No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC., d/b/a
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, Desert Palace, Inc., dba Caesars Palace Hotel & Casino.

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 340 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

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

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, members of EEAC and the Chamber have a substantial interest in the issue presented in this case, *i.e.*, whether there must be direct evidence of discrimination in Title VII cases to warrant the "mixed-motives" analysis this Court established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

EEAC and the Chamber seek 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 attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters, EEAC and the Chamber are 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

Respondent Catharina F. Costa worked in a warehouse for Desert Palace, Inc., dba Caesars Palace Hotel & Casino ("Caesars"). *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 844 (9th Cir. 2002). During her employment, Costa was disciplined several times for engaging in inappropriate conduct and using profanity at work. *Id*. at 844-45. She was terminated by Caesars in 1994 for a physical altercation she had with a co-worker. *Id.* at 846.

Costa sued Caesars, alleging among other things that her sex was a motivating factor in her termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. At trial, the U.S. District Court for the District of Nevada gave the jury a "mixed-motives" instruction as follows:

> You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence

> that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Id. at 858. The jury returned a verdict in favor of Costa and awarded her back pay and damages. *Id.* at 846.

On appeal, the U.S. Court of Appeals for the Ninth Circuit vacated the judgment based on this Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and Justice O'Connor's concurrence. The appeals court held that the district court had erred by giving the jury the mixed-motives instruction without "direct and substantial evidence of discriminatory animus," and that the error was not harmless. *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 889 (9th Cir.), *vacated*, 274 F.3d 1306 (9th Cir. 2001).

On *en banc* rehearing, the Ninth Circuit overruled the panel in a 7-4 decision, holding that the district court's mixed-motives jury instruction was proper. 299 F.3d at 859. The *en banc* majority held that the 1991 Civil Rights Act overruled *Price Waterhouse* entirely, thereby allowing a Title VII plaintiff to use either direct or circumstantial evidence to show that a protected characteristic played "a motivating factor" in an adverse employment action. The dissenting judges observed that the majority holding "puts our circuit in conflict with almost all others." *Id.* at 866. (Gould, Kozinski, Fernandez & Kleinfeld, JJ., dissenting).

This Court granted certiorari to address the conflict between the Ninth Circuit's decision and those of the other circuit courts of appeals over what type of evidence Title VII plaintiffs must show in order for a district court to treat their case as one involving mixed-motives under *Price Waterhouse v. Hopkins*.

SUMMARY OF ARGUMENT

A mixed-motives analysis is appropriate only when the plaintiff has presented direct evidence of discrimination, *i.e.* that a decisionmaker either referred openly to a protected

characteristic to explain a challenged employment decision or relied on a facially discriminatory policy. This standard is based on the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Since no opinion garnered the support of a majority of Justices in *Price Waterhouse*, Justice O'Connor's concurring opinion states this Court's holding. *Marks v. United States*, 430 U.S. 188, 193 (1977). Therefore, *Price Waterhouse* requires direct evidence that a protected characteristic played a substantial role in an employment action for a mixed-motives analysis to apply. Neither the plain language of the 1991 Civil Rights Act (CRA), P.L. 102-166, nor its legislative history indicates that Congress intended to alter this standard.

This Court should limit mixed-motives analysis only to situations where a decisionmaker openly referred to a protected characteristic to explain a challenged employment decision or relied on a facially discriminatory policy. Justice O'Connor's characterization of the plaintiff's proof in *Price Waterhouse* as direct evidence and this Court's prior narrow interpretation of direct evidence both support this standard. In *Price Waterhouse*, the plaintiff was told essentially that she did not make partner because she did not conform to gender stereotypes. Likewise, in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), a precursor to *Price Waterhouse*, a school superintendent said he would not rehire the plaintiff because the plaintiff had talked to a radio station about a controversial school policy. In both cases, the decisionmaker's open reference to a protected characteristic or activity to explain the adverse action was direct evidence of discrimination. By allowing respondent to use a mixed-motives analysis without direct evidence of discrimination, the Ninth Circuit erred and must be reversed.

