-for causation standard in Title VII retaliation claims creates a dichotomy between discrimination claims and retaliation claims under the same statute. It also creates a higher causation standard for employees to meet in proving a prima facie case of Title VII retaliation. The Court cites three primary reasons for the change. The first is a textualist argument in which the majority opinion asserts that the words "because" or "because of" in the text of Title VII suggest that but-for causation should be the standard.

This Article will focus on the remaining two rationales the Court gives, which are oriented around avoidance of a flood of litigation. Justice Kennedy, writing for the majority, notes, "[t]he proper interpretation and implementation of [the Title VII retaliation provision] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency."⁴⁸

This dicta suggests that a heightened standard in retaliation cases is necessary to prevent a flood of retaliation claims. Justice Kennedy also asserts, "[i]n addition, lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment."⁴⁹ This second argument asserts that raising the causation standard is necessary to deter a flood of *frivolous* retaliation claims. Hence, the Court purports to limit both meritorious claims and claims it deems as frivolous in the name of judicial efficiency.

A. The Court's (Flawed) Premise that Floodgates Arguments Are Relevant to Retaliation Claims

Rather than viewing the increasing number of retaliation claims as evidence that retaliation is occurring and affected employees are utilizing proper legal channels to seek redress, the Court views the rising number of claims as more of a judicial nuisance. While courts should be good stewards of judicial resources, docket reduction should not take precedence over ensuring equal justice under the law. The

46. Brief for the United States as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (No. 12-484), 2013 WL 1462056.

47. *Nassar*, 570 U.S. at 360.

48. *Id.* at 358.

49. *Id.*

Court has instituted many procedural mechanisms aimed at controlling the volume of litigation generally.⁵⁰ While some scholars criticize these procedural controls generally, other scholars note the hurdles these procedural rules impose on plaintiffs in employment discrimination cases.⁵¹ Despite the problems created by procedural backstops in anti-discrimination cases, changes to procedure in the interest of docket control are more palatable than changes to substantive law. As the Court explains in *Nassar*, this resort to changing substantive anti-retaliation law is grounded in the belief that too many cases are being filed and that these filings are frivolous. Procedural changes can work two-fold to ensure judicial efficiency in employment retaliation without encroaching on an individual's ability to rely on the legal system as a means to assert and enforce individual civil rights.

B. The Dicta Debate

Some may argue that the Court's floodgates arguments are dicta.⁵² The absence of the arguments about floodgates generally or the flood of frivolous claims from the Court's summary supports this argument.⁵³ However, the Court went to great lengths in the *Nassar* decision to espouse the floodgates and frivolous floodgates arguments, even citing EEOC data in support. Additionally, the dissenting opinion by Justice Ruth Bader Ginsburg specifically stated that the Court's eagerness to reduce the number of retaliation claims drove the decision.⁵⁴ Moreover, the Court's reasoning from *Nassar* about a flood of retaliation claims generally, and more specifically a flood of frivolous claims, has been cited in numerous opinions by lower courts.⁵⁵

50. Sperino & Thomas, *supra* note 22, at 229–31.

51. See, e.g., Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment violates the Seventh Amendment); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (criticizing the Court's abrupt shift from minimal notice pleading to more stringent pleading standards); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (examining the pitfalls of using summary judgment in hostile environment cases); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (asserting that courts are abusing summary judgment in a manner that benefits defendants in disability discrimination cases); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–07 (1993) (arguing that the use of summary judgment is denying plaintiffs impartial justice in cases brought under Title VII and the Age Discrimination in Employment Act).

52. See Sperino & Thomas, *supra* note 22, at 244 (“[T]he fakers/floodgates argument itself is now an official pronouncement of legal doctrine or even dicta.”).

53. *Id.* at 228–29 (citing *Nassar*, 570 U.S. at 359–360).

54. See *id.* at 229 (citing *Nassar*, 570 U.S. at 386 (Ginsburg, J., dissenting) (“Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers.”)).

55. See, e.g., *Salak v. Pruitt*, 277 F. Supp. 3d 11, 24 (D.D.C. 2017); *Medero v. NBC Merchs, Inc.*, No. 16-6583, 2017 WL 3328361, at *7 (E.D. Pa. Aug. 3, 2017); *Shaniga v. St. Luke's Med. Ctr. LP*, No. CV-14-02475-PHX-GMS, 2016 WL 1408289, at *11 (D. Ariz. Apr. 11, 2016); *Donald v. UAB Hosp. Mgmt., LLC*, No. 2:14-cv-727-WMA, 2015 WL 3952307, at *4 (N.D. Ala. June 29, 2015); *Childs-Bey v. Mayor & City Council of Bait*, No. TJS-10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013); *Foster v. Univ. of Md. E. Shore*, No. TJS-10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013).

Moreover, at times, arguments surrounding judicial economy may not be the primary rationale for ruling in a certain manner but may tip the scale or serve as an add-on to bolster the true rationale.⁵⁶ The Court could have come to the same conclusion about the causation standard for Title VII claims without invoking floodgates arguments at all. Indeed, this is what Justice Kennedy did in a dissenting opinion almost twenty-five years earlier. In *Price Waterhouse v. Hopkins*,⁵⁷ the Court considered the causation standard that should be applied in Title VII status-based discrimination claims.⁵⁸ *Price Waterhouse* was decided before the 1991 CRA was passed, which allowed motivating factor to be used as the causation standard in Title VII claims. The plurality opinion in *Price Waterhouse* used a motivating factor causation standard,⁵⁹ while a concurring opinion authored by Justice Sandra Day O'Connor suggested a substantial factor standard was warranted.⁶⁰ Justice Kennedy, writing for the three dissenting justices, espoused the same argument in the *Price Waterhouse* dissent when considering Title VII discrimination claims that he asserted in the *Nassar* majority opinion considering Title VII retaliation claims—that the term “because of” in the statute should be interpreted as requiring a showing of but-for causation.⁶¹

Interestingly, there was no mention of the volume of retaliation claims in the *Price Waterhouse* dissent. While publicly available data for EEOC retaliation charges date back to 1997, in that year only 22.6% of all charges filed were retaliation charges. It may well be the case that the *Price Waterhouse* dissent did not mention the high number of retaliation claims because the numbers were not high at that time. This supports the notion that the arguments concerning floods of claims generally and floods of frivolous claims in particular were ancillary to the argument about the meaning of “because of.”

This begs the question why the floodgates argument was ever included. The answer may lie in what some scholars refer to as “judicial dicta planting.”⁶² This occurs when a court opinion includes dicta for the purpose of influencing how the law develops.⁶³ Because the floodgates arguments in *Nassar* stand for the proposition that the number of retaliation cases should inform interpretive decisions, this premise may inform the development of future anti-retaliation law.

56. Bruce Green, *The Price of Judicial Economy in the U.S.*, 7 OÑATI SOCIO-LEGAL SERIES 790, 802 (2017).

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

58. *Id.* at 232.

59. *Id.* at 258.

60. *Id.* at 265 (O'Connor, J., concurring).

61. *See id.* at 285 (Kennedy, J., dissenting) (“[I]t must be that a decision that would have been the same absent consideration of sex was not made ‘because of’ sex. In other words, there is no violation of the statute absent but-for causation.”).

62. *See* Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 597 (2021); Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 176–77 (2011); *see also* ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 30–31 (1969).

63. Stinson, *supra* note 62, at 597; McAllister, *supra* note 62, at 177.

II. CLOSING THE FLOODGATES ON THE FLOODGATES ARGUMENT

Floodgates arguments are typically used to avoid creating new causes of action or to avoid providing standing to sue new categories of people/entities. However, application of floodgates arguments to substantive anti-retaliation law does neither. When a court uses a floodgates argument to justify a restrictive interpretation of an anti-retaliation provision in a workplace statute, it becomes more difficult for persons who already have standing under an existing cause of action to bring a viable claim. Anti-retaliation provisions are enforcement tools, and judicial application of a floodgates argument in these instances dilutes enforcement. This Part examines the misalliance of floodgates arguments to anti-retaliation laws. It first addresses the traditional use of floodgates arguments to justify not creating new causes of action and not granting standing to sue new parties.

A. Deviation from Past Pattern and Practice

Floodgates arguments are typically invoked to keep from creating new causes of action. However, when invoked regarding anti-retaliation laws, floodgates arguments are being used to prevent individuals from bringing claims, thereby diminishing their ability to recover under existing causes of action. The overarching premise of a floodgates argument is that the rights of some are predicated on how many others will pursue that right. In an employment retaliation context, this means that if enough employers retaliate, courts will decrease workers' ability to recover from retaliation, thereby diluting, if not destroying, the mechanism underlying workplace rights. Anti-retaliation provisions are tools of regulatory enforcement. Weakening these provisions based on the number of individuals who are being punished for or deterred from claiming workplace rights is antithetical to their purpose.

Additionally, the floodgates rationale has frequently been invoked in the context of dealing with claims that have traditionally been unmeritorious, such as habeas, *Bivens*, and prisoner claims.⁶⁴ However, there is no evidence that retaliation claims are traditionally unmeritorious. Indeed, as discussed above, there is evidence that claims of employer retaliation have merit.⁶⁵

Rather than seeking to protect the legislative and executive branches, the Court is actually undermining them. With respect to the legislative branch, the Court is weakening the private enforcement regulatory scheme that Congress has created to enforce workplace laws. Private enforcement is institutionalized in American public law.⁶⁶

64. For a detailed discussion of the U.S. Supreme Court's use of a floodgates argument in these types of claims, see Levy, *supra* note 13, at 1037–53.

65. See *infra* Section II.B.

66. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141 (2012); see also David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1242 (2018) (highlighting the problems with treating whistleblower retaliation claims as private disputes); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural*

While the floodgates argument can be made in a myriad of types of cases, it frequently appears in cases advocating for new causes of action, cases involving an implied private right of action, claims involving treble damages, and next of friend suits.⁶⁷ These types of suits involve either creating a new cause of action under which to sue, broadening the category of individuals that have the capacity to sue, or incentivizing plaintiffs to sue. However, the Court's invocation of a floodgates argument in *Nassar* is different because workplace retaliation claims are not new and employees have always had standing to sue for retaliation. Moreover, the *Nassar* Court's use of the floodgates argument is not grounded in an unwillingness to incentivize claims; rather, it is an attempt to disincentivize claims. The *Nassar* Court referenced concerns about both the number of retaliation charges filed with the EEOC⁶⁸ and the possibility of frivolous retaliation claims being filed.⁶⁹ However, the majority opinion does not provide evidence to support either contention.

The *Nassar* Court's floodgates argument was also paternalistic. The EEOC itself took the position that a mixed motive standard should be applied. This position was given no deference. An underlying premise of a floodgates argument

Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, 54 UCLA L. REV. 1087, 1088 (2007) (explaining Congress's recognition of the importance of private enforcement of civil rights when creating fee-shifting statutes); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 409 (2008) (arguing that private enforcement is necessary for some statutes "because the threat that federal funds will be withheld is remote at best"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1213–16 (1982); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860–62 (2003) (highlighting public and private enforcement mechanisms in securities law).

67. See Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 383–85 (2003).

68. Justice Kennedy, writing for the majority, cited the rising number of retaliation charges filed with the EEOC, stating,

The proper interpretation and implementation of [Title VII's anti-retaliation provision] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013).

69. Justice Kennedy also asserted that the "lessening" of the causation standard in Title VII retaliation cases would result in the filing of frivolous retaliation lawsuits. He provided the following hypothetical in support of his claim:

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances.

Id.

is that the predicted increase in cases would be a burden. According to the EEOC's 2020 Annual Performance Report, of the twelve established performance goals, the agency met or exceeded ten of them, partially met two of them, and zero were in the failed-to-meet category.⁷⁰

The opinion in *Nassar* seems to focus on the category dealing with the volume of cases that the federal judiciary will receive.⁷¹ Congress has directed the courts to hear these matters, and federal courts have no authority to make changes in substantive law to decrease the number of cases on their dockets.⁷² The rationale for the change in Title VII causation is striking. To have substantive federal civil rights law changed after the statute's half a century of existence and over twenty years of mixed-motive jurisprudence in an effort to control the federal judiciary's workload is absurd. It is also a rationale that fails on several fronts.

It is of the utmost importance to note that an increase in EEOC retaliation charges is not a bad thing, as the EEOC is the agency that Congress has charged with enforcing Title VII, and employees who feel they have been retaliated against for exercising Title VII rights are encouraged to file with the EEOC. The *Nassar* decision has not led to a decrease in Title VII retaliation charges. If the Court is legitimately concerned about the increasing number of employment discrimination suits, the court can implement other measures to address the problem. The federal judiciary has numerous mechanisms at its disposal. Regardless of the option chosen, the judiciary should ensure that the answer is procedural and leave the integrity of substantive workplace law intact.

