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

REPLY BRIEF FOR THE PETITIONER

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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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I. Section 107 of the Civil Rights Act of 1991 Is Applicable Only to Mixed-Motive Cases and It Did Not Alter the *Price Waterhouse* Direct Evidence Requirement.

Respondent Costa and amici Lawyers' Committee for Civil Rights Under Law, et al. ("Lawyers' Committee") argue that Section 107 of the Civil Rights Act of 1991 ("CRA 1991"), 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), applies to all Title VII disparate treatment cases, not just mixed-motive cases. "As the *en banc* court properly held in this case, the Civil Rights Act of 1991 sets 'a motivating factor' as the causation standard for all cases of Title VII disparate treatment discrimination." (Lawyers' Committee Br., p. 9) (emphasis in original). "Section 703(m) is not *limited* to cases in which an employer has acted with multiple motives." (Resp. Br., p. 11) (emphasis in original). Costa goes further and claims that not only does Section 107 of CRA 1991 apply to all Title VII disparate treatment cases, but that this section "does not purport to amend [42 U.S.C. §2000e-2(a)] by clarifying the words 'because of'; to the contrary [42 U.S.C. §2000e-2(m)] is a new and distinct provision which entirely supplants the phrase 'because of' wherever it appears in Title VII." (Resp. Br., pp. 21-22.)

Caesars' position is that Section 107 represents a relatively modest adjustment to Title VII regarding the remedies available in the limited number of Title VII mixed-motive cases. Costa's interpretation of Section 107 effectively

overrules *McDonnell Douglas/Burdine*[1] and relieves Title VII plaintiffs of their burden of proof on causation in virtually every disparate treatment case. A review of the context in which Section 107 of CRA 1991 was enacted and its plain language quickly rebuts Costa's interpretation.

Before *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the employer never carried the burden of proof on causation in Title VII disparate treatment cases. The Court recognized the extraordinary circumstances presented in *Price Waterhouse* that supported a burden-shifting framework separate from the pretext framework established in *McDonnell Douglas/Burdine*. The Court in *Price Waterhouse* for the first time approved a mixed-motive analysis for Title VII disparate treatment cases which in narrow circumstances shifts the burden of proof on causation to the employer. The Court held that a heightened evidentiary showing was required to trigger the mixed-motive analysis. This heightened evidentiary requirement was necessary because of the "strong medicine" of shifting to the employer the burden of proof on causation. *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring). The Court took great pains to recognize the continuing viability and importance of the pretext framework established in *McDonnell Douglas/Burdine*. *Price Waterhouse*, 490 U.S. at 245, 247 (Brennan, J., plurality opinion); *Id.* at 260 (White, J., concurring); *Id.* at 261 (O'Connor, J., concurring); *Id.* at 279-80 (Kennedy, J., dissenting). Before CRA 1991, circuit courts distinguished between the *Price Waterhouse* mixed-motive framework and the *McDonnell Douglas* pretext framework and had adopted

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

the direct evidence requirement announced in Justice O'Connor's opinion in *Price Waterhouse*.[2]

Against this backdrop, Congress enacted CRA 1991. Section 107 of CRA 1991 codified the *Price Waterhouse* mixed-motive analysis with the exception that after CRA 1991 an employer that prevails on the same-decision defense no longer avoids liability altogether. 42 U.S.C. § 2000e-5(g)(2)(B). CRA 1991 did not alter the distinction between *McDonnell Douglas/Burdine* pretext cases and *Price Waterhouse* mixed-motive cases. CRA 1991 did not repeal the "because of" standard in 42 U.S.C. § 2000e-2(a). Moreover, nothing in the text of CRA 1991 suggests that Congress intended to disturb the heightened evidentiary requirement for triggering the mixed-motive analysis. Contrary to the Ninth Circuit's *en banc* reading of the legislative history of CRA 1991, that history confirms that the remedy issue was the one aspect of *Price Waterhouse* that Congress intended to overturn by enactment of CRA 1991. (Pet. Br., pp. 20-23.) After CRA 1991 and until the Ninth Circuit's decision in this case, circuit courts consistently applied the distinction between pretext and mixed-motive cases and required a heightened evidentiary standard to trigger application of the latter.