Allowing the Ninth Circuit's decision to stand would prejudice employers severely by adding significant hurdles for them to overcome when defending against employment dis-

crimination claims. The decision below would turn every discrimination claim into a mixed-motives case, shifting the burden to the employer in every instance to prove its employment action was based on legitimate criteria. Employers would have to prove their innocence, even if the plaintiff presented only circumstantial evidence of discrimination. The Ninth Circuit's ruling thus overrides the proof scheme this Court developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for use when there is no direct evidence of discrimination. At the same time, mixed-motives treatment significantly undermines the ability of employers to defend against discrimination claims.

ARGUMENT

A MIXED-MOTIVES ANALYSIS IS APPROPRIATE ONLY WHEN THERE IS EVIDENCE THAT A DECISIONMAKER OPENLY REFERRED TO A PROTECTED CHARACTERISTIC TO EXPLAIN A CHALLENGED EMPLOYMENT DECISION OR RELIED ON A FACIALLY DISCRIMINATORY POLICY

I. THIS COURT'S HOLDING IN *PRICE WATERHOUSE,* A STANDARD THE 1991 CIVIL RIGHTS ACT DID NOT ALTER, AND PRIOR NARROW INTERPRETATION OF DIRECT EVIDENCE SUPPORT LIMITING MIXED-MOTIVES ANALYSIS ONLY TO SITUATIONS WHERE A DECISIONMAKER OPENLY REFERRED TO A PROTECTED CHARACTERISTIC TO EXPLAIN A CHALLENGED EMPLOYMENT DECISION OR RELIED ON A FACIALLY DISCRIMINATORY POLICY

A. Justice O'Connor's Concurring Opinion in *Price Waterhouse v. Hopkins* Requiring Direct Evidence That a Protected Characteristic Played a Substantial Role in an Employment Action for a Mixed-Motives Analysis States This Court's Holding

Title VII of the Civil Rights Act of 1964 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), so that direct evidence is often unavailable, this Court has 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).

This Court established the now-familiar method of proof to establish intentional discrimination using circumstantial evidence in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of discrimination, a plaintiff must show (1) he was a member of a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applications; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open, and the employer continued to seek applicants with his qualifications. *Id.* 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, 253-54 (1981).

If the plaintiff establishes a prima facie case, the burden 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 this 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, 508 (1993). If the plaintiff cannot make this showing, he has failed to establish a violation of Title VII. *McDonnell Douglas*, 411 U.S. at 807.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court established another way of proving intentional discrimination where an adverse employment decision is based on a mixture of both legitimate and illegitimate motives. In that case, the plaintiff showed that her employer, an accounting firm, did not make her a partner based at least in part on its perception that she did not conform to the

stereotype of how a woman should act. In particular, the plaintiff was told she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'" to improve her chances for partnership. *Id.* at 235 (citation omitted). Her employer argued that the plaintiff was passed over because of problems with her interpersonal skills. *Id.* at 236.

A plurality of four Justices ruled that where a plaintiff proves that gender played "a motivating part" in an employment decision, along with legitimate factors, the plaintiff has shown that the decision was "because of" her sex in violation of Title VII. *Id.* at 250. The employer still can avoid liability, but only if it proves that it would have made the same decision without considering the protected characteristic. *Id* This method of proof is known as a "mixed-motives" analysis. *Id.* at 246.

The plurality distinguished between mixed-motives cases and pretext cases, which are analyzed under the *McDonnell Douglas* paradigm. According to the plurality, the pretext analysis presupposes that *either* a legitimate or illegitimate reason caused an adverse employment decision by asking whether the defendant's reason is the "true" one. *Id.* at 247. Under the *McDonnell Douglas* test, the plaintiff retains at all times the burden of persuading the fact finder that intentional discrimination occurred. *Burdine*, 250 U.S. at 253. In contrast, the mixed-motives analysis recognizes the comparatively rare situation in which there actually is eyewitness 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.* The plurality 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-motives analysis. The defendant then must prove that it would have reached the same decision based on wholly legitimate reasons, without considering the protected characteristic. *Id.* at 276 (emphasis added). If the defendant succeeds, then Justice O'Connor agreed with the plurality that it had not discriminated "because of" a protected characteristic.