Professors Sandra F. Sperino and Suja A. Thomas have addressed the *Nassar* Court's floodgates arguments.⁷³ They assert that there are already several mechanisms in place to curb any potential of frivolous Title VII claims, including a requirement to exhaust administrative remedies, a statute of limitations, motions to dismiss, affirmative defenses, and many others.⁷⁴ They also note that the lower courts were already applying a mixed motive standard to Title VII cases, and it is difficult to *start* a flood of litigation by continuing to do something that you have already been doing for over two decades.⁷⁵ Professors Sperino and Thomas aptly illustrate the mechanisms already in place to reduce frivolous litigation, and assert that *Nassar* is part of an overarching problem of having the courts infuse their own views on evidence of discrimination into workplace law.⁷⁶

70. U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2020 ANNUAL PERFORMANCE REPORT (2021), <https://www.eeoc.gov/fiscal-year-2020-annual-performance-report> [<https://perma.cc/4979-ZQHW>].

71. Sperino & Thomas, *supra* note 22, at 229–31.

72. *Id.* at 229.

73. *See id.* at 229–31.

74. *Id.*

75. *Id.* at 238.

76. *Id.* at 225.

B. Flaws in the Court's Argument and Supporting Data

There are multiple flaws in the Court's floodgates arguments. A review of the EEOC charge filings pre-*Nassar* shows that the Court's concerns were unfounded.⁷⁷ Further, an examination of post-*Nassar* EEOC charge data shows retaliation charges are still the most filed charges with the EEOC, and there is no indication that merit has been affected. Beyond the negligible reduction in retaliation charges indicated by EEOC data, the Court asserted that a flood of litigation was imminent absent any explanation of what constitutes a flood.

Any assertion that we are engaged in too much litigation requires an assessment of 1) how much we have and 2) how much is too much.⁷⁸ Determining how much we have is the easier of the two calculations. We have statistics on retaliation claims filed with administrative agencies and with the courts. However, assessing how much is too much proves exceedingly difficult with respect to retaliation. One primary cause of this difficulty is an inability to discern whether actual or threatened retaliation is deterring employees from filing charges. In other words, the volume of retaliation claims, though high, may be accounting for a mere fraction of the incidences of retaliation actually occurring in the workplace. Additionally, the fact that, on average, retaliation charges are more meritorious than other charges suggests that people are filing more retaliation claims because employers are engaging in more retaliatory behavior.

There is a difference between keeping the floodgates from opening and closing them. The *Nassar* Court seemed to suggest that a change in the Title VII retaliation causation standard would do both. However, data shows that it has done neither. EEOC statistics on retaliation-based charges reveal that although the number of retaliation charges received by the EEOC decreased from 38,530 in FY 2013 to 37,955 in FY 2014 (corresponding with the issuance of the *Nassar* opinion in June 2013), they increased in subsequent years and have not been below the FY 2014 number in the half-decade since.⁷⁹ In fiscal year 2020, 55.8% of all charges filed with the EEOC were retaliation claims,⁸⁰ signaling that retaliation charges continue to outpace charges of discrimination based on any protected class.

Additionally, the Court expressed concern about frivolous cases being filed if the causation standard for retaliation was not heightened. However, the *Nassar* Court provided no support for this contention. EEOC data pre-*Nassar* provides no indication that the retaliation charges being filed were frivolous. In the decade prior to the *Nassar* decision, the percentage of merit resolutions⁸¹ to EEOC retaliation

77. See EEOC Charge Statistics, *supra* note 1.

78. See generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5, 11 (1983).

79. EEOC Charge Statistics, *supra* note 1.

80. *Id.*

81. The EEOC defines "merit resolution" as a "[c]harge resolved with an outcome favorable to charging party or charge with meritorious allegations. These are comprised of negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations." *Definition of Terms*,

charges was slightly higher than the percentage of meritorious resolutions of all EEOC filings.⁸² This close range may be affected by the high percentage of overall EEOC retaliation charges that are retaliation claims. However, on average from FY 2003 through FY 2013, retaliation charges were more meritorious than all EEOC charge types except disability, sex, and pregnancy.⁸³ Chart 1 below shows the average percentage of merit resolutions prior to *Nassar* by charge type.

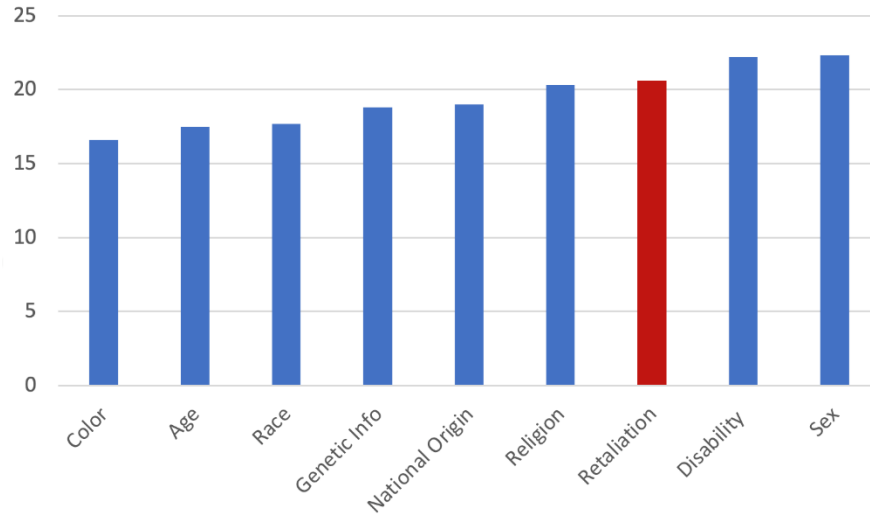


Chart 1: Merit Resolutions by Charge Type Pre-Nassar⁸⁴

U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/definitions-terms> [<https://perma.cc/U8LS-CUNA>] (last visited Mar. 7, 2023).

82. *Retaliation-Based Charges (Charges filed with EEOC) FY 1997–FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Meritorious Retaliation Charges*], <https://www.eeoc.gov/statistics/retaliation-based-charges-charges-filed-eeoc-fy-1997-fy-2020> [<https://perma.cc/C2RS-WDXK>] (last visited Mar. 7, 2023).

83. *Id.*

84. This chart shows the average percentage of merit resolutions from FY 2003 through FY 2013. However, data for charges filed under the Genetic Information Non-Discrimination Act (GINA) is from FY 2010 to FY 2013. GINA was passed in 2008. See *Pregnancy Discrimination Charges FY 2010–FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/pregnancy-discrimination-charges-fy-2010-fy-2020> [<https://perma.cc/9SHP-JLM9>] (last visited Mar. 7, 2023).

The EEOC data shows there was not an influx of meritless retaliation cases.⁸⁵ Nevertheless, the Court still cited a need to avoid frivolous retaliation claims as one of two reasons necessitating a restrictive interpretation of anti-retaliation law. The Court's decision to alter substantive anti-retaliation law has not affected the merit of the cases. The percentage of meritorious resolutions of EEOC retaliation charges is on par with the percentage of meritorious resolutions of all EEOC filings, with less than one percentage point separating the two for all fiscal years post-*Nassar*.⁸⁶ However, disaggregation of the data by claim reveals that retaliation charges post-*Nassar* have been more meritorious than discrimination cases based on race, color, national origin, religion, and age.⁸⁷ Only charges related to some type of disability, genetic discrimination,⁸⁸ and sex-based discrimination inclusive of pregnancy discrimination and sexual harassment had higher percentages of meritorious resolutions.⁸⁹ Chart 2 shows the percentage of merit resolutions by charge type post-*Nassar*.

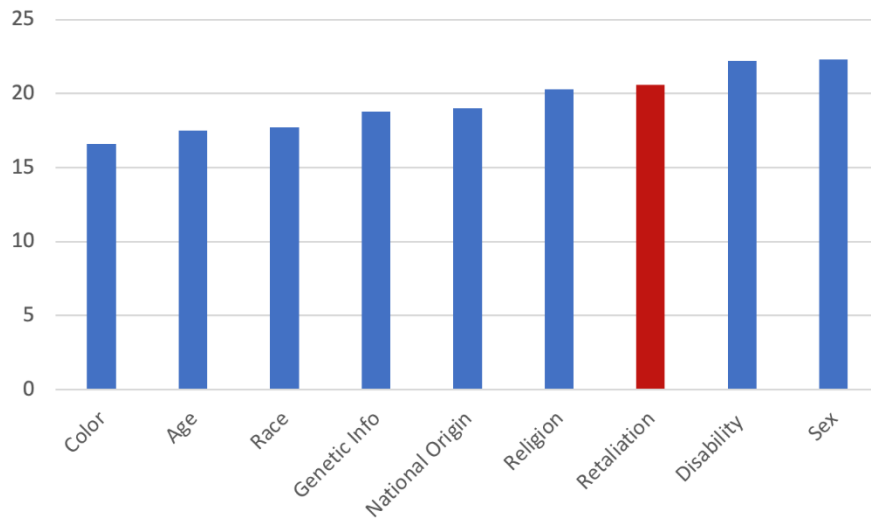


Chart 2: Merit Resolutions by Charge Type Post-Nassar

While analysis of claims filed provides insight, there are numerous workplace claims involving discrimination as well as a violation of labor standards that never

85. See *Meritorious Retaliation Charges*, *supra* note 82.

86. *Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/enforcement-and-litigation-statistics> [<https://perma.cc/VN7X-4RM5>] (last visited Mar. 7, 2023).

87. See *id.*

88. The percentage of merit-based resolutions increased from 12.7 in FY 2019 to 30.8 in FY 2020. See *id.*

89. See *id.*

get filed because employees fear employer retaliation.⁹⁰ Hence, it is vital that anti-retaliation provisions in statutes be allowed to perform the work they were designed to perform, including deterring employers from retaliating against employees. Issuing restrictive interpretations of substantive anti-retaliation law is antithetical to this purpose. As Professor Marin K. Levy stated, “[i]nviting a flood of new claims into federal court may well be dangerous. But without sound legal footing, it is more dangerous still to divert a line of cases where it would not otherwise flow.”⁹¹ Courts already have tools to prevent frivolous litigation, and this tool chest appears to be growing. Examples of these include greater judicial influence in pre-trial adjudication at the trial court level, as evidenced by the heightened pleading standards of *Iqbal*⁹² and *Twombly*.⁹³

The failure of the heightened causation standard to deter the filing of retaliation claims is encouraging. Indeed, filing claims to seek government investigation of potential illegal conduct by employers is socially beneficial behavior. The failure of the restrictive interpretation to deter would-be complainants from filing EEOC charges is encouraging. However, the failure of *Nassar*'s change in substantive anti-retaliation law to curb retaliation charges may prompt the Court to make even more substantive changes to anti-retaliation law in an attempt to decrease filings. The high number of retaliation charges have led courts to invoke floodgates arguments in other cases in which anti-retaliation law is being interpreted, including cases brought under labor and employment statutes other than Title VII.⁹⁴

III. UNCONSIDERED STAKEHOLDERS

A floodgates argument is a policy argument, and a good policy argument takes all stakeholders into account. Not only was the *Nassar* opinion flawed with respect to the floodgates concerns espoused, but it was deficient in its discussion of the stakeholders involved. The majority opinion only addressed the effect on employers, not employees or the general public. Moreover, even when addressing employers, it only evaluated the effect of such a decision on employers who are compliant with anti-retaliation laws. The opinion used the hypothetical of an employee who files a retaliation claim in an effort to forestall lawful employee discipline. The opinion noted the “financial and reputational” costs to the employer

90. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-12, WORKPLACE SAFETY AND HEALTH: BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT WORKERS AT MEAT AND POULTRY PLANTS 51 (2017) (noting that fear of retaliation makes employees reluctant to report workplace hazards, illnesses, or injuries to the Occupational Safety and Health Administration).

91. Levy, *supra* note 13, at 1015.

92. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

93. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

94. See, e.g., *Williams v. Serra Chevrolet Auto., LLC*, 4 F. Supp. 3d 865, 878–80 (E.D. Mich. 2014) (citing the floodgates argument in *Nassar* as justification for requiring a plaintiff to prove but-for causation at the prima facie case stage rather than at the pretext stage).

in such a hypothetical.⁹⁵ However, there was no discussion of the numerous employees who are the victims of retaliation by their employers. These employees suffer financial and reputational harm when they are subject to an adverse action as a result of exercising a statutory right.

