No. 02-679

# In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO, PETITIONER

*v.*

CATHARINA F. COSTA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a plaintiff in a Title VII case must adduce direct evidence of discriminatory intent to trigger application of the mixed-motive analysis under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

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### INTEREST OF THE UNITED STATES

This case concerns the appropriate standards for triggering mixed-motive instructions in cases of intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The United States has a substantial interest in the resolution of that question. The Attorney General is responsible for enforcing Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5. In addition, the United States, as the Nation's largest employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII.

## STATEMENT

1. Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's gender, race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Recognizing that direct evidence of discrimination often may not be available to prove intentional discrimination, this Court set forth a burden-shifting framework for analyzing Title VII disparate treatment cases in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Under the *McDonnell Douglas* framework, once a plaintiff has established a prima facie case of discrimination, the burden of going forward with evidence shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. *Ibid.* If the employer presents evidence of a nondiscriminatory reason for its action, the plaintiff may then show that the employer's proffered explanation is not the true reason for the employment decision or that a discriminatory reason more likely than not motivated the employer. *Id.* at 804; see *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). The burden of persuasion remains with the plaintiff at all times. *Burdine*, 450 U.S. at 253.

For thirty years, courts have used the *McDonnell Douglas*/*Burdine* pretext standard to resolve most Title VII cases. It represents a "sensible, orderly way to evaluate the evidence" in a Title VII disparate-treatment case, giving both plaintiff and defendant fair opportunities to litigate "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). It also represents this Court's definitive construction of "[t]he language of Title VII," which "makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discrimina-

tory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." 411 U.S. at 800. The *McDonnell Douglas* framework, moreover, has gained wide acceptance, not only in cases alleging discrimination on the basis of "race, color, religion, sex, or national origin" under Section 2000e-2(a) and the other provisions of Title VII, but also in similar discrimination cases, such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods.*, *Inc.*, 530 U.S. 133, 141 (2000) (assuming without deciding that *McDonnell Douglas* framework applied in ADEA case and collecting court of appeals cases that so hold). Wherever it governs, the *McDonnell Douglas* framework at all times places the burden on the plaintiff to demonstrate that the adverse employment action was taken "because of" discriminatory motive.

In 1989, the Court set forth a different test for analyzing intentional discrimination claims in "mixed-motive" cases, *i.e.*, those in which the employment decision was taken for both lawful and unlawful reasons. See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 240-247 (1989) (plurality opinion). Under *Price Waterhouse*, once a plaintiff establishes that an unlawful reason was a substantial or motivating factor in the employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent reliance on the unlawful reason. *Id.* at 258 (plurality opinion). An employer avoids Title VII liability altogether if it succeeds on its "same-decision" defense. *Ibid.* Although *Price Waterhouse* altered the burdens of proof in mixed-motive cases, it reaffirmed that the *McDonnell Douglas* pretext framework would remain the dominant rule in Title VII disparate treatment cases. See *id.* at 247 (plurality opinion); *id.* at 260 (opinion of White, J.);

*id.* at 261 (opinion of O'Connor, J.); *id.* at 280 (Kennedy, J., dissenting).

Congress modified the *Price Waterhouse* mixed-motive test when it passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. As amended in 1991, Title VII provides: "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). The 1991 amendments overruled *Price Waterhouse*'s holding that an employer could avoid Title VII liability entirely by showing that it would have taken the same employment action absent the discriminatory motive. Under the statute, an employer violates Section 2000e-2(m) if unlawful discrimination was a motivating factor for the employment practice, but it can limit its liability to declaratory relief, limited injunctive relief, and attorney's fees and costs if it shows that it would have taken the same action absent the discrimination. See 42 U.S.C. 2000e-5(g)(2)(B). The nature of the evidence that a plaintiff must show under Section 2000e-2(m) to trigger the *Price Waterhouse* mixed-motive analysis is the issue before the Court in this case.

2. Respondent Catharina Costa worked as a truck driver and heavy equipment operator in a warehouse belonging to petitioner Caesars Palace Hotel & Casino in Las Vegas, Nevada. Respondent was the only woman covered by a collective bargaining agreement between Caesars and her union. During respondent's seven years of employment at Caesars, she was repeatedly disciplined for, among other infractions, tardiness, absenteeism, and using vulgar language. According to respondent, however, male workers were not disciplined for the same conduct and so the disciplinary actions taken against her amounted to gender discrimination. Pet.

App. 3a-6a. In 1994, respondent was involved in a verbal and physical confrontation with another co-worker, Herb Gerber, that resulted in respondent's termination and Gerber's suspension. *Id.* at 6a. Respondent was terminated, according to petitioner, because of her history of disciplinary problems, as well as her altercation with Gerber. *Id.* at 7a.

3. After an arbitrator upheld her termination, respondent filed this Title VII action against petitioner, alleging gender discrimination in the conditions of her employment and termination. The case was tried before a jury. At the conclusion of the evidence, the district court instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female. If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

Pet. App. 57a. Petitioner stated at trial that it had no objection to this instruction. Tr. 460.

