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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 08-441, Gross v. FBL Financial Services.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Thank you.

Mr. Chief Justice, and may it please the Court:

The court of appeals erred in holding that the plaintiff had to have direct evidence in order to obtain the specific instruction at issue in this case.

This Court's decision in Desert Palace makes two important points that are relevant today. First, the Court noted that this Court had at no time imposed a direct evidence requirement without an affirmative directive from Congress to do so. Secondly, the Court noted that Congress, when it wished to impose heightened standards, had done --

JUSTICE SCALIA: Excuse me. That -- that statement may be wrong depending upon how you read Price Waterhouse, might it not? The first statement, that we've never imposed such a requirement. I mean, if you think Justice O'Connor's opinion was the determinative

1 opinion in Price Waterhouse, then -- then we had.

2 MR. SCHNAPPER: That -- that's true, Your
3 Honor. That was not the view of the Court in Desert
4 Palace. Desert Palace may have misspoken in that
5 regard.

6 JUSTICE SCALIA: It was dictum. They may
7 have been wrong.

8 MR. SCHNAPPER: Well, we -- we'd like to
9 think they are right. I mean, we think they are right.
10 But of course, as you say, that is, in a sense, one of
11 the questions before us.

12 JUSTICE KENNEDY: Well, but -- I just want
13 -- you said that the Court has never imposed a
14 burden-of-proof-shifting requirement absent a directive
15 from Congress? So you read --

16 MR. SCHNAPPER: No. I --

17 JUSTICE KENNEDY: Or maybe -- maybe I
18 misheard.

19 MR. SCHNAPPER: Well, I may have misspoken,
20 Your Honor. What the Court said was that this Court had
21 never imposed a direct evidence requirement --

22 JUSTICE KENNEDY: All right.

23 MR. SCHNAPPER: -- in the absence of an
24 affirmative directive from Congress.

25 CHIEF JUSTICE ROBERTS: There is some

1 disagreement among the parties, of course, what "direct
2 evidence" means, whether it means direct as opposed to
3 circumstantial, or direct in -- in the terms that for
4 example Judge Colloton put it in the decision below.

5 MR. SCHNAPPER: Your Honor, there's not a
6 difference between the parties. We take no position on
7 that. There's a considerable variety of views about --

8 CHIEF JUSTICE ROBERTS: So you're telling us
9 that we've never required direct evidence, when you're
10 not taking a position on what direct evidence is?

11 MR. SCHNAPPER: The --

12 CHIEF JUSTICE ROBERTS: I mean, you may be
13 right or you may be wrong. But we kind of have to know
14 what we're dealing with.

15 MR. SCHNAPPER: Yes, but the Court hasn't
16 put those two things together in the way you did. I
17 think that's fair. The Court's statement in Desert
18 Palace didn't define direct evidence. It's not -- it's
19 not clear in that -- in that sense exactly what the
20 Court meant. I think it's fair to say it certainly
21 meant the Court hadn't required direct evidence in the
22 sense of -- of non-circumstantial evidence, but --

23 CHIEF JUSTICE ROBERTS: Well, in your
24 petition, you asked -- you used the phrase "direct
25 evidence." And I just want to know in what sense you

1 mean that.

2 MR. SCHNAPPER: We -- it's our view that no
3 particular -- special evidence is required to get the
4 instruction in this case.

5 JUSTICE GINSBURG: Is there a variety of
6 views among the circuits on what Justice O'Connor meant
7 by the term "direct evidence"? It wasn't defined in
8 Price Waterhouse either.

9 MR. SCHNAPPER: No, it was not, Your Honor.

10 JUSTICE GINSBURG: So there is a range of
11 views on what it means, starting from direct versus
12 circumstantial, to something like strong evidence.

13 MR. SCHNAPPER: There is a range of views on
14 that, but our view is the -- the burden on the plaintiff
15 is to show by a preponderance of the evidence that in
16 this case age was a motivating factor, but it's not
17 required to show it by any particular kind of evidence
18 or to show it by strong evidence as opposed to merely
19 evidence sufficient to establish that by a preponderance
20 of the evidence.