Exercising statutory rights is *protected* activity, and anti-retaliation provisions in workplace statutes is the manner by which Congress has chosen to protect it. Courts are properly charged with hearing cases about individuals being denied access to redress. For courts to alter substantive anti-retaliation law in an effort to decrease the number of retaliation claims being filed is the judiciary abdicating its duty to administer justice. Despite Justice Kennedy's language in *Nassar*, heightening standards employee-plaintiffs must prove in an effort to disincentivize them from filing their claims in the first place is neither fair nor responsible.

There were several stakeholders who were either not addressed at all or addressed by way of a cursory discussion. This Part explores those stakeholders who were not discussed in the Court's opinion and how the advancement of the floodgates arguments to narrow anti-retaliation protections may affect them.

A. Employers

A comprehensive examination of the impact of allowing considerations of judicial economy to dictate substantive anti-retaliation law requires consideration of the effect on employers. Employers can be divided into two categories—those who are compliant and those who are not.

The majority opinion in *Nassar* briefly mentions compliant employers by way of a hypothetical. Justice Kennedy references a hypothetical in which a compliant employer who has not violated any workplace laws is preparing to discipline an employee who is legitimately deserving of such discipline.⁹⁶ In anticipation of the discipline, the employee files an employment discrimination case, so when the discipline occurs, the employee is able to file a retaliation claim. The Court inserts this hypothetical to show the type of harm that can befall compliant employers. However, that harm pales in comparison to the harm that compliant employers will face if robust anti-retaliation protections are not in place.

Because compliance can be costly, violations of workplace laws can be cost efficient. Hence, non-compliant employers have the ability to drive compliant employers out of the market. With regard to compliance with employment discrimination laws, discrimination on the basis of a protected class may be economically beneficial to the employer.⁹⁷ Imagine a law firm whose clients have a preference for male attorneys. Without employment discrimination laws, this client preference may incentivize the law firm to make hiring decisions based on an

95. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358–59 (2013).

96. *Nassar*, 570 U.S. at 358.

97. Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 323 (1987).

applicant's membership in a protected class. The cost of non-compliance is also present with other workplaces laws that are not categorized as employment discrimination laws. For instance, an employer who purchases safety equipment required by the Occupational Health and Safety (OSH) Act has expenditures that an employer who chooses to violate the OSH Act by not purchasing the equipment would not have. Likewise, an employer who pays its employees the minimum wage required under the Federal Labor Standards Act (FLSA) would have costs that an employer who was violating the law by paying below the minimum wage would not. Simply put, compliant employers will be driven from the market by non-compliant employees whose noncompliance provide them with competitive advantage.

Non-compliant employers are incentivized to maintain their competitive advantage over compliant ones. Actual or threatened retaliation is one way this happens. Dilution of retaliation protections decreases the number of individuals who seek redress for employer misconduct. Without employees reporting employer misconduct, the workplace law violations will go unaddressed. The negative effects this will have on employees is apparent. If an employee is being discriminated against or robbed of their wages, pension, or family and medical leave rights, this will negatively impact the employee. What can often be more difficult to see is the societal impact. Unaddressed workplace violations can impact more than simply individual employees. For example, it does not take much imagination to see how an employer sexually harassing one female employee without consequence can lead to the employer harassing other female employees, or how an employer who experiences no consequences for cheating employees out of overtime pay can eventually start stealing other wages from employees.

B. Employees

The ability of employees or applicants for employment to report employer non-compliance without reprisal from employers helps undergird workplaces and incentivize employees to report employer misconduct. This reporting of workplace law violations is socially desirable behavior. However, employees will be less willing to engage in this socially desirable behavior if the law fails to protect them when they do so.⁹⁸

One way for employers to lessen the probability that they will have to change any non-compliant behavior is to decrease the chance of getting caught, thereby decreasing the chance of being compelled to comply. Because the overwhelming majority of administrative agency investigations are triggered by a complaint, interfering with an employee's ability or willingness to file a complaint will weaken the agency's ability to detect and remedy workplace law violations. Compliance can be an expensive endeavor, so market forces can incentivize non-compliance. Non-

98. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“Plainly, effective enforcement [of the Fair Labor Standards Act] could thus only be expected if employees felt free to approach officials with their grievances.”).

compliance is cheaper, so while it disadvantages employees, it greatly benefits employers.

Employees can be categorized into four groups: (1) aggrieved employees who file a claim, (2) aggrieved employees who do not file a claim, (3) unaggrieved employees who file a claim, and (4) unaggrieved employees who do not file a claim. These claims can be filed with the courts, with administrative agencies, or internally with the employer. Regardless of the forum in which the claim is filed, narrowly interpreting retaliation protections based on floodgates arguments affects employees in every category.

The effects are perhaps the most obvious for aggrieved employees who file a claim of employer misconduct. Weak retaliation protections leave these employees exposed to reprisal from their employers. Employers comparing the costs associated with retaliating against employees with the benefits gained can easily see that the weaker retaliation protections are, the more beneficial the retaliatory behavior becomes to employers. This increases the likelihood that employees who file claims will experience some form of retaliation.

Aggrieved employees who choose not to file a claim, like employers, also engage in a cost-benefit analysis whereby they weigh the utility of filing the claim for redress against the likelihood and costs of possible reprisal. Anemic retaliation protections increase the likelihood that these employees will experience retributive behavior from their employer. When the costs of filing a claim outweigh the benefits, employees may opt to accept discriminatory treatment or not report employer misconduct that could affect themselves, other employees, the employer's customers/clients, shareholders, or the general public.

Judicially created doctrines that mandate that employees report employer misconduct to be able to recover also exacerbate the problem of having narrow interpretations of anti-retaliation law. The *Faragher/Ellerth* defense provides an illustration.⁹⁹ In 1998, the Supreme Court created the *Faragher/Ellerth* defense, which allows employers to escape liability in hostile environment cases under Title VII where there has been no tangible employment action against the employee if two criteria are met. First, the employer must have exercised reasonable care to prevent and remedy any sexually harassing behavior.¹⁰⁰ The second prong states that the employer can only use the defense if the employee unreasonably failed to take advantage of any corrective measures that the employer provided.¹⁰¹

Hence, the Court created a doctrine that rewards employers for creating policies and procedures with respect to remedying harassment and punishes employees who fail to utilize those procedures. In other words, to be able to recover, the Court requires employees to report the misconduct, yet weakens the very laws

99. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

100. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

101. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

that protect employees from reprisal if they report misconduct. This renders those employer policies and procedures ineffective and symbolic in nature. Nevertheless, the Court, as is the case with *Faragher/ Ellerth*, defers to these structures and declines to find discrimination if the structures are present.¹⁰² However, the Court is interpreting anti-retaliation laws in a manner that disincentivizes reporting.

Not only is the intent of Congress to protect employees who file workplace law claims from retaliation negated, but the choice by aggrieved employees not to file may affect employees who are currently not experiencing any type of employment-related issues. An ability to retaliate against employees with minimal if any liability may embolden employers to make their retaliation more pervasive. This may affect employees who are currently not affected. For example, if a manager is able to sexually harass an employee without consequence, that manager may begin to harass multiple employees, increasing the number of employees who are impacted.

The category of employees that the *Nassar* Court addressed is unaggrieved employees who file complaints. While the Court focused on unaggrieved employees who file complaints knowing that they have not experienced any violation of workplace law, there is a separate class of unaggrieved employees who file claims—those who genuinely, albeit mistakenly, believe they have suffered harm as a result of a violation of workplace law. The judiciary is well aware of this class of employees and has even created a good faith belief standard under anti-retaliation law that addresses employees in this position. The law in every circuit is that an employee may be deemed to have engaged in protected activity even if the employer conduct about which the employee complained does not violate the underlying statute, so long as the employee had a good faith belief that it was unlawful.¹⁰³

102. See LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 5 (2016) (“[J]udicial deference to symbolic structures, irrespective of their effectiveness, help[s] to explain why race and gender inequality persist in the American workplace more than half a century after the passage of Title VII . . .”).

103. See *Trainer v. HEI Hosp., LLC*, 699 F.3d 19, 26 (1st Cir. 2012) (“[I]t is not necessary that the [ADEA retaliation] plaintiff succeed on the underlying claim of discrimination; ‘[i]t is enough that the plaintiff had a reasonable, good-faith belief that a violation occurred.’”) (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 827 (1st Cir. 1991)); *McMenemy v. City of Rochester*, 241 F.3d 279, 283 (2d Cir. 2001) (noting that a plaintiff in a retaliation claim can prove protected activity if they can show a “good faith, reasonable belief that the underlying challenged actions of the employer violated the law”); *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193–94 (3d Cir. 2015) (“[A]lthough a plaintiff in a retaliation case ‘need not prove the merits of the underlying discrimination complaint,’ she must have ‘act[ed] under a good faith, reasonable belief that a violation existed.’”); *Peters v. Jenney*, 327 F.3d 307, 321 (4th Cir. 2003); *Armstrong v. K & B La. Corp.*, 488 F. App’x 779, 782 (5th Cir. 2012) (“For his actions to satisfy the opposition clause, Armstrong must have had an objectively reasonable belief that Rite Aid was engaged in employment practices barred by Title VII.”); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) (limiting retaliation protections to those individuals whose discrimination claims are meritorious “undermines Title VII’s central purpose”); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (“[A]s long as the employee had a reasonable belief . . . the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII.”); *Trent v. Valley Elec. Ass’n*, 41 F.3d 524, 526 (9th Cir. 1994) (noting that an employee need not “prove that the employment practice at issue was in fact unlawful under Title VII. . . . [A plaintiff] must only show that she had a

Interestingly, the recourse for the employer who is subject to a claim by an unaggrieved employee who has fabricated the allegations and the recourse for the employer who is subjected to a claim by an unaggrieved employee who reasonably believes that the employer's conduct is unlawful is the same—to let the adjudicative process run its course. The analytical framework for both discrimination and retaliation claims allows employers the opportunity to articulate a legitimate non-discriminatory or non-retaliatory reason for the adverse action, and employees bear the burden of proving that any proffered reason was indeed a pretext for unlawful conduct. A mechanism for determining if the allegations are either patently false or simply do not rise to the level of a statutory violation is already encompassed in the legal framework for these cases. Hence, for the judiciary to dilute retaliation protections because it fears a flood of frivolous claims is evidence of the judiciary distrusting the analytical framework that it created.

A final classification of employees is employees who are needed to serve as witnesses. Whether the charge being adjudicated was filed in court, with an administrative agency, or internally with the employer, witnesses are needed. If given the choice, witnesses may elect not to testify out of fear of retaliation. This would hinder enforcement of workplace laws. This would have an adverse effect on claims that are initiated by an employee complaint, as well as those that are initiated by the government. For example, the EEOC has the ability to pursue Commissioner charges, and both the EEOC and the Department of Labor (DOL) have the ability to launch directed investigations.¹⁰⁴ Both Commissioner charges and directed investigations trigger investigations without a complaint being filed with the agencies, and both enforcement schemes would be hindered by weaker anti-retaliation laws.

If employees are not given the choice of whether to testify, as in the case of a subpoena, witnesses may be forced to participate in a process that leads to retaliation because the regulatory scheme Congress created to protect them is not provided

'reasonable belief' that the employment practice she protested was prohibited under Title VII.") (citing *Sias v. City Demonstration Agency*, 588 F.2 692, 695 (9th Cir. 1978); see also *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 270 (2001) (declining to rule on the propriety of the Ninth Circuit's proposition that practices that the employee could reasonably believe were unlawful are protected under Title VII's anti-retaliation provision, but assuming it is correct in deciding the case); U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016) https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#_ftnref56 [<https://perma.cc/4CEY-TPNY>] ("For statements or actions to be protected . . . they must be based on a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated. Because there is conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII, the reasonable belief standard can apply to protect complainants as well as witnesses or bystanders who intervene or report what was observed." (footnote omitted)).

104. See 29 U.S.C. § 626; 29 U.S.C. § 211(a); 42 U.S.C. § 2000e-5(b); see also *Commissioner Charges and Directed Investigations*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/commissioner-charges-and-directed-investigations> [<https://perma.cc/H5CJ-SPJQ>] (last visited Mar. 7, 2023).

adequate protections because the courts are afraid there will be too many cases on their dockets.

