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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

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iii**

IDENTITY AND INTEREST OF *AMICUS CURIAE* **1**

SUMMARY OF ARGUMENT **2**

ARGUMENT **6**

- **A. DIRECT EVIDENCE IS NOT A PREREQUISITE FOR THE APPLICATION OF THE MOTIVATING FACTOR STANDARD OF CAUSATION UNDER THE CIVIL RIGHTS ACT OF 1991** **6**
- **B. THE NUMBER OF MOTIVES FOR AN ADVERSE EMPLOYMENT ACTION IS NOT RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.** **14**
- **C. THE PROOF OF PRETEXT OR DISPARATE TREATMENT IS RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.** **17**
- **D. THE *MCDONNELL DOUGLAS* FRAME-WORK APPLIES TO THE MOTIVATING FACTOR STANDARD OF CAUSATION CODIFIED IN SECTION 2000E-2(M).** **19**

E. THE *MCDONNELL DOUGLAS* FRAME-WORK DOES NOT APPLY TO JURY INSTRUCTIONS. JURIES SHOULD BE INSTRUCTED CONSISTENT WITH THE MOTIVATING FACTOR STANDARD IN ALL CASES.....23

CONCLUSION.....27

TABLE OF AUTHORITIES

CASES

Akrabawi v. Carnes Co., 152 F.3d 688 (7th Cir. 1998) 26

Ardestani v. I.N.S., 502 U.S. 129 (1991) 13

Berndt v. Kaiser Aluminum, 789 F.2d 253 (3rd Cir. 1986) 24

Canup v. Chipman-Union, 123 F.3d 1440 (11th Cir. 1997) 26

Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) 14, 20, 25

Cunningham v. Housing Authority of Opelousas, 764 F.2d 1097 (5th Cir.), *cert. denied* 474 U.S. 1007 (1985) 24

Faulkner v. Super Valu Stores Inc., 3 F.3d 1419 (10th Cir. 1993) 17

Garcia v. City of Houston, 201 F.3d 672 (5th Cir. 2000) . 27

Golomb v. Prudential Insurance Co., 688 F.2d 547 (7th Cir. 1982) 17

Graham v. Dresser Industries Inc., 928 F.2d 408 (9th Cir. 1991) 17

Greene v. Safeway Stores, Inc., 98 F.3d 554 (10th Cir. 1996) 17

Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074 (10th Cir. 1998) 27

Hyatt Corp. v. NLRB, 939 F.2d 361 (6th Cir. 1991) 10

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 23

Marks v. United States, 430 U.S. 188 (1977) 10

McDonnell Douglas Corp. v. Green, 711 U.S. 792

(1973) ..... passim

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306 (10th Cir. 1990) 24

Mt. Healthy City Bd of Ed. v. Doyle, 490 U.S. 274 (1977).. 8

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 11

Norris v. Sysco Corp., 191 F.3d 1043 (9th Cir. 1999)..... 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).. passim

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000) 19, 21

Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996) 26

Siegert v. Gilley, 500 U.S. 226 (1991)..... 13

Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744 (9th Cir. 1997) 25

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). 16, 21

Stacks v. Southwestern Bell Yellow Pages Inc., 996 F.2d 200 (8th Cir. 1993) 10

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 20, 21, 23

Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997), vacated in part on reh'g, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998) 10

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2nd Cir.), *cert. denied*, 506 U.S. 826 (1992)..... 10

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 23

United States v. Ron Pair Enters., Inc.
489 U.S. 235 (1989). 12, 13

STATUTES

Age Discrimination in Employment Act,
29 U.S.C. § 621 *et seq.*, ... 16

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* 6

42 U.S.C. § 2000e-2(a) 20

42 U.S.C. § 2000e-2(a)(1) 12, 25

42 U.S.C. § 2000e-2(m) ..... passim

42 U.S.C. § 2000e-5(g)(2)(B) 11, 12, 26

OTHER AUTHORITIES

Model Ninth Circuit Jury Civil Instructions, ... 14

Wigmore, John Henry, EVIDENCE IN TRIALS AT COMMON LAW (Tillers rev. 1983) 13

Zubrensky, Michael, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 *Stanford L. Rev.* 959 (1994) 14

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions because of race, color, religion, sex or national origin.