21 JUSTICE ALITO: Price Waterhouse was a bench
22 trial.

23 MR. SCHNAPPER: Yes.

24 JUSTICE ALITO: And Mt. Healthy was a bench
25 trial, wasn't it?

1 MR. SCHNAPPER: I believe so, yes.

2 JUSTICE ALITO: Now, would the -- if there
3 is a direct evidence requirement, it may arguably cause
4 a great deal of problem when the trial judge has to give
5 an instruction to the jury, because then the -- the jury
6 will first have to decide whether a particular type of
7 evidence is present in the case before it can tell
8 what -- who has the burden of proof and what the
9 standard is. But if Price Waterhouse is understood
10 simply as a way for a judge conducting a bench trial to
11 look at the evidence, does it present any of the
12 problems that have been identified with the Price
13 Waterhouse -- that interpretation of Price Waterhouse as
14 applied to jury trials?

15 MR. SCHNAPPER: Well, it wouldn't present
16 the same -- there are special problems applying it to
17 jury trials. We think that the requirement of direct
18 evidence is simply wrong for -- for a number of reasons.
19 At the least, the Court would have to finally resolve
20 what direct evidence means in this particular context.

21 JUSTICE ALITO: Well, if it's just an
22 instruction to a judge conducting a bench trial, it
23 could mean that if the -- if the judge sitting as the
24 trier of fact finds that there is direct evidence,
25 strong evidence supporting the plaintiff's claim, then

1 the judge will need to have strong evidence, stronger
2 evidence on the other side in order to rule against the
3 plaintiff. It's not hard to figure out how it might
4 work out in that situation.

5 The problem comes when it has to be posed in
6 the form of a jury instruction.

7 MR. SCHNAPPER: Well, it's a particularly
8 serious problem there, but if -- if you were to announce
9 this as a rule, you would -- I think the time has come
10 to explain definitively what "direct evidence" means.
11 The courts of appeals are in wide disagreement about
12 that, and -- at some --

13 JUSTICE GINSBURG: In any event, it was the
14 view of only one Justice, Justice O'Connor alone. She
15 did make the fifth vote, but no one else accepted a
16 direct evidence test.

17 MR. SCHNAPPER: Your Honor, she made the
18 sixth vote. There were five members of the Court other
19 than Justice O'Connor who agreed in the result in that
20 case. The plurality expressly rejected a direct
21 evidence requirement. Justice White --

22 JUSTICE GINSBURG: Well, would you -- would
23 you urge that we should count Justice White's decision
24 as the controlling decision rather than Justice
25 O'Connor's?

1 MR. SCHNAPPER: To the extent that you were
2 disposed to resolve this case based on an interpretation
3 of Price Waterhouse. But it's our view that the
4 subsequent decision, unanimous decision, in Desert
5 Palace makes that unnecessary. Desert Palace indicates
6 that heightened proof requirements -- those are the
7 words of the opinion. It suggests that they should not
8 be imposed by the courts absent a statutory directive.

9 JUSTICE ALITO: But Desert Palace was a
10 Title VII case, wasn't it, under the 1991 amendment to
11 Title VII?

12 MR. SCHNAPPER: It was. But that part of
13 the reasoning of the case is not based on the language
14 of Title VII other than the absence from Title VII of
15 that specific language. The structure of the opinion
16 first talks about the definition of "demonstrate" in
17 section 701(n). That's obviously not relevant to the
18 ADEA. But then it goes on to say that the absence in
19 Title VII of any heightened proof requirement also
20 weighs heavily against the court's inferring, and that
21 part of the reasoning isn't limited to Title VII.

22 JUSTICE KENNEDY: But your -- your position,
23 and you rest heavily on the argument, I think, that
24 there's no textural support in the ADEA for a heightened
25 evidence requirement in order to shift the burden of

1 proof. But isn't it true there's no textural support
2 for shifting the burden of proof at all? I mean, I
3 don't see how you can -- can convince us of the first
4 proposition without confronting the second.

5 MR. SCHNAPPER: Well, the -- this Court has
6 on a number of occasions allocated the burden of proof
7 among the parties, including to a defendant, without a
8 specific textual basis. The Court did so, for example,
9 in Burlington Industries v. Ellerth, where the Court's
10 opinion places on the defendant the burden of
11 establishing an affirmative defense in certain types of
12 sexual harassment cases. There wasn't a textual basis
13 for that.

14 JUSTICE KENNEDY: Well, of course,
15 affirmative defenses are usually that the burden of
16 persuasion is on the party asserting the affirmative
17 defense.