C. Agencies

Administrative agencies are also stakeholders to which the Court gave little attention when using floodgates arguments to alter substantive anti-retaliation law. Courts need to recognize the crucial role of administrative agencies in fostering compliance and engaging in enforcement outside the courts. Agencies serve as gatekeepers, quasi-gatekeepers, and arbiters of workplace law claims. Because anti-retaliation provisions in workplace statutes function as enforcement tools, ensuring broad interpretation of these provisions in a manner that provides the most robust protection possible against employer retaliation is important to ensuring administrative agencies can fulfill their missions. An examination of three federal agencies—the EEOC, DOL’s Wage and Hour Division (WHD), and DOL’s Occupational Safety and Health Administration (OSHA)—will illustrate the harmful effects restrictive interpretations can have on an agency’s ability to fulfill its mission.

1. Agencies as Gatekeepers

Some agencies, like the EEOC, serve as gatekeepers because the statutes they enforce require would-be plaintiffs to exhaust administrative remedies prior to being able to file lawsuits in federal court.¹⁰⁵ The doctrine of exhaustion of administrative remedies posits “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”¹⁰⁶

The U.S. Supreme Court has noted that a requirement of exhaustion of administrative remedies serves two purposes.¹⁰⁷ The first is to protect the authority of administrative agencies.¹⁰⁸ This purpose is grounded in the notion that administrative agencies ought to have principal responsibility in the areas Congress has charged them with enforcing.¹⁰⁹ Exhaustion requirements are particularly important when the agency in question has specialized expertise in the area. The second purpose of the requirement that administrative remedies be exhausted is to promote judicial efficiency.¹¹⁰ Gatekeeper agencies keep numerous cases from ever reaching the Court’s docket by resolving them or identifying deficiencies in the evidence before the complainants file a federal lawsuit.

105. *See, e.g.*, 42 U.S.C. §§ 2000e-5(e)(1), 2000e-5(f)(1) (2018) (requiring Title VII complainants to file charges with the EEOC prior to commencing an action in federal court).

106. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

107. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

108. *Id.*

109. *Id.*

110. *Id.*

Harming administrative agencies that serve as gatekeepers is antithetical to decreasing judicial caseload. When agencies are able to effectively fulfill their missions, the number of cases on the federal judiciary's docket decreases. With respect to federal workplace laws, the EEOC is the seminal example. The EEOC enforces eight employment discrimination statutes.¹¹¹ All of these statutes except the Equal Pay Act of 1963 require job applicants or employees to file a charge of discrimination with the EEOC before filing a lawsuit.¹¹² Unless the discrimination claim arises under the Age Discrimination in Employment Act of 1967 (ADEA),¹¹³ potential plaintiffs must obtain a right to sue letter from the EEOC before filing in federal court.¹¹⁴ The EEOC must issue a right to sue letter if the complainant requests one after more than 180 days have passed with no resolution.¹¹⁵ The most common outcome in EEOC cases is that the agency issues a right-to-sue letter with a no-cause determination.¹¹⁶ Hence, in many instances, some complainants receive a right-to-sue letter simply without the charge having been fully investigated by the agency.

While some scholars criticize the value of the EEOC's gatekeeping function,¹¹⁷ the fairly low percentage of EEOC charges that turn into court cases compared to the fairly high percentage of complainants that receive a right-to-sue letter suggests that the EEOC is indeed adequately performing a gatekeeping function. Approximately 17% of EEOC charges turn into federal lawsuits.¹¹⁸ Hence, despite the fact that the EEOC is fairly liberal with issuing right-to-sue letters, many of these cases never end up on the federal judiciary's docket.

Interpreting substantive anti-retaliation laws based on floodgates arguments can harm agencies serving as gatekeepers by making it more difficult for them to meet their missions. The fact that these agencies enforce statutes that require exhaustion is indicative of congressional confidence in the agency to fulfill its mission. The same reliance on agency expertise that prompted Congress to require

111. *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/laws-enforced-eeoc> [<https://perma.cc/92NV-NKBW>] (last visited Mar. 7, 2023).

112. *See* 29 C.F.R. § 35.40 (requiring exhaustion of administrative remedies before filing an ADEA claim in court).

113. Individuals planning to file an age discrimination lawsuit must have filed a charge with the EEOC but need not wait for a right-to-sue letter to file a lawsuit in court. Rather, ADEA complainants can file a case in court sixty days after the date the EEOC charge was filed. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/92RR-T3UQ>] (last visited Mar. 7, 2023).

114. *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/5F6V-7S44>] (last visited Mar. 7, 2023).

115. 42 U.S.C. § 2000e-5(f)(1) (2018).

116. Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17, 27 (2019).

117. *See, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 698 (2013) (“[T]he EEOC’s charge resolution process appears to provide precious little gatekeeper value.”).

118. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 41 (2017).

exhaustion should encourage the courts to give some level of deference to an agency's interpretation of the anti-retaliation provisions of the statutes the agency enforces.

2. *Agencies as Quasi-Gatekeepers*

Some administrative agencies, like WHD, serve as quasi-gatekeepers, keeping substantial amounts of litigation off the federal judiciary's docket despite no requirement that administrative remedies be exhausted. These agencies provide aggrieved individuals with an alternative to pursuing legal action in federal court. WHD enforces compliance with numerous minimum labor standards statutes, including laws that provide for federal minimum wage, overtime pay, recordkeeping, child labor restrictions, and family and medical leave.¹¹⁹ For many of the statutes WHD enforces, employees have the option of seeking enforcement either through WHD or going directly to court without exhausting administrative remedies.

Harming the quasi-gatekeepers is also antithetical to decreasing the federal judiciary's caseload. The WHD is charged with enforcing certain workplace statutes, and one of its major enforcement tools. This tool ensures not only that employees are willing to report employer misconduct by filing charges or complaints, but also that they are willing to participate in investigations of complaints that are already filed.

3. *Agencies as Arbiters*

Some agencies, like OSHA, serve as arbiters, as the statutes they enforce do not confer a private right of action. OSHA enforces laws that provide for the occupational health and safety of the nation's workforce.¹²⁰ The substantive anti-retaliation law the Court makes will apply even when there is no private right of action. This means that decisions the courts make in consideration of the estimated number of cases that will appear on the judiciary's docket will apply even in instances where the cases would never end up in federal court. In short, a practice of the courts issuing restrictive interpretations of anti-retaliation laws in consideration of the judicial economy would be over-broad. Reliance on a floodgates argument would in essence apply a reasoning grounded in judicial economy to statutes in which judicial economy is not at issue because there is no private right of action.

The courts frequently apply decisions regarding anti-retaliation provisions in a certain workplace statute to other workplace statutes. Such has been the case with the anti-retaliation provision in *Nassar*. Though *Nassar* was a Title VII retaliation

119. *Wage and Hour Div., About Us*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/about> [<https://perma.cc/3FBS-TRNK>] (last visited Mar. 7, 2023).

120. *About OSHA*, U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/aboutosha> [<https://perma.cc/86FF-NT79>] (last visited Mar. 7, 2023).

claim, its holding has been applied to several other statutes, including the Fair Labor Standards Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.¹²¹ There is certainly reason to believe that the restrictive anti-retaliation rulings applicable to one workplace statute would creep into cases interpreting other workplace laws. Indeed, this has already occurred, as the *Nassar* interpretation of the Title VII anti-retaliation provision, which provides for a private right of action after administrative remedies are exhausted, has crept over to the OSH Act's anti-retaliation provision, which has no private right of action.

With respect to the OSH Act, though there is no private right of action, the Court's decision in *Nassar* has affected OSHA's enforcement of the OSH Act's retaliation provision. Prior to the *Nassar* decision, OSHA had a regulation requiring protected activity to only be a substantial reason for the adverse action in retaliation claims.¹²² However, effective September 3, 2021, OSHA has changed that regulation to now require but-for causation, citing *Nassar*.¹²³ This is a salient example of the Court's use of a floodgates argument to justify the restrictive interpretation of an anti-retaliation statute expanding to another statute in which a floodgates argument is inapplicable. However, more of this type of expansion may be on the horizon.

In addition to hampering the filing and investigation of retaliation claims, deciding substantive anti-retaliation law based on floodgates concerns would also encumber enforcement of other types of workplace laws. For example, an employee

121. See, e.g., *Kubiak v. S.W. Cowboy, Inc.*, 164 F. Supp. 3d 1344, 1365 (M.D. Fla. 2016) (applying *Nassar*'s but-for causation requirement to an FLSA retaliation claim); *West v. City of Holly Springs*, No. 3:16CV79-MPM-RP, 2019 WL 2267294, at *2 (N.D. Miss. May 28, 2019) (applying *Nassar* to an FLSA retaliation case); *Jackson v. Haynes & Haynes, P.C.*, No. 2:16-cv-01297-AKK, 2017 WL 3173302, at *5 (N.D. Ala. July 26, 2017) (holding that the plaintiff's FLSA retaliation claim fails because she cannot prove but-for causation and citing *Nassar*); *Sharp v. Profitt*, 674 F. App'x 440, 451 (6th Cir. 2016) (applying *Nassar* to the FMLA); *Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 187 (D. Mass. 2017) (holding that *Nassar*'s logic signals a but-for causation requirement in the FMLA); *Acosta v. Brain*, 910 F.3d 502, 513–14 (9th Cir. 2018) (assuming, but not deciding, that the but-for causation standard from *Gross* and *Nassar* that the lower court used is applicable to an ERISA retaliation claim). But see *Perez v. Lloyd Indus., Inc.*, 399 F. Supp. 3d 308, 314 (E.D. Pa. 2019) (giving the U.S. Department of Labor's interpretation of the retaliation causation standard under OSHA as either substantial reason or but-for deference despite the *Nassar* decision).

122. The previous version of the regulation read:

[T]o establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity, section 11(c) has been violated.

29 C.F.R. § 1977.6(b) (2010).

123. The new regulation states:

[T]o establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole or primary consideration behind discharge or other adverse action. If the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated.

29 C.F.R. § 1977.6(b) (2021); see also 86 Fed. Reg. 49472 (2021) (discussing how *Nassar* influenced the use of the "but-for" test).

whose employer was committing wage theft in violation of the Fair Labor Standards Act may be deterred from filing the wage theft claim, which is not a retaliation claim, for fear that the employee would experience retaliation and that retaliation would go unredressed due to the anemic enforcement of anti-retaliation laws.

The Court's interpretation of anti-retaliation provisions in workplace statutes affects not only the judicial branch but also administrative agencies. Deciding substantive workplace law in a manner that aims to decrease the number of retaliation cases on the judiciary's docket hinders agencies' abilities to fulfill their mission of enforcing workplace statutes for the sake of decreasing the judiciary's workload.

IV. UNDERMINING THE REGULATORY SCHEME ITSELF

Acknowledgement of the need for effective enforcement is one of the reasons anti-retaliation provisions are so pervasive in workplace statutes.¹²⁴ The pervasiveness of the retaliation proscriptions is indicative of Congress's realization that these proscriptions are essential to a functioning regulatory system. Diluting the effectiveness of these anti-retaliation provisions makes retaliation even more of a rational choice for employers. Interpreting substantive anti-retaliation law narrowly due to floodgates concerns would undermine the regulatory scheme Congress created for workplace laws. It would also signal the Court's embrace of two disturbing premises. The first is that the more people who violate a law, the easier the courts will make it to violate the law. The second is that laws that directly or indirectly affect equal employment opportunity will be undermined if enough people violate them. This Part discusses how both of these premises are pernicious.

A. Multiplying Injury

Retaliation is prevalent in the workplace. If employers multiply injury, it follows that actions will be multiplied too. Courts should not adopt the posture that if enough employers violate the law, then the judiciary will make it more difficult for victims to recover for the harm experienced from these violations. Whether an individual receives equal justice under the law should not be predicated on how many other people need justice as well. Moreover, this posture would suggest that employers are able to steer the government's regulatory compliance efforts if there are simply enough employers who decide not to comply.

There are two types of injuries that would be multiplied if the court continues down the path of issuing narrow interpretations of anti-retaliation laws based on floodgates concerns—retaliatory conduct and the violation of the applicable

124. See 29 U.S.C. § 215(a)(3) (2018) (prohibiting retaliation under the FLSA); 42 U.S.C. § 2000ff-6(f) (proscribing retaliation under the Genetic Information Non-Discrimination Act); 42 U.S.C. § 2000e-3(a) (making retaliation unlawful under Title VII); 29 U.S.C. § 623(d) (barring retaliation under the ADEA); 42 U.S.C. § 12203(a) (outlawing retaliation under the ADA); 29 U.S.C. § 2615(b) (prohibiting retaliation under the FMLA); 29 U.S.C. § 660(c)(1) (proscribing retaliatory behavior under OSHA); 29 U.S.C. § 158(a)(4) (outlawing retaliatory actions under the National Labor Relations Act).

underlying law (e.g., discrimination, wage theft, occupational safety and health violations, etc.). In other words, restrictive interpretations of anti-retaliation statutory provisions will leave employees more vulnerable to both retaliation and the workplace harm the anti-retaliation provision was created to enforce.