The "plain language" arguments raised by Costa and the Lawyers' Committee to support elimination of the distinction between pretext and mixed-motive cases and to eliminate the heightened evidentiary requirement are

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[2] *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989); *Randle v. La Salle Telecommunications, Inc.*, 876 F.2d 563, 569-70 (7th Cir. 1989). *See also* cases cited in the Brief for the United States at pp. 27-29.

unavailing. The plain language of Section 107 establishes that it applies only to *Price Waterhouse* mixed-motive cases by providing that an unlawful employment practice is established where "the complaining party demonstrates that [a prohibited factor] was a motivating factor for any employment practice, *even though other factors also motivated this practice*." 42 U.S.C. § 2000e-2(m). (Emphasis added.) This is a description of a *Price Waterhouse* mixed-motive case, and there was no need to include the "other factors" phrase in this section if it was intended to apply to all disparate treatment cases. The "other factors" phrase is clearly a reference to mixed-motive cases, and its inclusion conclusively rebuts the argument that the motivating factor analysis was intended to apply to pretext as well as mixed-motive cases.

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 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 . . . ." If Section 107(a), 42 U.S.C. §2000e-2(m), were intended to apply to all disparate treatment cases, then Section 107(b) would have been drafted to apply to all cases brought under 42 U.S.C. § 2000e-2(a). The fact that Congress explicitly limited Section 107(b) to apply only to claims under Section 107(a) 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 v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 218 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

Moreover, Section 107(b) cannot by its terms apply in a case brought under 42 U.S.C. § 2000e-2(a) because if a plaintiff proves that a decision was made "because of" an unlawful factor (as opposed to a mixture of unlawful and lawful factors motivating the decision), it would be impossible for a defendant to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor." Section 107 of CRA 1991 can only be read to apply to mixed-motive cases.[3]

The language of CRA 1991 does not support Costa's contention that Section 107 was enacted to "supplant" the "because of" standard wherever it is found in Title VII. Congress could have amended 42 U.S.C. § 2000e-2(a) and other Title VII sections that include the phrase "because of" and substituted the "motivating factor" language in its place. Congress did not. Nor did Congress overturn or modify the *McDonnell Douglas/Burdine* pretext framework. "It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. See Civil Rights Act of 1991, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonell Douglas* and *Burdine*." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 542 (1993) (Souter, J., dissenting).[4]

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[3] The argument that the term "demonstrates" is defined in 42 U.S.C. §2000e-m as "meets the burdens of production and persuasion" says nothing about the *nature* of the evidence necessary to meet those burdens. (Resp. Br., pp. 12-13.)

[4] After CRA 1991, the Court has reaffirmed and applied the *McDonnell Douglas/Burdine* pretext framework in disparate treatment cases based on circumstantial evidence. *Reeves v.*

The argument that Section 107 applies to all Title VII disparate treatment cases is also rebutted by *Landgraf v. USI Film Products,* 511 U.S. 244, 251 (1994). In a case involving the retroactive application of CRA 1991, the Court noted that Section 107 of CRA 1991 "responds to *Price Waterhouse* [citation omitted] by setting forth standards applicable in 'mixed-motive' cases. . . ." *Id.* at 251.

Costa claims that her interpretation of Section 107 "would not conflict in any way" with the *McDonnell Douglas* pretext framework and that the *McDonnell Douglas* framework concerns a method by which a plaintiff may establish "*motive*" and the Section 107 or *Price Waterhouse* mixed-motive framework is a method "of allocating the burden on *causation*." (Resp. Br., pp.29-30.) (Emphasis in original.) In fact, *McDonnell Douglas* is not merely a method to establish motive, but is a framework for proving causation. *See*, *e.g.*, *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (The Court explains that a plaintiff who proves "pretext" under the *McDonnell Douglas* framework proves "but for" causation.)

