No. 02-679

In the Supreme Court of the United States

DESERT PALACE, INC., DBA
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 ON THE MERITS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*?

2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment Corporation which is a publicly traded corporation. Park Place Entertainment Corporation is unaware of any publicly traded company that owns 10 percent or more of its stock.

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The August 2, 2002, *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F.3d 838 (9th Cir. 2002) and is reprinted in the Appendix to the Petition for Writ of Certiorari "Pet. App." at 1a - 53a. The October 2, 2001, Ninth Circuit panel opinion is reported at 268 F.3d 882 (9th Cir. 2001) and is reprinted at Pet. App. 54a - 69a. The January 28, 1999, order of the United States District Court for the District of Nevada is reprinted at Pet. App. 70a - 87a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its *en banc* opinion on August 2, 2002. The Petition for Writ of Certiorari was filed on October 31, 2002, and was granted on January 10, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166) ("Title VII"), 29 U.S.C. § 2000e *et. seq.*, specifically 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) and 2000e-5(g)(2)(B). These sections of Title VII are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

I. Overview of the Case.

Petitioner Caesars hired Respondent Catharina Costa in 1987. During the next seven years, Costa received many warnings and suspensions because of altercations with her co-

workers. In 1994, there was another altercation, this time with a twenty-five year employee with a good disciplinary record. Caesars terminated Costa and suspended her co-worker for five days. Costa sued, claiming gender discrimination in violation of Title VII.

Though the record was devoid of direct evidence of discrimination, the district court instructed the jury under a mixed-motive framework rather than under the appropriate pretext framework. The jury returned a verdict against Caesars, and Caesars appealed. The Ninth Circuit panel held that the district court committed reversible error by giving a mixed-motive jury instruction in the absence of direct evidence of discrimination. The panel decision was vacated, and a 7-4 majority of the *en banc* Ninth Circuit ruled that direct evidence is not required to trigger a mixed-motive analysis in Title VII cases. The *en banc* majority holding directly conflicts with the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and, as noted by the *en banc* dissent, places the Ninth Circuit "in conflict with almost all others." Pet. App. 51a.

II. Statement of Facts.

Costa worked in Caesars' warehouse where she operated a forklift to deliver bulk food orders. Though she was the only female warehouse employee in her collective bargaining unit, other women regularly worked in and around the warehouse. Costa Tr. 26: 22-24, Tr. 27: 6-22; Hallett Tr. 509: 9-11; Def. Exh. 37, Tr. 200.

Costa had a long history of *not* getting along with co-workers. In a fit of anger in her first year at Caesars, she threw a roll of tape at another employee and broke a window in the warehouse. In September 1990, she verbally harassed

another employee. Costa received disciplinary warnings for each of these incidents. Def. Exhs. 2 and 4, Tr. 200.[1] In July 1991, she had a loud confrontation with a co-worker in which they hurled vulgar, insulting names. Although Costa's disciplinary record at the time was worse, *compare* Def. Exhs. 2 and 4, Tr. 200 with Def. Exh. 37, Tr. 200, Warehouse Manager Lou Wood suspended both Costa and the co-worker for three days. Def. Exh. 8, Tr. 200; Costa Tr. 223: 2-6. Costa herself acknowledged that Wood tried to be fair, and he did not treat her worse than he treated her male co-workers. Costa Tr. 224: 23-25, 225: 1.

Six months later, in January 1992, Costa had another verbal confrontation with another warehouse co-worker. Each used vulgar, insulting language, and Costa tried to hit the co-worker with a pallet jack. Costa and the male co-worker each received five-day suspensions. Costa's union grieved the suspension. The union settled the grievance on Costa's behalf with an agreement to reduce her suspension to two and one-half days. The reduced suspension could still be relied upon, however, to support further discipline, up to and including termination. A different union which represented the co-worker settled with Caesars on the same terms. Def. Exhs. 14 and 23, Tr. 200; Riley Tr. 392: 24-25, 393: 1-3; Stewart Tr. 415: 9-17.

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[1] Caesars compiled the disciplinary records of warehouse employees for the period 1987 through July 1996. Tr. 199:14-25. The compilation is organized by file letter code, employee name, gender, date, type of infraction and disciplinary action taken. *See* Def. Exh. 37, Tr. 200.

In September 1992, Costa was rude to a co-worker and belligerent to a supervisor and received another written warning. Def. Exh. 16, Tr. 230.

In December 1993, Costa used profanity and ethnic slurs against a co-worker and endangered the co-worker with her forklift. This time Caesars suspended her for 30 days. Her union grieved the suspension. Without reaching the merits of the grievance, the arbitrator overturned the suspension because Caesars had failed to introduce the work rules into evidence at the arbitration hearing. Pl. Exh. 52, Tr. 170; Stewart Tr. 417: 20-25, 418: 1-2, 23-25, 419: 1-5.

In August 1994, Costa engaged in the altercation that resulted in her termination. This time, the co-worker was Herbert Gerber, a twenty-five year employee who, unlike Costa, had never received a disciplinary suspension and had no history of altercations with other employees. Stewart Tr. 426: 3-25, 427: 1. Costa claimed Gerber hit her; Gerber said Costa pushed him. There was physical evidence of contact, but no witnesses to the incident. Costa Tr. 237: 2-5; Joint Appendix ("J.A.") 6-7 [Costa Tr. 233-34]; Stewart Tr. 421: 16-25, 422: 1, 424: 17-22.

Without corroborating witnesses, Caesars' usual practice was to discipline both employees participating in an altercation. However, as Costa's union representative testified, Caesars would not necessarily impose equal discipline on each employee. Stewart Tr. 424: 23-25, 425: 1-12; Riley Tr. 387: 16-22. Instead, Caesars' practice was to consider all circumstances, including an employee's length of service and past record. Stewart Tr. 425: 6-12.

Caesars suspended Gerber for five days. Caesars chose to suspend rather than terminate his employment

because of his twenty-five years of service, his relatively clean disciplinary record (Gerber had never been suspended), and the absence of any history of failing to get along with co-workers. Stewart Tr. 426: 3-25, 427: 1.

Caesars terminated Costa. In choosing termination, Caesars considered her poor disciplinary record, and in particular her two prior suspensions for similar infractions. Def. Exhs. 8, 14 and 23, Tr. 200; Stewart Tr. 425: 15-25, 426: 1-2. Caesars' collective bargaining agreement with Costa's union permits Caesars to terminate an employee only for "just cause." Pl. Exh. 76, p. 30, Tr. 201. The union grieved the termination, but lost: the arbitrator ruled that Caesars terminated Costa for just cause. Pet. App. 7a.[2]

Having failed to persuade an arbitrator, Costa brought an action against Caesars under Title VII. Costa claimed she was terminated because of her gender, and that male co-workers were treated less harshly in similar circumstances. Pl. Exhs. 39-49 and 54, Tr. 198, 402.

On the issue of animus, Costa offered only two pieces of evidence that she characterized as gender-based remarks by members of management. One witness said supervisor Karen Hallett, a *woman*, referred to Costa as a "bitch." J.A. 11-12 [Graham Tr. 298-99]. And, Costa testified that supervisor Wayne Bach denied her overtime once because a co-worker "had a family to support." J.A. 8-9 [Costa Tr. 249]. Costa offered no evidence that Hallet's use of the word "bitch" connoted anything more than Hallet's personal dislike for Costa, or that Hallet had directed the remark at women in

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[2] The district court excluded from evidence the arbitration decision. Pet. App. 44a-45a.

general. As for the incident involving assignment of overtime, Costa admitted that neither Bach nor Hallett said anything connecting the decision to her gender or to the gender of the co-worker. J.A. 8-9 [Costa Tr. 249]. Costa had no family to support. Costa Tr. 249: 21-23.