While this vulnerability would apply to all employees, it would not apply to all employees equally. Female workers and workers of color are disproportionately vulnerable to subordination, discrimination, and exploitation in the workplace. For instance, although an employee of any gender can be sexually harassed, women experience more sexual harassment than men. Additionally, a recent study showed that although 18% of workers report experiencing employment discrimination, about 24% of Black workers and 24% of Hispanic workers in the United States reported having been discriminated against at work in the past year.¹²⁵ Despite their underrepresentation in the workforce, they are overrepresented with regard to employment discrimination.

These disparities are not limited to violations of employment discrimination laws. They also exist with respect to minimum labor standards laws. These laws provide minimum criteria regarding employee wages, hours, and working conditions. Female employees and employees of color experience employer violations of these laws at different rates. For example, these groups have higher instances of wage theft.¹²⁶ These disparities in victims of labor standards violations apply to numerous types of labor standards like occupational safety and health violations.¹²⁷ Moreover, some labor standards laws were passed for the specific purpose of eliminating discrimination.¹²⁸

Moreover, like racial and gender disparities regarding violations of the underlying workplace laws, disparities exist regarding which employees are retaliated against for reporting workplace misconduct, and Black workers and women are most likely to experience reprisal for reporting employer misconduct.¹²⁹ Because

125. Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), <https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx> [<https://perma.cc/KS9L-39XA>].

126. Foreign-born Latinx workers experience the highest rates of wage theft. Among U.S. born workers, Black workers experience wage theft at triple the rate of White workers. BERNHARDT ET AL., *supra* note 7; see also DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR (2017), <https://files.epi.org/pdf/125116.pdf> [<https://perma.cc/WCX8-KUXS>].

127. See Candice A. Shannon, Kathleen M. Rospenda, Judith A. Richman & Lisa M. Minich, *Race, Racial Discrimination, and the Risk of Work-Related Illness, Injury or Assault: Findings from a National Study*, 51 J. OCCUPATIONAL ENV'T MED. 441, 441 (2009); Lee S. Friedman & Linda Forst, *Ethnic Disparities in Traumatic Occupational Injury*, 50 J. OCCUPATIONAL ENV'T MED. 350, 353 (2008).

128. For example, the U.S. Supreme Court has noted that the Family and Medical Leave Act aims to protect the right to be free from sex discrimination in the workplace. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

129. See Michael T. Rehg, Marcia P. Miceli, Janet P. Near & James R. Van Scotter, *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 224 (2008); IRENE TUNG & LAURA PADIN, SILENCED ABOUT COVID-19 IN THE WORKPLACE (2020), <https://www.nelp.org/publication/silenced-covid-19-workplace/> [<https://perma.cc/FJN2-Z47C>]; see also Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace*

employer violations of workplace laws disproportionately affect employees based on race and gender, anemic enforcement of anti-retaliation laws would have a detrimental effect on all employees, but the loss of robust protections would be particularly devastating and debilitating for some of the nation's most vulnerable workers. This is particularly impactful due to the changing demographics of the nation's workforce.

B. Exacerbating Inequality

As the U.S. workforce diversifies, workplace laws and their accompanying anti-retaliation provisions become increasingly salient. The U.S. population is becoming increasingly diverse. The population is comprised of 38.7% racial/ethnic minorities,¹³⁰ and 40% of Americans are expected to identify themselves as a member of a racial or ethnic minority group by the year 2030.¹³¹ This percentage is expected to increase to 50% by the year 2050.¹³² As the percentage of the American population becomes increasingly diverse, so does the percentage of the American workforce.

The combined forces of changing population demographics, globalization, and civil rights laws have led to an increase in diversity among organizations. This increased diversification has been accompanied by the need to understand how diversity affects organizations, including workplaces.¹³³ Social science literature has revealed that workforce diversity can have both positive and negative effects on organizations.

Additionally, increased diversification of the American workforce will increase the propensity for discrimination, subordination, and exploitation increases. Social science research shows that while there are numerous positive results of workforce diversity, there are negative results as well.¹³⁴ The goal is to maximize the positive aspects of workforce diversity while minimizing the negative ones. Workplace laws can help curb this, but they can only be effective with vigorous anti-retaliation protections. Workers need to be able to exercise workplace rights and/or report employer misconduct without actual or threatened retaliation. Weakened anti-

Law Enforcement: An Empirical Analysis, 89 IND. L.J. 1069, 1098–99 (2014) (finding empirically that the least socially powerful workers were the most likely to experience retaliation); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005) (explaining how as the power disparity widens between a low-status target and a higher-status perpetrator widens, retaliation is more likely to occur).

130. U.S. CENSUS BUREAU, QUICK FACTS: UNITED STATES (2016), <https://www.census.gov/quickfacts/fact/table/US/PST045217> [<https://perma.cc/2J87-M5FC>].

131. Janice L. Dreachslin, *Diversity Management and Cultural Competence: Research, Practice, and the Business Case*, 52 J. HEALTHCARE MGMT. 79, 79 (2007).

132. Byeong Yong Kim, *Managing Workforce Diversity: Developing a Learning Organization*, 5 J. HUM. RES. HOSP. & TOURISM, 69, 70 (2006).

133. Ulysses J. Brown, III, Stephen B. Knouse, James B. Stewart & Ruby L. Beale, *The Relationship Between Unit Diversity and Perceptions of Organizational Performance in the Military*, 36 J. APPLIED STAT. 111, 111 (2009).

134. See *supra* Section II.B.

retaliation laws create incentives for employers to retaliate and decrease the ability of workers to protect themselves from or recover for such retaliatory behavior.

Positive aspects of diversity include higher critical thinking, higher quality decision-making,¹³⁵ better problem solving,¹³⁶ more creativity,¹³⁷ lower group think,¹³⁸ increased profits,¹³⁹ increased firm value,¹⁴⁰ more customers,¹⁴¹ increased market share,¹⁴² and competitive advantage. These advantages of diversity are well-established in the social science literature. Equally well-documented are the negative effects of diversity in workplaces. Increased diversity is associated with decreased psychological attachment among employees, lower group cohesiveness, a lower *perception* of organizational performance, and intra-organizational conflict.¹⁴³ Fortunately, the positives outweigh the negatives,¹⁴⁴ but it remains imperative that workplaces and the nation collectively leverage the positive outcomes of diversity while minimizing or eliminating the negative outcomes in the workplace.

Cognitive and social psychologies provide the framework for many theories of diversity.¹⁴⁵ The primary diversity-related theories that explain the negative aspects of diversification are social identity theory and the similarity-attraction paradigm. Social identity¹⁴⁶ refers to “an individual’s knowledge of belonging to

135. See Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCH. REV. 23 (1986).

136. Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, 8 COMPETITIVENESS REV. 3 (1998) (arguing that ethnic, gender, and age diversity promotes creativity and problem-solving capability).

137. Nigel Bassett-Jones, *The Paradox of Diversity Management, Creativity and Innovation*, 14 CREATIVITY & INNOVATION MGMT. 169, 171 (2005).

138. *Id.*

139. See Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIO. REV. 208 (2009).

140. *Id.*

141. *Id.*

142. *Id.*

143. David W. Pitts & Elizabeth M. Jarry, *Getting to Know You: Ethnic Diversity, Time and Performance in Public Organizations*, 87 PUB. ADMIN. 503 (2009).

144. Jesse E. Olsen & Luis L. Martins, *Understanding Organizational Diversity Management Programs: A Theoretical Framework and Directions for Future Research*, 33 J. ORG. BEHAV. 1168 (2012).

145. Lynn M. Shore, Beth G. Chung-Herrera, Michelle A. Dean, Karen Holcombe Ehrhart, Don I. Jung, Amy E. Randel & Gangaram Singh, *Diversity in Organizations: Where Are We Now and Where Are We Going?*, 19 HUM. RES. MGMT. REV. 117, 118 (2009).

146. Social identity theory originated from experiments involving British schoolboys who were randomly assigned to one of two groups. Though the assignments were random, the boys were told that the assignments were based on preferences by one of two artists. While each boy knew to which of the two groups he had been assigned, none of them knew the identity of any other individual assigned to their group or the identity of individuals assigned to the other group. The boys were instructed to distribute money to other participants. No self-interest was involved, as a participant could not distribute money to himself. The only information the distributors had about the individuals to whom money could be distributed was that individual’s group membership and code number. Despite the fact that the group had no past history and the group members had not even met each other, participants strongly favored their own group. Hundreds of experiments exploring social identity theory have been conducted since this original study. Michael A. Hogg, *Social Identity Theory*, in UNDERSTANDING PEACE AND CONFLICT THROUGH SOCIAL IDENTITY THEORY 3, 3–17 (Shelley McKeown, Reeshma Haji & Neil Ferguson eds., 2016).

certain social groups, together with some emotional significance associated with this group membership.”¹⁴⁷ Pursuant to this theory, people will categorize themselves and others by social groups using various demographic characteristics, including race and sex.¹⁴⁸ People deem others who are similar to themselves to be members of an in-group and those who are not like them to be members of an out-group.¹⁴⁹ This theory lends itself to the idea that diversity will have negative consequences, such as group conflict and a lack of cohesion.¹⁵⁰

Like social identity theory, the similarity-attraction paradigm suggests that people are more comfortable interacting with people of similar demographic characteristics and attributes.¹⁵¹ When given the choice of interacting with someone similar or dissimilar from themselves, individuals will elect to interact with an individual who is similar to them.¹⁵² Individuals tend to feel less comfortable, secure, and trusting around others with different characteristics.¹⁵³

Both social identity theory and the similarity-attraction paradigm provide support for the assertion that individuals prefer being around those who are most like them. These theories are applicable to workplace behavior. These psychological and sociological predispositions manifest into preferential treatment for certain groups in the workplace.

Congress has passed employment discrimination legislation to address many of these by-products of a diverse workforce. These laws prohibit employers from discriminating against employees and applicants on the basis of a protected class. Additionally, Congress has passed legislation that sets minimum labor standards in several areas including minimum wage and overtime pay; occupational safety and health; retirement and other employee benefits; and family and medical leave. While these minimum labor standards statutes are not considered anti-discrimination statutes, they are frequently invoked by members of protected classes, as certain groups are more likely to have their rights under these statutes violated.¹⁵⁴

Because anti-retaliation laws are enforcement tools aimed at promoting effective enforcement, as the retaliation protections get diluted so do the statutory rights created in these statutes. Whether the applicable statute is an anti-discrimination or a labor standards statute, vulnerable workers, a group that has

147. Henri Tajfel, *Social Categorization*, in 1 INTRODUCTION TO SOCIAL PSYCHOLOGY, 272, 292 (S. Moscovici ed., 1972).

148. Olsen & Martins, *supra* note 144, at 1168–87.

149. *Id.*

150. *See id.*

151. *See* Pitts & Jarry *supra* note 143.

152. James R. Lincoln & Jon Miller, *Work and Friendship Ties in Organizations: A Comparative Analysis of Relational Networks*, 24 ADMIN. SCI. Q. 181 (1979).

153. Sungjoo Choi & Hal G. Rainey, *Managing Diversity in U.S. Federal Agencies: Effects of Diversity and Diversity Management on Employee Perceptions of Organizational Performance*, 70 PUB. ADMIN. REV. 109 (2010); Pitts & Jarry, *supra* note 143.

154. For instance, racial and ethnic minorities, women, and immigrants are more likely to be subject to wage theft. BERNHARDT ET AL., *supra* note 7.

historically included female workers and workers of color, will experience disproportionate harm from the dilution.

Not only will dilution of the underlying protections from discrimination or deprivation of labor standards suffer if the anti-retaliation provisions that undergird these laws are weakened, but also female employees and employees of color will be disproportionately harmed. These groups experience higher rates of retaliation than other groups. The disproportionate targeting of women and people of color suggests that bias itself is one motivation for retaliation.¹⁵⁵

Congress has created a system of private enforcement that uses anti-retaliation provisions to reinforce the substance of the statutes. Hence, it is imperative that the protection of rights aimed at promoting equal employment opportunity not be purposefully diluted by the court based on the number of people who need such protection.