The district court also gave the jury the following "mixed-motive" instruction:

> You have heard evidence that the defendant's treatment of the 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 the 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.

Pet. App. 33a-34a, 57a-58a. Petitioner objected to this instruction on the ground that the case was not a "mixed motive" case because respondent failed to submit "direct evidence" that her gender was a motivating factor in her firing. Tr. 460.

The jury was given a Verdict Form in which it was first asked:

> 1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?

Pet. App. 88a. The jury answered this question "Yes." *Ibid.* The Verdict Form then stated:

> If you answered yes, please answer the following special interrogatory:
>
> 2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?

Pet. App. 89a. The jury answered this question "Yes." *Ibid.* The Form then instructed the jury to answer the third question:

> 3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?

Pet. App. 89a. The jury answered this question "No." *Ibid.* The jury awarded respondent $64,377.74 for "financial loss," $200,000 in damages for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, and $100,000 in punitive damages. *Id.* at 89a-90a.

4. A panel of the Ninth Circuit reversed, holding that "in the absence of substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus, the giving of a mixed-motive instruction was reversible error." Pet App. 55a. The panel noted that the Ninth Circuit had not previously addressed "what evidentiary burden a plaintiff must satisfy to prove her gender was a motivating factor in an adverse employment action." *Id.* at 60a. Relying on Justice O'Connor's concurring opinion in *Price Waterhouse* and decisions of other circuits, the panel held that because respondent had failed to produce direct and substantial evidence of discriminatory intent, "the district court erred in giving the jury a mixed-motive instruction." *Id.* at 65a.

5. Rehearing the case en banc, the Ninth Circuit affirmed in part and reversed and remanded in part. In a 9-4 decision, the majority held that "Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called 'mixed-motive' case." Pet. App. 2a. The en banc court accordingly affirmed the district court's liability finding, as well as the jury's back pay and compensatory damages awards. In light of this Court's intervening decision in *Kol-*

*stad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), the court of appeals remanded the case for reconsideration of the award of punitive damages. Pet. App. 45a-47a.

The en banc court disagreed with the panel's conclusion that under *Price Waterhouse* a plaintiff must produce direct and substantial evidence of discriminatory intent. Rather, the court characterized Justice O'Connor's discussion of the direct evidence requirement in *Price Waterhouse* as merely a "passing reference" (Pet. App. 8a), and declined, "where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code" (*id.* at 23a-24a (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993))). The en banc court also reasoned that because the 1991 amendments to Title VII specified that employers may no longer escape liability simply by showing other sufficient causes for their actions, "the premise for Justice O'Connor's comment is wholly abrogated"; *i.e.*, "there is no longer a basis for any special 'evidentiary scheme' or heightened standard of proof to determine 'but for' causation." Pet. App. 17a.

Applying this standard, the en banc court concluded that the evidence was sufficient to warrant issuance of a mixed-motive instruction (Pet. App. 32a-35a); that respondent presented sufficient evidence for a reasonable jury to find that sex discrimination was a motivating factor in a number of adverse employment actions, including her termination (*id.* at 36a-42a); and that "[t]here was a substantial basis for the jury to conclude that Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex" (*id.* at 43a).

6. The four dissenting judges concluded that "[t]he majority's analysis is not persuasive and should be corrected because it disregards the holding of [*Price Waterhouse*] that is reflected in Justice O'Connor's concurring opinion." Pet. App. 48a. After summarizing the plurality and concurring

opinions in *Price Waterhouse*, the dissenters concluded that Justice O'Connor's opinion requiring the use of direct evidence to prove a mixed-motive case was the holding under the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), because that opinion "concurred in the judgment on the narrowest grounds." Pet. App. 49a. The 1991 amendments to Title VII, moreover, "did not modify the Supreme Court's prior holding on the need for direct evidence." *Id.* at 50a. The dissenters further observed that "the majority's holding puts our circuit in conflict with almost all others" (*id.* at 51a), and emphasized that "[t]he Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of [*Price Waterhouse*] that jettisons the direct evidence requirement" (*id.* at 53a).

## SUMMARY OF ARGUMENT

The court of appeals erred in holding that a plaintiff in a Title VII mixed-motive case does not have a heightened evidentiary burden of presenting direct evidence of discriminatory intent. Contrary to the majority of courts of appeals that have addressed the issue, the en banc court failed to find that this Court's decision in *Price Waterhouse* requires plaintiffs in Title VII cases to proffer direct and substantial evidence of discriminatory intent as a prerequisite to establishing liability under the mixed-motive framework.

The en banc court also erred in holding that the 1991 amendments to Title VII abrogate any need for a heightened evidentiary standard for plaintiffs in mixed-motive cases. Both the text and legislative history of Section 107 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, demonstrate that Congress enacted the relevant 1991 amendments to overrule only the portion of the *Price Waterhouse* decision that excused an employer from all liability upon a showing that it would have taken the same employment action without regard to any illegitimate factor. Far

from undermining the need for a heightened, direct evidence standard in mixed-motive cases, Section 107, by expanding liability in mixed-motive cases, supports requiring plaintiffs to make a strong initial showing, through direct evidence, that discriminatory intent in fact motivated the challenged employment action. Congress, moreover, did not evidence an intent to modify the distinction drawn in *Price Waterhouse* between pretext and mixed-motive cases, nor did it attempt to alter *Price Waterhouse*'s holding regarding the plaintiff's evidentiary burden in mixed-motive cases, including the direct evidence requirement. Indeed, before the decision below, every court of appeals that had considered the effect of the 1991 amendments on *Price Waterhouse*'s direct evidence requirement had found that those amendments do not address whether a plaintiff must show direct evidence of discrimination as a precondition to applying a mixed-motive analysis.