Lawyers' Committee argues that Section 2000e-2(m) must apply to all Title VII disparate treatment cases or else"absurd results" will occur. (Lawyers' Committee Br., p. 12.) It is not absurd to require a plaintiff in a pretext case to carry the ultimate burden of persuasion, with direct or circumstantial evidence, on the issue whether a challenged decision was made for an unlawful reason *or* for lawful reasons. It is likewise not absurd to require a plaintiff to

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Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

make a heightened evidentiary showing to demonstrate that an unlawful factor was a motivating factor in a decision which was also based on lawful factors, *before the burden of persuasion on causation is shifted* to the employer to prove it would have made the decision absent the unlawful factor. This is the result of maintaining the *McDonnell Douglas/Burdine* pretext framework and the *Price Waterhouse* mixed-motive framework established by the Court. To require a heightened evidentiary showing by a plaintiff in cases where (1) lawful reason(s) are present for an employment action and (2) the burden of proof on causation is shifted to the employer is exactly the balance struck by Justice O'Connor's concurring opinion in *Price Waterhouse*. All circuit courts, except perhaps the Ninth Circuit, recognize the distinctions between pretext and mixed-motive cases, despite enactment of CRA 1991.

II. Justice O'Connor's Concurring Opinion - - Which Requires Direct Evidence To Trigger the Application of the Mixed-Motive Analysis - - Is the Holding of the Court in *Price Waterhouse*.

Costa and the Lawyers' Committee argue that Justice O'Connor's concurring opinion, which requires direct evidence to trigger the application of the mixed-motive analysis, is not the holding in *Price Waterhouse*. (Resp. Br., pp. 23-24; Lawyers' Committee Br., pp. 13-15.) The Lawyers' Committee argues that Justice White's concurring opinion is the holding. (Lawyers' Committee Br., pp. 14-15.) These arguments fail.

The *Price Waterhouse* plurality opinion states that its description of the evidence necessary to trigger the mixed-motive analysis is *not* "meaningfully different" from the direct evidence requirement in Justice O'Connor's concurring

opinion, but further states that a precise description of the requisite evidence is "unnecessary in this case." *Price Waterhouse*, 490 U.S. at 251-52, 250 n.13 (Brennan, J., plurality opinion). While the plurality opinion does not expressly adopt a specific evidentiary standard to trigger the mixed-motive analysis, it implicitly adopts a high standard by agreeing that its description of the requisite evidence is not "meaningfully different" from the heightened evidentiary standard in Justice O'Connor's concurring opinion.

Justice White concurred in the judgment, but his concurring opinion would apply *Mount Healthy* and require a plaintiff to show that "the unlawful motive was a *substantial* factor in the adverse employment action." *Id.* at 259 (White, J., concurring).[5]

Justice O'Connor also concurred in the judgment, but her concurring opinion states that the mixed-motive analysis is triggered only by "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criteria in reaching their decision." *Id.* at 276 (O'Connor, J., concurring) (emphasis added).

The Court in *Marks* provided guidance for determining the holding of the Court in situations like those presented in *Price Waterhouse*. "When a fragmented Court 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

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[5] *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Direct evidence of an unlawful motive - - a written statement from the decisionmakers which identified plaintiff's protected speech as a reason for the adverse job action - - was present in *Mt. Healthy*. *Id.* at 283 n.1.

that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977), *quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). Here, no single rationale on the evidentiary showing necessary to trigger the mixed-motive analysis enjoyed the assent of five Justices. Justice O'Connor's concurring opinion requiring direct evidence is the narrowest ground supporting the judgment of the Court.