V. CONGRESS SHOULD LEGISLATE A RULE OF CONSTRUCTION MANDATING BROAD COVERAGE

Inserting a rule of construction into statutory language stating that anti-retaliation provisions are to be interpreted broadly would help prevent the courts from issuing restrictive interpretations of anti-retaliation laws that sacrifice effective enforcement for the sake of judicial economy. While this would constitute a congressional override of *Nassar*, it would be a unique one inasmuch as it would not be an override of the causation issue in *Nassar*. Rather, it would constitute an override of the principle that the actual or anticipated volume of cases should inform interpretation of substantive anti-retaliation law.

Traditionally, the government has been reticent to intervene in employer-employee relationships, typically citing freedom of contract concerns to justify this reticence.¹⁵⁶ The government will only intervene where it feels a matter is important enough to abrogate the common law doctrine of at-will employment and provide statutory protections. Workplace statutes, like most statutes, are the result of an arduous, political process replete with compromises, and there is no shortage of commentary on the shortcomings of many of these statutes.¹⁵⁷ However, the final product is what the two congressional chambers agreed upon, and the labor,

155. Steele, *supra* note 10.

156. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that a state minimum wage statute for male bakers was invalid because the statute interfered with freedom of contract, thus infringing upon the Fourteenth Amendment's right to liberty).

157. See, e.g., Kristin M. Malone, *Using Financial Incentives to Achieve the Normative Goals of the FMLA*, 90 TEX. L. REV. 1307, 1307–08 (2012) (arguing that the FMLA “has done little to change the gendered patterns of leave taking for family-care purposes”); Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 67–68 (2004); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 140 (1998) (referring to the provisions of the FMLA as “meager”).

employment, and anti-discrimination rights codified in these workplace statutes are worthy of robust retaliation protections to bolster effective enforcement.

Congress has legislatively remedied restrictive judicial interpretations of employment discrimination and other workplace laws in the past. In fact, an empirical study examining congressional overrides found that of thirty subject matter areas examined, civil rights laws and workplace laws ranked second and fourth respectively in regard to the highest frequency of congressional overrides.¹⁵⁸

Several legislative overrides in the workplace law arena have been passed in the last fifty years. For example, in *General Electric Co. v. Gilbert*,¹⁵⁹ the Court held that Title VII's prohibition against sex discrimination did not encompass discrimination on the basis of pregnancy.¹⁶⁰ Congress responded by passing the Pregnancy Discrimination Act of 1978, which explicitly states pregnancy discrimination is sex discrimination under Title VII.¹⁶¹

That same year, Congress also passed the Age Discrimination in Employment Act Amendments of 1978.¹⁶² The amendments overrode the Court's decision in *United Airlines, Inc. v. McMann*,¹⁶³ which held that an employer's use of a pension plan that mandated retirement of an employee once he reached age sixty was not unlawful discrimination under the Age Discrimination in Employment Act.¹⁶⁴

In another instance, in 1989 the Court decided several cases in which it narrowed Title VII protections. Congress responded by passing the Civil Rights Act of 1991¹⁶⁵ in which it abrogated several of the Court's decisions that it did not like and codified others with which it agreed.¹⁶⁶ In 2009, Congress passed the Lilly

158. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1357 (2014).

159. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

160. *Id.*

161. Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978).

162. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 623 (2018)).

163. *United Airlines, Inc. v. McMann*, 434 U.S. 192, 193 (1977).

164. *Id.* at 198.

165. Interestingly, the Civil Rights Act of 1991 is implicated in *Nassar*. In passing the 1991 CRA, Congress explicitly allowed Title VII cases to proceed under a mixed-motive theory. Courts then used mixed-motive theories for Title VII discrimination and retaliation claims after the 1991 CRA. *See, e.g., Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (deciding that a mixed-motive jury instruction was proper in Title VII retaliation claims); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001) (noting that a mixed-motive defense is available in retaliation cases). It was not until *Nassar* that the Court drew a dichotomy between Title VII discrimination cases and Title VII retaliation cases.

166. The Civil Rights Act of 1991 abrogated the following decisions in whole or in part: *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (holding that Title VII does not apply extraterritorially to regulate conduct of United States employers who employ United States citizens abroad); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (disallowing the shifting of fees for services rendered by expert witnesses in civil rights litigation to losing party); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the application of § 1981 in the employment arena to making contracts); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989) (holding that an employment discrimination claim based on facially neutral seniority system begins to run when the seniority system is adopted); *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that white employees who did not intervene in earlier employment discrimination proceedings in which consent decrees were entered could challenge employment decisions that were taken in accordance with those decrees); *Wards Cove Packing Co. v. Atonio*, 490

Ledbetter Fair Pay Act,¹⁶⁷ amending Title VII and the ADEA to override the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁶⁸ which, interpreting Title VII narrowly, held that charges of compensation discrimination cases had to be filed within either 180 days or 300 days¹⁶⁹ of the date the pay decision was first made. The congressional override allows employees to file a charge of pay discrimination within 180 or 300 days of each paycheck that is issued pursuant to a discriminatory compensation practice.

While most of the aforementioned congressional overrides occurred within approximately two to three years of the applicable Court decisions, there is usually a longer time span between the decision and the legislative override. For instance, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) overturned Supreme Court decisions issued in 1999 and 2002.¹⁷⁰ In *Sutton v. United Airlines, Inc.*,¹⁷¹ the Supreme Court issued a restrictive interpretation of the Americans with Disabilities Act (ADA) by allowing consideration of mitigating measures in determining whether a medical condition constituted a disability. A few years later, the Court held in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,¹⁷² that to qualify as a disability, a medical condition must prevent or severely restrict an individual from "doing activities that are of central importance to most people's daily lives."¹⁷³ Even with nearly a decade elapsing between these cases and the passage of the ADAAA to supersede them, the time span between the cases and overrides is still below the average time between a Court decision and its legislative override, which is eleven years.¹⁷⁴ Hence, the fact that *Nassar* was not overturned

U.S. 642 (1989) (holding that statistical evidence showing a high percentage of non-white workers in employee's cannery jobs and a low percentage of such workers in other jobs did not establish prima facie case of disparate impact); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (allowing mixed-motive Title VII claims); *Libr. of Cong. v. Shaw*, 478 U.S. 310 (1986) (holding that when Congress passed Title VII, it did not waive the federal government's traditional immunity from interest). For a comprehensive discussion of the 1991 CRA, see Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281 (2011).

167. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

168. 550 U.S. 618 (2007), *superseded by statute* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

169. Charges of discrimination under Title VII must be filed within 180 days of the alleged discriminatory act in states without a Title VII deferral agency with which charges of discrimination may be filed and within 300 days in states that have one. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/time-limits-filing-charge> [<https://perma.cc/5DBN-K9QN>] (last visited Mar. 7, 2023); The ADA Amendments Act overturned the following decisions: *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (allowing consideration of mitigating measures in determining whether a medical condition constituted a disability); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (holding that to qualify as a disability, a medical condition must prevent or severely restrict an individual from "performing activities that are of central importance to most people's daily lives.").

170. ADA Amendments Act of 2008, Public Law 110-325, 122 Stat. 3553 (2008).

171. *Sutton*, 527 U.S. 471.

172. *Toyota Motor v. Williams*, 534 U.S. 184.

173. *Id.* at 198.

174. *Christiansen & Eskridge*, *supra* note 158, at 1355.

legislatively immediately after its passage would not prevent it from being overturned now.

While Congress can and should legislate to ensure anti-retaliation protections are enforced, the fact remains that Congress will never be able to account for every possible scenario at the time of legislative drafting. At some point, judicial interpretation will be needed. However, a pronouncement of broad interpretation would unequivocally convey to the courts that they are to broadly construe anti-retaliation protections. Moreover, the continual rise in retaliation claims may lead the Court to continue issuing restrictive interpretations of anti-retaliation laws.

Congress should add a rule of construction to all workplace anti-retaliation statutory provisions mandating broad interpretation. Doing so would help ensure that the courts could not continue to issue restrictive interpretations of substantive anti-retaliation law in an effort to deter employees from filing. Congress has signaled and the courts have confirmed¹⁷⁵ that reporting violations of workplace law is socially desirable behavior. Having courts now interpret these statutes in a manner that will deter individuals from engaging in this socially desirable behavior is antithetical to the purpose of the statutes. Moreover, having the courts list a floodgates argument, typically with no supporting evidence, as their reason for doing so adds insult to injury.

This Part briefly describes the half-century's worth of anti-retaliation jurisprudence broadly construing anti-retaliation statutes and illustrates how this norm, dubbed the anti-retaliation principle by Dean Richard Moberly,¹⁷⁶ has risen to a canonical level. It also discusses the unpredictable nature of judicial application of canons of statutory construction, concluding that codification in statute is the most reliable way to ensure robust enforcement of anti-retaliation laws. Using the ADAAA as a model, this Part illustrates how Congress has legislated rules of statutory construction before and highlights the similarities between the need to do so in the ADAAA context and the need to do so with respect to anti-retaliation law.

A. Codifying the Canon

For half a century, the Supreme Court broadly construed anti-retaliation provisions in statutes. This broad construction was so prevalent some argued that it rose to the level of a canon of statutory construction.¹⁷⁷ Professor Richard Moberly named this canon “the anti-retaliation principle,” describing it as the Court’s recognition that “employees must be protected from retaliation in order to further the enforcement of society’s civil and criminal laws.”¹⁷⁸ This recognition led the Court to view anti-retaliation provisions in statutes as enforcement tools that

175. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

176. *See* Moberly, *supra* note 12.

177. *Id.* at 445–46.

178. *Id.* at 380.

benefit society as whole rather than simply as instruments that offer additional protection to employees.¹⁷⁹

The anti-retaliation principle has been used by the Court widely in workplace law. Examples include the Court interpreting workplace statutes as permitting courts to order employers to pay damages to retaliation victims,¹⁸⁰ permitting former employees to bring claims despite statutory text referring to “employees,”¹⁸¹ finding a violation of retaliation law where a third party with a close relationship to the employee who engaged in the protected activity suffered the adverse action,¹⁸² and even interpreting a statute to contain an implied retaliation proscription where there was no express anti-retaliation provision in the text of the statute.¹⁸³

Despite the Court’s prior longstanding commitment to broad interpretation of anti-retaliation laws in a manner that provides robust protections, the Court is now starting to issue narrow, restrictive interpretations of these laws. These narrow interpretations are coming despite the broad language of certain anti-retaliation provisions. Even some of the most devoted textualists among jurists have acknowledged that the language of Title VII’s retaliation provision is broad. For instance, in *Thompson v. North American Stainless LP*,¹⁸⁴ Justice Scalia, writing for the majority, acknowledged a broad standard of what conduct is covered under Title VII’s anti-retaliation provision because the provision itself is broadly worded.¹⁸⁵ Nevertheless, *Nassar* ushered in a new era of narrow interpretation.

A canon already exists calling for broad interpretation of remedial statutes. This canon can be traced back to nineteenth century U.S. jurisprudence.¹⁸⁶ However, one drawback of this statutory interpretation canon, and all canons, is that their application can be inconsistent, if not downright fickle. Courts get to determine when and if they will apply certain canons. Additionally, as Professor Karl Llewellyn noted, for every canon of construction, there is an opposite canon.¹⁸⁷

Preventing courts from giving dispositive weight to a floodgates argument requires that courts have a clearer indication of congressional intent. Inserting a rule of statutory construction into the text of anti-retaliation provisions would limit courts’ ability to interpret substantive anti-retaliation law based on caseload and

179. *Id.* at 380.

180. *See Robert DeMario Jewelry, Inc.*, 361 U.S. at 289.

181. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

182. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173 (2011) (finding a Title VII violation where an employer retaliated against an employee for engaging in protected activity by subjecting her fiancé to an adverse employment action).

183. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (holding that 42 U.S.C. § 1982 contains an implied cause of action for retaliation).

184. 562 U.S. 170 (2011).

185. *Id.* at 174–75.

186. *See Stewart v. Kahn*, 78 U.S. 493 (1870) (“The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment.”).

187. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521–35 (1960).

better effectuate the purpose of anti-retaliation provisions in statutes. In essence, including a rule of construction in the text of these statutes would codify the canon and provide courts with firmer grounds on which to base broad interpretations.