The rest of Costa's alleged evidence of gender-based, disparate treatment came in the form of anecdotal stories:

(a) On one occasion a male supervisor walked into a room where Costa and several of her co-workers were eating soup. The supervisor said to Costa, "Don't you have work to do?" Costa Tr. 44: 8-15. No discipline resulted. The supervisor, Hugh Roth, was not involved in Costa's termination.

(b) Another supervisor, Bill Meredith, pressured Costa to fill out a United Way pledge card, Costa Tr. 57: 2-20, and was "disrespectful" to her. Costa Tr. 56: 20-25, 57: 1. He made no gender-based comments. He was not involved in her termination. When asked why she believed Meredith's treatment was discriminatory, Costa answered: "Because that was the way Bill Meredith was." Costa Tr. 56: 1-3.

(c) According to Costa, supervisors Roth and Meredith would not allow her to take breaks in the receiving office, whereas others were permitted to do so. Costa Tr. 210: 24-25, 211: 1-25, 212: 1-4. No discipline resulted. Again, neither supervisor was involved in her termination. Stewart Tr. 480: 15-25, 481: 1-3.

(d) According to Costa, supervisor Karen Hallett followed her around. Costa Tr. 146: 13-24. Other employees, all men, also complained that Hallett followed

them too. Stewart Tr. 431: 18-25; Hallett Tr. 536: 17-25, 537: 1-2, 562: 5-15.

(e) According to Costa, her supervisors did not fairly assign overtime. J.A. 8 [Costa Tr. 248]. Several of her co-workers, all males, made similar complaints. J.A. 13 [Dudenake Tr. 335]; Thomas Tr. 328: 23-25, 329: 1-3; J.A. 15 [Whitaker Tr. 348, Cornaggia Tr. 337].

At trial, Caesars objected to giving the jury a *Price Waterhouse* mixed-motive instruction, arguing that Costa had not produced direct evidence of discrimination. J.A. 16-17 [Tr. 460-61]; J.A. 24-25; Pet. App. 58a. Caesars requested pretext instructions. *Id.* Over the objection of Caesars, the district court gave the following "mixed-motive" jury 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 (emphasis added).[3]

No doubt influenced by the first sentence of the instruction, the jury answered the first question on the verdict form as follows:

> 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?
>
> Yes __X__ No ____

J.A. 40 (emphasis added).

III. Proceedings Below.

The jury reached a verdict and awarded Costa back wages of $64,377, compensatory damages of $200,000 and punitive damages of $100,000. J.A. 40. The district court denied Caesars' motion for judgment as a matter of law on Costa's termination and on the award of punitive damages. Pet. App. 56a, 72a-78a. The district court granted Caesars' motion for a new trial or remittitur, and Costa accepted a reduced compensatory damages award in the amount of $100,000. *Id.* at 7a, 78a and 86a. The district court also awarded Costa attorney's fees and costs. *Id.* at 84a-87a.

On appeal, the Ninth Circuit panel reversed, holding that the district court's mixed-motive jury instruction impermissibly shifted the burden of proof on causation to Caesars. Citing *Price Waterhouse* and several circuit court

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[3] Neither party requested this specific instruction.

decisions, the panel held that a mixed-motive instruction is allowed only when a Title VII plaintiff produces "direct and substantial evidence of discriminatory animus." Pet. App. 59a - 65a. The panel held that Costa did not produce such evidence. *Id.*

The Ninth Circuit granted Costa's petition for a rehearing *en banc*. In a 7-4 decision, the *en banc* majority held that the district court properly gave the mixed-motive jury instruction, shifting the burden of proof on causation to Caesars. The *en banc* majority did not find that Costa had presented direct evidence of discrimination; rather, it held that direct evidence of discrimination is not required to trigger the burden-shifting framework.

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred in holding that direct evidence is not required to trigger the mixed-motive analysis in Title VII cases. Justice O'Connor's concurring opinion in *Price Waterhouse* requiring direct evidence to trigger the application of the mixed-motive analysis is the holding of that case. The Ninth Circuit's conclusion that the Civil Rights Act of 1991 ("CRA 1991") "wholly abrogated" the premise for the direct evidence requirement is erroneous. The text of CRA 1991 does not show any intent by Congress to disturb the direct evidence requirement. The legislative history of CRA 1991 confirms Congress' intent to overrule only one aspect of the *Price Waterhouse* decision, namely, that an employer who prevails on the same-decision defense does not escape liability altogether. The Ninth Circuit's rejection of the direct evidence requirement based on a flawed analysis of CRA 1991 and its legislative history adds confusion to the law. The Ninth Circuit's decision should be overturned on these grounds alone.

There are compelling reasons for the Court to reaffirm that direct evidence is required to trigger the mixed-motive analysis. Absent direct evidence to trigger the mixed-motive analysis, the burden of proof on causation will be shifted to the employer in virtually all Title VII cases, disturbing the careful *McDonnell Douglas/Burdine* framework established by the Court. Retention of the direct evidence requirement is also necessary to maintain the balance of rights of employers and employees under Title VII.

The direct evidence required to trigger the burden-shifting framework of *Price Waterhouse* must meet a high standard. *Price Waterhouse* implicitly and explicitly establishes a high standard for the required evidence, and most circuit courts have adopted a high standard as a prerequisite to burden shifting. The circuit courts, however, have defined direct evidence in different ways, causing confusion in the application of *Price Waterhouse*. Caesars urges the Court to adopt the approach applied by the First Circuit in *Febres v. Challenger Caribbean Corp*.

ARGUMENT

I. Direct Evidence Is Required in Title VII Cases to Trigger the Application of the Mixed-Motive Analysis.

A. The *Price Waterhouse* holding requires direct evidence to trigger the application of the mixed-motive analysis.

Disparate treatment claims under Title VII can be proven by direct or circumstantial evidence. "As in any lawsuit, [a Title VII] plaintiff may prove his case by direct or circumstantial evidence." *Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Direct evidence of intentional discrimination is, however, "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). *See also Aikens,* 460 U.S. at 716 ("there will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("direct evidence is relatively rare"); *Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) ("Because direct evidence is rare in discrimination cases, a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion.").

The Court established a framework for analyzing the typical circumstantial evidence case brought under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later reaffirmed it in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). The *McDonnell Douglas/Burdine* framework is a three-step, burden-shifting method to prove intentional discrimination in the absence of direct evidence. The first step requires the plaintiff to

establish a prima facie case of discrimination. This is not an "onerous" burden; it involves the elimination of the most common, nondiscriminatory reasons for an adverse employment action. *Burdine*, 450 U.S. at 256.[4] Once a prima facie case is established, an inference of discrimination arises. The burden of production, but not proof, then "shifts to the employer to articulate some legitimate, nondiscriminatory reason for [the adverse action]." *McDonnell Douglas*, 411 U.S. at 802. If the employer makes such a showing, the burden shifts to the plaintiff to prove that the articulated reason is pretextual. *Burdine*, 450 U.S. at 253-55.

The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 256. Under the *McDonnell Douglas* procedure it never is the employer's burden to prove the absence of discriminatory motive. *Board of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 29-30 (1978). Until 1989, an employer in a Title VII disparate treatment case did not bear the burden of persuasion on causation under any circumstances.

In 1989, the Court in *Price Waterhouse* approved a mixed-motive analysis for Title VII cases that in narrow circumstances shifts the burden of persuasion on causation to the employer. The *Price Waterhouse* plurality opinion[5] states

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[4] "As should be apparent, 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." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring).