In ATLA's view, freedom from illegal discrimination is fundamental to the enjoyment of all opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of the contributions which highly qualified individuals are capable of making. ATLA has the firm conviction that diversity in the workplace is essential both for the fulfillment of individual liberty, and to enable society to actualize its true potential.

SUMMARY OF ARGUMENT

The motivating factor standard codified in the Civil Rights of Act of 1991 relieved plaintiff of the necessity of proving that a discriminatory motive was a "but-for" cause or even a "substantial factor" for an adverse employment decision. It also enabled plaintiff to establish liability upon a showing that a protected characteristic was a motivating factor, allowing the defendant to escape damages and certain types of equitable relief only after satisfying its burden that it would have made the same decision even without

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monetary contribution to the preparation or submission of this brief.

consideration of the protected characteristic. The statute did not, however, relieve the plaintiff of the burden of proving discriminatory intent, nor did it attempt to regulate the method of proof or the type of evidence to be utilized. The plain language of the statute is silent on the subjects of pretext, disparate treatment and direct evidence. The plain language of the statute fails to distinguish between cases involving a single motive or multiple motives. The motivating factor standard codified in the Civil Rights Act of 1991 is the only standard for proving a claim under Title VII of the Civil Rights of 1964. Neither the number of motives nor the existence of pretext or direct evidence makes any difference.

Nevertheless, relying upon the concurring opinion of Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Petitioner and the Government argue that the motivating factor standard codified in the statute only applies when plaintiff offers "direct evidence" that the adverse employment action was motivated by a protected characteristic. Justice O'Connor's concurring opinion, however, was not the controlling opinion in *Price Waterhouse*. Direct evidence is simply an additional method of proving discriminatory intent. The requirement of direct evidence as a prerequisite for the application of the motivating factor standard would obviate the historic understanding that direct evidence is no more probative than circumstantial evidence.

The Petitioner and the Government argue that the motivating factor standard codified in the statute applies only when there exist multiple motives for an adverse employment action which, they claim, is the

rare exception. The plain language of the statute, however, does not limit its application to multiple-motive cases, and even if it did, multiple-motive or mixed-motive cases represent the vast majority, if not all, of cases litigated under Title VII. The evidentiary framework of *McDonnell Douglas Corp. v. Green,* 711 U.S. 792 (1973), is not limited to proving discriminatory intent where there exists only a single motive for an adverse employment action. Even under the obsolete and more restrictive "a determining factor" (but-for) standard, it is clear that the application of *McDonnell Douglas* did not require proof that an illegal reason be the only reason for an adverse employment action.

The Petitioner and the Government also distinguish between so-called pretext cases and mixed-motive cases, and argue that the codified motivating factor standard does not apply to the former. They also appear to distinguish between disparate treatment cases (which they equate with pretext cases) and mixed-motive cases. A confusion of terminology and basic concepts has led to a confusion of the issues by the Petitioner, the Government, and lower courts.

Contrary to the position of the Petitioner and the Government, the valid comparison is not between pretext cases and mixed-motive cases. This is a false dichotomy. The number of motives or reasons for an adverse employment action is entirely unrelated to the concept of pretext. Pretext is simply one method of proving discriminatory intent. In proving pretext, the employee seeks to prove that the employer's articulated reason is an attempted coverup for the existence of an illegal motive. The inference of an

illegal motive is created by proof that 1) the employer's articulated reason(s) is not the true reason(s) for an adverse employment action; 2) even if true, it did not motivate the adverse employment decision; *or* 3) that an illegal reason also motivated the adverse employment decision. So-called pretext cases are not different types of cases from so-called mixed-motive cases. Regardless of the number of motives, plaintiff will often prove that a protected characteristic was a motivating factor by proving pretext. Plaintiff will also rely upon evidence of pretext to demonstrate that the employer would not have made the same decision.

Disparate treatment is simply one way but not the only way of proving pretext; that members of a protected classification are treated less favorably than others. Evidence of disparate treatment can relate specifically to the employer's articulated reason for adverse action or to unrelated employment practices.