One primary benefit of a rule mandating broad construction of anti-retaliation provisions in workplace statutes is that it is an easier remedy than the legislature having to predict every possible issue that may arise in the context of anti-retaliation claims. Regardless of what the issue before the Court may be, a rule of construction in the statutory text would signal to the judiciary that the interpretation should be a broad one, aimed at providing robust protection from retaliation.

Additionally, the codified rule of construction would serve a dual purpose. Enforcement of anti-retaliation laws and enforcement of the underlying statutory right that the anti-retaliation law was created to protect would benefit from such a rule. For example, a rule mandating broad construction for the Equal Pay Act of 1963's anti-retaliation provision¹⁸⁸ would protect employees from retaliation, as well as from pay discrimination.

Another benefit of codifying a rule of construction in the text of a statute is that lawyers will have the opportunity to adequately and more fully brief the issue. Sometimes floodgates arguments are included in judicial opinions by the judge with no mention of judicial economy in the appellate briefs or during oral argument. A rule of construction would allow lawyers litigating these cases to have a textual argument concerning interpretation and brief it.

Including a rule of construction in anti-retaliation provisions of workplace statutes would help prevent the judiciary from issuing restrictive interpretations of anti-retaliation laws. Such a prescription seems like it would be remarkably successful at preventing the use of floodgates arguments to justify substantive changes in anti-retaliation law. However, it can only achieve the overall goal of offering employees robust protections from retaliation if courts are willing to truly adhere to the purpose of the anti-retaliation provision laws.

B. Possible Approaches

There are two avenues by which Congress could pursue a rule of construction for anti-retaliation provisions in workplace statutes. The first, and most desirable, would be an omnibus anti-retaliation statute (i.e., a single statute codifying all of the workplace law retaliation protections). An omnibus anti-retaliation statute would be appropriate because it would be able to target several areas of reform needed across

188. The anti-retaliation provision of the Equal Pay Act of 1963 provides that it is unlawful for any person:

[T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

statutes. It may also standardize some of the text of retaliation provisions¹⁸⁹ and incorporate additional reforms¹⁹⁰ needed to provide robust retaliation protections, like reforms pertaining to employee coverage under anti-retaliation provisions of statutes,¹⁹¹ what types of employee reporting activities are protected,¹⁹² what type of retributive employer conduct that is prohibited,¹⁹³ what proof standards are required,¹⁹⁴ and what legal forums are available for redress.¹⁹⁵ Like the 1991 CRA and the ADAAA, an omnibus statute would tackle multiple areas that need reforming to improve the efficacy of anti-retaliation law.

The second option for inserting a rule of construction would be to pass a simple statute that noted the workplace laws to which Congress wanted to add the broad construction. This option would not be as far-reaching as a more comprehensive bill. However, it would still serve the purpose of putting the judiciary on notice that it is to interpret anti-retaliation provisions in workplace statutes broadly.

C. A Similar Situation: The Americans with Disabilities Act Amendments Act of 2008

There is legislative precedent for inserting a rule mandating broad construction in statutes. In fact, such a statutory construction mandate exists in the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁹⁶ RICO is noteworthy here because it is a criminal statute, and ambiguity in criminal statutes is typically met with narrow interpretations by the courts under the rule of lenity.¹⁹⁷ However, Congress inserted a provision in RICO calling for the statute to be construed

189. The statutory text of anti-retaliation provisions in workplace laws varies across statutes. For a detailed discussion of differences in the language of anti-retaliation provisions, see Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525 (2011).

190. For a discussion of proposed reforms for inclusion in an omnibus anti-retaliation statute, see Steele, *supra* note 10, at 1694–99.

191. See Nancy Modesitt, *The Garcetti Virus*, 80 U. CIN. L. REV. 137, 176 (2011) (arguing for the inclusion of statutory language that expressly provides for anti-retaliation protections even if the employee conduct that serves as the basis for protected activity is related to their job functions).

192. See Nicole Buonocore Porter, *Ending Harassment by Staring with Retaliation*, 71 STAN. L. REV. ONLINE 49, 56–57 (2018) (arguing for elimination of the reasonable belief requirement in Title VII claims and a lower threshold for meeting the materially adverse standard); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2070 (2015) (advocating for a less onerous adverse action standard for retaliation claims); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 941, 984–85 (2007) (proposing elimination of a reasonableness standard for protected activity in favor of a good faith standard).

193. Nicole B. Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 852–53 (2019) (advocating for lowering the threshold to meet the material adversity standard).

194. See *supra* Part I.

195. See THOMAS MCGARITY, SIDNEY SHAPIRO, RENA STEINZOR & MATTHEW SHUDTZ, *THE NEXT OSHA: PROGRESSIVE REFORMS TO EMPOWER WORKERS* 4 (2012), https://cpr-assets.s3.amazonaws.com/documents/Next_Generation_OSHA_1207.pdf [<https://perma.cc/U883-5RYW>] (calling for a private right of action for claims brought under the Occupational Safety and Health Act of 1970 in an effort to strengthen enforcement); 29 U.S.C. §§ 1001–1461.

196. 18 U.S.C. §§ 1961–1968 (2018).

197. For a detailed discussion of the historical origins and modern use of the rule of lenity, see Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918 (2020).

broadly. If broad construction of a criminal statute is warranted in certain instances, a rule mandating broad construction of a civil workplace statute is even more palatable. Indeed, Congress has already inserted a broad rule of construction in another workplace statute, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).¹⁹⁸ In passing the ADAAA, Congress remedied several restrictive interpretations of the ADA from 1999 through 2002 which made it more difficult for individuals with disabilities to qualify for coverage under the ADA.¹⁹⁹ Through the ADAAA, Congress corrected narrow interpretations by establishing that the definition of “disability” is to be broadly interpreted. Specifically, Congress included language that states “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of [the Act].”²⁰⁰

Despite the canon of statutory interpretation that remedial statutes are to be construed broadly, the Court started interpreting the ADA in a manner that made it more difficult for employees to be covered by the statute. This inclusion of a rule of construction in the statutory text was Congress signaling to the Court that narrow interpretation was not the legislature’s intent. Case decisions post the insertion of the rule of broad construction make clear that the judiciary received the message Congress was sending.²⁰¹

In addition to correcting narrow interpretations of anti-retaliation laws through legislation, Congress should revisit its drafting of anti-retaliation provisions in statutes.²⁰² The onus must be on Congress to examine and reform the statutory language of anti-retaliation provisions to ensure that these workplace laws are maximally effective. Congressional action would prohibit the judiciary from having the opportunity to invoke floodgates rationales. Floodgates arguments are policy rationales, but when a statute is unambiguous, the Court will have no room to invoke policy rationales. The Court has previously stated, “Whatever merits [floodgates arguments] and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.”²⁰³

198. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)).

199. The ADA Amendments Act overturned the following decisions: *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (allowing consideration of mitigating measures in determining whether a medical condition constituted a disability); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (holding that to qualify as a disability, a medical condition must prevent or severely restrict an individual from “performing activities that are of central importance to most people’s daily lives”).

200. 42 U.S.C. § 12102(4)(A) (2018).

201. See *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (2014) (noting that the amendment expresses that Congress viewed the Supreme Court’s and lower court’s interpretation of the ADA as an “unduly narrow construction”).

202. For a discussion of congressional drafting of anti-retaliation provisions, see Daiquiri J. Steele, *Preserving Pandemic Protections*, 42 BERKELEY J. EMP. & LAB. L. 321 (2021).

203. *Artuz v. Bennett*, 531 U.S. 4, 10 (2000); see also Levy, *supra* note 13, at 1046; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 108–09, 109 n.141 (2006) (noting that the judiciary is bound by the methods Congress chooses to bring about its purposes).

D. Plausibility and Partisanship

An empirical study found a statistically significant correlation between a legislative override of a Supreme Court decision and several variables. All five variables are relevant to *Nassar*.²⁰⁴ The first variable is a close decision, with the case being decided by either a plurality of justices or only five or six justices voting in the majority. The second variable is a narrowing of federal regulation. *Nassar* was a 5–4 decision that narrows federal regulation. Indeed, *Nassar* narrows not only regulatory interventions aimed at eliminating retaliation, but also the regulation of whatever subject matter Congress created the anti-retaliation provision to protect. The third variable is reliance on the plain meaning rule in the interpretation of the statute. This is present in *Nassar*, as the Court purported to use the plain meaning of the term “because” to justify the decision, bolstered by the floodgates arguments.²⁰⁵ The fourth variable that is correlated to a congressional override of a Supreme Court decision is an express invitation from the majority, a concurring justice, or a dissenting justice for Congress to override the decision.²⁰⁶ In her dissent in *Nassar*, Justice Ruth Bader Ginsburg wrote, “Today’s misguided judgment . . . should prompt yet another Civil Rights Restoration Act.”²⁰⁷ These four variables are obviously present with respect to *Nassar*, none of which warrant much discussion. What follows is a discussion of the final variable that is highly correlated with statutory overrides—rejection of an agency’s interpretation.

When a Supreme Court decision rejects an agency’s interpretation, that decision is much more likely to be subject to a congressional legislative override than the average decision.²⁰⁸ While the *Nassar* Court noted the number of retaliation charges filed with the EEOC, it is implausible that a concern about EEOC’s workload factored into the Court’s decision. The primary reason for this is that the EEOC itself argued that a motivating factor standard should be used.²⁰⁹ The agency itself is in a much better position to evaluate its workload than the Court.²¹⁰ In addition to the EEOC’s manual stating that there was credible evidence that retaliation was a motive for the challenged adverse action, the EEOC joined the U.S. Department of Justice in arguing for a mixed motive standard in its amicus curiae brief.²¹¹ The EEOC was not given deference in *Nassar* despite the longstanding interpretation held and publicized by the EEOC. While the EEOC has been given deference in the past on many important issues related to

204. Christiansen & Eskridge, *supra* note 158, at 1321.

205. Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338, 350, 358 (2013).

206. Christiansen & Eskridge, *supra* note 158, at 1321.

207. *Nassar*, 570 U.S. at 386 (Ginsburg, J., dissenting).

208. *Id.*

209. Brief for the United States as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338 (2013) (No. 12-484), 2013 WL 1462056, at 11.

210. Sperino & Thomas, *supra* note 22, at 241.

211. Brief for the United States as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338 (2013) (No. 12-484), 2013 WL 1462056.

retaliation,²¹² the *Nassar* Court gave neither deference to the EEOC nor an explanation for the lack of deference.

Administrative agencies cannot control the level of deference the Court will afford their interpretations. While there is case law that purportedly explains the rules of deference, courts often do not apply deference standards in accordance with the deference doctrine of their own creation.²¹³ Professor Jud Mathews aptly described the challenge administrative agencies face with respect to deference in courts, stating “[A]gencies seeking to defend statutory interpretations in court can anticipate with confidence neither what standard will be applied nor how the court will apply it.”²¹⁴ Ironically, the judiciary has held administrative agencies to a higher standard of reasoning than that to which it holds lower courts.²¹⁵ Hence, besides attempting to proactively meet the requirements for deference, the agencies are at the mercy, and seemingly sometimes whim, of the courts.

There are three types of deference applicable in workplace law cases. Two of these, *Chevron*²¹⁶ deference and *Skidmore*²¹⁷ deference, apply to agency interpretation of statutes. The third type, alternately referred to as *Seminole Rock* deference or *Auer* deference, applies to an agency’s interpretations of its own regulations. Under *Chevron*, courts are to accept an agency’s reasonable construction of a statute.²¹⁸ *Skidmore* holds that the persuasive weight of an agency’s opinion depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .”²¹⁹ *Seminole Rock* or *Auer* deference provides that courts should give deference to an agency’s interpretation of its own regulation as long as that interpretation is reasonable and even if the court deems another reasonable reading of the regulation better.²²⁰

212. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 1335–36 (2011) (giving weight to EEOC’s interpretation of “filed any complaint” set forth in its compliance manual while interpreting the FLSA, a statute enforced by DOL); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (giving deference to EEOC guidance regarding what constitutes a “charge”); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345–46 (1997) (finding that the term “employees” in Title VII encompassed former employees and noting that the EEOC’s interpretations “carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions”).

213. Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1350 (2013); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1740 (2010).

214. Mathews, *supra* note 213, at 1351.

215. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2009 (2015).

216. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

217. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

218. *Chevron*, 467 U.S. at 843.

219. *Skidmore*, 323 U.S. at 140.

220. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (“In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. The agency’s interpretation will be accepted if, though not the fairest reading of the regulation,

While no agency can be sure what level of deference the courts will confer, if any, the outlook seems more precarious for the DOL and EEOC. Ironically, two of the formative deference cases, *Skidmore* and *Auer*, involved DOL interpretations of a workplace statute, and the agency's interpretations were upheld in both cases.²²¹ Nevertheless, both DOL and the EEOC have been among the agencies given the lowest instances of deference.