Costa misstates Caesars' argument on this point. Costa claims that Caesars urges that Justice O'Connor's concurring opinion is the holding of the Court "because her vote was necessary to constitute a majority in favor of the Court's judgment." (Resp. Br., p. 23.) That is not Caesars' argument. Rather, Justice O'Connor's concurring opinion is the holding of the Court because it is the "narrowest ground" supporting the judgment. Both Costa and the Lawyers' Committee misapply *Marks* and argue that because the plurality opinion and Justice White's concurring opinion did not expressly require direct evidence, Justice O'Connor's opinion is irrelevant. (Resp. Br., pp. 23-24; Lawyers' Committee Br., pp. 14-15.) They both argue that because five Justices supported the judgment without counting Justice O'Connor's concurring opinion (the four-Justice plurality plus Justice White), her opinion can be ignored. (*Id.*) That argument is in conflict with *Marks*, which looks to the position of the Justice who concurs on the "narrowest ground" in cases where, as in *Price Waterhouse*, no single rationale enjoys the assent of five Justices. The plurality opinion expressly adopts no standard; Justice White's concurring opinion states that the unlawful bias must be a substantial factor in the decision; Justice O'Connor's concurring opinion agrees that the unlawful bias must be a substantial factor, but her opinion requires that this demonstration be made through "direct evidence." Costa and

the Lawyers' Committee simply seek to add Justice White's concurring opinion to the four-Justice plurality, rather than Justice O'Connor's narrower concurring opinion, in order to avoid the direct evidence holding.

The statement by Costa that "a total of five Justices (the plurality together with Justice White) agreed that direct evidence was not needed to shift the burden of proof under *Price Waterhouse*" is not true. (Resp. Br., p. 24.) Nowhere in the plurality opinion or in Justice White's concurring opinion is there any reference to direct evidence not being needed. Again, the plurality stated that its description of the evidence required to shift the burden of proof on causation was not "meaningfully different" from Justice O'Connor's direct evidence requirement, and Justice White urged application of *Mt. Healthy*, a case in which direct evidence was present. It *is* true that six Justices (the plurality and Justices O'Connor and White) in *Price Waterhouse* held that the evidence presented by Ann Hopkins was sufficient to shift the burden of proof, and she presented strong, direct evidence that her sex was a motivating factor in the adverse job action.

As argued on page 16 of Caesars' Brief on the Merits, even the *Price Waterhouse* dissent considered Justice O'Connor's concurring opinion regarding the direct evidence requirement the holding of the Court. *Price Waterhouse*, 490 U.S. at 280, 290 (Kennedy, J., dissenting). Costa attempts to dispense with that argument by proclaiming that "it is not unheard of for dissenters to seek to recharacterize the holding of the Court in a manner closer to the minority view." (Resp. Br., p. 27.) The "minority view" in *Price Waterhouse* was that the burden of proof on causation in Title VII disparate treatment cases should not shift to the employer. In recognizing Justice O'Connor's concurring opinion as

controlling, the dissent moves nothing closer to its view that the burden of proof on causation should not shift.[6]

III. Costa's Arguments That Caesars' Proposed Direct Evidence Standard Is "Neither Clear Nor Workable" Are Nothing More Than Disagreements With Decisions of the Court. (Resp. Br., pp. 36-44.)

Costa first complains that Caesars and the United States are urging the Court to:

> create a classification system dividing Title VII discriminatory intent cases into two distinct categories with separate methods of proof and different burdens of proof regarding causation: "mixed-motive" cases and *McDonnell Douglas* cases.

(Resp. Br., p. 36.)

The Court already created the separate *McDonnell-Burdine* pretext framework and the *Price Waterhouse* mixed-motive framework. Caesars urges nothing new on this point. Caesars simply explains that the frameworks established by the Court are appropriate and survived CRA 1991. It is Costa

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[6] Costa and the Lawyers' Committee also ignore (1) the circuit court decisions specifically applying *Marks* to *Price Waterhouse* and concluding that Justice O'Connor's concurring opinion is the holding of the Court and (2) the great weight of circuit court decisions that have implicitly held that Justice O'Connor's concurring opinion is the holding of the Court. (Pet. Br., pp. 23-24.)

who seeks to supplant the "because of" standard and merge the pretext and mixed-motive frameworks.