Contrary to the assertions of the Petitioner and the Government, the evidentiary framework of *McDonnell Douglas* is not inconsistent with the motivating factor standard articulated in *Price Waterhouse* and qualified by the Civil Rights Act of 1991. They are two separate concepts. The shifting burdens of *McDonnell Douglas* provide an evidentiary framework for the purpose of proving discriminatory intent, that is, the existence of a discriminatory motive. The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all. The motivating factor standard, on the other hand, addresses the issue of causation and not intent.

Indeed, the Civil Rights Act of 1991 made it easier for Plaintiff to survive summary judgment because it eliminated Plaintiff's need to prove "but-for" causation and substituted the more lenient motivating factor standard. This is a Congressional policy decision for which this Court may not substitute its judgment. Having survived summary judgment, the trial court can give only a motivating factor instruction because that is the only claim available. A proper jury instruction combined with special interrogatories will allow the jury the flexibility to distinguish between mixed-motive and single motive cases. Only in mixed-motive cases will the same decision affirmative defense become a relevant inquiry.

ARGUMENT

A. DIRECT EVIDENCE IS NOT A PREREQUISITE FOR THE APPLICATION OF THE MOTIVATING FACTOR STANDARD OF CAUSATION UNDER THE CIVIL RIGHTS ACT OF 1991.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. Although Plaintiff received outstanding evaluations and letters of recommendations, she was also accused of being abrasive and needed to improve on interpersonal skills. When the partners in her office later refused to repropose her for partnership,

she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* 490 U.S. at 231-32.

The trial court found that "[b]oth '[s]upporters and opponents of her candidacy,' indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff.'" *Id*. at 236. The trial judge also found, however, that some partners reacted negatively to Hopkins because she was woman. In particular, it was explained to Hopkins that in order to improve her chances at partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. at 235.

The trial judge found "that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman . . . ." *Id*. at 236. Nevertheless, the trial judge decided that "some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments." *Id*. at 236-37. The trial court found that the firm discriminated on the basis of gender, but could escape injunctive relief by clear cogent and convincing evidence that it would have made the same decision even without considering gender. *Id*. at 237. The Court of Appeals affirmed, but held that the same decision defense was a defense against all liability and not just equitable relief.

Writing for a plurality of four in *Hopkins*, Justice Brennan rejected the requirement that plaintiff prove "but-for" causation in order to establish liability under Title VII. 490 U.S. at 240. In order to satisfy the "because of" standard of causation, plaintiff simply had to prove that an illegal motive was "a motivating factor" in the defendant's decision making process. *Id*. at 250-51. Title VII was intended to prohibit an employment decision which was tainted in any way by a discriminatory motive. "We take these words [because of] to mean that gender must be irrelevant to employment decisions. *Id*. at 240.

In reference to the type of evidence necessary to prove that a protected characteristic was a "motivating factor," the plurality stated "we 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 251-252. The plurality also concluded that a defendant could nevertheless escape all liability if it could prove by a preponderance of the evidence that it would have made the same decision even without consideration of the protected characteristic. *Id*. at 242.

Justice White concurred in result. He differed with the plurality only concerning the specifics of the employer's burden. Relying upon *Mt. Healthy City Bd of Ed. v. Doyle*, 490 U.S. 274 (1977), Justice White rejected the "motivating factor" standard and concluded that in order to prove a violation of the statute, plaintiff must prove that the protected characteristic was a "substantial factor" in the

decision making process. *Id*. at 258-260. In all other respects, Justice White agreed with the plurality that *Mt. Healthy* provided the proper framework for analyzing "mixed-motives" cases. 490 U.S. at 259. Conspicuously absent from Justice White's concurring opinion is any passing reference to the type of evidence required. Specifically, nothing is said about the necessity of "direct evidence" as a prerequisite for invoking the so-called "mixed-motive" model.

Justice O'Connor also concurred. She concluded that "because of" intended to create a "but-for" standard of causation under Title VII. 490 U.S. at 262-63. She concluded that this standard of causation was satisfied by a finding that a discriminatory motive was a "substantial factor" in the decision making process. Only then would the burden shift back to the defendant to prove that it would have made the same decision even without consideration of the protected characteristic.

> It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. *See* ante at 250, n.13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the

> burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations.