The EEOC is the agency with the lowest rate of deference given by federal courts.²²² An empirical study by Professors Kent Barnett and Christopher J. Walker analyzing 1,558 instances in which a federal circuit court reviewed an agency's interpretation found that of the twenty-eight agencies contained in the sample, the EEOC was ranked twenty-eighth.²²³ DOL ranked nineteenth out of twenty-eight.²²⁴ The study also used the same dataset to rank deference rate by subject-matter.²²⁵ Of the twenty-two subject matter areas implicated, labor ranked fifteenth, employment ranked eighteenth, and civil rights ranked last at twenty-second.²²⁶

Additionally, while the EEOC enforces several statutes, the agency has no *substantive* rulemaking authority over Title VII, its preeminent statute.²²⁷ Rather, the EEOC's Title VII rulemaking authority is limited to procedural matters only.²²⁸ The U.S. Supreme Court has held that because Congress did not give the EEOC rulemaking authority to interpret substantive provisions of Title VII, the agency's substantive interpretations do not receive *Chevron* deference.²²⁹ Rather, EEOC substantive Title VII interpretations only qualify for consideration where *Skidmore* deference will apply. The EEOC does have rulemaking authority under the

it is a plausible reading—within the scope of the ambiguity that the regulation contains.” (citation omitted)).

221. In *Skidmore*, the Court considered whether the on call time firefighters spent in the fire hall was compensable under the Fair Labor Standards Act. During this time, the firefighters ate, slept, played, and entertained themselves with various activities like playing dominoes and pool. The DOL Wage and Hour Administrator argued in an amicus curiae brief that time spent eating and sleeping was not compensable, but all other on call time was. The Court deferred to the Administrator's position. *Skidmore*, 323 U.S. at 135–36, 138, 140. The primary question before the Court in *Auer* was whether DOL's “salary-basis” test for determining whether an employee is exempt from the Fair Labor Standards Act suggests a permissible reading of the statute as applicable to public employees. The Court held that it did. *Auer v. Robbins*, 519 U.S. 452, 454–55, 458 (1997).

222. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 53 (2017).

223. *Id.* at 54.

224. *Id.*

225. *See id.* at 49–52.

226. *Id.* at 50.

227. Title VII provides, “The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out [Title VII].” 42 U.S.C. § 2000e-12(a).

228. *Id.*

229. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (“[T]he level of deference afforded [the agency's interpretation] ‘will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’”) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

ADEA,²³⁰ the ADA,²³¹ and the Genetic Information Nondiscrimination Act (GINA),²³² and would qualify for consideration for *Chevron* deference under these statutes.

The Court's treatment of the EEOC when it comes to deference is often at odds with the Court's enunciated deference standards.²³³ Scholars have posited several possible explanations for the Court's lack of deference to the EEOC.²³⁴ One hypothesis is that the agency's inability to engage in substantive rulemaking under Title VII prompts it to engage in less formal guidance like interpretative guidance and compliance manuals, and the informality of this guidance affects the level of deference the EEOC receives.²³⁵ Another potential explanation surrounds the political nature of the anti-discrimination work that the EEOC performs.²³⁶ Another theory is that the Court believes itself to have expertise in the area of anti-discrimination, more so than in other areas covered by other agencies, because of its Fourteenth Amendment jurisprudence.²³⁷

One limitation of any proposed legislative intervention is political will. While Congress has passed legislation to broaden protections of workplace laws previously, in 1978, 1991, and 2008, a single political party had control of both houses of Congress. Nevertheless, the bills had broad bipartisan support.²³⁸ Additionally, there is not a substantial difference in how conservative and liberal policies fare in regard to congressional overrides.²³⁹ Moreover, Congress has a history of overriding decisions, even during times of partisan enmity.²⁴⁰

Congressional passage of the bill titled "Ending Forced Arbitration of Sexual Assault and Harassment Act" in 2022 is a recent example of bipartisanship in

230. See 29 U.S.C. § 628 (authorizing the EEOC to issue regulations necessary to enforce the ADEA).

231. See 42 U.S.C. § 12116 (mandating that the EEOC issue regulations to effectuate Title I of the ADA).

232. 42 U.S.C. § 2000ff-10 (requiring the EEOC to issue regulations to enforce GINA).

233. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1949 (2006).

234. For a discussion of theories of why the Court affords the EEOC such little deference, see *id.*

235. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 102–07 (1995).

236. Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 571 (2000).

237. Hart, *supra* note 233, at 1951.

238. The bill that became the Civil Rights Act of 1991 passed the Senate by a vote of 93–5. It passed the House of Representatives by a vote of 381–38. Upon signing the bill into law, President George H.W. Bush stated, "Most of this Act's major provisions have been the subject of a bipartisan consensus." Statement on Signing the Civil Rights Act of 1991, President George Bush (Nov. 21 1991) (available at <https://www.presidency.ucsb.edu/node/266572> [<https://perma.cc/ML6U-9PR3>]). The bill that became the Americans with Disabilities Act Amendments Act. The bill that became the Americans with Disabilities Act Amendments Act passed the House by a vote of 402–17, and the Senate approved the bill by unanimous consent.

239. Christiansen & Eskridge, *supra* note 158, at 1322.

240. Many congressional overrides occurred in the 1990's despite the highly partisan rancor during that period. See *id.* at 1333.

passage of employment discrimination legislative overrides. The companion bills, H.R. 4445 and S. 2342, would prohibit enforcement of arbitration agreements signed before an alleged incident of sexual harassment or sexual assault that require third-party arbitration. The bill passed the House of Representatives by a vote of 335–97 and passed the Senate by voice vote.²⁴¹ The bill was being sponsored by Senators Kirsten Gillibrand (D-N.Y.) and Lindsey Graham (R-S.C.) and Representatives Cheri Bustos (D-Ill.) and Morgan Griffith (R-Va.) and was powered by the #MeToo Movement,²⁴² which created bipartisan support.²⁴³

The #MeToo movement exposed things about the American workplace that courts should learn from and apply in their decisions regarding employment laws. While the movement has important legal implications for employment practices dealing with harassment,²⁴⁴ it can be viewed in a much broader context. The movement has revealed that workplace misconduct is occurring at alarming rates. Even more notably, the movement has shown that the legal system has failed to deter such conduct or incentivize employers to curtail the conduct in the workplace, and fear of retaliation is the primary reason victims did not complain of the wrongdoing. The revelation that millions of people have experienced workplace misconduct is a sobering reminder of the importance of workplace protections. In 2005, Professor Deborah L. Brake recounted the social science research that shows the frequency of retaliation in the workforce with respect to sexual harassment.²⁴⁵

241. Paige Smith, *House Approves #MeToo Bill Aimed at Workplace Sexual Harassment*, BLOOMBERG (Feb. 7, 2022), <https://news.bloomberglaw.com/daily-labor-report/house-approves-metoo-bill-aimed-at-workplace-sexual-harassment> [<https://perma.cc/6J4W-7ZDS>].

242. The #MeToo movement was founded by Tarana Burke in 2007 and went viral in 2017 after actress Alyssa Milano urged her social media followers to reply with the hashtag “#metoo” if they had experienced harassment or assault. Cassandra Santiago & Doug Criss, *An Actress, a Little Girl, and the Heartbreaking Origin of Me Too*, CNN (Oct. 17, 2017), <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html> [<https://perma.cc/4Z9T-J4UN>]; Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017), <https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html> [<https://perma.cc/2KXY-FS5R>].

243. Paige Smith, *Lawmakers Crossing Aisle to End Harassment Claim Arbitration*, BLOOMBERG (July 14, 2021), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/X359CSG800000?bna_news_filter=true#jcite [<https://perma.cc/D9TB-P3D8>].

244. See Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018) for a robust discussion of the legal implications of the movement.

245. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 37 (2005) (citing Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (noting that a student found that women who reported sexual harassment through formal organizational channels experienced more negative outcomes than those who did not report)); Theresa M. Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 124–25 (2001) (noting that many plaintiff’s lawyers agree that if an employee complains about employment discrimination, that employee can typically consider that employment relationship over); Donna J. Benson & Gregg E. Thomson, *Sexual Harassment on a University Campus: The Confluence of Authority Relations, Sexual Interest and Gender Stratification*, 29 SOC. PROBS. 236, 244–45 (1982) (explaining that a study of college students found that female students who confronted their professors about harassment were likely to experience retaliation); Mindy E. Bergman, Regina Day Langhout, Patrick A. Palmieri, Lilia M. Cortina & Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting*, 87 J. APPLIED PSYCH. 230 (2002) (describing a study finding that even when women perceived that confronting harassment made things better,

That trend continues with respect to sexual harassment related retaliation and is prevalent in many other areas of workplace law.²⁴⁶ The Supreme Court is well aware of the chilling effect retaliation can have on victims. In *Crawford v. Metropolitan Government of Nashville & Davidson County*,²⁴⁷ a retaliation case brought under Title VII of the Civil Rights Act of 1964 (Title VII), the Court, quoting Professor Brake, recognized that “fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”²⁴⁸ These fears are warranted. Studies show that employees who report wrongdoing in the workplace face retaliation at concerning rates.²⁴⁹ These fears transcend harassment claims and apply more broadly to any workplace mistreatment.²⁵⁰

The bipartisan support this bill received suggests that a bill providing for a broad rule of construction for anti-retaliation provisions in workplace statutes may also garner bipartisan support. However, for the bill to be effective, it would need to provide this rule of construction for all workplace retaliation statutes across the typical workplace law categories—employment discrimination laws, minimum labor standards laws, and labor laws.

CONCLUSION

The Court has begun invoking floodgates arguments to justify narrow interpretations of anti-retaliation provisions in workplace statutes. Not only is this practice antithetical to half a century of anti-retaliation jurisprudence in which these provisions were interpreted broadly, but it also endangers the regulatory scheme

empirical outcomes showed that it did not); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 247–48 (1993) (explaining a study that showed filing a complaint, whether formal or informal, yielded worse outcomes than alternative measures, such as doing nothing, talking to the harasser, or seeking social support); Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (highlighting a study of state employees finding that sixty-two percent of women who complained of sexual harassment experienced retaliation); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED PSYCH. 877, 896 (1997) (noting that assertive responses to sexual harassment were actually associated with more negative outcomes); Deborah Erdos Knapp, Robert H. Faley, Steven E. Ekeberg & Cathy L. Z. Dubois, *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 711 (noting that women who complain of sexual harassment commonly experience public humiliation); Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983) (finding that forty percent of women who filed complaints with a state equal rights agency reported experiencing retaliation).

246. Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 632 (2007) (noting the negative effect reporting harassment has on a woman's professional reputation); BERNHARDT ET AL., *supra* note 7, at 20; Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCH., 247, 255 (2003) (finding that seventy-five percent of employees who reported workplace mistreatment faced some form of retaliation).

247. *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271 (2009).

248. *Id.* at 279.

249. See Cortina & Magley, *supra* note 246 (finding that seventy-five percent of employees who reported workplace mistreatment faced some form of retaliation).

250. See BERNHARDT ET AL., *supra* note 7.

Congress has established for workplace law. A floodgates argument is grounded in the notion of judicial economy, and its foundational premise is that an interpretation of the law in a particular way would cause a wave of litigation, thereby drastically increasing the judiciary's workload or the workload of an administrative agency, leading to dysfunction. However, anti-retaliation laws are so integral to an effective regulatory enforcement scheme that the dilution of these laws will lead to the very dysfunction that a floodgates argument seeks to avoid.

A floodgates argument is incongruent with and should not be applied to anti-retaliation laws. Whereas floodgates arguments seek to avoid establishing new causes of action or giving new categories of individuals standing to sue, as applied to anti-retaliation laws, a floodgates argument does neither. Rather, the argument in a retaliation context seeks to discourage parties who already have standing from being able to bring claims under an existing cause of action.

Legislative intervention is needed to prevent the judiciary from narrowly interpreting substantive anti-retaliation law in a manner that attempts to deter employees from filing cases. Specifically, Congress should create a rule of construction, modelled after the one in the ADAAA, that provides for the broad interpretation of anti-retaliation statutory provisions. While doing so would not solve all problems related to restrictive interpretations of anti-retaliation law, it would go a long way towards ensuring that courts cannot simply use a floodgates argument to effectively dismantle anti-retaliation safeguards and, in the process, the workplace rights these provisions were created to preserve.