No. 08-441

IN THE
Supreme Court of the United States

JACK GROSS,
Petitioner,
v.
FBL FINANCIAL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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March 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondent before this Court in favor of affirmance.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC members have a substantial interest in the issue presented in this case regarding the scope and applicability of this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), to non-Title VII cases. Specifically, EEAC has a direct and ongoing interest in the question of when, if ever, it is appropriate to shift the burden of proof regarding causation to an employer-defendant in a non-Title VII employment discrimination case.

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of

the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Jack Gross has worked in various capacities for FBL Financial Group, Inc. (FBL) and/or its predecessor company since 1987. Pet. App. 2a. In 1999, at the age of 51, Gross was promoted to the position of Claims Administration Vice President. *Id*. As a result of two corporate reorganizations, Gross was reassigned to the position of Claims Administration Director in 2001, and in 2003, to the position of Claims Project Coordinator. *Id.* Many of the duties Gross had performed as Claims Administration Director were transferred to the newly created Claims Administration Manager position, which was given to Lisa Kneeskern, an employee in her early forties. *Id.* at 7.

Gross brought an action in the U.S. District Court for the Southern District of Iowa claiming that FBL demoted him because of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*. *Id.* at 3a. Over FBL's objection, the trial court gave a mixed-motive jury instruction providing that Gross had the burden of proving that he was demoted and that age was a motivating factor in the demotion decision. *Id.* The trial court went on to instruct the jury that a defense verdict would be warranted if FBL could prove "'by a preponderance of the evidence that [it] would have demoted [Gross] regardless of his age.'" *Id.* at 6a. The jury returned a verdict for Gross in the amount of $46,945, representing compensation for lost wages. *Id.* at 3a.

FBL filed post-trial motions for judgment or, in the alternative, for a new trial, arguing among other

things that Gross failed to present any direct evidence of age discrimination, and all of the decision makers testified that age was not a factor in the employment decision. *Id.* The district court denied FBL's motions, concluding that despite the absence of any direct evidence of discrimination, there was "ample circumstantial evidence presented during trial that FBL intentionally discriminated against Gross based on his age." *Id.* at 25a. It pointed out that Gross himself testified that "the only common thread" linking the people affected by the reorganization was age, and that "everybody over 50" was impacted. *Id.* The district court found that "an *inference* of age discrimination is raised by the decision to place Kneeskern in the claims administration manager position instead of Gross." *Id.* (emphasis added). It also found that there was sufficient evidence for the jury to find that the company's stated reason for reassigning Gross to the Claims Project Coordinator position — that "it was a good fit for his strengths and weaknesses" — was false and a pretext for unlawful discrimination, because at the time the demotion decision was made, "there was no defined position for Gross to 'fit' into." *Id.* at 28a.

FBL appealed the decision to the Eighth Circuit, which found that the district court erred in providing a mixed-motive instruction to the jury where no direct evidence of age discrimination was presented. *Id.* at 3a. It determined that the approach to allocating the burden of proof articulated by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applies to mixed-motive age discrimination cases, noting that Justice O'Connor's concurrence is viewed as "the controlling opinion that sets forth the governing rule of law" in such cases. *Id.* at 5a.

Applying that rule, the Eighth Circuit found that "to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show by direct evidence that an illegitimate factor played a substantial role in the employment decision." *Id.* (citations and quotations omitted). "Direct evidence," it continued, must consist of more than "stray remarks" or "statements by non decision makers" suggesting a discriminatory motivation. *Id.* Rather, "[d]irect evidence for these purposes is evidence showing a specific line between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that the illegitimate criterion actually motivated the adverse employment action." *Id.* (citations and quotations omitted). Absent such a showing, the Eighth Circuit found, the burden-shifting analysis that this Court first established in the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) applies, under which the burden of persuasion "remains with the plaintiff throughout . . . ." *Id.* at 4a. Because Gross failed to present any direct evidence of age discrimination, the Eighth Circuit concluded that the district court's mixed-motives jury instruction was improper. *Id.* at 6a.

In doing so, the Eighth Circuit soundly rejected Gross' contention that both § 107 the Civil Rights Act of 1991 — which amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, to, among other things, codify a "motivating factor" burden-shifting approach applicable to mixed-motive cases — and *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) — which held that direct evidence is not required in order to proceed on a mixed-motive theory under Title VII — supersede *Price Waterhouse*. *Id.* at 8a-10a. It observed that § 107

applies only to Title VII and does not affect claims arising under the ADEA. *Id.* at 8a. The appeals court also pointed out that this Court in *Desert Palace* expressly declined to rule on whether direct evidence is required in order to obtain a mixed-motive jury instruction in non-Title VII cases. *Id.* at 10a. It thus reversed and remanded the case for a new trial. Gross petitioned for a writ of certiorari, which this Court granted on December 5, 2008.

SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, bars employers from discriminating against an employee "because of such individual's age." 29 U.S.C. § 623(a). Under the familiar burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff seeking to prove unlawful intentional discrimination using circumstantial evidence must demonstrate that the employer's stated non-discriminatory explanation for the challenged employment decision is a pretext for discrimination. 411 U.S. at 802 (footnote omitted); *see also* St. *Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08 (1993).

In *Price Waterhouse v. Hopkins*, a plurality of this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq*. 490 U.S. at 250. Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without having considered the protected characteristic. *Id.* at 249. This so-called "mixed-motive"

analysis thus shifts the burden of proof regarding causation to the employer after the plaintiff shows, by direct evidence, that a protected characteristic was a motivating factor in the employment decision.

Two years after *Price Waterhouse* was decided, Congress enacted the Civil Rights Act of 1991 (CRA), P.L. 102-166, which established a "motivating factor" test applicable to mixed-motive cases brought under Title VII. Specifically, § 107 of the 1991 Act provides that after a plaintiff "demonstrates that race, color, religion, sex or national origin was a motivating factor" — along with other, legitimate considerations — for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may significantly limit its liability for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor . . . ." 42 U.S.C. § 2000e-5(g)(2)(B). Section 107 did not similarly amend the ADEA or any other non-Title VII employment nondiscrimination law.

This Court recognized the limited scope of the 1991 amendments in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a Title VII case. There, it interpreted the "motivating factor" test as permitting Title VII plaintiffs to obtain a mixed-motive jury instruction even in the absence of direct evidence of discrimination. Because § 107 of the CRA did not incorporate the "motivating factor" test into the ADEA, however, the Court's subsequent analysis in *Desert Palace* of that provision simply does not apply, and should not be extended, to age discrimination claims. Indeed, the Court expressly declined to extend its holding in *Desert Palace* beyond the Title VII context.

Despite sharing a common goal of eradicating employment discrimination, Title VII and the ADEA

differ in a number of significant ways, further making § 107 and this Court's interpretation of it in *Desert Palace* plainly inapplicable to age discrimination claims. This Court has observed repeatedly that these differences justify applying the two statutes differently in certain circumstances. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005).

Price Waterhouse was decided in the context of Title VII, not the ADEA, and this Court never has expressly extended its holding in that case to intentional age discrimination cases. Even assuming that *Price Waterhouse* does apply to ADEA claims, however, the ultimate burden of proving unlawful discrimination nevertheless should always remain squarely with the plaintiff, unless and until direct evidence is presented demonstrating that the employer took the challenged employment action "because of" the plaintiff's age. As this Court observed last Term, "'[w]hatever the employer's decisionmaking process,' a plaintiff alleging disparate treatment cannot succeed unless the employee's age '*actually played a role in that process and had a determinative influence on the outcome*.'" *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (emphasis added) (citation omitted).

Applying *Desert Palace* to the ADEA would create an opportunity for plaintiffs to turn every age discrimination claim into a mixed-motive case, thus imposing on employers a meaningful and substantial hardship. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer would determine the employer's burden of proof. Rather, plaintiffs could simply plead every garden variety discrimination claim under both a

single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent. Because damages for violations of the ADEA are limited to make-whole relief and liquidated damages for willful violations, there is no disincentive — as there might be under Title VII — to pursuing an age discrimination case under a mixed-motive theory.

ARGUMENT

I. REGARDLESS OF THE CIRCUMSTANCES, SHIFTING THE BURDEN OF PROOF TO THE EMPLOYER ON THE QUESTION OF CAUSATION IN AN INTENTIONAL AGE DISCRIMINATION CASE IS IMPROPER

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

Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), developed "a sensible, orderly way to evaluate

the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The *McDonnell Douglas* burden-shifting scheme is one of the ways in which plaintiffs have been able to establish intentional discrimination using circumstantial evidence.

In order to make out a prima facie case under *McDonnell Douglas*, a plaintiff must show that (1) he was a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applications; (3) despite his qualifications, was rejected; and (4) after his rejection, the position remained open, and the employer continued to seek applicants with his qualifications. 411 U.S. at 802 (footnote omitted). The burden to establish a prima facie case is not onerous, yet it "creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Once that threshold requirement is met, the burden of production of evidence shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 802. If the employer succeeds, the presumption of discrimination drops from the case. *Burdine*, 450 U.S. at 255 n.10. At that point, the burden shifts back to the plaintiff to show the proffered reason was merely a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). If the plaintiff cannot make this showing, he cannot establish a violation. *McDonnell Douglas*, 411 U.S. at 807.