[5] Opinion by Justice Brennan, in which Justices Marshall, Blackmun and Stevens joined.

that when mixed-motives drive an employment decision, the *McDonnell Douglas/Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47 (Brennan, J., plurality opinion). If the plaintiff proves that an unlawful factor "played a motivating part in an employment decision," the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent the unlawful factor. *Id.* at 258.[6]

The plurality opinion in *Price Waterhouse* did not describe precisely what evidence would suffice to shift the burden of persuasion to the employer in a mixed-motive case.

> [W]e do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case.

Id. at 251-52.

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[6] The plurality also stated that when an employer carries its burden of proof on the same-decision defense, it avoids liability outright. *Id.* This part of the opinion was superseded by Section 107 of the 1991 amendments to Title VII, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments allow limited remedies even when the employer succeeds in proving the same-decision defense. As demonstrated *infra*, the 1991 amendments did not alter the nature of the evidence necessary to trigger a mixed-motive analysis.

The *Price Waterhouse* dissent[7] asserted that the *McDonnell Douglas/Burdine* evidentiary scheme fully addressed the different measures through which a plaintiff could prove illegal discrimination, without shifting the burden of persuasion to the employer in any disparate treatment case. *Id.* at 279-80, 288 (Kennedy, J., dissenting). Justice White concurred in the judgment, but his concurring opinion would apply the *Mt. Healthy*[8] approach to causation and require the plaintiff to show that "the unlawful motive was a *substantial* factor in the adverse employment action." *Id.* at 259 (White, J., concurring).

Justice O'Connor's concurring opinion agreed with the plurality's burden-shifting approach but specified that a heightened evidentiary showing was necessary to trigger the mixed-motive analysis. *Id.* at 262, 276-77 (O'Connor, J., concurring). Justice O'Connor wrote separately in part to "express my views as to 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. Specifically, Justice O'Connor's concurrence stated that a mixed-motive/burden-shifting analysis is triggered only by "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added).

The concurring opinion of Justice O'Connor in *Price Waterhouse* that requires direct evidence to trigger the mixed-motive analysis is the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented court

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[7] Opinion by Justice Kennedy, in which Chief Justice Rehnquist and Justice Scalia joined.

[8] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . ."). Applying the principle of *Marks* to *Price Waterhouse*, Justice O'Connor's concurring opinion, which requires direct evidence as the evidentiary prerequisite to a mixed-motive analysis, is the narrowest ground supporting the judgment of the Court. Justice O'Connor's concurrence shifts the burden of causation to the employer in mixed-motive cases only where the plaintiff meets a high evidentiary standard and presents direct evidence of discrimination.

The Third Circuit analyzed this issue and concluded that:

> Justice O'Connor's concurrence in *Price Waterhouse* limited the scope of the plurality's holding . . . by setting forth the predicate necessary to trigger the shift in the burden of persuasion . . . only plaintiffs who "demonstrate[ ]" with "sufficiently direct" evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion.

Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 215 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001), *quoting Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). *Accord*, *Fernandes v. Costa Brothers Masonry*, 199 F.2d 572, 580 (1st Cir. 1999) ("[W]hen the Supreme Court rules by means of a plurality opinion (as was true in *Price Waterhouse*), inferior courts should give effect to the narrowest ground upon which a majority of the Justices

supporting the judgment would agree. [Citation to *Marks* omitted.] The O'Connor concurrence fits this profile.")[9]

The *Price Waterhouse* dissent considered Justice O'Connor's concurring opinion as the holding of the Court. The dissenting opinion read the holding in *Price Waterhouse* as shifting the burden of persuasion to the employer only "in a limited number of cases" where the "plaintiff proves by *direct evidence* that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added). The dissenting opinion also noted that "the 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." *Id.* at 290.

The Ninth Circuit's conclusion that the direct evidence requirement was a mere "passing reference," Pet. App. 16a-17a, and not the holding in *Price Waterhouse* is wrong and conflicts with almost all other circuit courts. *See infra*, Argument Section I.B.3. The Ninth Circuit's further conclusion that CRA 1991 "wholly abrogated" the premise for Justice O'Connor's concurrence, Pet. App. 16a-17a, is also wrong.

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[9] As demonstrated in Argument Section I.B.3. *infra*, almost all circuit courts apply Justice O'Connor's concurring opinion and require "direct evidence" to trigger application of the mixed-motive analysis. *But see Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . , so that it is far from clear that [it] should be taken as establishing binding precedent."), *vacated in part on reh'g*, 1998 U.S. App. LEXIS 3634 (D.C. Cir. 1998).

B. The Civil Rights Act of 1991 did not abrogate the *Price Waterhouse* direct evidence requirement.

1. The plain language of CRA 1991 does not show that Congress rejected or overruled the *Price Waterhouse* direct evidence requirement.

CRA 1991 "is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." *Landgraf v. USI Film Prods., et al.*, 511 U.S. 244, 250 (1994). The Court in *Landgraf* noted that Section 107 of CRA 1991[10] responds to *Price Waterhouse* "by setting forth standards applicable in 'mixed motive' cases . . . ." *Id.* at 251. CRA 1991 overruled only one aspect of *Price Waterhouse*. Before CRA 1991, an employer that prevailed on the same-decision defense in a mixed-motive case avoided liability altogether. *Price Waterhouse*, 490 U.S. at 254, 258 (Brennan, J., plurality opinion). After CRA 1991, an employer that prevails on the same-decision defense no longer avoids liability altogether. 42 U.S.C. § 2000e-2(m) and § 2000e-5(g)(2)(B).[11] These statutory amendments are silent altogether with respect to the *Price Waterhouse* holding that direct evidence is required to trigger a mixed-motive case in the first place. Nothing in the text of CRA 1991 suggests that Congress intended to disturb the direct evidence requirement.

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[10] Codified at 42 U.S.C. § 2000(e)-2(m) and § 2000(e)-5(g)(2)(B).

[11] 42 U.S.C. § 2000e-5(g)(2)(B)(i) provides that an employer that prevails on the same-decision defense may nevertheless be liable for declaratory relief, injunctive relief, attorney's fees and costs.

The Third Circuit considered the effect of CRA 1991 on the *Price Waterhouse* direct evidence requirement in *Watson*, *supra*. The *Watson* court analyzed the text of Section 107(a) of CRA 1991 and concluded that CRA 1991 altered only the scope of the same-decision defense in mixed-motive cases - - i.e., after CRA 1991 an employer no longer escapes liability altogether by prevailing on the same-decision defense. *Watson*, 207 F.3d at 216. The *Watson* court then concluded that "Section 107(a) does not, at least on its face, alter the other significant holding of *Price Waterhouse* set forth in Justice O'Connor's concurrence - - i.e., the distinction drawn between 'pretext' and 'mixed-motive' cases and the evidentiary showing necessary to trigger a shift in the burden of persuasion with respect to causation." *Id*.

The Tenth Circuit also analyzed Section 107 of CRA 1991 in *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999). The *Medlock* court first concluded that CRA 1991 altered only the remedies available if an employer prevails on the same-decision defense.

> Section 107(a) of the Civil Rights Act of 1991, now codified at 42 U.S.C. § 2000e-2(m), overruled the Supreme Court's decision in Price Waterhouse to the extent that that decision holds an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive. Compare 42 U.S.C. § 2000e-2(m) . . . with Price Waterhouse . . . . Thus, the Civil Rights Act of 1991 does not create the mixed motive standard. Instead, the Act expands the relief available to a plaintiff who demonstrates that an unlawful criterion played a motivating part in an employment decision, even though the

> employer shows that it would have made the same decision regardless. See 42 U.S.C. § 2000e-5(g)(2)(B).