18 MR. SCHNAPPER: And -- and Justice -- in the
19 case of Price Waterhouse, Justice White characterized
20 this allocation as the burden, as an affirmative
21 defense. But this sort of thing happens routinely with
22 regard to the allocation of burdens. It does not happen
23 routinely with regard to heightened evidence
24 requirements.

25 JUSTICE SOUTER: I take it the only issue

1 that you have raised before us is whether the evidence
2 that does raise a burden on the defendant's part has got
3 to be, whatever this means, direct or not? That's the
4 only issue?

5 MR. SCHNAPPER: That -- that's the only
6 issue before the Court.

7 JUSTICE SOUTER: Am I right that the only
8 source of argument for the proposition that there does
9 have to be direct evidence is Justice O'Connor's
10 opinion, separate opinion?

11 MR. SCHNAPPER: Well, that has been the
12 primary basis for the argument in the courts below. I
13 think Respondent has other arguments as well.

14 JUSTICE SOUTER: Well, there are -- there
15 are arguments about the need for substantial evidence.
16 But the argument for direct evidence goes back to the
17 separate O'Connor opinion.

18 MR. SCHNAPPER: That's certainly the origin.

19 JUSTICE SOUTER: And are you -- I mean,
20 we're going to hear about this. Are you going to make
21 an argument to the effect that that should not be
22 regarded as the controlling opinion, and if that is the
23 source of it, that is the end of the issue? Are you --
24 are you going to get into that?

25 MR. SCHNAPPER: Well, I would be happy -- I

1 would be happy to get into it, Your Honor.

2 JUSTICE SOUTER: All right. I think you
3 should.

4 MR. SCHNAPPER: As -- as Justice Ginsburg
5 pointed out, there are -- there were actually six
6 members of the Court in Price Waterhouse who concurred
7 in the result. Four members of the Court in the
8 plurality expressly rejected a direct evidence
9 requirement and said there were no limits on the type of
10 evidence that could be used.

11 Justice White said that the plaintiff's
12 burden was to show that in that case gender was a
13 substantial factor. He didn't say substantial evidence
14 was required.

15 JUSTICE SOUTER: I was going to say, as I
16 understand the White opinion, it had nothing to do with
17 the character of the evidence. It had to do with the
18 degree of persuasiveness of the evidence. Is that
19 correct?

20 MR. SCHNAPPER: With due respect, no, Your
21 Honor. It had to do --

22 JUSTICE SOUTER: Then I don't understand
23 what "substantial" means. What do you think he meant by
24 that?

25 MR. SCHNAPPER: "Substantial factor" was

1 somewhere on a scale of a very unimportant factor or a
2 very, very important factor, which is separate from how
3 clear the evidence was that it was a small or large
4 factor.

5 JUSTICE SOUTER: Okay. Okay. I see your
6 point.

7 CHIEF JUSTICE ROBERTS: In your response to
8 Justice Souter's question, you said you're only focusing
9 on the direct evidence threshold. But if direct
10 evidence is the threshold to give you the benefit of
11 shifting the burden of persuasion of the employer, is it
12 really fair for you to be able to say, we are only going
13 to take out one side of the balance; we're going to
14 leave the other side of the balance there? It seems to
15 me that it's artificial to separate the two
16 requirements, the two aspects of the Price Waterhouse
17 inquiry.

18 MR. SCHNAPPER: Well, the -- the Price
19 Waterhouse plurality and Justice White didn't see two
20 aspects. The requirement was proof by a preponderance
21 of the evidence that in that case gender was a
22 motivating factor, and for five members of the Court
23 that was sufficient. There wasn't -- there wasn't
24 something else that went with it. There was for Justice
25 O'Connor, but she's the sixth vote. And -- and --

1 CHIEF JUSTICE ROBERTS: I understand the
2 difficulty of figuring out who is controlling in -- in
3 Price Waterhouse. But at least as it has been applied,
4 my understanding -- I understand it has been applied in
5 different ways. My understanding of what people mean
6 when they say "the Price Waterhouse approach," which is
7 that there is a higher showing of evidence, direct
8 evidence, whatever -- people don't agree on what that
9 means. But if you meet that showing, then the burden of
10 persuasion shifts to the employer on the issue of
11 causation.

12 MR. SCHNAPPER: Your Honor, that's precisely
13 the issue on which the lower courts have been divided.
14 Some courts have expressly rejected that view and have
15 taken the view that there is no special heightened
16 standard of any kind. Other courts think that it is
17 required. That's what we are -- what --

18 JUSTICE GINSBURG: But, Mr. Schnapper, there
19 is a difference -- and I think it's critical to your
20 case -- between what's called the prima facie case that
21 a plaintiff would make under the McDonnell Douglas test
22 and proving by a preponderance of the evidence that in
23 this case age discrimination was a motivating factor.