The courts of appeals, however, are in disagreement over the meaning of "direct evidence." Although the question is not free from doubt, the better reading of *Price Waterhouse* is that direct evidence means non-circumstantial or non-inferential evidence. In other words, in order to justify shifting the burden of persuasion to the defendant, the plaintiff must submit evidence that, without resort to inferences or presumptions, establishes that race or gender was a substantial, motivating factor in the employer's decision.

For these reasons, the Court should vacate the Ninth Circuit's holding regarding the plaintiff's evidentiary burden in mixed-motive cases, reaffirm the direct evidence requirement announced in Justice O'Connor's *Price Waterhouse* opinion, and remand this case for further proceedings under the correct legal standard.

## ARGUMENT

### PLAINTIFFS IN TITLE VII MIXED-MOTIVE CASES MUST ADDUCE DIRECT EVIDENCE OF DISCRIMINATORY INTENT TO INVOKE THE MIXED-MOTIVE ANALYSIS UNDER *PRICE WATERHOUSE* V. *HOPKINS*

In 1989, a plurality of this Court in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241, held that a plaintiff may recover for gender discrimination under Title VII if she shows that gender was a motivating factor, but not the sole motive, in the contested employment decision. The employer would not be liable in such a case, however, if it presents evidence showing that it would have made the same decision regardless of the discriminatory motive. *Id.* at 244-245. Justice White and Justice O'Connor separately concurred in the judgment. The plurality opinion and both concurring opinions emphasized that, unlike in single-motive or "pretext" cases, a plaintiff in a mixed-motive case must meet a heightened burden of proof by presenting evidence that discriminatory intent played a substantial, motivating role in the challenged employment decision. *Id.* at 248-250 & n.13 (plurality opinion); *id.* at 259 (opinion of White, J.); *id.* at 275 (opinion of O'Connor, J.).

Justice O'Connor's concurrence further emphasized that a plaintiff may invoke this "mixed-motive" test only after the plaintiff presents "direct evidence that decisionmakers placed substantial negative reliance on [the] illegitimate criterion." 490 U.S. at 277. The four-Justice plurality acknowledged Justice O'Connor's direct evidence requirement and stated that its formulation of the heightened showing a plaintiff must make in a mixed-motive case, which focused on the requirement that the illegitimate criterion was a motivating or substantial factor in the adverse employment action, was not "meaningfully different from" Justice

O'Connor's direct evidence standard. *Id.* at 250 n.13. Similarly, the three dissenting Justices plainly read Justice O'Connor's direct evidence requirement as part of the Court's holding. *Id.* at 280 ("I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. 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."); *id.* at 290-291 ("[T]he Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue.").

Moreover, all of the opinions in *Price Waterhouse* recognized the continuing importance of the "pretext" framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981), for analyzing disparate treatment cases under Title VII. See 490 U.S. at 247 (plurality opinion) ("[T]he premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed."); *id.* at 260 (opinion of White, J.) (applying [*Price Waterhouse*] approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in [*Burdine* and *McDonnell Douglas*]"); *id.* at 261 (opinion of O'Connor, J.) ("The evidentiary rule the Court adopts today should be viewed as a supplement to the

careful framework established by our unanimous decisions in [*McDonnell Douglas* and *Burdine*]."); *id.* at 280 (Kennedy, J., dissenting) ("[T]he Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases."). The Court, therefore, suggested that most Title VII cases would continue to be analyzed under the *McDonnell Douglas*/*Burdine* pretext analysis, and that the burden of persuasion would shift to the defendant only where the plaintiff had satisfied a heightened burden of showing that an impermissible consideration was a substantial, motivating factor in the employer's decision.

Acting specifically in response to the *Price Waterhouse* decision, Congress amended Title VII in 1991, to provide that "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." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)). Congress also provided that "[o]n a claim in which an individual proves a violation under section 2000e-2(m)" (*i.e.*, *Price Waterhouse* mixed-motive claims), if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the employer would be liable for only declaratory relief, injunctive relief, attorney's fees and costs, but not damages, reinstatement, or back pay. Pub. L. No. 102-166, § 107(b), 105 Stat. 1075 (42 U.S.C. 2000e-5(g)(2)(B)). Through these amendments, Congress overturned the holding in *Price Waterhouse* that allowed employers to avoid Title VII liability entirely by showing that the same employment action would have been taken absent the discriminatory motive. Congress, however, did not attempt to modify the clear distinction drawn in *Price Waterhouse* between pretext and mixed-motive cases,

nor did it attempt to alter its holding regarding the plaintiff's evidentiary burden in mixed-motive cases.