Id. at 552. The court then held that CRA 1991 did not alter the evidentiary requirement necessary to trigger a mixed-motive analysis.

> Furthermore, the Act does not address what type of evidence is required to meet this standard and so warrant a mixed motive instruction. Consequently, we agree with defendant that Price Waterhouse continues to control when a mixed motive instruction is appropriate.

Id. See also Gagnon v. Sprint Corp., 284 F.3d 839, 847-48 (8th Cir. 2002), *cert. denied*, 123 S.Ct. 485 (2002) ("As modified by Section 107 of the Civil Rights Act of 1991 . . . the mixed-motive model allows for declaratory relief, injunctive relief, attorney's fees and costs once Gagnon meets his initial burden regarding direct evidence."); *Tanca v. Nordberg*, 98 F.3d 680, 681 (1st Cir. 1996) ("Congress partially overruled *Price Waterhouse* in the 1991 Act by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases"); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed-motive instruction in accordance with the standards set forth in Section 107, a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires 'direct evidence that decision makers placed substantial negative reliance on an

illegitimate criterion.'", *quoting Price Waterhouse*, 490 U.S. at 227 (O'Connor, J., concurring)).[12]

2. The legislative history confirms that the direct evidence requirement survived the enactment of CRA 1991.

To support its decision to ignore Justice O'Connor's concurring opinion in *Price Waterhouse* and refuse to require direct evidence to trigger a mixed-motive analysis, the Ninth Circuit relies on an erroneous interpretation of CRA 1991's legislative history. The Ninth Circuit argues that the "legislative history evinces a clear intent to overrule *Price Waterhouse*" and that the history shows "beyond doubt" that "the premise for Justice O'Connor's comment is wholly abrogated . . . ." Pet. App. 16a-17a. The legislative history does not support this argument. Rather, the legislative history confirms that the only aspect of *Price Waterhouse* that Congress intended to overrule was the plurality holding that allowed an employer to *avoid liability altogether* by prevailing on the same-decision defense. That result was accomplished by the enactment of Section 107 of CRA 1991. 42 U.S.C. §§ 2000e-2(m) and 5(g)(2)(B).

The House Committee Report accompanying CRA 1991 expressly states that CRA 1991 just "overrules *one*

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[12] In *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996), a panel of the Ninth Circuit stated: "By enacting the 1991 Civil Rights Act, Congress *partially overruled Price Waterhouse*. The Act allows an employer to limit the employee's remedy, rather than defeat liability outright, by showing it would have made the same decision." (Emphasis added.)

aspect of the Supreme Court's decision in *Price Waterhouse*." H.R. Rep. No. 102-40, pt. 1, at 64 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (emphasis added).[13] The report elaborates: CRA 1991 "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.*

In the section of the report cited by the Ninth Circuit entitled "The Need to Overturn Price Waterhouse," the first paragraph expressly identifies the one aspect of *Price Waterhouse* to be overturned, namely the plurality's conclusion 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." *Id.* at 46.

Part 2 of the House Committee Report discusses *Price Waterhouse* and states:

> In a 6-3 plurality decision, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens concluded that once a Title VII plaintiff has proven that an unlawful criterion was considered by the employer in making an employment decision, the burden shifts to the employer who can avoid liability "only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken gender into account."

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[13] *See also* H.R. Rep. No. 102-40, pt. 2, at 16-18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (same).

> In separate opinions, Justice O'Connor and Justice White concurred in the decision, concluding that the burden of proof should shift to the employer to show that gender made no difference in the decision, but only when a plaintiff shows "by *direct evidence* that an illegitimate criterion was a substantial factor in the decision."

H.R. Rep. No. 102-40, pt. 2, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (emphasis added). This section of the report shows at a minimum Congressional recognition of the *Price Waterhouse* direct evidence requirement as reflected in the legislative history. As demonstrated above, Congress did not intend to disturb that requirement by enactment of CRA 1991.

In rejecting the argument that a mixed-motive instruction is appropriate in every Title VII case following CRA 1991, the Second Circuit noted that "the House Committee Report makes clear that Section 107 was enacted *solely* to overrule the part of *Price Waterhouse* that allowed an employer to avoid all liability by prevailing on its dual motivation defense." *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997) (emphasis added). *Accord*, *Watson*, 207 F.3d at 218.

The Ninth Circuit's reliance on CRA 1991 and its legislative history to ignore the direct evidence requirement is misplaced. The Ninth Circuit *en banc* dissent correctly concluded that CRA 1991 "did not modify the Supreme Court's prior holding on the need for direct evidence" and that by "vitiating Justice O'Connor's direct evidence requirement,

the majority's holding puts our circuit in conflict with almost all others." Pet. App. 50a-51a.

3. The great weight of circuit court decisions in Title VII discrimination cases continues to apply the direct evidence requirement after CRA 1991.

Congress did not intend to disturb the direct evidence requirement in mixed-motive cases by enactment of CRA 1991. The great weight of circuit court decisions after CRA 1991 continues to require direct evidence to trigger the mixed-motive analysis in discrimination cases brought under Title VII. *See Fernandes*, 199 F.3d at 580 (1st Cir. 1999) ("It follows that plaintiffs may use the *Price Waterhouse* mechanism in disparate treatment cases in which they adduce direct evidence of a discriminatory animus, whereas they must proceed under the conventional *McDonnell Douglas* framework (commonly called 'pretext analysis') in all other cases."); *Fields*, 115 F.3d at 122 (2d Cir. 1997) ("For a plaintiff to be able to insist on a dual motivation charge, there must either be direct evidence of discrimination [citation omitted], or circumstantial evidence that is 'tied directly to the alleged discriminatory animus,' [citation omitted]."); *Watson*, 207 F.3d at 215 (3d Cir. 2000) ("Pursuant to Justice O'Connor's concurrence, only plaintiffs who 'demonstrate []' with 'sufficient direct' evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion.", *quoting Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring)); *Wagner v. Dillard Dep't. Stores, Inc.*, 17 Fed. Appx. 141, 148 (4th Cir. 2001) ("In order to merit the more favorable mixed-motive jury instruction, a plaintiff must present 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate

criterion,'" *quoting Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring)); *Sreeram v. Louisiana State Medical Center-Shreveport, et al.*, 188 F.3d 314, 321 (5th Cir. 1999) ("Since we have found that the evidence on the record was insufficient to support an inference of discrimination, it follows that [plaintiff] did not come forward with 'direct evidence' of discrimination so as to trigger evaluation of her claim under [*Price Waterhouse*]."); *Laderach v. U-Haul of Northwestern Ohio, et al.*, 207 F.3d 825, 829 (6th Cir. 2000) ("Once there is credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997) ("Two methods exist for Plair to satisfy his burden of proof: by direct evidence that racial discrimination motivated Brach's decision to terminate him, or by the indirect, burden-shifting method of [*McDonnell Douglas/Burdine*]."); *Gagnon*, 284 F.3d at 847 (8th Cir. 2002) ("Gagnon can proceed under the mixed-motives standard set forth in [*Price Waterhouse*] if he is able to produce direct evidence that an illegitimate criterion . . . played a motivating part in [the] employment decision.") (Internal quotes and citations omitted.); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999) ("Generally, a mixed-motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998) (The plaintiff did not present sufficient direct evidence to trigger the *Price Waterhouse* mixed-motive analysis.).[14]

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[14] These circuit courts apply Justice O'Connor's concurring opinion in Title VII discrimination cases after CRA 1991 and require "direct evidence" to trigger the mixed-motive analysis. The circuit courts are not, however, uniform in their interpretation or

4. The Ninth Circuit's interpretation of CRA 1991 creates confusion in the law because it requires different evidentiary thresholds to trigger the mixed-motive analysis depending on the type of claim raised.