Costa next claims that a "system of categorization under which a judge must determine prior to trial whether a case involves mixed motives would be entirely unworkable." (*Id.* at p. 37.) Caesars does not urge any pre-trial determination, and this issue was also resolved by the Court in *Price Waterhouse* and applied by lower courts. "At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives." *Price Waterhouse*, 490 U.S. at 247 n.12 (Brennan, J., plurality opinion). "Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided on the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable. . . ." *Id.* at 278-79 (O'Connor, J., concurring). "Whether a plaintiff has satisfied this evidentiary threshold is a decision for the district court after it has reviewed the evidence. [Citations to *Price Waterhouse* opinions omitted.] If so, the plaintiff is entitled to a mixed motive treatment. If not, the plaintiff must prevail under the standards that apply in pretext cases." *Fuller v. Phipps*, 67 F.3d 1137, 1142-43 (4th Cir. 1995). "[A]n employee may present his case under both theories and the district court must then decide whether one or both theories properly apply at some point in the proceedings prior to instructing the jury." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 781 n.17 (3d Cir. 1994). Trial courts frequently assess the sufficiency of evidence at various stages in a proceeding - - e.g., summary

judgment, judgment as a matter of law - - and Costa offers no reasonable argument why it is not "fair and workable" for a trial court to determine if a plaintiff has sufficient evidence to trigger a mixed-motive analysis before a jury is instructed.

Costa argues that testimony from a decisionmaker to a plaintiff that "I did not hire you because you are white" is not direct evidence and therefore the application of the mixed-motive analysis "will be rare." (Resp. Br., pp. 39-40.) Caesars disagrees that such evidence is not direct evidence under *Price Waterhouse* or any reasonable standard, and Caesars does not contend that such evidence is insufficient under the standard it proposes. If, however, a plaintiff has such strong, direct evidence that a decision was made for an unlawful reason, a plaintiff would not need to invoke the mixed-motive analysis. Rather, such a plaintiff could prove discrimination "because of" the unlawful factor and establish a violation under 42 U.S.C. §2000e-2(a). Such evidence would not require the use of the *McDonnell Douglas* circumstantial evidence framework,[7] nor would such a plaintiff need to invoke the mixed-motive analysis which could conceivably allow the employer an opportunity to avoid damages under 42 U.S.C. §2000e-5(g)(2)(B).[8]

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[7] *See Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

[8] Costa's reliance on Judge Tjoflat's decision in *Wright v. Southland Corp*, 187 F.3d 1287 (11th Cir. 1999) for this analysis of direct evidence is misplaced. (Resp. Br., pp. 39-40 n.45.) Judge Tjoflat's analysis is "mere obiter dictum. . ." *Copley v. Bax Global, Inc.*, 80 F. Supp. 2d 1342, 1348 (S.D. Fla. 2000). "Judge Tjoflat's opinion, however, is not the law of the Eleventh Circuit. Neither of the other two judges on the panel concurred in the opinion, and subsequent decisions have not followed it." *Bates v.*

Whether or not the application of the mixed-motive analysis "will be rare" is not a reason to refuse to follow the *Price Waterhouse* direct evidence standard. Justice O'Connor's concurring opinion acknowledged that direct evidence is "hard to come by". *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). (*See also* Pet. Br., p. 11 for other cases acknowledging that direct evidence of intentional discrimination is relatively rare.) The purpose of a heightened evidentiary standard in mixed-motive cases is to ensure that the "strong medicine" of shifting the burden of proof on causation will only occur in a narrow category of cases. To do otherwise will destroy the careful *McDonnell Douglas/Burdine* framework established by the Court.