The Ninth Circuit's decision in this case holds that the 1991 amendments to Title VII altered the standards of causation and proof in all Title VII cases and largely eliminated the distinction between pretext and mixed-motive cases. Although there is some reason to doubt whether Title VII initially drew a sharp distinction between pretext and mixed-motive cases, the courts have consistently treated these cases as distinct. Moreover, the 1991 amendments, by providing distinct remedies in mixed-motive cases, appear to reinforce that distinction. In addition, by introducing jury trials, the 1991 amendments created the possibility that jury instructions in mixed-motive cases could confuse jurors into thinking that the defendant bears the burden of proof on issues related to the defendant's conduct. For these reasons, virtually every court of appeals to address the plaintiff's burden in a mixed-motive case has maintained the distinction between the types of cases and employed some form of the direct evidence test to police the line. That approach reflects the better view of the 1991 amendments.

### A. Under *Price Waterhouse* v. *Hopkins*, Plaintiffs In Mixed-Motive Cases Must Initially Present Direct Evidence Of Discriminatory Intent

The Ninth Circuit's en banc decision dismissed Justice O'Connor's requirement that a plaintiff must present "direct evidence" that an impermissible consideration was a substantial, motivating factor in an employment decision as being merely a "passing reference." Pet. App. 8a. As the discussion above demonstrates, that characterization is plainly mistaken.

Despite the apparently fragmented decision in *Price Waterhouse*, all nine Justices agreed that the standard the Court announced for mixed-motive cases did not alter the

analytical framework of the *McDonnell Douglas* pretext standard, which they acknowledged would still govern traditional disparate treatment cases under Title VII where the jury must choose between the plaintiff's showing of an impermissible motive and the employer's showing of a legitimate one. See *Price Waterhouse*, 490 U.S. at 246-247 (plurality opinion); *id.* at 260 (opinion of White, J.); *id.* at 270 (opinion of O'Connor, J.); *id.* at 280 (Kennedy, J., dissenting). It is also clear that Justices White and O'Connor both agreed with the four Justices in the plurality that a plaintiff in a mixed-motive case must satisfy a heightened burden of proof by presenting evidence that discriminatory intent played a substantial role in the challenged employment decision. *Id.* at 247 n.12, 248-249 (plurality opinion); *id.* at 259 (opinion of White, J.); *id.* at 275 (opinion of O'Connor, J.). The plurality disclaimed any meaningful difference between its standard and Justice O'Connor's direct evidence requirement, *id.* at 250 n.13, and the three dissenting Justices plainly viewed the direct evidence requirement as an integral part of the Court's holding, *id.* at 280, 290-291.

Indeed, prior to the Ninth Circuit's en banc decision in this case, all of the courts of appeals had interpreted *Price Waterhouse* as requiring a plaintiff to present direct evidence that an impermissible consideration was a substantial, motivating factor in an employment decision before shifting the burden of persuasion to the employer to show that it would have taken the same employment action without regard to the impermissible consideration. The First and Third Circuits have explicitly held that, under the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), Justice O'Connor's concurring opinion is the binding holding in *Price Waterhouse*.[1] Moreover, the Fifth, Sixth, Seventh, Eighth,

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[1] See, *e.g.*, *Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("Most courts agree that Justice O'Connor's seminal

Tenth, and Eleventh Circuits have implicitly endorsed Justice O'Connor's concurring opinion by requiring plaintiffs in mixed-motive cases to present direct evidence of discrimination to shift the burden of persuasion to the employer to show that the same adverse employment decision would have been made regardless of the discrimination.[2] The D.C. and Second Circuits also require plaintiffs in mixed-motive cases to proffer evidence of conduct or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision, even though they question whether Justice O'Connor's direct evidence

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concurrence in *Price Waterhouse* furnishes the best device for testing quality" of the available evidence.); *Fakete* v. *Aetna, Inc.*, 308 F.3d 335, 337 n.2 (3d Cir. 2002) ("Justice O'Connor's opinion * * * represents the holding of the fragmented Court in *Price Waterhouse*.").

[2] See, *e.g.*, *Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1216-1217 (5th Cir. 1995) (employees not entitled to mixed-motive jury instruction because plaintiff's proffered statements were not direct evidence of age discrimination); *Laderach* v. *U-Haul*, 207 F.3d 825, 829 (6th Cir. 2000) (supervisor's statements that he would not promote plaintiff because of her gender and would not allow her to answer the telephone because "women are not mechanically inclined" were direct evidence of discriminatory intent); *Oates* v. *Discovery Zone*, 116 F.3d 1161, 1170-1171 (7th Cir. 1997) (plaintiff failed to present direct evidence of discriminatory intent that related to the contested employment action); *Mohr* v. *Dustrol, Inc.*, 306 F.3d 636, 640-641 (8th Cir. 2002) (foreman's statements that he would not have any women on his crew constituted direct evidence of discrimination); *Tomsic* v. *State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1478 (10th Cir. 1996) (stereotyped remarks reflected only the supervisor's personal opinion and did not qualify as direct evidence of discrimination by employer); *EEOC* v. *Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) (decisionmaker's comment that he would not hire blacks was direct evidence that racial discrimination motivated the employer's promotion decision).

requirement is the holding in *Price Waterhouse*.[3] As discussed in Part C, *infra*, the courts of appeals have adopted different standards for precisely what constitutes "direct evidence," but every other court of appeals that has applied *Price Waterhouse* has adopted the requirement that plaintiffs in mixed-motive cases must meet a heightened burden of proof.