Justice O'Connor's concurring opinion requiring direct evidence to trigger application of the mixed-motive analysis was rendered in the context of a Title VII sex discrimination case. The direct evidence requirement has been applied consistently to mixed-motive cases raising all types of discrimination and retaliation claims brought under Title VII and other federal and state anti-discrimination laws. *See,* e.g. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995) (applying the *Price Waterhouse* direct evidence requirement to age discrimination claims brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621); *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000) (same); *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 961-62 (11th Cir. 1997) (same as to race discrimination claims brought under 42 U.S.C. § 1981); *Medlock*, 164 F.3d at 550-51 (10th Cir. 1999) (same as to retaliation claims brought under Title VII); *Gagnon*, 284 F.3d at 849-50 (8th Cir. 2002) (same and state law discrimination claims); *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002) (same as to disability discrimination claims brought under the Americans with Disabilities Act, 42 U.S.C. §12101-12213); *Buchsbaum v. University Physicians Plan*, 2002 U.S. App. LEXIS 25440, *9-13 (3d Cir. 2002)(same).

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application of the direct evidence requirement. *See infra*, Argument Section II.B.

Claiming that the law in this area is confusing, the Ninth Circuit felt it "unnecessary" to get "mired in the debate over whether Justice O'Connor's concurring opinion was controlling or not." Pet. App. 16a-18a.[15] The Ninth Circuit cites CRA 1991 and its legislative history to ignore the direct evidence requirement. Instead of lessening the claimed confusion, the Ninth Circuit's decision adds confusion to the law because it requires different evidentiary thresholds to trigger the mixed-motive analysis depending on the type of claim raised. Section 107 of CRA 1991 addresses only Title VII mixed-motive discrimination claims involving "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(m). Only these five (5) enumerated Title VII claims are affected by Section 107 of CRA 1991, and then only to the extent that an employer who prevails on the same-decision defense no longer avoids liability altogether. No other Title VII claims or other types of discrimination claims brought under other federal anti-discrimination laws are affected by Section 107.[16]

"[I]t is common for employment discrimination complaints to combine claims under different statutes." *Watson*, 207 F.3d at 220. Following the Ninth Circuit's

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[15] The Ninth Circuit characterized other circuit court decisions interpreting and applying the direct evidence requirement as a "quagmire," "this morass," "chaos" and "a veiled excuse to substitute their own judgment for that of a jury." Pet. App. 18a, 21a, 23-24a.

[16] For example, CRA 1991 did not codify the mixed-motive analysis for Title VII retaliation claims brought under 42 U.S.C. § 2000e-3. Neither did CRA 1991 codify the mixed-motive analysis for age discrimination claims brought under the ADEA or for race discrimination claims brought under 42 U.S.C. § 1981.

holding could result in requiring a court to apply a direct evidence standard to trigger mixed-motive treatment of one type of discrimination claim (an ADEA age claim, for example) and a preponderance of the evidence standard to trigger mixed-motive treatment of another type of claim (Title VII sex claim, for example) in the same case. The Third Circuit in *Watson* relied in part on the "confusion" that such a result could cause when it held that the *Price Waterhouse* direct evidence requirement continues to apply to Title VII discrimination claims enumerated in Section 107 after CRA 1991. *Id.* "Compared with the confusion that would result . . . retaining the distinction between the standards of causation in 'pretext' and 'mixed-motive' cases will cause fewer practical problems because cases in which the plaintiff can make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence are relatively uncommon . . . ." *Id.*[17]

By enacting CRA 1991, Congress did not intend to require different evidentiary thresholds to trigger a mixed-motive analysis depending on the type of discrimination claim raised. Rather, Congress intended to overrule only one aspect of the *Price Waterhouse* decision - - the effect of the employer prevailing on the same-decision defense. The Ninth Circuit's reliance on Section 107 of CRA 1991 to declare that direct evidence is no longer required to trigger the mixed-motive analysis in Title VII cases is erroneous. Adoption of that view would serve only to add confusion to the law.

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[17] The situation in which a plaintiff brings a race discrimination claim under both Title VII (a claim covered by Section 107) and 42 U.S.C. § 1981 would require an even more convoluted analysis.

C. There are other compelling reasons to retain the *Price Waterhouse* direct evidence requirement.

The Court should reaffirm that direct evidence is necessary to trigger a mixed-motive analysis (1) to avoid shifting the burden of proof on causation to employers in most discrimination cases, and (2) to maintain the balance between employee and employer rights in discrimination cases.

1. Failure to retain the *Price Waterhouse* direct evidence requirement would shift the burden of proof on causation to the employer in most discrimination cases.

The *Price Waterhouse* plurality opinion and both concurring opinions took great pains to express the view that the mixed-motive framework that applied in that case did not overrule or require modification of the Court's holdings in *McDonnell Douglas* or *Burdine*. "Our holding casts no shadow on Burdine . . . ." *Price Waterhouse*, 490 U.S. at 245 (Brennan, J., plurality opinion). "I agree with Justice Brennan that applying this 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 260 (White, J., concurring). "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 261 (O'Connor, J., concurring).[18] In a unanimous

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[18] The *Price Waterhouse* dissenting opinion would not shift the burden of proof on causation to employers in mixed-motive cases and stated that "adherence to the evidentiary scheme established in

opinion, the Court recently reaffirmed the application of the *McDonnell Douglas/Burdine* framework in cases based on circumstantial evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-43 (2000).

The Ninth Circuit not only ignores the Court's *Price Waterhouse* holding, but by failing to require direct evidence it effectively circumvents the *McDonnell Douglas/Burdine* analysis. Without the *Price Waterhouse* evidentiary restraint on when plaintiffs may invoke the mixed-motive analysis, almost every plaintiff will opt for that analysis in order to shift the burden of proof on causation to the employer. As the *Price Waterhouse* dissenting opinion noted: "[A]lmost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of 'stray remarks' or other evidence of discriminatory animus." *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting). This is so because "plaintiffs enjoy more favorable standards of liability in mixed-motive cases. . . ." *Fuller*, 67 F.3d at 1141.

Under the Ninth Circuit's view, any circumstantial evidence of discrimination would be sufficient to shift the burden of proof on causation to the employer in mixed-motive cases. Pet. App. 29a-33a. The Ninth Circuit would apparently shift the burden of proof to the employer where the plaintiff makes out only a *prima facie* case of discrimination and introduces circumstantial evidence that the employer's explanation for its actions are unworthy of credence. Pet. App. 31a. Such a showing is no more than a *McDonnell Douglas/Burdine* circumstantial evidence case, as reaffirmed by the Court in *Reeves*. The Ninth Circuit acknowledges that: "In many respects, Costa's case presents a typical Title VII

[*McDonnell Douglas/Burdine*] is a wiser course . . . ." *Id*. at 279 (Kennedy J., dissenting).

case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different." Pet. App. 34a. Caesars suggests that this is the scenario in virtually all Title VII discharge and disciplinary cases in which plaintiffs rely on circumstantial evidence of discrimination. The Ninth Circuit impermissibly shifted the burden of proof on causation to Caesars.