490 U.S. at 277-78 (O'Connor, J., concurring in judgment).

In addition, Justice O'Connor concluded that in order to shift the burden to the employer, the plaintiff must satisfy the substantial factor standard with direct evidence. "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." 490 U.S. at 276.

Relying on *Marks v. United States*, 430 U.S. 188 (1977), Petitioner and the Government argue that Justice O'Connor's opinion constitutes the holding of the Court in *Hopkins*, because it constituted the "narrowest" ground of decision. But the direct evidence requirement was not adopted by the plurality or by Justice White. It was therefore not the narrowest ground for the decision and was not the controlling analysis.[2] Moreover, in support of the

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[2] *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2nd Cir.), *cert. denied*, 506 U.S. 826 (1992) ("The requirement of 'direct evidence' was not, however, adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition"); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 374 n.5 (6th Cir. 1991)("it cannot be said with certainty that *Price Waterhouse* requires a Title VII plaintiff in a mixed-motive case to make a strong showing by direct evidence that discrimination was a substantial and motivating factor in an employment decision."); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997), as vacated in part on reh'g, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment

motivating factor standard of causation, a majority of Justices in *Price Waterhouse* relied upon *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), which does not restrict the type of evidence available to plaintiff. The evidence of a discriminatory motive in *Transportation Management* was characterized by the plurality in *Price Waterhouse* as follows:

> But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of the [the employee's] union activity; there was . . . *no direct evidence* that grudge played a role in the [employer's] decision [to fire the plaintiff]. . . .

490 U.S. at 257 (emphasis added).

In response to a series of Supreme Court decisions, Congress passed the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964. One of the decisions meant to be clarified was *Price Waterhouse v. Hopkins*, *supra*. With respect to *Price Waterhouse*, the amendment clarified that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in

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. . . , so that it is far from clear that [it] should be taken as establishing binding precedent"); *Stacks v. Southwestern Bell Yellow Pages Inc.*, 996 F.2d 200, 201 n.1 (8th Cir. 1993) ("We conclude that there is no restriction on the type of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision").

the employment action; the "substantial factor" standard articulated by Justices White and O'Connor was rejected. *See* Section 2000e-2(m). In addition, Section 2000e-5(g)(2)(B) provided that the employer's "same decision" evidence serves as an affirmative defense with respect to the scope of remedies, not as a defense to liability.[3]

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[3] In relevant part, the amended statute provides as follows:

> 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(a)(1) .

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

42 U.S.C. § 2000e-2(m).

> 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).

Statutory interpretation begins with the language of the statute. *See United States v. Ron Enters., Inc.*, 489 U.S. 235, 241 (1989). When the plain meaning of a statutory provision is unambiguous, that meaning is controlling. *Id*. at 242. Reliance on legislative history is not needed where the plain language of the statute is clear and unambiguous. There is a strong presumption that the plain language of the statute expresses congressional intent, "rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-136 (1991) (internal quotations and citations omitted); *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989). The plain language of the Civil Rights Act of 1991 is entirely silent on the type of evidence necessary to support the motivating factor standard of causation. The statute's silence on the subject strongly supports the Ninth Circuit's conclusion that direct evidence is not required.

The American legal system has historically emphasized the probative value of evidence, rather than its type. *See* 1A John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 26, at 957 (Tillers rev. 1983). It is apodictic that strong circumstantial evidence may be much more probative than weak direct evidence, as when fingerprint or DNA evidence places a defendant at the scene of a crime while direct eye witness testimony from a near sighted person does not. *See Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy Concurring) ("I would reject, however, the Court of Appeals' statement that a plaintiff must

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42 U.S.C. § 2000e-5(g)(2)(B).

present direct, as opposed to circumstantial, evidence. Circumstantial evidence may be as probative as testimonial evidence"). All juries are traditionally instructed that direct evidence is not entitled to any greater weight than circumstantial evidence. *E.g*. Model Ninth Circuit Jury Civil Instructions, 1.5. Furthermore, requiring courts to distinguish between direct and circumstantial evidence will inevitably lead to confusion and subjective judicial judgments concerning the nature of the evidence which qualifies as "direct." As stated by the Ninth Circuit, "[t]he resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-53 (9th Cir. 2002) (discussing different standards by different circuits and inconsistent ruling by panels of the same circuit). *See also* Michael Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 *Stanford L. Rev.* 959, 970-80 (1994) (recognizing the differing approaches to direct evidence within the circuits).