In *Price Waterhouse v. Hopkins*, a Title VII case, a plurality of this Court ruled that where a plaintiff

proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII. 490 U.S. at 250. Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id*. at 249. This method of proof has come to be referred to as the "mixed-motive" analysis. *Id.* at 246.

Under the *McDonnell Douglas* test, the plaintiff retains at all times the burden of persuading the fact finder that intentional discrimination occurred. *Burdine*, 450 U.S. at 253. By contrast, the mixed-motive analysis recognizes the relatively rare circumstance in which there actually exists direct, "smoking gun" evidence of discrimination, yet the employer contends that it would have taken the same employment action in any event. *Price Waterhouse*, 490 U.S. at 247. Once the plaintiff persuades the trier of fact that an illegitimate factor actually was considered, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246. The plurality characterized the employer's burden at this stage as "an affirmative defense." *Id.* It expressly declined to identify, however, "which specific facts, 'standing alone' would or would not establish a plaintiff's case," explaining that to do so was "unnecessary in this case." *Id.* at 252.

Justices White and O'Connor each wrote a separate opinion concurring in the judgment without joining the plurality opinion. Justice White disagreed with the plurality's requirement that the employer must

provide objective evidence that it would have reached the same result absent the discriminatory factor. In his view, employers should not be restricted to objective evidence to make this showing. *Id.* at 261 (White, J., concurring).

Justice O'Connor wrote separately to explain her view on "when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262 (O'Connor, J., concurring). In Justice O'Connor's view, only "*direct evidence* that an illegitimate criterion was a substantial factor in the decision" would justify shifting the burden of proof to the defendant under a mixed-motive analysis. *Id.* at 276 (O'Connor, J., concurring) (emphasis added). The defendant then would be required to show that it would have reached the same decision based on wholly legitimate reasons, without considering the protected characteristic. If the defendant succeeds, Justice O'Connor agreed with the plurality that it would not be considered to have discriminated "because of" a protected characteristic.

According to Justice O'Connor, mixed-motive cases appropriately require the employer to assume the heightened burden of refuting discrimination. While the prima facie case under *McDonnell Douglas* may give rise to an inference of discrimination, it does not amount to proof of "the evil[] Congress sought to eradicate from the employment setting." *Id.* at 275 (O'Connor, J., concurring). Therefore, the defendant is entitled to a presumption that it acted in good faith when confronted with only circumstantial evidence of discrimination, and should not have to prove that it acted lawfully. *See id.* at 266 (O'Connor, J., concurring). The existence of direct evidence of discrimina-

tion does not entitle the employer, however, to the same presumption that it acted in good faith. *Id.* at 271 (O'Connor, J., concurring).

A. Section 107 of the 1991 Civil Rights Act Did Not Amend the ADEA To Include a "Motivating Factor" Mixed-Motive Test

In enacting § 107 of the Civil Rights Act of 1991 (CRA), P.L. 102-166, Congress sought to partially overrule *Price Waterhouse* by creating and codifying a "motivating factor" test applicable to mixed-motive cases brought under Title VII. Specifically, § 107(a) amended Title VII to provide:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court may grant declaratory relief, injunctive relief, and attorney's fees . . . and shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

42 U.S.C. § 2000e-5(g)(2)(B).

It is well-settled that when construing statutory provisions, courts must look first to the plain mean-

ing of the statutory language. *See*, *e.g.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

On its face, § 107 applies only to cases of discrimination on the basis of race, color, religion, sex or national origin; it does not extend to causes of action for discrimination based on age or any other characteristic elsewhere statutorily protected. Congress thus consciously and conspicuously chose not to apply the "motivating factor" burden-shifting analysis applicable to Title VII mixed-motive cases to any other federal employment nondiscrimination law, including the ADEA.

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

> In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights and Women's Equity in

> Employment Act of 1991 *as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by such act*."

H.R. Rep. No. 102-40, pt. 1, at 12 (1991) (emphasis added). That language was dropped and never became part of the final bill.

In a section-by-section analysis of what *was* to become the 1991 CRA, Senator Dole described § 107 as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).[2] Because § 107 clearly does

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[2] *Amicus* AARP argues that the legislative history of the 1991 amendments actually supports extending *Desert Palace* to the ADEA, yet the statement it offers in its brief in support is incomplete, and taken out of context. That portion of the legislative history provides, in its entirety:

> RELATIONSHIP TO OTHER LAWS MODELED AFTER TITLE VII
>
> A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et. seq., are modeled after, and have been interpreted in a manner consistent with, Title VII.
>
> The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA, once a plaintiff makes a prima facie case of

not apply to claims brought under statutes other than Title VII, it cannot be used as a basis for shifting the burden of proof regarding causation to the employer.