24 I think you must concede that, in order to
25 fit within this double motive frame, you must show not

1 simply a prima facie case, but by a preponderance of the
2 evidence that the discriminatory factor was a motivating
3 factor.

4 MR. SCHNAPPER: Yes. We -- we are obligated
5 to do that, and the -- the defendant has argued below
6 and would, I think, on remand still be in a position to
7 argue that we didn't have enough evidence to meet that
8 burden. But that question isn't before us.

9 JUSTICE GINSBURG: Can -- can one know if
10 you've met that burden before the case goes to the jury?
11 That is, when -- when the case starts out, it's unknown
12 whether you have established by a preponderance of the
13 evidence that age discrimination was a motivating
14 factor.

15 MR. SCHNAPPER: Well, whether there is
16 sufficient evidence is often tested by a motion for
17 summary judgment. So courts do look at that matter,
18 that issue, before trial. What -- what isn't knowable
19 before trial -- and -- and frankly is often known only
20 to the jury -- is whether the jury will conclude that
21 the defendant acted with two motives or one motive.
22 That -- that isn't something you would normally be able
23 to -- to resolve before the case went to trial or even
24 during the course of the trial.

25 JUSTICE SOUTER: Well, don't -- correct me

1 if I am wrong. I assume that in a jury case that simply
2 was left to the jury, and the instruction would be
3 something like this: If you find that the plaintiff has
4 shown that age was a motivating factor, then you look to
5 the next question. And that is: Has the defendant
6 shown that he would have fired the plaintiff anyway?
7 Isn't that the way it works?

8 MR. SCHNAPPER: That's the -- that's the way
9 it works. Yes, that's the way it works. And that --
10 that is the way it works in -- in a Title VII case
11 because of the language of the statute. The juries
12 routinely get that instruction in those cases. That's
13 certainly proof --

14 JUSTICE KENNEDY: Well, in -- in response
15 further to Justice Ginsburg's question, and I think
16 Justice Souter's, too, is there -- are there any
17 tactical difficulties or strategic difficulties that
18 counsel face if they don't quite know which way the
19 burden is going to shift before trial? The -- the
20 number of witnesses you have waiting in the hallway or
21 -- this -- this would be after summary judgment.

22 MR. SCHNAPPER: No more than would normally
23 be the case. What happened here in terms of jury
24 instructions was typical, which was the parties proposed
25 their differing instructions a week before trial, the

1 instructions were resolved at the end of trial. That --
2 that happens all the time.

3 Sometimes if the parties don't know how the
4 instructions are going to come out, that complicates
5 their tactics, but that happens every day in trials.

6 Thank you.

7 JUSTICE SCALIA: Could -- before you sit
8 down, I -- I have been trying to figure out Justice
9 White's opinion in Price Waterhouse. Why -- I mean,
10 indeed he -- he voted to -- to remand the case, as
11 did -- as did the four in the plurality, but for a very
12 different reason. They remanded because -- "We reverse
13 the court of appeals' judgment against Price Waterhouse
14 because the courts below erred by deciding that the
15 defendant must make" the proof of he would have been
16 fired anyway by clear and convincing evidence. That --
17 that was the basis for their reversing and remanding.

18 That was not Justice White's, because -- he
19 said, "Because the Court of Appeals required Price
20 Waterhouse to prove by clear and convincing evidence
21 that it would have reached the same" -- "in the absence
22 of the improper motive, rather than merely requiring
23 proof by a preponderance of the evidence, as in Mt.
24 Healthy, I concur in the judgment reversing this case in
25 part and remanding. With respect to the employer's

1 burden, however, the plurality seems to require that the
2 employer submit objective evidence." And he disagreed
3 with that.

4 MR. SCHNAPPER: All right. There -- there
5 were a number of different issues in the case. The
6 first, the court of appeals had held that when the
7 burden is on the employer to show it would have made the
8 same decision anyway, the employer has to meet that
9 burden with clear and convincing evidence.

10 The plurality and Justice White, and I think
11 the whole court rejected that.

12 Secondly, the plurality suggested that the
13 employer in response would have to have objective
14 evidence. Justice White rejected that, and the
15 objective evidence standard has not been followed by the
16 lower courts in -- in the wake of that.