### B. The Civil Rights Act Of 1991 Did Not Alter The Plaintiff's Burden To Adduce Direct Evidence of Discrimination In Mixed-Motive Cases

The Ninth Circuit also erred in concluding that the Civil Rights Act of 1991 altered the standards of causation and proof in all Title VII cases, thereby largely eliminating the distinction between pretext and mixed-motive cases. Pet. App. 16a-18a. As with its reading of *Price Waterhouse*, the Ninth Circuit's interpretation of Congress's 1991 amendments to Title VII stands alone. Except for the en banc decision below, every court of appeals that has considered the effect of the 1991 amendments on *Price Waterhouse*'s direct evidence requirement has found that those amendments do not address whether a plaintiff must show direct evidence of discrimination as a precondition to applying a mixed-motive analysis. See, *e.g.*, *Weston-Smith* v. *Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (stating that the 1991 amendments are "silent on exactly what showing is needed to trigger a mixed-motive case"); *Watson* v. *SEPTA*, 207 F.3d 207, 216 (3d Cir. 2000), cert. denied, 531 U.S. 1147 (2001); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), cert. denied, 506 U.S. 826 (1992). In addition, shortly after

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[3] See, *e.g.*, *Thomas* v. *NFL Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), cert. denied, 506 U.S. 826 (1992).

Congress enacted the 1991 amendments, the EEOC adopted guidelines setting forth the standards of proof and causation for pretext and mixed-motive cases, respectively, and analyzing the effect of the 1991 amendments on those standards. See *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 8 Lab. Rel. Rep. (BNA) 405:6915 (July 7, 1992) (EEOC Guide). As those guidelines explain, "most appellate court decisions that have addressed the question since *Price Waterhouse* have agreed with Justice O'Connor that direct evidence is required for the mixed motives framework to apply. *Nothing in Section 107 [of the 1991 amendments] alters this aspect of the Supreme Court's decision.*" *Id.* at 405:6921-405:6922 (emphasis added).

Both the text and legislative history of the 1991 Title VII amendments indicate that those amendments dealt solely with the scope of the employer's liability in an appropriate mixed-motive case. Congress intended to overrule only one aspect of this Court's *Price Waterhouse* decision—to permit limited liability even where a defendant in a properly classified mixed-motive case has demonstrated that it would have taken the same employment action without regard to the impermissible factor that tainted its decision. Congress, however, did not alter the *McDonnell Douglas*/*Burdine* pretext framework or the direct evidence standard for determining when a case is properly subject to a mixed-motive analysis. Nor did Congress intend to end the distinction between pretext and mixed-motive cases that has long been an aspect of this Court's Title VII jurisprudence and that none of the separate opinions in *Price Waterhouse* sought to question.

### 1. *The text of the 1991 amendments demonstrates that Congress did not alter* Price Waterhouse*'s direct evidence requirement*

Section 107(a) of the Civil Rights Act of 1991 expressly applies only to mixed-motive cases by providing that an unlawful employment practice is established where "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). The "other factors" phrase is clearly a reference to mixed-motive cases, and its inclusion belies any suggestion that the "motivating factor" analysis was intended to apply to pretext as well as mixed-motive cases. Indeed, there would have been no need to add this phrase if Congress intended all disparate treatment cases to be considered the same way. See *Watson*, 207 F.3d at 217 (interpreting Section 2000e-2(m) to avoid rendering statutory language superfluous or meaningless). If Congress had wanted to apply the motivating factor standard to all Title VII cases, it could have done so directly by simply defining Section 2000e-2(a)'s prohibition on employment actions taken "because of" race, gender, or other impermissible factors as requiring the plaintiff in all cases to prove only that the discriminatory intent was a motivating factor in the action. By including the reference to "other factors also motivat[ing] the practice," Congress could only have intended to limit the scope of Section 2000e-2(m) to *Price Waterhouse*-type mixed-motive cases.

In addition, the term "demonstrates" in Section 107(a) is identical to Justice O'Connor's use of that term in her concurring opinion and suggests that, like the opinions in *Price Waterhouse* themselves, the amendment was only intended to affect mixed-motive cases. See, *e.g.*, *Price Waterhouse*, 490 U.S. at 276 (opinion of O'Connor, J.) ("Requiring that the

plaintiff *demonstrate* that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated.") (emphasis added). As the Third Circuit explained in *Watson*, "the term 'demonstrates' is not the most apt choice if the drafters wanted to describe, not just cases in which the plaintiff offers 'direct' evidence of discriminatory animus, but also the great number of disparate treatment cases in which the plaintiff, proceeding under *McDonnell Douglas*, establishes the elements of a prima facie case and urges the factfinder to infer discriminatory animus from the employer's asserted failure to offer a credible alternative reason for the contested employment action." 207 F.3d at 218.