B. *Desert Palace* Has No Applicability Beyond the Title VII Context

This Court recognized the limited scope of the 1991 amendments in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a Title VII case. Writing for the unanimous Court, Justice Thomas observed, "[t]his case provides us with the first opportunity to consider the effects of the 1991 Act on jury instructions in mixed-motive cases." *Id.* at 98. There, the Court held that "direct evidence of discrimination is not required in mixed-motive cases" brought under Title VII, *id.* at 101, and a plaintiff may use competent evidence of any sort, whether direct or circumstantial, to demonstrate that race, color, national origin, religion, or sex was a motivating factor in an employment decision. The Court rested its holding in large part on the

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> disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. This was the clear intent of the Committee during its consideration of the ADA.
>
> Similarly, mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.

H.R. Rep. No. 102-40, pt. 2, at 4 (1991). To the extent that the ADA specifically incorporates Title VII's remedies and procedures, there may be some strength to this statement as it may be applied to mixed-motive claims brought under the ADA. Significantly, the ADEA is not mentioned in the mixed-motive discussion above, however, and contains a remedial scheme that is patterned after the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, not Title VII.

actual text of Title VII, as amended by the CRA, which codified the "motivating factor" test in mixed-motive cases brought under that statute. The Court took note of the fact that the CRA did not extend the test to any other context outside of Title VII, and expressly declined to reach the question whether direct evidence of discrimination is required in mixed-motive causes of action brought under statutes other than Title VII.

"No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880). Because neither § 107 nor *Desert Palace* established a "motivating factor" test with respect to mixed-motive discrimination claims brought under the ADEA, neither can be used to justify shifting the burden of proof regarding causation to employers in such cases.

Despite sharing a common goal of eradicating employment discrimination, Title VII and the ADEA differ in a number of significant ways, further making § 107 and this Court's interpretation of it in *Desert Palace* plainly inapplicable to age discrimination claims. Unlike sex, race, and other protected characteristics, for instance, age often is correlated with legitimate factors, such as salary or seniority. There is a distinction between age-based decisions, which are unlawful, and actions based on age-correlated factors, which are not unlawful. It is much more difficult to devise a situation in which a "race-correlated" factor (if, in fact, such a thing exists) would not be a proxy for unlawful race discrimination. Furthermore, as this Court observed in *City of Jackson*, "[I]ntentional discrimination on the basis of

age has not occurred at the same levels as discrimination against those protected by Title VII." *Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005). Thus, while it is true that Title VII and the ADEA are alike in many ways, there also are significant differences, which as this Court has found, justify applying them differently in certain circumstances. Permitting a mixed-motive jury instruction in the absence of direct evidence of discrimination "because of" age is one such circumstance.

II. EVEN IF THE *PRICE WATERHOUSE* MIXED-MOTIVE ANALYSIS IS AVAILABLE UNDER THE ADEA, IN THE ABSENCE OF DIRECT EVIDENCE THAT A DEFENDANT TOOK ADVERSE EMPLOYMENT ACTION "BECAUSE OF" THE PLAINTIFF'S AGE, THE ULTIMATE BURDEN OF PROVING A VIOLATION OF THE LAW SHOULD REMAIN AT ALL TIMES WITH THE PLAINTIFF

This Court has never expressly applied *Price Waterhouse* to the ADEA context, and Congress has never endorsed a mixed-motive approach with respect to age discrimination claims. For that reason, the mixed-motive burden-shifting scheme applicable to Title VII cases arguably does not extend to claims brought under any other statute, including the ADEA, at all. Even if *Price Waterhouse* does apply to ADEA claims, however, the ultimate burden of proving unlawful discrimination nevertheless should always remain squarely with the plaintiff, unless and until direct evidence is presented demonstrating that the employer took the challenged employment action "because of" the plaintiff's age. "In the employment context, direct evidence of discrimination is 'evidence

of conduct or statements that both reflect directly on the alleged discriminatory attitude and that bear directly on the contested employment decision.'" *Johnson v. Mechanics & Farmers Bank*, 2009 U.S. App. LEXIS 1260 (4th Cir. Jan. 23, 2009) (citation omitted).