According to Justice O'Connor, mixed-motives cases appropriately require the employer to assume the heightened burden of refuting discrimination. While the prima facie case under *McDonnell Douglas* may be indicative of discrimination, it does not amount to proof of "the evil[] Congress sought to eradicate from the employment setting." *Id.* at 275. 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. In contrast, direct evidence of discrimination does not entitle the employer to the same presumption that it acted in good faith. Instead, the employer must justify its decision on legitimate criteria. *Id.* at 271.

Without an opinion supported by a majority of the Justices, Justice O'Connor's concurring opinion states the holding of this Court in *Price Waterhouse*. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court instructed that when 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." (citation omitted). In *Price Waterhouse*, neither the plurality opinion nor Justice White addressed what type of evidence would be sufficient to shift the burden of persuasion to the employer to prove that it would have reached the same decision absent consideration of the discriminatory factor. Justice O'Connor's concurrence requiring direct evidence as a prerequisite for the shift thus is the narrowest ground on which a majority of the Justices agreed. Therefore, her concurring opinion states the holding of this Court.

In addition, Justice Kennedy's dissent, which the Chief Justice and Justice Scalia joined, specifically uses Justice O'Connor's words to describe the Court's holding. "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. *Ante*, at 1804-1805 (opinion of O'CONNOR, J.)." 490 U.S. at 280 (Kennedy, J., dissenting).

B. This Court Should Limit Mixed-Motives Analysis Only to Situations Where There Is Evidence a Decisionmaker Openly Referred to a Protected Characteristic To Explain a Challenged Employment Decision or Relied on a Facially Discriminatory Policy

1. Justice O'Connor used a narrow interpretation of direct evidence in *Price Waterhouse*

Justice O'Connor did not explicitly define in *Price Waterhouse* what type of proof would constitute "direct evidence that an illegitimate criterion was a substantial factor in the decision," 490 U.S. at 276 (O'Connor, J., concurring), so as to shift the burden of proof to the defendant to justify its decision on legitimate grounds. Nevertheless, her conclusion that the plaintiff in *Price Waterhouse* had satisfied this evidentiary threshold shows that evidence that a decisionmaker explicitly referred to a protected characteristic to explain a challenged employment action will suffice for this purpose.

In *Price Waterhouse*, the plaintiff produced evidence that several evaluators cited her failure to conform to certain gender stereotypes as a reason why she should not become a partner, that the decisionmakers gave these evaluations "great weight," and that the partner who explained to the plaintiff why she did not make partner told her she could increase 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.'" *Id.* at 272 (citation omitted). To Justice O'Connor, this evidence conveyed that the rejection was because of the plaintiff's gender 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. The overt "advice" that the plaintiff should act more like a woman to improve her partnership prospects thus directly connected her

gender 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.

In contrast, Justice O'Connor said that stray remarks in the workplace, statements made by nondecisionmakers, statements made by decisionmakers that are unrelated to the challenged employment decision, or evidence of sex stereotyping are not sufficient to treat a case as involving mixed-motives. *Id.* at 277. Otherwise, every reference to a protected characteristic would turn into direct evidence of discrimination. Justice O'Connor recognized the problem with such a standard:

> 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. The Ninth Circuit's reliance on exactly the type of evidence Justice O'Connor dismissed as insufficient to warrant a mixed-motives analysis thus requires reversal.

2. The Court's prior decisions limit direct evidence to situations involving direct consideration of a protected characteristic

Justice O'Connor was not writing on a clean slate when she described the plaintiff's proof as direct evidence in *Price Waterhouse*. The standard she adopted follows logically from this Court's decision in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), a mixed-motives case involving a constitutional violation. In that case, a teacher, who was not rehired after he alerted a local radio station to a

controversial school policy, sued the school district for violating his right to free speech under the First Amendment. The Court found that a letter from the school superintendent to the plaintiff explaining that he would not be rehired because he had spoken to a local radio station was direct evidence that his protected speech was a "motivating factor" in the adverse decision. *Id*. at 282-83. This evidence was sufficient to shift the burden to the school district to prove by a preponderance of the evidence that it would not have rehired the teacher even absent the protected conduct. *Id.* at 287. The Court's decision in *Mount Healthy* thus supports Justice O'Connor's conclusion that a decisionmaker's open reference to a protected factor to explain an employment decision was direct evidence in *Price Waterhouse*.