Adopting the Ninth Circuit's view and ignoring the *Price Waterhouse* direct evidence requirement would result in an impermissible shift of the burden of proof on causation to the employer in virtually all Title VII cases. Such a result is contrary to over 25 years of jurisprudence under Title VII since *McDonnell Douglas*. Other courts have recognized this danger. *Fernandes*, 199 F.3d at 580 ("It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis."); *Fuller*, 67 F.3d at 1142 ("' not all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge.' [Citation omitted.] Otherwise, any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish between the two theories."); *Watson*, 207 F.3d at 215 ("As Justice O'Connor made clear in her concurrence, the *Price Waterhouse* shift in the burden of persuasion does not apply to 'pretext' cases, in which plaintiffs prove intentional discrimination indirectly through the burden-shifting paradigm set forth in *McDonnell Douglas* and its progeny."); *Hook v. Ernst & Young*, 28 F.3d 366, 376 (3d Cir. 1994) ("The Supreme Court has taken great pains to differentiate between the two theories. . . . Therefore, to the extent [plaintiff] argues that production of evidence sufficient to show a *McDonnell Douglas/Burdine* prima facie

case is evidence of discrimination sufficient to warrant a mixed-motives instruction, we think she misstates the law."); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-49 (8th Cir. 1993) ("it is clear that merely establishing a *prima facie* case of discrimination is not enough" to entitle "a plaintiff to a *Price Waterhouse* burden-shifting instruction.").

The Court should reaffirm that direct evidence is required to trigger application of the mixed-motive analysis and shift the burden of proof on causation to the employer. To do otherwise will destroy the careful *McDonnell Douglas/Burdine* framework established by the Court.

2. Failure to retain the *Price Waterhouse* direct evidence requirement would upset the balance struck between employee and employer rights in Title VII cases.

The Court should reject the invitation to allow the plaintiff-friendly mixed-motive analysis to override the *McDonnell Douglas/Burdine* framework. By any measure, cases filed in federal court alleging employment discrimination continue to rise.[19] The "strong medicine of requiring the employer to bear the burden of persuasion on the issue of

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[19] In 2001, there were 21,157 employment discrimination cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2001 *Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, at http. // www.uscourts.gov / judbususc / judbus.html. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

causation"[20] in employment cases should not be dispensed lightly. Retaining the direct evidence requirement avoids an incentive for employers to adopt quotas and engage in preferential treatment of protected groups in violation of Title VII. The Court recognized in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (O'Connor, J., plurality opinion) that: "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."

By adopting the direct evidence requirement, Justice O'Connor's concurring opinion balanced the rights of employees and employers under Title VII, requiring plaintiffs to carry a high evidentiary burden to trigger a mixed-motive analysis. Justice O'Connor's concurrence also warned of the dangers described in *Watson* by stating:

> Shifting the burden of persuasion to the employer in a situation like this one [where direct evidence is produced] creates no incentive to preferential treatment in violation of [Title VII]. To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

Price Waterhouse, 490 U.S. at 275 (O'Connor, J., concurring).

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[20] *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring).

Enactment of CRA 1991 reinforces this rationale for retaining the direct evidence requirement in mixed-motive cases. When Justice O'Connor's concurring opinion balanced the rights of Title VII litigants and adopted the direct evidence requirement, the employer could avoid a finding of liability altogether by prevailing on the same-decision defense. After CRA 1991, the employer no longer avoids a liability finding but rather can only limit its damages. CRA 1991 shifts the balance in favor of Title VII plaintiffs on the remedy issue. Retention of the direct evidence requirement is necessary after CRA 1991 to maintain the balance of rights struck by the *Price Waterhouse* holding.

II. The Evidence Required to Trigger the Burden-Shifting Framework of *Price Waterhouse* Must Meet a High Standard.

A. *Price Waterhouse* implicitly and explicitly set a high standard for the required evidence.

1. Before *Price Waterhouse,* the Court had rejected shifting the burden of proof on causation in disparate treatment cases under Title VII; thus, approving a burden-shifting framework in *Price Waterhouse* implicitly recognized its extraordinary circumstances.

Before *Price Waterhouse*, the Court had rejected shifting the burden of proof on causation to the employer in disparate treatment employment discrimination cases. In

Board of Trs. of Keene State Coll. et. at. v. Sweeney, 439 U.S. 24 (1978), the First Circuit had interpreted *McDonnell Douglas* as requiring the employer to prove the absence of discriminatory motive on the theory that the employer had greater access to such evidence. *Id.* at 24. The Court rejected this interpretation, explicitly holding that the employer does not carry the burden of persuasion; it only must "articulate" but not "prove" a legitimate, nondiscriminatory reason for its decision. *Id.* at 24-25. "The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." *Id.* at 27 (Stevens, J., dissenting). *See also* Argument Section I.A.

2. The record facts in *Price Waterhouse* provided extraordinary circumstances that supported a burden-shifting framework and, by implication, established a high threshold for doing so.

The facts in *Price Waterhouse* supporting plaintiff's claim of unlawful disparate treatment were compelling. As a candidate for partnership in her firm, plaintiff had compiled a record of accomplishment, particularly in business development, matched by none of the other 87 candidates. *Price Waterhouse,* 490 U.S. at 234 (Brennan, J., plurality opinion). Her only shortcoming, in the view of the partners deciding her candidacy, was her aggressiveness, which was seen as "spill[ing] over into abrasiveness." *Id.* at 234. It was clear on the record that at least some of the partners reacted negatively to plaintiff "because she was a woman." *Id.* at 235. Several partners described their view of plaintiff's over-aggressiveness in gender-based terms: "macho," "overcompensat[ing] for being a woman," and "has matured

from a tough-talking somewhat masculine hard-nosed mgr to an authorative, formidable, but much more appealing lady ptr candidate." *Id.* at 235. Perhaps most revealing of the decisionmakers' thought processes, the partner charged with explaining to plaintiff why the firm had decided to place her candidacy on hold stated that plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Justice O'Connor's concurring opinion summarized the evidence as follows:

> In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. . . [T]hese evaluations were given "great weight" by the decisionmakers at Price Waterhouse.

Id. at 272 (O'Connor, J., concurring). Highlighting how plaintiff had produced the strongest possible evidence of discriminatory animus – evidence linked directly to the challenged employment decision – Justice O'Connor's concurring opinion explained:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, 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 272-73.

Given such (i) direct evidence of illegal motive, (ii) by the decisionmakers, (iii) at the moment of their decision, no wonder the plurality opinion held that the employer could "avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account." *Id*. at 258 (Brennan, J., plurality opinion).

Justice O'Connor's concurring opinion agreed with this burden-shifting approach in the context of such strong, direct evidence of discrimination in part because: "[T]he explicit consideration of race, color, religion, sex, or national origin in making employment decisions 'was the most obvious evil Congress had in mind when it enacted Title VII.'" *Id*. at 275 (O'Connor, J., concurring), *quoting Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977).

3. Justice O'Connor's concurring opinion explicitly set a high standard for burden-shifting; only direct evidence that an illegitimate criterion was a substantial factor in the challenged decision suffices; comments by non-decisionmakers, unrelated comments by decisionmakers, and stray remarks are insufficient.

Recognizing that an employer's burden of rebuttal under the *McDonnell Douglas/Burdine* framework is

intentionally light (i.e., mere articulation of a legitimate reason) because plaintiff's prima facie burden is light (i.e., raising an inference of possible discrimination), Justice O'Connor's concurring opinion stated:

> In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.
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> * * *
>
> Thus, stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Id. at 276-77 (O'Connor, J., concurring).[21]

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[21] Though the *Price Waterhouse* plurality opinion did not describe precisely what evidence would suffice to shift the burden of persuasion on causation to the employer, the plurality opinion stated that its description of what would be required is *not* "meaningfully different" than this description in Justice O'Connor's concurring opinion. *Id*. at 250 n.13. (Brennan, J., concurring opinion.)