B. THE NUMBER OF MOTIVES FOR AN ADVERSE EMPLOYMENT ACTION IS NOT RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.

"In [single-motive] cases, the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision. In mixed-motive [multiple-motive] cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is

legitimate." *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring in the judgment). The Government argues that Section 2000e-2(m), which references "other factors also motivat[ing] the practice," demonstrates the Congressional intent to restrict application of the statute to only mixed-motive cases. *See* Gov. Brief at 19. But this argument is entirely specious. The language of the statute does not allow for the application of the motivation factor standard *only* when other factors also motivated the practice. It applies *even though* or *regardless* of whether other factors motivate the practice. The clear Congressional intent was to establish the motivating factor standard recognized by the *Price Waterhouse* plurality, and to reject the substantial factor standard required by Justices O'Connor and White.

In addition, a limitation of Section 2000e-2(m) to mixed-motive cases, as argued by the Petitioner and the Government, would be no limitation at all since in virtually all Title VII cases there exists sufficient evidence for the jury to find mixed motives. In the large majority of cases, an employee will allege discrimination on the basis of a protected characteristic, and an employer will then articulate more than one legitimate reason for the adverse employment action at issue, *e.g.*, absenteeism and failure to meet a sales quota. The employee may attempt to rebut this evidence through either direct or circumstantial evidence.

The plaintiff may offer evidence of disparate treatment in reference to an employment practice unrelated to the articulated reason; *e.g.*, when the employer articulates failure to meet a sales quota and the employee demonstrates disparate treatment

concerning attendance, training or overtime. The jury may then conclude that the failure to meet the sales quota is a true reason, but that the disparate treatment for an unrelated employment practice demonstrates that an illegal reason also played a part in the decision making process. Even where the employee's evidence is limited to disproving the articulated reason, a fact finder still might rely upon other evidence in the record, but not articulated by the employer, as a reason for the adverse employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523 (1993) ("the defendant's 'articulated reasons' themselves are to be found 'lurking in the record'"). Under these circumstances, a fact finder may well conclude that the employer was motivated by an illegal reason *and* one or more of the employer's articulated or unarticulated reasons; mixed motives. In addition, where there exists more direct evidence of discriminatory intent, a fact finder may easily conclude that the articulated reason is true, but that the employer's own words reflect that an illegal reason was also a motivation. The probative value of direct evidence is completely unaffected by the number of motives.

Even a case litigated under a "but-for" standard of causation applying *McDonnell Douglas* has not traditionally been limited to only a single motive case. When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse,* 490 U.S. at 241 (Brennan, J., plurality opinion) *citing* 110 Cong. Rec. 2728, 13837 (1964). Accordingly, in numerous cases, particularly under the Age Discrimination in Employment Act, 29

U.S.C. § 621 *et seq.*, courts have routinely instructed juries that in order to prevail "age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference.'"[4]

C. THE PROOF OF PRETEXT OR DISPARATE TREATMENT IS RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.

The Petitioner and the Government argue that there exists a distinction between pretext and mixed-motive cases. It argues that the "other factors" phrase in Section 2000e-2(m) "belies any suggestion that a

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[4] *E.g.*, *Graham v. Dresser Industries Inc.*, 928 F.2d 408 (9th Cir. 1991)("To constitute an ADEA violation, age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be "a determining factor" or "make a difference") (citing Ninth Circuit cases); *Golomb v. Prudential Insurance Co.*, 688 F.2d 547 (7th Cir. 1982)("We agree that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.*, 3 F.3d 1419, 1425 n.3 (10th Cir. 1993) (Recognizing a proper instruction under *McDonnell Douglas*: "In order to prevail on his first theory of unlawful age discrimination, 'disparate treatment,' each plaintiff must prove, by a preponderance of the evidence, that his age was a determining factor in defendant's failure to hire him. However, a plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age."); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996)("To prevail on an ADEA claim, a plaintiff must prove that age was a determining factor in the employer's decision to terminate the plaintiff. The plaintiff need not prove that age was the sole factor behind his termination").