Justice O'Connor's standard for direct evidence in *Price Waterhouse* also is consistent with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which she cited as an example of direct evidence. 490 U.S. at 271-72 (O'Connor, J., concurring). In *Trans World Airlines*, the Court held that a company transfer policy that limited a disqualified captain's transfer options based on his age was discriminatory on its face. 469 U.S. at 121. The direct evidence of age discrimination in the company policy thus rendered the *McDonnell Douglas* test inapplicable, the Court said. *Id.*

Mount Healthy and *Trans World Airlines* thus indicate that an admission by a decisionmaker that he rejected the plaintiff because she was a woman would constitute direct evidence to warrant mixed-motives treatment. Likewise, evidence that a decisionmaker said a female candidate would have stood a better chance at obtaining the job if she were a man, or relied on a facially discriminatory policy that limits hiring to only men, also probably would be enough to shift the burden of persuasion to the employer to show that it did not discriminate. Respondent's failure to produce any comparable

direct evidence of discrimination in the instant case thus warrants reversal of the Ninth Circuit's decision to treat her case as involving mixed-motives.

3. The decision below would make the *McDonnell Douglas* line of cases superfluous

This Court has developed different proof schemes to distinguish between discrimination claims based on direct evidence of unlawful bias versus those resting solely on circumstantial evidence. *Price Waterhouse*, 490 U.S. at 246-47. "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." 490 U.S. at 271 (O'Connor, J., concurring). The *McDonnell Douglas* test does not even apply when a plaintiff has direct evidence of discrimination. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Turning *every* discrimination claim into a mixed-motives case would eliminate this careful distinction and unfairly require employers to prove they acted lawfully in all cases.

The Third Circuit cautioned against this outcome:

> Such a result would merge the two different theories, mixed-motives and pretext, into one cause of action. Every pretext case would then require a mixed-motives instruction and that instruction would shift to the employer the production and persuasion burdens of negating any causal connection between the employer's actions and illegal discrimination instead of requiring the employee to show pretext and to persuade the factfinder that illegal discrimination was the legal cause of action against her . . . the Supreme Court has taken great pains to differentiate between the two theories.

Hook v. Ernst & Young, 28 F.3d 366, 374-75 (3d Cir. 1994) (citation omitted). Likewise, the First Circuit warned that "this mixed-motive approach, uncabined, has the potential to

swallow whole the traditional *McDonnell Douglas* analysis." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999).

C. The 1991 Civil Rights Act Left Intact This Court's Holding in *Price Waterhouse* That Direct Evidence Is Necessary for a Mixed-Motives Analysis

1. The Civil Rights Act does not refer to the type or quantity of evidence necessary to shift the burden of persuasion to the defendant in a mixed-motives case

Section 107 of the Civil Rights Act of 1991 ("CRA"), P.L. 102-166, superseded only selected parts of this Court's holding in *Price Waterhouse* that an employer was not liable for discrimination *at all* if it could show that it would have reached the same decision without considering a protected characteristic. 490 U.S. at 258. Section 107(a) states: "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) (emphasis added). Section 107(b) makes an employer liable for declaratory and injunctive relief, and attorney's fees and costs, but not damages or reinstatement if it can show that it would have taken the same action despite the impermissible motivating factor. 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 meaning of the statutory language. *See*, *e.g.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). For, as this Court has stated repeatedly, 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)).