B. Most circuit courts have defined "direct evidence" strictly as a prerequisite to burden-shifting.

The most exhaustive work by any court to catalogue the circuits' varied approaches to the direct evidence question is reported in *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999).

In *Fernandes*, plaintiffs and all other "dark-skinned Cape Verdean" workers were denied rehire when their suspended construction project resumed. *Id.* at 578. Plaintiffs sued alleging race, national origin and color discrimination. *Id.* at 579. In addition to showing that only white and light-skinned Portuguese workers, but no dark-skinned Cape Verdean workers, were rehired, plaintiffs introduced evidence that in refusing to rehire them the employer had stated: "I don't need minorities, I don't need no residents on this job," and "I don't have to hire you locals or Cape Verdean people." *Id.* at 578. The employer asserted legitimate, nondiscriminatory reasons for its decisions. *Id.* at 586. The district court entered summary judgment against all of plaintiffs' claims, concluding that the employer's statements were "stray remarks," insufficient to trigger a mixed-motive analysis, and that under a pretext analysis, the employer's articulated, nondiscriminatory reasons were not proven to be pretextual. *Id.* at 587.

On appeal, the First Circuit began by asking whether the employer's statements constituted "direct evidence" within the meaning of *Price Waterhouse*. Before deciding, the court surveyed the law in all circuits on the point and placed it in three rough categories: the "classic" position ("holding that ['direct evidence'] signifies evidence that, if believed, suffices to prove the fact of discriminatory animus without inference,

presumption, or resort to other evidence"); the "animus plus" position (requiring "evidence, both direct and circumstantial, of conduct or statements that (a) reflect directly the alleged discriminatory animus and (b) bear squarely on the contested employment decision"); and the "animus" position (accepting as sufficient, direct or circumstantial evidence proving the alleged discriminatory animus, whether or not it bears squarely on the challenged employment decision). *Id.* at 581. Ultimately, the court concluded that the employer's statements in *Fernandes*, while not dismissible as mere "stray remarks," were at best "ambiguous statements" that would not rise to the level of "direct evidence" under any of the three approaches. *Id.* at 583. Therefore, it agreed with the district court that the mixed-motive framework was not triggered and remanded for further proceedings. *Id.* at 583-589.

The *Fernandes* 1999 survey of the circuits is still useful: it not only displays the degree to which circuit courts are divided on defining "direct evidence" but also the degree to which their varied approaches have unified around two fundamental principles. The courts that *Fernandes* catalogued as taking the "classic" or "animus-plus" approach agree that: (1) the proffered evidence must demonstrate the alleged discriminatory animus, and (2) it must bear squarely on the contested employment decision. (The difference between the approaches is that the former would not recognize *circumstantial* evidence.) Representative decisions requiring both (1) and (2) as elements of the definition of "direct evidence" include: *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002); *Wagner*, 17 Fed. Appx. at 148 (4th Cir. 2001); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897-98 (5th Cir. 2002), *petition for cert. filed*, (Jan. 27, 2003); *Laderach*, 207 F.3d at 829 (6th Cir. 2000); *Markel v. Board of Regents*, 276 F.3d 906, 910 (7th Cir. 2002); *Equal*

Employment Opportunity Comm'n. v. Liberal R-II Sch. Dist., 314 F.3d 920, *8-10 (8th Cir. 2002); *Shorter*, 188 F.3d at 1207-08 (10th Cir. 1999); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330-31 (11th Cir. 1998).

Only the Second Circuit has consistently taken the position that no link between animus and the challenged decision is required. *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 161-62 (2d Cir. 2001). The Eighth Circuit has vacillated. *Compare Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-49 (8th Cir. 1993) and *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999) with *Equal Employment Opportunity Comm'n. v. Liberal R-II Sch. Dist.*, 314 F.3d 920 (8th Cir. 2002).

The great majority of courts, then, understand *Price Waterhouse* not only to require "direct evidence" to trigger the mixed-motive/burden-shifting analysis, but also to set a strict standard for its satisfaction.

C. The best approach is the one applied by the First Circuit in *Febres v. Challenger Caribbean Corp*.

The First Circuit has devoted special time and attention to studying this issue, and it has adopted the correct approach. Less than one year after the *Fernandes* study, the First Circuit returned to the question in *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000).

In *Febres*, the employer downsized, retaining some employees and terminating others. *Id.* at 59. Three officials were responsible for deciding whom to keep and whom to let go. *Id.* During their deliberations, one said privately to

another that three factors were to be used in the process: job performance, union identification, and "in some cases, the age." *Id*. Plaintiffs, none of whom was retained, sued for age discrimination. *Id.* Plaintiffs asserted that the quoted language constituted direct evidence of intentional age discrimination. *Id.* at 60. The employer argued that this was not direct evidence within the meaning of *Price Waterhouse* because the statement "may have been referring to a plan to give older employees special (favorable) treatment." *Id*. at 61. The court of appeals rejected that argument, in part because the official who testified about hearing the comment explained that, in response, he had "defended the older people" and pointed out that "us older guys sometimes work better than younger people." *Id*. at 61 n.4. The First Circuit held that plaintiffs had established direct evidence sufficient to trigger application of the mixed-motive analysis. *Id.* at 62.

Of more interest than the outcome in *Febres* is the court's approach to the direct evidence question. Rather than draw "fine distinctions," the court held that evidence is "direct" and thus justifies a mixed-motive jury instruction:

> when it consists of [1] statements by a decisionmaker [2] that directly reflect the alleged animus and [3] bear squarely on the contested employment decision.[22]

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[22] The court found the quoted statement to bear squarely on the contested employment decision, which was whom to retain. It rejected the employer's argument that the words did not bear squarely on the narrower question of whether to retain precisely the plaintiffs. *Id.* at 62.

Id. at 60 (bracketed numbers added). Stated differently:

> In a mixed-motive case, the burden of persuasion does not shift merely because the plaintiff introduces sufficient direct evidence to permit a finding that a discriminatory motive was at work; the burden shifts only if the direct evidence in fact persuades the jury that a discriminatory motive was at work. Put another way, the burden of persuasion does not shift unless and until the jury accepts the "direct evidence" adduced by the plaintiff and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision.

Id. at 64.

The *Febres* approach best unifies the plurality opinion and Justice O'Connor's concurring opinion in *Price Waterhouse* as well as the stronger principles of the various circuit positions.[23] It also has these virtues: (1) it preserves the mixed-motive framework as a real alternative for plaintiffs who can prove "the most obvious evil Congress had in mind . . . ," i.e., "explicit consideration" of race, color, religion, sex, or national origin as a motivating factor in employment

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[23] *See* Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much in Between: A Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases*, 7 Suffolk J. Trial & App. Advoc. 181 (2002).

decisions;[24] (2) it does not reject circumstantial evidence automatically, so long as it proves statements by the decisionmaker(s) that directly reflect the alleged animus and that bear squarely on the contested employment decision; and (3) it limits the circumstances in which employers will face strict liability for attorney's fees and injunctive relief to those "relatively rare" situations where direct evidence of discrimination has been provided.

D. Only a strict definition of "direct evidence" will shield defendants from the inherent prejudice caused by jury instructions like the pattern instruction given below.

The present case provides an excellent example of the risk of prejudice to employers when mixed-motive jury instructions are given in the absence of direct evidence of discrimination.