'motivating factor' analysis was intended to apply to pretext as well as mixed-motive cases." *See* Gov. Brief at 19. But as the Ninth Circuit correctly understood, pretext and mixed-motive cases are not different kinds of cases. 299 F.3d at 857.

The concept of pretext is entirely unrelated to the number of motives for an adverse employment action. Pursuant to Section 2000e-2(m), plaintiff has the burden of proving discriminatory intent; that a protected characteristic was a "motivating factor" in the employment decision. The employer will inevitably articulate a reason or reasons for its adverse employment decision, and the employee will attempt to demonstrate, one way or the other, that the articulated reason is simply a coverup for illegal discrimination.[5] Toward that end the employee will invariably offer evidence that the employer's reason is a pretext. In addition or in the alternative, the employee may offer evidence of pretext to rebut the employer's allegation that it would have made the same decision even without consideration of the protected characteristic.

In order to prove a coverup (pretext), the employee will attempt to demonstrate that 1) the articulated reason is false; 2) even if the reason is true it did not motivate the adverse employment decision; *or* 3) even if the reason did motivate the decision, an illegal reason also played a part in the decision

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[5] "In short, on the retrial, respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were, in fact, a *coverup* for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis added).

making process. There are no limitations on the type of evidence that an employee can offer for the purpose of proving a coverup for illegal discrimination. Employees often offer evidence of disparate treatment; that similarly situated employees were treated differently than those within the protected class. They may offer evidence that the articulated reason by the employer was unworthy of belief. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000). In addition, they may offer either more direct evidence or other circumstantial evidence which demonstrates that the employer was also motivated by an illegal reason. [6]

D. THE *MCDONNELL DOUGLAS* FRAMEWORK APPLIES TO THE MOTIVATING FACTOR STANDARD OF CAUSATION CODIFIED IN SECTION 2000E-2(M).

The Petitioner and the Government argue that there exists a difference between the *McDonnell Douglas* evidentiary framework and the so-called mixed-motive framework established by Section

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[6] In most cases, the evidence of disparate treatment is not restricted to the employer's articulated reason – it embraces many unrelated employment practices to demonstrate that the employer treats those in a protected classification differently than those who are not within a protected classification. In those cases, the fact finder is free to conclude that the employer did not treat the employee differently than others in reference to the articulated reason, and that the reason offered by the employer is true. Nevertheless, because the employer generally treats others more favorably than those within a protected class, the fact finder is free to conclude that the employer was also motivated by an illegal reason. In other words, that the employer had mixed motives.

2000e-2(m). They argue that Section 2000e-2(m) applies only to mixed-motive cases, which require direct evidence, but that so-called "pretext" cases require the application of the *McDonnell Douglas* framework. Indeed, the dissenting opinion in the lower court emphatically asserts that the mixed motive analysis is a departure from *McDonnell Douglas* because *McDonnell Douglas* requires proof of pretext and that a mixed motive analysis does not:

> Mixed motives analysis is a departure from the well-established *McDonnell Douglas* framework. Whereas *McDonnell Douglas* requires the plaintiff to make a pretext showing once an employer puts forth evidence of legitimate nondiscriminatory reasons for the challenged employment practice, mixed motive analysis allows a plaintiff to prevail even when she cannot prove pretext.

Costa v. Desert Palace, Inc., 299 F.3d 838, 867 (9th Cir. 2002) (Judge Gould, dissenting). The dissent even argues that the elimination of the direct evidence requirement would effectively overrule *McDonnell Douglas*. *Id*. These arguments are all specious and reflect a limited understanding of the differences and purposes of "mixed motives" and the *McDonnell Douglas* evidentiary framework.

Title VII prohibits employers from discriminating against employees "because of" race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). The *McDonnell Douglas* evidentiary framework is designed to assist the Court in determining the existence of an illegal motive. Under *McDonnell Douglas*, the prima facie case "eliminates the most common nondiscriminatory reasons for the

plaintiff's rejection." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "We presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id*. (citation and internal quotation marks omitted).