The CRA did not displace *Price Waterhouse's* common law requirement for direct evidence to warrant a mixed-motives analysis. Section 107 is completely silent as to what type of evidence is necessary to shift the burden of persuasion from the plaintiff to the defendant in a mixed-motives case. A narrow interpretation of the scope of the CRA's changes is thus warranted, because "[n]o 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. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879). The Ninth Circuit thus erred by interpreting section 107 more broadly to overrule this Court's entire holding in *Price Waterhouse* than the plain language of the statute justifies, and must be reversed.

In addition, several federal circuit courts also have agreed that section 107 of the CRA replaced only that portion of the *Price Waterhouse* decision that an employer was not liable for discrimination at all if it could show it would have taken the same action without considering the discriminatory motive. *See*, *e.g.*, *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999); *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997).

Therefore, the Court's holding in *Price Waterhouse* requiring direct evidence for mixed-motives treatment remains good law after the CRA and warrants reversal of the Ninth Circuit's contrary holding.

2. The Civil Rights Act's legislative history shows Congress did not intend to supersede the requirement for direct evidence to proceed under a mixed-motives analysis

Should the Court delve beyond the plain language of section 107, the CRA's legislative history also indicates that Congress did not intend to supersede the entire ruling in *Price Waterhouse*. Instead, Congress targeted for change only the Court's conclusion that an employer would not be liable for discrimination at all, if it could show it would have reached the same decision without considering the impermissible factor. A section-by-section analysis of the legislation by Senator Dole described the CRA's change to Title VII 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]

In addition, the report from the House Committee on Education and Labor on the 1990 version of the CRA supports a limited scope of the final CRA. The 1990 version contained virtually the same language regarding mixed-motives cases as the 1991 law. The House report focused solely on the need to replace the part of *Price Waterhouse* holding that employers could avoid liability entirely if they could show that they would have reached the same decision without considering the impermissible factor. H.R. Rep.

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[2] President George Bush issued a statement upon signing the CRA instructing that Senator Dole's analysis would be treated as "authoritative interpretive guidance" on the meaning of the statute. Statement By The President (Nov. 21, 1991), *reprinted in* Employment Policy Found., *The Civil Rights Act of 1991 Legislative History*, vol. II-1991 (1992), at 223-34.

No. 102-40, pt. 1, at 45-48 (1991). In fact, the committee specifically clarified that the proposed legislation did not affect two other holdings in *Price Waterhouse* regarding the use of sex stereotyping to prove gender discrimination and the preponderance of the evidence standard for employers. *Id*. at 45. Thus, the CRA's legislative history shows that the statute did not alter *Price Waterhouse's* requirement that a plaintiff must show direct evidence to proceed under a mixed-motives analysis.

II. ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND WOULD SEVERELY COMPROMISE AN EMPLOYER'S ABILITY TO DEFEND AGAINST DISCRIMINATION CLAIMS

A. The Decision Below Would Turn Every Discrimination Claim Into a Mixed-Motives Case, Shifting the Burden of Proof to the Employer Every Time

The Ninth Circuit's decision gives plaintiffs the ability to turn even garden variety discrimination claims into mixed-motives cases, shifting the burden of proof to the employer every time. Even plaintiffs with only circumstantial evidence of discrimination will be able to bypass entirely the *McDonnell Douglas* test in favor of the higher burden a mixed-motives analysis places on employers. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer will determine the employer's burden of proof. Instead, the decision below significantly ratchets up the employer's burden of proof in *every case* to prove lawful activity. The Ninth Circuit's ruling thus gives plaintiffs not only a second "bite at the apple" to convince the trier of fact that intentional discrimination occurred, it allows the plaintiffs to swallow the apple whole.

Enabling plaintiffs unilaterally to transform every pretext case to a mixed-motives one significantly burdens employers by complicating their defense immeasurably. A mixed-motives instruction, as Justice O'Connor recognized, 490 U.S. at 262 (O'Connor, J., concurring), takes the drastic step of shifting the burden to employers to *prove* affirmatively that they would have acted the same way in any event, not just articulate a legitimate, nondiscriminatory reason for their action under the *McDonnell Douglas* standard. Not surprisingly, a Justice Department study revealed that plaintiffs had won almost 80 percent of the mixed-motives cases after the *Price Waterhouse* decision. *See* H.R. Rep. No. 102-40, pt. 1, at 157-58 (1991) (minority views). Therefore, maintaining "the distinction [between mixed motives and pretext cases] is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motives cases . . . ." *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995).