Finally, the claim by Costa that the direct evidence standard proposed by Caesars limits its application to statements (1) by "decisionmakers" (2) that reflect "unambiguous bias"[9], (3) "made in connection with the decision at issue" is nothing more than an argument that Justice O'Connor's concurring opinion be rejected. (Resp. Br., pp. 43-44.) Justice O'Connor's concurring opinion states:

> 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

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The Variable Annuity Life Ins. Co., 200 F. Supp. 2d 1375, 1381 n.3 (N.D. Ga. 2002).

[9] Caesars actually proposes that the statements "directly reflect the alleged animus." (Pet. Br., p. 41.)

> decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring).

The direct evidence standard proposed by Caesars is consistent with the holding and facts in *Price Waterhouse*. It provides a workable test for application by the trial judge who must act as a gatekeeper to determine if a plaintiff's evidence is sufficient to trigger the mixed-motive analysis and shift the burden of proof on causation to the employer. Costa's view that no heightened evidentiary standard is required would effectively merge the pretext and mixed-motive frameworks and repeal the "because of" standard in 42 U.S.C. § 2000e-2(a). This view is contrary to the Court's prior rulings and Congressional intent as reflected in the plain language of CRA 1991 and its legislative history.

IV. Caesars Objected To the Mixed-Motive Jury Instruction, and the Trial Court's Decision to Give That Instruction Was Not Harmless Error.

Costa and amicus Ann B. Hopkins contend that the at-issue mixed-motive jury instruction "benefitted" Caesars and was to Caesars' "advantage" because it gave Caesars a chance to avoid certain damages. (Resp. Br., p. 19; Hopkins Br., p. 25.) The giving of the mixed-motive instruction without direct evidence that Costa's gender was a motivating factor in her discharge did not "benefit" or "advantage" Caesars, and it was in error. At trial, Caesars objected to the mixed-motive instruction which began with the phrase "You have heard evidence that the defendant's treatment of the plaintiff was motivated by plaintiff's sex . . ." and then shifted to Caesars the burden of proof on causation. (J.A. 16-17 [Tr. 460-61];

J.A. 24-25; Pet. App. 58a.) The Ninth Circuit panel recognized that this error was not harmless because it improperly shifted the burden of proof on causation to Caesars. (Pet. App. 65a-66a.)

This case presents a garden variety, circumstantial evidence Title VII pretext case in which "*either* a legitimate [altercation with co-worker against a background of prior discipline] *or* an illegitimate [sex discrimination] set of considerations led to the challenged decision." *Price Waterhouse*, 490 U.S. at 247 (Brennan, J., plurality opinion).[10] As such, Costa should have retained the burden of proof on causation.

V. Costa's Statement of the Facts Materially Misstates the Record.

Costa's factual statement contains numerous conclusory and erroneous points not supported by the

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[10] Amicus Ann B. Hopkins appears to agree that this was not a mixed-motive case: "On this record, it is not clear whether a dual motivation instruction was appropriate. . . . Costa said that she was fired because of her sex, and Caesars said it was because of her disciplinary record. This would seem to pose the type of either-or choice characteristic of *Burdine's* pretext model, which is unsuitable for dual motivation treatment." (Hopkins Br., p. 30.) Nowhere in her brief does Costa argue that she presented direct evidence of sex discrimination. In fact, Costa acknowledges that "Caesars' Merits Brief, to be sure, sets out evidence which, if credited by the jury, might have led to a verdict in favor of the Defendant." (Resp. Br., p. 49.)

record.[11] Many of the points are not germane to the issues in the case, but Caesars does call to the Court's attention two areas where Costa makes material misstatements.[12]

A. The overtime comment did not reference gender.

Costa's brief alleges that Costa was once not given an overtime assignment and that her supervisor said the reason her co-worker received the assignment was because "he's a man and has a family to support." (Resp. Br., p. 4.) In her direct testimony at trial, Costa inferred that the supervisor referenced the gender of the co-worker in the statement. However, under cross-examination, Costa recanted and admitted that the supervisor never referenced the co-worker's

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[11] Although short of an explicit statement, Costa does by innuendo suggest that by terminating her "only" three months after she filed her EEOC charge that Caesars illegally retaliated against her. (Resp. Br., p. 6.) Costa's retaliation claim was actually dismissed by the district court on summary judgment. Minute Order, October 16, 1997. (District Court Docket No. 43.)