In addition, Section 107(b), 42 U.S.C. 2000e-5(g)(2)(B), which limits the types of remedies available in mixed-motive cases, expressly states that this provision applies only to "claim[s] in which an individual proves a violation under section 2000e-(2)(m)." If, as the Ninth Circuit assumed, Section 107(a) had been meant to affect *all* disparate treatment cases against employers, then Section 107(b) naturally would have been drafted to apply to all cases brought *under 42 U.S.C. 2000e-2(a)*, the provision that sets out unlawful employment practices. See *Watson*, 207 F.3d at 218. The fact that Congress explicitly limited Section 2000e-5(g)(2)(B) to apply only to claims under Section 2000e-2(m) confirms "that Congress intended to draw a distinction between most disparate-treatment cases against employers (which are brought under 42 U.S.C. § 2000e-2(a)) and a subset of cases 'in which an individual proves a violation under Section 2000e-2(m).'" *Watson*, 207 F.3d at 218. If Congress did not intend to preserve the separate burdens of proof between pretext and mixed-motive cases, it would not have provided that Section 2000e-5(g)(2)(B) applies only to claims under Section 2000e-(2)(m).

This reading of the 1991 amendments is further supported by the context in which Congress enacted them. At the time Congress enacted the 1991 amendments, it was settled that *Price Waterhouse* altered the standard of proof only in mixed-motive cases and that most Title VII cases would continue to be evaluated under *McDonnell Douglas* pretext principles, which at all times place the burden of persuasion on the plaintiff. Moreover, before the enactment of the 1991 amendments, several courts of appeals had expressly adopted the direct evidence requirement announced in Justice O'Connor's *Price Waterhouse* opinion. See, *e.g.*, *Jackson* v. *Harvard Univ.*, 900 F.2d 464, 467 (1st. Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus."), cert. denied, 498 U.S. 848 (1990); *Gagne* v. *Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315-316 (6th Cir. 1989) ("[T]he *Price Waterhouse* Court specifically admonished that the new standard would apply *only* in the limited circumstances where the employee had produced *direct* evidence" of discriminatory intent.), overruled on other grounds, *Kline* v. *Tennessee Valley Auth.*, 128 F.3d 337 (6th Cir. 1997); *EEOC* v. *Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) ("In a direct evidence case, the plaintiff must produce direct testimony that the employer acted with discriminatory motive.").

Accordingly, when Congress enacted the 1991 amendments, it did so against the background of settled case law defining the standards of proof and causation for *McDonnell Douglas* pretext cases, on the one hand, and for plaintiffs to shift the burden of persuasion to the defendant in mixed-motive cases, on the other. This Court should not presume that by enacting the 1991 amendments, which on their face only address remedies in mixed-motive cases, Congress intended to eliminate either the distinctions between pretext and mixed-motive cases or the direct evidence requirement that defines the line between the two. See *United States* v.

*Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents."). Cf. *CFTC* v. *Schor*, 478 U.S. 833, 845-846 (1986) (Congress's decision not to alter an established interpretation of a statute upon reenacting the statute is "persuasive evidence that the interpretation is the one intended by Congress.") (citation omitted); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986).

**2. *The legislative history of the 1991 amendments confirms that Congress did not alter* Price Waterhouse*'s direct evidence requirement***

The legislative history of the 1991 amendments further demonstrates Congress's intent to preserve the distinction between mixed-motive and pretext cases and to change only the remedies applicable to mixed-motive cases. See, *e.g.*, *Watson*, 207 F.3d at 219; *Fields* v. *New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997); *Fuller* v. *Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995). For example, the House Report makes clear that Congress designed Section 107 to "overrule[] *one aspect* of the Supreme Court's decision in *Price Waterhouse*." H.R. Rep. No. 40, 102d Cong., 1st. Sess., Pt. 1, at 48 (1991) (emphasis added); accord *id.* at 101 (noting bill "overturns *part* of the Supreme Court's decision in *Price Waterhouse* in order to hold an employer liable whenever discriminatory considerations play a part in an employment decision, even if other, legitimate motives are also present") (emphasis added); H.R. Rep. No. 40, *supra*, Pt. 2, at 16 ("Section 5 overturns *one aspect* of the Supreme Court's decision in *Price Waterhouse*.") (emphasis added). Under the heading, "The Need To Overturn *Price Waterhouse*," the House Report identifies the only portion of *Price Waterhouse* that the legislation was meant to overrule as the holding that "*the defendant may avoid a finding of liability* * * * by proving

by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." H.R. Rep. No. 40, *supra*, Pt. 1, at 46 (emphasis added). The Report further explains that Section 107 "would clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate *remedy*." *Id.* at 48. Moreover, the section of the House Report containing minority views on the legislation expressly characterizes the amendments as "dealing with mixed motive cases." *Id.* at 157.

### 3. *The Ninth Circuit's approach would frustrate much of this Court's Title VII jurisprudence*

The Ninth Circuit's reading of the 1991 amendments would fundamentally alter all Title VII cases by allowing a plaintiff to proceed in every case under the instructions applicable to mixed-motive cases. There is no support in the 1991 Act to show that Congress intended to transform Title VII in such a way.