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:

> [e]mployment 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. There is little cost in going forward with a Title VII case if the existence of even one unlawful con-

> tributing motivation may assure the employer's minimum liability. 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). By improperly shifting the burden of proof to the employer in virtually every discrimination case, the Ninth Circuit's decision inflates significantly the plaintiff's chances of winning even a weak discrimination claim.

Reserving mixed-motives treatment for cases with direct evidence of discrimination will encourage employers to be vigilant in preventing harm, a primary goal of Title VII. This standard will prompt employers to develop early warning programs to monitor the workplace for discrimination to avoid situations involving direct evidence, which would trigger the higher burden. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1999). Otherwise, forcing employers to prove that they acted lawfully, regardless of whether the plaintiff has direct or only circumstantial evidence of discrimination, provides less incentive for employers to make sure decisions are not inappropriately based on protected factors. If employers will face this higher burden no matter how hard they try to make sure decisionmakers act lawfully, or how well they succeed, then they will have less incentive to develop procedures to scrutinize employment decisions carefully.

In addition, the Ninth Circuit's relaxed standard for mixed-motives cases would encourage frivolous claims, which also frustrate Title VII's goal of avoiding harm. Frivolous mixed-motives claims divert employers' attention and resources away from developing proactive approaches against discrimination:

> [S]ince a large portion of . . . employment discrimination claims may not be legitimate, there is a countervailing

> need to have a somewhat stricter evidentiary requirement in employment discrimination cases in order to prevent excessive or frivolous claims, particularly since jurors typically side with the employee in such cases, rather than the "Goliath" employer.
>
> A continued deluge of claims would force employers to take extreme measures to protect themselves against frivolous litigation and expend valuable energy and resources to guard against potential claims of discrimination . . . 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) (footnote omitted).

To guard against this waste, this Court properly restricted 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 at least in part 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). Because circumstantial evidence does not satisfy this narrowly drawn standard, the Ninth Circuit's ruling below must be reversed.

B. The Decision Below Significantly Undermines an Employer's Defense to a Discrimination Claim

The Ninth Circuit's decision also severely prejudices employers by significantly undermining their ability to defend against discrimination claims. Forcing employers simultaneously to defend against both claims of pretext and

mixed-motives will require them to argue alternative theories in almost every case. First, they must contend that they did not discriminate and in fact based their actions on legitimate, nondiscriminatory reasons. At the same time, employers will have to argue the patently defensive alternative that even if they did discriminate, they would have made the same decision anyway.

This apparent inconsistency is likely to hurt the employer's credibility with the jury:

> The primary danger is that it suggests a lack of confidence in one's own case and perhaps even a degree of desperation. The advancement of multiple theories in a case is the equivalent of throwing in "everything but the kitchen sink" in the hope that something will prove persuasive . . . Jurors will likely ask themselves why they should believe a particular theory when the attorney presenting that theory does not even seem to believe it. Multiple-choice theories are likely to elicit just such a response: "If the attorney feels so passionate about the primary theory, why does he give me another option?" In other words . . . the jury will likely perceive this approach as game playing or even worse, manipulative and dishonest.

H. Mitchell Caldwell, *et al.*, *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 993 (Mar. 2002).

A mixed-motives instruction also prejudices employers by giving juries the option of reaching a compromise verdict in favor of a sympathetic plaintiff. "[J]uries are notorious for wanting to 'split the baby.'" *Id.* at 996. (footnote omitted). A jury that is sympathetic to the plaintiff may use mixed-motives treatment as a way to find for the plaintiff without awarding damages, even though the employer can prove a legitimate reason for its decision. The attraction of a compromise verdict thus reduces an employer's chances of successfully defending against discrimination claims. By

turning most discrimination claims into mixed-motives cases, the decision below forces defendant-employers into an untenable position, and must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals below should be reversed.

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