[12] Costa's amicus National Employment Lawyer's Association ("NELA") also omits material facts from its brief. In an effort to suggest that plaintiffs are losing more cases, NELA cites to the BJS Special Report, stating that "for civil rights cases, dismissals increased from 66% in 1990 to 71% in 1998." (NELA Br., p. 11.) NELA, however, omits the explanation given by BJS for the rise in dismissals. According to the special report, this 5% increase "was driven by the rise in the proportion of out of court settlements - increasing from 31% to 35% between 1990 and 1998, as well as voluntary dismissals - increasing from 8% to 13%." NELA's interpretation of the term "dismissal" is misleading because it suggests more and more plaintiffs are losing their discriminatory claims.

gender or used the word "man" in reference to why the co-worker received the assignment:

> Q. [Counsel for Caesars] And he said that Dudenake was getting the overtime because he had a family to support?
> A. [Costa] That's what was said at the time.
> Q. He didn't say anything about Mr. Dudenake being a man in that conversation?
> A. I took it as such.
> Q. But he didn't say that?
> A. A man that has a family to support.
> Q. You took it that way, but he didn't say the word "man," did he?
> A. He didn't have to say the word "man" because people can say a lot of things. The inference was there.

J.A.9 [Costa Tr. 249]; Pet. App. 63a.

B. Gerber admitted that Costa pushed him in the elevator.

Costa, in an attempt to attack Caesars' decision to terminate her for participating in an altercation with a co-worker, states that there is no evidence that she pushed Herbert Gerber in the elevator. Costa states that Gerber gave conflicting accounts of whether Costa had shoved or hit him, "*ultimately* admitting she had done neither." (Resp. Br., pp.6-7.) (Emphasis added.) Gerber's "ultimate" trial testimony on this point follows:

Q. [Counsel for Caesars] Is your memory now refreshed as to what happened in that elevator?
A. [Herbert Gerber] Yes.
Q. Did Ms. Costa push you in that elevator?
A. Yes.

Gerber Tr. 584.[13]

CONCLUSION

Costa and her amici invite the Court to repeal the "because of" standard of causation in 42 U.S.C. § 2000e-2(a) and everywhere else it is found in Title VII. In its place Costa requests that the Court amend Title VII and apply the "motivating factor" standard of causation applicable only in mixed-motive cases to *all* Title VII disparate treatment cases. That result would shift the burden of proof on causation to the employer in virtually every Title VII disparate treatment case and effectively overrule *McDonnell Douglas/Burdine*.

Congress did not repeal 42 U.S.C. §2000e-2(a) when it codified the *Price Waterhouse* mixed-motive analysis in Section 107 of CRA 1991. Congress did not eliminate the distinction between pretext and mixed-motive cases when it enacted Section 107. Section 107 on its face applies only to

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[13] Costa also states in her factual summary that it would be improbable that she would have started a physical altercation with Gerber because she is "a woman of average height and weight" and would have been "no match for the taller, heavy set Gerber." (Resp. Br., p.7.) Other than Costa's testimony regarding her dress size at various times in her life, there is no evidence in the record to indicate whether she was of average height and weight.

mixed-motive cases, as the Court recognized in *Landgraf*. Congress also did not intend to disturb the heightened evidentiary requirement necessary to trigger the mixed-motive analysis. Rather, the one aspect changed by CRA 1991 involves the remedies available if an employer prevails on the same-decision defense.

Caesars requests that the Ninth Circuit *en banc* opinion be vacated, and that the relief requested in its Brief on the Merits be granted.

Respectfully submitted.

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