The Ninth Circuit's en banc decision threatens to eliminate the traditional distinction between pretext and mixed-motive cases. Indeed, the en banc majority stated that "[n]or are 'single-motive' and 'mixed-motive' cases fundamentally different categories of cases." Pet. App. 31a. The majority's formulation of the mixed-motive analysis, as the dissent pointed out, would improperly provide an incentive for plaintiffs to "opt for the [*Price Waterhouse*] framework to avoid having to show pretext." *Id.* at 53a.

Lastly, far from undermining the premise for imposing a higher evidentiary burden on plaintiffs as the Ninth Circuit surmised, Section 107 of the Civil Rights Act of 1991 provides even greater support for such a requirement. Under that amendment, an employer can no longer avoid Title VII

liability by demonstrating that it would have made the same decision absent consideration of an impermissible factor. As the Fourth Circuit stated in *Fuller*, "[t]he Civil Rights Act of 1991 modified the *Price Waterhouse* scheme, making mixed-motive treatment *more favorable* to plaintiffs." 67 F.3d at 1142 (emphasis added). Justice O'Connor noted in *Price Waterhouse* that the burden-shifting that occurs in a mixed motive case is "strong medicine," 490 U.S. at 262, such that the plaintiff must make a "strong showing of illicit motivation" before "the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer." 490 U.S. at 276-277. The 1991 amendments make that "medicine" even stronger for defendants by expanding the scope of liability in mixed-motive cases. Accordingly, they only underscore the need to require plaintiffs to come forward with direct evidence that discriminatory animus played a substantial, motivating role in the challenged conduct.

### C. "Direct Evidence" Of Discrimination Must Directly Reflect The Alleged Discriminatory Intent And Be Directly Related To The Challenged Employment Action

Although, aside from the Ninth Circuit, the courts of appeals are in unison in holding that a plaintiff must satisfy a heightened standard of proof in order to qualify for a mixed-motive instruction, they have struggled to define the contours of *Price Waterhouse*'s direct evidence requirement. Virtually all of the courts of appeals have interpreted Justice O'Connor's reference to "direct evidence" to require, at a minimum, that the plaintiff's evidence directly relate to the decisionmaking process that led to the adverse employment action at issue. See, *e.g.*, *Cronquist* v. *City of Minneapolis*, 237 F.3d 920, 925 (8th Cir. 2001); *Thomas* v. *NFL Players Ass'n*, 131 F.3d 198, 204-205 (D.C. Cir. 1997); *Hook* v. *Ernst*

*& Young*, 28 F.3d 366, 374 (3d Cir. 1994); *Fuller*, 67 F.3d at 1142; *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). That is, the discriminatory motive must be directly related to the decisionmaker and to the injury alleged by the plaintiff. As the Seventh Circuit stated in *Oates* v. *Discovery Zone*, 116 F.3d 1161, 1170 (7th Cir. 1997), "a plaintiff's so-called 'direct' evidence need not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." See *Weston-Smith*, 282 F.3d at 65 (direct evidence is evidence that sufficiently links the person who utters a discriminatory statement to the decisionmaking process); *Simmons* v. *Oce-USA, Inc.*, 174 F.3d 913, 915 (8th Cir. 1999) (defining direct evidence as "conduct or statements by persons involved in the decisionmaking process * * * directly reflecting the alleged discriminatory attitude * * * sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision"); *De la Cruz* v. *New York City Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 23 (2d Cir.) (stating that "a plaintiff must initially proffer evidence that an impermissible criterion was *in fact* a 'motivating' or 'substantial' factor in the employment decision"), mot. denied, 519 U.S. 805 (1996); *Fuller*, 67 F.3d at 1142 ("What is required * * * is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.").

The courts of appeals are divided over whether the direct evidence requirement also imposes a limitation on the *type* of evidence the plaintiff must show to warrant shifting the burden of persuasion to the defendant. Several courts of appeals have read the direct evidence standard as requiring the plaintiff to submit "evidence, which if believed, proves [the] existence of [a] fact in issue *without inference or presumption*." *Rollins* v. *Tech-South, Inc.*, 833 F.2d 1525, 1529

n.6 (11th Cir. 1987) (quoting *Black's Law Dictionary* 413 (5th ed. 1979)); accord *Shorter* v. *ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas* v. *ADVO Sys., Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999); *Troupe* v. *May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994); *Jackson* v. *Harvard Univ.*, 900 F.2d 464, 467 (1st. Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus."), cert. denied, 498 U.S. 848 (1990). The EEOC has similarly defined direct evidence as "any written or verbal policy or statement made by a respondent or respondent official *that on its face* demonstrates a bias against a protected group and is linked to the complained of adverse action." EEOC Guide at 405:6917.[4] Moreover, under this approach, the employer's statements or conduct relied upon must not be too remote in time to the challenged employment action. See *Simmons*, 174 F.3d at 916 (supervisor's racial comments did not constitute direct evidence of discrimination where the plaintiff failed to show a "causal link" between the racial comments at issue and his termination two years later); *Nitschke* v. *McDonnell Douglas Corp.*, 68 F.3d 249, 252-253 (8th Cir. 1995) (finding that document written six years prior to plaintiff's termination was not direct evidence of discrimination).