At the close of evidence, Caesars was confident plaintiff had not proven by direct evidence that gender played any part in any adverse employment decision. Therefore, Caesars argued that the mixed-motive framework was inapplicable; the proper framework was the pretext framework of *McDonnell Douglas/Burdine*. Under that framework, Caesars' burden was to articulate a legitimate, nondiscriminatory reason. Caesars had carried its burden by showing that plaintiff was terminated over an altercation with a co-worker against a background of prior warnings and suspensions for failing to get along with others. Costa's burden throughout was to prove that gender was the but-for

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[24] *Price Waterhouse*, 490 U.S. at 274 (O'Connor, J., concurring), *quoting Teamsters*, 431 U.S. at 335 n.15.

reason for termination, and one of the ways she might do that was to show that Caesars' reason was pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508-13 (1993).

Over Caesars' objection, the trial court gave the following pattern jury 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.
> . . .

Pet. App. 33a-34a (emphasis added). The first question on the verdict form was:

> 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?

J.A. 40 (emphasis added). The prejudice to Caesars is clear. A reasonable lay juror would almost unavoidably conclude that the trial judge was directing a verdict in plaintiff's favor on the question of gender as a motivating factor.[25]

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[25] The dissenting opinion in *Price Waterhouse* predicted: "Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. Section 1981 or the [ADEA], where courts borrow the Title VII order of proof for the conduct of jury trials." *Price Waterhouse*, 490 U.S. at 292

The problem was not so much with the words of the instruction or of the verdict form. The problem was with the low (or *nonexistent*) evidentiary threshold found to trigger the mixed-motive framework in the first place. Mere "evidence that" unlawful reasons motivated a decision, without more, can never be sufficient. If the trial court below had followed *Price Waterhouse* it would not have applied the mixed-motive framework.

1. The overtime comment is not direct evidence.

The second *Febres* factor requires "direct evidence" to reflect directly the alleged animus. Costa's evidence regarding the overtime assignment does not satisfy the requirement. She testified that the supervisor said her co-worker had a family to support. Costa admitted that the supervisor made *no* reference to the co-worker's gender or to hers. J.A. 8-9 [Costa Tr. 248-49]. The language used was gender neutral because a person of either gender could have dependent family members to support. The supervisor's statement fails to show that the co-worker received overtime because he was a man, or that Costa was denied overtime because she was a woman. The co-worker had a family to support while Costa did not. J.A. 9 [Costa Tr. 249].

Comments that are isolated and ambiguous do not constitute direct evidence of sex discrimination. *Komac v. Gordon Food Serv.*, 3 F. Supp. 2d 850, 855 (N.D. Ohio 1998) (when plaintiff protested that men earned more money, her supervisor responded that they "have a wife and three kids

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(Kennedy, J., dissenting). CRA 1991, making jury trials the norm for all Title VII cases, has magnified the problem the dissenting opinion predicted.

at home" – held not direct evidence of sex discrimination because it was isolated and ambiguous in light of the context). Here, there is *no* evidence that the supervisor made any other statements about family issues. The one statement that was made was ambiguous and gender neutral because it could have referred to any employee denied overtime because others had families to support. Moreover, the statement cannot support a discriminatory discharge claim because it fails to satisfy the third *Febres* factor: it bears no relation to Costa's termination. Stewart Tr. 480: 15-25, 481: 1-3. The supervisor who made the statement (Bach) was not involved in the termination decision. *Id*.

2. Karen Hallett's use of the word "bitch" is not direct evidence.

Costa's co-worker testified that Karen Hallett told him that she wanted to get rid of "that bitch," referring to Costa. J.A. 11-12 [Graham Tr. 298-99]. This evidence also falls far short of the second *Febres* factor. Many courts have found that the mere use of the word "bitch" is not evidence of gender animus. *Neuren v. Adduci, Mastriani, Meeks and Schill, et. al.*, 43 F.3d 1507, 1513 (D.C. Cir. 1995) (reference to plaintiff as "bitch" in written performance evaluation was grounded in gender-neutral concerns about plaintiff's interpersonal relations with co-workers rather than discriminatory considerations); *Barnett v. Depart. of Veterans Affairs*, 153 F.3d 338, 342-43 (6th Cir. 1998) (use of the word "bitch" by supervisor who made it known that he disliked plaintiff and used her as the butt of office jokes is consistent with personal dislike rather than discriminatory animus); *Kriss v. Sprint Communications Co. Ltd. P'ship.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (use of the word "bitch" is not an indication of general misogynist attitude where the term was directed toward only one woman, rather than women in

general and was, therefore, not particularly probative of gender discrimination).

Here, the context of Hallett's statement gives no support to a finding of gender animus. Where words such as "bitch" can have several connotations, context is everything in interpreting them. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d. 1164, 1168 (7th Cir. 1996), *overruled in part by AMTRAK v. Morgan*, 536 U.S. 1001 (2002). The *Galloway* court explained the importance of context in analyzing use of the word "bitch":

> It is true that "bitch" is rarely used of heterosexual males (though some heterosexual male teenagers have taken recently to calling each other "bitch"). But it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman." If Bullock had called Galloway a "sick woman," and a similarly situated male coworker a "sick man," there would be no ground for an inference of sex discrimination. And, likewise, were there a similarly situated male worker to Galloway whom Bullock called a "sick bastard" while calling her a "sick bitch," we do not think it would be rational for a trier of fact to infer that Bullock was making the workplace more uncongenial for women than for men. Even if Bullock didn't abuse

> any men, there would not be an automatic inference from his use of the word "bitch" that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender.

Galloway, 78 F.3d at 1168.

The co-worker to whom Karen Hallett allegedly made the statement was asked whether Hallett gave any reason why she wanted to get rid of Costa. The co-worker responded: "No, it was basically she did not like the way that Catharina did her job." Graham Tr. 299: 3-5. The context lends no credence whatsoever to an argument that Hallett's use of the word "bitch" was evidence of gender animus.

Other testimony by three co-workers confirms that the conflict between Costa and Hallett was personal and that there was no gender animus. One confirmed that they "didn't like each other," and he did not consider their animosity to be based on "sex or someone being a female versus a male." Thomas Tr. 323: 17-25, 324: 1-8. Another testified that Hallett's management style created problems for the entire department, and that "males as well as females" had filed over 52 union grievances while Hallett was in management that remained unresolved. Graham Tr. 307: 5-25, 308: 1. The third elaborated on the animosity between manager Hallett and union steward Costa, noting that Costa was "very vocal about union contract issues" during a contentious time between labor and management. Bell Tr. 340: 10-23.

Hallett's use of the term "bitch" in reference to Costa does not constitute evidence or gender animus sufficient to satisfy the second *Febres* factor. Neither does this evidence satisfy the third *Febres* factor. There is no evidence in the

record to indicate that the use of this term was related to the termination decision. On the contrary, as discussed above, the disputes between Hallett and Costa and between Hallett and other workers were ongoing events with no nexus to Costa's termination.

Neither the overtime assignment nor the use of the term "bitch" constitutes direct evidence under *Febres* or within the meaning of *Price Waterhouse*, and Costa was therefore not entitled to a mixed-motive instruction. Without the erroneous ruling that this case met the *Price Waterhouse* requirement for mixed-motive analysis, the trial court would not have used the pattern instructions for mixed-motive cases. It would have proceeded, as Caesars' requested, under the *McDonnell Douglas/Burdine* pretext framework.

CONCLUSION

For these reasons, Caesars respectfully requests that the Ninth Circuit *en banc* opinion be reversed and that the Court reinstate the Ninth Circuit panel opinion.

Respectfully submitted.

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APPENDIX A

Quoted below are pertinent sections of Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166), 29 U.S.C. § 2000e *et. seq.*

42 U.S.C. § 2000e-2(a)(1) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this title, 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-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action

in the absence of the impermissible motivating factor, the court —

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney' s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).