This Court has said that where there is no clear majority opinion, "the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). Justice O'Connor's concurring opinion in *Price Waterhouse* requiring direct evidence as a prerequisite for shifting the burden of proof to the employer is the narrowest ground on which a majority of the Justices agreed and thus states the holding of the Court. In fact, Justice Kennedy's dissent, which the Chief Justice and Justice Scalia joined, specifically describes the Court's holding by referring to Justice O'Connor's "direct evidence" standard: "The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision." 490 U.S. at 280 (Kennedy, J., dissenting).

The employee in *Price Waterhouse* produced compelling and persuasive evidence that her employer improperly relied on gender stereotypes in deciding to pass her over for partnership. The evidence included specific statements by firm decision makers, including the suggestions that the plaintiff could increase considerably her chances of partnership if she were to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" 490 U.S. at 272 (O'Connor, J., concurring) (citation omitted).

To Justice O'Connor, such statements displayed an obvious sex bias just as clearly as if "she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid." *Id.* at 273 (O'Connor, J., concurring). The overt "advice" that the plaintiff should act more like a woman to improve her partnership prospects thus directly connected her sex to the adverse employment action, warranting the "strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation . . . ." *Id.* at 262.

Importantly, Justice O'Connor noted that mere stray remarks, statements made by non-decision makers, statements made by decision makers that are unrelated to the challenged employment decision, or only indirect evidence of sex stereotyping are insufficient to warrant a mixed-motive instruction. *Id.* at 277 (O'Connor, J., concurring). Otherwise, any passing reference to a protected characteristic could be used to convert a pretext case to one involving direct evidence, thereby justifying placing the burden on the employer to prove that it did not discriminate. As Justice O'Connor wisely observed:

> Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of sex."

Id. (O'Connor, J., concurring).

This is particularly dangerous ground under the ADEA, where many legitimate employment actions may *correlate* with age without being made "because of" it. In *Mereish v. Walker*, the Fourth Circuit pointed out:

> [W]hen Congress enacted the Civil Rights Act of 1991 in response to *Price Waterhouse*, it amended only Title VII and did not pass a corresponding amendment to the ADEA. And maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions.

359 F.3d 330, 339-40 (4th Cir. 2004). Thus, as this Court observed last Term, "'[w]hatever the employer's decisionmaking process,' a plaintiff alleging disparate treatment cannot succeed unless the employee's age 'actually played a role in that process and had a determinative influence on the outcome.'" *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (citation omitted).

III. APPLYING *DESERT PALACE* TO THE ADEA WOULD CREATE AN OPPORTUNITY FOR PLAINTIFFS TO TURN EVERY AGE DISCRIMINATION CLAIM INTO A MIXED-MOTIVE CASE, THUS IMPOSING ON EMPLOYERS A MEANINGFUL AND SUBSTANTIAL HARDSHIP

Replacing the conventional *McDonnell Douglas* burden-shifting approach with the markedly less burdensome "motivating factor" approach in mixed-motive ADEA cases involving only circumstantial

evidence would fundamentally alter the manner in which such cases are litigated. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer would determine the employer's burden of proof.

Instead, opportunistic plaintiff's counsel eager to win their cases — or negotiate generous settlement packages with "deep-pocketed" corporate defendants — will plead every garden variety discrimination claim under both a single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent. Because damages for violations of the ADEA are limited to make-whole relief and liquidated damages for willful violations, there is no *disincentive* — as there might be under Title VII — to pursuing an age discrimination case under a mixed-motive theory. Employers rightly concerned about the difficulties associated with proving, by a preponderance of the evidence, a *negative* — that they *did not* discriminate — invariably will consider more carefully any opportunity to settle early, even where they believe they have been wrongly accused.

The prospect of turning every employment discrimination claim into a mixed-motives case is especially problematic because employment decisions often provide fertile grounds for discrimination claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic was *a* motivating factor, as opposed to *the* motivation. As one commentator observed:

> Employment decisions . . . are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor—a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. . . . Summary judgment will be less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). Permitting plaintiffs to manipulate the burdens of proof in age discrimination cases in this manner increases significantly their chances of avoiding summary judgment, and ultimately prevailing at trial, even where their evidence is very weak.

Furthermore, frivolous mixed-motives claims divert attention and resources away from the development of proactive corporate anti-discrimination measures. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997).

To guard against this waste, this Court properly restricted the mixed-motives analysis to the rare case in which a plaintiff can demonstrate with a high degree of assurance that the challenged employment

decision was the result of illegitimate motives. *Price Waterhouse*, 490 U.S. at 247. This standard should ensure that "plaintiffs in employment discrimination cases use anti-discrimination laws only as a shield against overly illegal employer conduct, and not as a sword to threaten employers into wasteful prophylactic actions." *Ward*, *supra* at 663 (footnote omitted).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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March 2009