Once Plaintiff establishes a prima facie case, the burden of production shifts to the defendant, who must articulate through admissible evidence one or more reasons for the adverse employment decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). Thereafter, the burden of shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that a discriminatory motive influenced the employer's decision despite its articulated reason. "[Plaintiff] may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). If a plaintiff proves that the defendant's explanation is "unworthy of belief," the finder of fact may, but need not, infer the existence of a discriminatory motive. *Reeves*, 530 U.S. at 147-48. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253; *accord Reeves, supra*, at 143.

The Civil Rights Act of 1991 has done nothing to change plaintiff's long standing burden of proving intentional discrimination. *McDonnell Douglas* is one useful method, but not the only method, of proving

that an illegal motive played at least some part in the employment decision. Once plaintiff has demonstrated that an illegal motive played a part in the employer's decision, plaintiff has proven a violation of Section 2000e-2(m), and the issue of causation then becomes relevant: to what degree did the illegal motive influence the employer's decision? The Civil Rights Act of 1991 establishes the standard for answering that question. It addresses only the subject of causation. It did not eliminate "but-for" causation, it merely shifted the burden to the employer to demonstrate that it would have made the same decision even without considering the protected characteristic. If the defendant succeeds in doing so, it avoids damages and certain types of equitable relief.

The *McDonnell Douglas* framework is not obsolete, as asserted by the dissenting opinion in the lower court. *McDonnell Douglas* continues to be a viable method of demonstrating the existence of a discriminatory motive. In order to survive summary judgment, plaintiff still must prove that the employer's articulated reason for the adverse action is a pretext, that is, a coverup for illegal discrimination. This can be achieved by demonstrating a triable issue of fact that 1) the articulated reason(s) is false; 2) even if the articulated reason(s) is true, that the reason did not motivate the adverse employment decision; *or* 3) even if the articulated reason(s) is true, an illegal reason also played a part in the decision making process. Any of these three methods will suffice to prove that the employer's articulated reason is a cover up for an illegal reason. The *McDonnell Douglas* framework does not address the issue of causation. It

only addresses the issue of discriminatory intent. In that regard, the number of motives is irrelevant.

E. THE *MCDONNELL DOUGLAS* FRAMEWORK DOES NOT APPLY TO JURY INSTRUCTIONS. JURIES SHOULD BE INSTRUCTED CONSISTENT WITH THE MOTIVATING FACTOR STANDARD IN ALL CASES.

The McDonnell Douglas framework primarily is a device to assist the court at the summary judgment stage of the proceeding, and was never intended to be utilized as a jury instruction.

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that [courts] should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation in deciding this ultimate question.

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). As the Court explained, "at this stage, the *McDonnell-Burdine* presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity'"), *citing Burdine,* 450 U.S. at 255 n.10. As a consequence, the

applicability of the *McDonnell Douglas* framework has no bearing on jury instructions. [7]

The Petitioner and the Government complain that applying the "motivating factor" standard of causation will allow Plaintiff to much more easily survive summary judgment. They are both correct but for different reasons than they assert.

Prior to the Civil Rights Act of 1991, plaintiff had to create a triable issue of fact concerning the existence of a discriminatory motive *and* that the illegal motive was a "but-for" cause of the adverse employment action. The Civil Rights Act of 1991, however, requires only that plaintiff create a triable issue of fact that an illegal motive existed and that it influenced the adverse action *to any degree*. The methods of proof and types of evidence to be utilized by plaintiff have not changed. Having satisfied this

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[7] *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("*McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination"); *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("the presumption and burdens inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury on the merits. . . . [T]he important issue is discrimination vel non not the orderly presentation of evidence"); *Berndt v. Kaiser Aluminum*, 789 F.2d 253, 257 (3rd Cir. 1986) (Once directed verdict is denied, it is unnecessary to decide if plaintiff established a prima facie case); *Cunningham v. Housing Authority of Opelousas*, 764 F.2d 1097, 1100 (5th Cir.), *cert. denied* 474 U.S. 1007 (1985) ("Once the case has been fully tried, the need to analyze each separate function of the *McDonnell-Burdine* analysis 'drops from the case'").

burden, summary judgment must be denied unless no disputed factual issue exists on the employer's same decision affirmative defense.[8] Although the Petitioner and the Government may be displeased at the prospect of plaintiff's diminished burden, this is a Congressional policy judgment for which this Court may not substitute its judgment.