17 The third question was whether the burden
18 should be placed on the employer. On that issue, the
19 Court was divided six to three. Six Justices, as we --
20 as we noted, were for that burden allocation. The --
21 Justice Kennedy and -- and yourself and the Chief
22 Justice dissented. So there were many issues.

23 Thank you. I'd like to reserve the --

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Blatt.

1 ORAL ARGUMENT OF LISA S. BLATT
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE,
4 SUPPORTING THE PETITIONER

5 MS. BLATT: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 I think both on a substantive level and a
8 procedural level Desert Palace largely resolves this
9 case. The question presented is the one of should you
10 have a direct evidence requirement to obtain a mixed
11 motive instruction under the Age Act? And there is the
12 procedural posture, which is Desert Palace left
13 unresolved a lot of very difficult and complicated
14 questions about when do you get to the jury on mixed
15 motives and what is the requirement that separates a
16 mixed motive motivating factor instruction from the "but
17 for" or commonly known as the McDonnell Douglas? And
18 Desert Palace left all that unresolved.

19 On the question presented, there has -- the
20 same conflict in the circuits under the Age Act is the
21 same conflict in the circuits that was under Title VII
22 -- is, do you need any kind of evidentiary special
23 showing to get to a mixed motive, and, if so, is it non-
24 circumstantial evidence or evidence that directly ties
25 --

1 JUSTICE ALITO: Can I ask you this? Do you
2 think that there is a tenable distinction between a
3 mixed motives case and a non-mixed motives case? In
4 every employment discrimination case that gets beyond
5 summary judgment, aren't there mixed motives at play?

6 MS. BLATT: I think there's a lot to be said
7 for that argument, and this is a very difficult and
8 unsettled question under Title VII. I think what would
9 be on the table if this Court ever had an appropriate
10 vehicle -- and this certainly is not the appropriate
11 vehicle to get into this question -- there would be
12 several options on the table. You could have what your
13 view suggests, which is after summary judgment you could
14 get a motivating factor instruction, if the jury would
15 be permitted to find both impermissible and permissible
16 motives.

17 You could also have a special verdict form
18 that asks the jury: Do you find that there were two
19 causes, one of which was an impermissible factor? And
20 you could have a situation which I think prevails in
21 trial courts now -- and has been the EEOC's practice --
22 which is -- and it's not the most analytically clean,
23 but they basically give the instruction, either a
24 determinative cause or motivating factor instruction, on
25 what they think best fits the evidence.

1 And I think it's important for the Court to
2 understand, as we -- the law exists now under Title VII
3 and under all the other anti-discrimination acts, there
4 are two regimes out there. There's a mixed motive
5 regime and a determining factor regime.

6 JUSTICE GINSBURG: Couldn't -- couldn't any
7 Title VII case be presented in either framework?

8 MS. BLATT: Yes. But this is -- I will also
9 give you, which I think is important, especially when
10 you write your opinion, the three reasons why you should
11 not resolve this very difficult question in this case.
12 And the first is that it wasn't pressed or passed on
13 below or raised in the brief in opposition and did not
14 receive full briefing by the parties and all the amici.

15 And, second, just as you left this issue
16 open in footnote 1 of your opinion in Desert Palace,
17 Judge Colloton writing for the court recognized this
18 precise issue in footnote 3 of the court's opinion on
19 petition appendix page 12, saying: Assuming there is no
20 direct evidence requirement, we are going to have to
21 figure out when is it appropriate to give a motivating
22 factor instruction, absent the -- the language, express
23 language in Title VII.

24 CHIEF JUSTICE ROBERTS: Why don't you --

25 MS. BLATT: The third reason --

1 CHIEF JUSTICE ROBERTS: I will let you get
2 your third reason in, in a minute, but why -- do you
3 really think it's fair to pick one part of a complicated
4 test that the court has constructed and say, well, this
5 one doesn't make any sense, and pull it out? I mean,
6 maybe it only makes sense in the context of the whole
7 construct, or maybe none of the elements actually make
8 sense. But it seems to me very artificial to focus on
9 one aspect and say, let's fix this, without assessing
10 what its impact is on the rest of the test.