Evidence that merely raises an inference of discrimination is, therefore, insufficient to shift the burden to the defendant. Unlike pretext cases, the evidence the plaintiff must present in mixed-motive cases "*is so revealing of discriminatory animus that it is not necessary to rely on any pre-*

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[4] The EEOC guidelines, however, note that direct evidence "is not limited to evidence from which *no* inferences need be drawn," but instead refers to "evidence that 'relates to actions or statements of an employer reflecting a discriminatory attitude correlating to the discrimination or retaliation complained of.'" EEOC Guide at 405:6918-405:6919 n.9 (quoting *Caban-Wheeler* v. *Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990)).

*sumption from the prima facie case* [as is necessary in a pretext action] to shift the burden" to the defendant. *Starceski* v. *Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995). Purely statistical evidence, evidence establishing merely the plaintiff's qualification for and the availability of a position, and stray remarks in the workplace by persons who are not involved in the pertinent decisionmaking process—all of which might be sufficient to make out a prima facie case under *McDonnell Douglas*—are insufficient for invoking the mixed-motive analysis. See *Ostrowski*, 968 F.2d at 182; *Price Waterhouse*, 490 U.S. at 277 (opinion of O'Connor, J.). In addition, remarks by a decisionmaker reflecting mere expressions of "personal opinion," and not existing policy, do not constitute direct evidence. *Tomsic* v. *State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1478 (10th Cir. 1996); accord *Nitschke*, 68 F.3d at 253 (finding no "causal relationship" between the personal views of the president of the defendant corporation and plaintiff's termination six years later).[5]

Other courts of appeals have held that the direct evidence requirement permits a plaintiff to establish that discriminatory intent was a motivating factor by either direct or circumstantial evidence. These cases typically emphasize that

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[5] Under this reading of direct evidence, relevant documents establishing that an existing policy itself is discriminatory would be sufficient. *Heim* v. *Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993); *Ostrowski*, 968 F.2d at 182. For example, a telephone-marketing corporation's pre-election "get-out-the-vote" calling campaign, in which African-American employees used a "black script" to call African-American voters while white employees used a "white script" to call white voters, is direct evidence of disparate treatment in job assignments based on race. See *Ferrill* v. *Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999). Statements or conduct by a person who "played a pivotal role" in the decisionmaker's treatment of the plaintiff may also be considered. See *Mohr*, 306 F.3d at 641; *Weston-Smith*, 282 F.3d at 65.

the law generally permits a plaintiff to prove her case without limitation as to the type of evidence upon which she can rely, and that circumstantial evidence is generally considered to be as persuasive as direct evidence. See, *e.g.*, *Ostrowski*, 968 F.2d at 182; *Fakete* v. *Aetna, Inc.*, 308 F.3d 335, 338 n.2 (3d Cir. 2002); *Bellaver* v. *Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000); *Medlock*, 164 F.3d at 550; *Thomas*, 131 F.3d at 203; see also *Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572, 581-583 (1st Cir. 1999) (collecting cases).

Although the question is not free from doubt, the view that the direct evidence requirement requires a plaintiff to submit non-inferential evidence or evidence that on its face establishes the discriminatory motive appears most consistent with this Court's decision in *Price Waterhouse*. Justice O'Connor in *Price Waterhouse*, for example, contrasted the requirement for "direct evidence" to shift the burden of persuasion in mixed-motive cases with the evidentiary standard applicable in pretext cases: "*McDonnell Douglas* itself dealt with a situation where the plaintiff presented *no direct evidence* that the employer had relied on a forbidden factor," but instead "was based only on * * * statistical probabilit[ies]" and "inference[s]." 490 U.S. at 270 (emphasis added). "In the face of this *inferential proof*, the employer's burden was deemed to be only one of production." *Ibid.* (emphasis added). She concluded, however, that "the employer is not entitled to the same presumption of good faith where there is *direct evidence* that it has placed substantial reliance on factors whose consideration is forbidden by Title VII." *Id.* at 271 (emphasis added). In other words, "the 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. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is*

direct evidence of intentional discrimination." *Ibid.* (emphasis added). The dissent also appears to have used "direct evidence" to contrast the type of inferential evidence applicable under the *McDonnell Douglas* test. See *id.* at 291 (Kennedy, J., dissenting) (noting that the direct evidence standard will require lower courts "to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence").

Moreover, this reading of direct evidence best furthers the purposes of Title VII by restricting mixed-motive burden-shifting instructions to only those cases where courts have a high degree of confidence that the employer's decision was tainted by improper motives. As Justice O'Connor explained, it is only where a plaintiff has produced such direct evidence that discriminatory animus was a substantial, motivating factor that courts should resort to the "strong medicine" of imposing on the defendant the burden of proving that it would have taken the same employment action without regard to impermissible factors.

## CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings under the correct legal standard.

Respectfully submitted.

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