Contrary to the ruling of the Ninth Circuit, juries should be instructed to determine whether a protected characteristic was a "motivating factor" in all cases.[9] The distinction recognized by the Ninth Circuit between single-motive and multiple-motive cases is illusory. As explained above, a jury could readily find that all cases are multiple-motive cases. In addition, Congress has determined that within the

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[8] Where dismissal turns upon an affirmative defense, the defendant has the burden of proof. In such cases "[t]he issue is not whether [defendant] had produced sufficient evidence to establish the defense but whether it was entitled to judgment as a matter of law, *i.e.*, whether no reasonable jury could fail to find that the defense had been established." *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997). Thus, the motion must be resolved in Plaintiff's favor unless the defendant can show that, resolving all facts in favor of Plaintiff, no reasonable jury could reject its affirmative defense. *Id*.

[9] The Ninth Circuit ruled that jury instructions should differ depending upon whether there exists a single motive or multiple motives for an adverse employment action. According to the Ninth Circuit, where the evidence supports a single motive for the adverse employment action, either the legitimate reason or the illegal reason but not both, the jury should be instructed to determine whether the illegal reason was "because of" the protected characteristic. Where the jury could find multiple motives, however, the jury should be instructed to determine whether the protected characteristic is a "motivating factor." *Costa*, 299 F.3d at 856-57.

meaning of Title VII the term "because of" contained in Section 2000e-2(a)(1) means a "motivating factor." *See* Section 2000e-2(m). If the jury finds that an illegal motive was not a motivating factor in the employment decision, the case is over and the employer wins. If the jury finds that an illegal motive was a motivating factor, plaintiff has succeeded in proving liability, but the jury must determine if a legitimate factor also influenced the employer's decision. If the jury determines that it did not, then plaintiff is entitled to full damages. If the jury decides that legitimate factors did influence the employer's decision, the jury must determine whether the employer would have made the same decision even without consideration of the protected characteristic. If the jury answers no to this third question, then plaintiff is awarded full damages. If the jury answers yes, then plaintiff is entitled to no damages, but may be awarded attorney fees and limited equitable relief.[10] These were precisely the instructions given in this case.

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[10] Title 42 U.S.C. § 2000e-5(g)(2)(B) provides that where plaintiff proves a violation of § 2000e-2(m) and the employer demonstrates that it would taken the same action, "the court - (i) *may* grant declaratory relief, injunctive relief . . . 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." (Emphasis added). The Circuits are split concerning the availability of fees under this section. The majority of Circuits which have decided the issue appear to follow *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996), which holds an award of fees is discretionary and the court should "consider the relationship between the fees and the degree of the plaintiff's success," which will ordinarily result in no fee at all. *Id.* at 1336. *See also Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-97 (7th Cir. 1998) ("We agree with *Sheppard's* analysis of the statute and we believe

CONCLUSION

For these reasons, the ruling of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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the list of factors is a good starting point for a court deciding whether to award attorney's fees under sec. 2000e-5(g)(2)(B)"); *Canup v. Chipman-Union,* 123 F.3d 1440, 1442-43 (11th Cir. 1997) (affirming district court's denial of attorneys' fees to employee who jury found would have been fired for having an affair with a subordinate)*; Norris v. Sysco Corp.,* 191 F.3d 1043, 1051 (9th Cir. 1999) ("Perhaps in the long run, *Gudenkauf*'s 'ordinarily' will rarely yield a result different from *Sheppard*'s 'proportionality,' but to the extent it would, we are satisfied that *Sheppard* states the correct rule"). *But see Gudenkauf v. Stauffer Communications, Inc.,* 158 F.3d 1074, 1081 (10th Cir. 1998) ("we conclude that recovery of damages is not a proper factor upon which to assess the propriety of granting a fee award in a mixed-motive case. Moreover, we agree with the district court that, as under section 2000e-5(k), a plaintiff who prevails under section 2000e-2(m) should ordinarily 'be awarded attorney's fees in all but special circumstances'"); *Garcia v. City of Houston,* 201 F.3d 672, 679 (5th Cir. 2000) (applying a mix of *Sheppard* factors and *Gudenkauf* considerations in favor of an award of 25% of the fees requested).

March 31, 2003