11 MS. BLATT: I see your point, even though
12 that's exactly what you did in Desert Palace. But Price
13 Waterhouse is a 2-decade-old decision. We're 20 years
14 past that, and it has been essentially codified in Title
15 VII. So no matter what you do to, quote unquote, "fix
16 this" under the Age Act, every -- the bulk of the
17 discrimination cases fall under Title VII, and a
18 motivating factor instruction is codified, and you
19 unanimously held in Desert Palace there's no special
20 evidentiary requirement.

21 CHIEF JUSTICE ROBERTS: But that was
22 because -- that was because of the 1991 Act, which
23 addressed Title VII and quite deliberately left ADEA
24 out.

25 MS. BLATT: Unless you overrule Price

1 Waterhouse, which would be an upheaval in the law, and
2 certainly -- this wouldn't be the appropriate case to do
3 it, all of the courts of appeals have unanimously held
4 under the Age Act and under a wide variety of State
5 statutes and other Federal discrimination statutes that
6 the Price Waterhouse burden-shifting framework applies.

7 CHIEF JUSTICE ROBERTS: You are asking us to
8 overrule the aspect of Price Waterhouse involving direct
9 evidence, at least if you look at Justice O'Connor's
10 opinion.

11 MS. BLATT: Right, but I don't think you
12 need to decide that question. In a lot of other
13 contexts, you have said, well, there's language in our
14 opinion that may have been confusing or it's not clear
15 what the holding is, but we henceforth are going to
16 clarify, here's what the law is.

17 You did it in the recent crack cocaine case
18 in Spears, you did it in your nude dancing case, and you
19 did it in a case called Jefferson v. City of Tarrant --
20 County, an opinion Justice Ginsburg authored, that you
21 said: Well, there's some language here that subsequent
22 cases have made clear, and there's lots of reasons why
23 you would not impose a "direct evidence" requirement,
24 however you define that term.

25 Since Desert Palace, there is the decision

1 of Sprint/United v. Mendelsohn. And I think that case a
2 fortiori forecloses all the arguments made by the other
3 side that, well, even if it doesn't mean
4 non-circumstantial evidence, it must mean something that
5 is highly relevant to the issue of discrimination. In
6 Sprint/United, you said: We're not going to have a
7 per se rule about what's relevant to prove
8 discrimination. The Court said the same thing in
9 Reeves. I think that was a unanimous decision.

10 CHIEF JUSTICE ROBERTS: What -- what would
11 be the position of the Solicitor General on just saying
12 let's get rid of all these artificial court
13 constructions and say this is like any other case, the
14 plaintiff has the burden of persuasion, and the
15 defendant can come up with what defenses he has,
16 including that I did this for some other reason -- it
17 wasn't because of age -- and the jury looks at it and
18 decides whom they believe?

19 MS. BLATT: You would still have the same
20 issue as you have under the constitutional regime of
21 what is causation? And if you asked my opinion, the
22 Solicitor General in -- in Price Waterhouse itself
23 argued something different that no Justice adopted. We
24 argued a standard of causation that no one -- no one was
25 persuaded by. Six went off on this motivating factor

1 with the burden-shifting approach, and three of the
2 Justices would have applied a straight "but for"
3 causation --

4 CHIEF JUSTICE ROBERTS: The statute -- the
5 statute has language. It says "because of."

6 MS. BLATT: And it --

7 CHIEF JUSTICE ROBERTS: Tell the jury that.

8 MS. BLATT: Absolutely. And it did in Title
9 VII, and this Court, for better or worse -- regardless
10 of what you think -- in Price Waterhouse, six Justices
11 defined the language "because of." And we have Price
12 Waterhouse now that is codified. And so --

13 JUSTICE ALITO: Is there any -- is there any
14 empirical evidence to show whether any of this really
15 makes a difference. Have there been studies on the
16 effect of the 1991 amendments, whether they have made a
17 difference in the way cases actually come out?

18 MS. BLATT: No. Let me just say two
19 responses. Not that I have seen empirical. I can tell
20 you the EEOC's experience, and that is they sometimes
21 prefer a "but for" all the burden being on them, and
22 sometimes they prefer the motivating factor instruction.
23 And despite what Respondent points out, they have some
24 defendants that think they like the affirmative defense.

25 So I -- and sometimes counsel just agree on

1 what the instruction should be. And it hasn't caused
2 that much of a problem, although there is a lot of
3 confusion about this kind of case, where the defendant
4 is insisting on one instruction and the plaintiff wants
5 another instruction. And that's what Judge Colloton is
6 reserving in a footnote saying: On remand I am going to
7 have to sort this out.

8 JUSTICE SOUTER: Yes, but regardless of what
9 the parties may prefer, isn't it likely that a jury,
10 regardless of instruction, is going to say something
11 like this: If we find that -- that age really was in
12 the boss's mind when he fired the person, and the boss
13 comes in, regardless of the instructions, and says the
14 guy's work was no good, he got late -- he arrived late
15 every day and so on, the jury is going to say: Did they
16 really fire him because he was old or because he didn't
17 come to work on time?

18 They are going to do the same thing that
19 they are going to do on the burden-shifting instruction,
20 probably, aren't they?

21 MS. BLATT: I mean -- there are two kinds of
22 jury findings. There's the -- but the problem in all
23 this area, if you do ever get a case that's appropriate,
24 I think what the Court should start with the assumption
25 which Justice Alito alluded to: Price Waterhouse was a

1 bench trial. The 1991 amendments under Title VII were
2 against the backdrop of non-jury trials. And both the
3 Price Waterhouse decision and the language of Title VII
4 are written ex post. What -- it's assuming some
5 artificial world where there was a finding of mixed
6 motives.

7 But in today's world everything needs to be
8 done ex ante. We need to know how to instruct the jury,
9 and that's the fundamental problem.

10 If you are looking at ex post world, you are
11 exactly right. A jury could either find this was all a
12 pretext, I think what was really going on was ageism or
13 sexism or racism, or it could find, a "split the baby,"
14 I think it's both. But you just can't possibly know
15 that --

16 JUSTICE SOUTER: You can't know it --

17 MS. BLATT: -- going in.

18 JUSTICE SOUTER: -- but if you said to the
19 jury, do the right thing, they'd probably come out about
20 the same way that they would come out if you gave the
21 burden-shifting instruction, I think.

22 MS. BLATT: I think you are basically
23 catching on the point that a lot of counsel in the real
24 world are basically deciding, what do we think the jury
25 is going to be most on our side with, with which

1 instruction? And it's not always clear going into the
2 case, it may be depending on the relative strength of
3 the
4 legitimate factor being asserted. Some defendants may
5 prefer the affirmative defense. Some may think, no,
6 it's prejudicial, we don't want that, we want a straight
7 determining-factor instruction.

8 JUSTICE SOUTER: But the reason I raise the
9 issue is, if -- if we are saying do we -- do we ditch
10 Price Waterhouse, my questions I guess are suggesting
11 something to the effect, what difference does it make?

12 MS. BLATT: Well, I don't think you can
13 ditch Price Waterhouse as a practical matter, because
14 you're going to create -- I mean -- massive confusion,
15 not only under the Age Act, but under the Americans with
16 Disabilities Act, the Family Medical Leave Act, a
17 variety of labor statutes, disability statutes --

18 JUSTICE SOUTER: Juries -- juries are
19 smarter than judges.

20 MS. BLATT: Well, you can do that, but all
21 the problems you think you are solving, you are going to
22 have to face them in Title VII. That is the bulk of
23 discrimination law, and you have two standards of
24 causation in that statute right now.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Go ahead and make
2 your third point briefly.

3 MS. BLATT: Oh, on why you shouldn't decide
4 it? I mean, it's essentially this: That this is
5 complicated, difficult under Title VII. That's the
6 leading anti-discrimination statute. I think the Court
7 may want to resolve these very legitimate important
8 questions in a Title VII case, because you have got
9 statutory language.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Phillips.

12 ORAL ARGUMENT OF CARTER G. PHILLIPS

13 ON BEHALF OF THE RESPONDENT

14 MR. PHILLIPS: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 It does seem to me in some ways the
17 Petitioner and Respondent in this case are ships passing
18 in the night because the issues here are unbelievably
19 complicated. I will say in 25 years of advocacy before
20 this Court I have not seen one area of the law that
21 seems to me as difficult to sort out as this particular
22 one is.

23 That said, I would hope that the Court would
24 seize upon this as an opportunity to provide some
25 significant clarity in the law, rather than seize this

1 as an opportunity to decide this case on the potentially
2 most narrow ground, which, frankly, as far as I can
3 tell, will not only not decide this case, ultimately,
4 but certainly will not do anything to resolve the mass
5 confusion that seems to exist among the lower courts.

6 So, I would urge the Court not to evaluate
7 this case strictly on the question of whether direct
8 versus circumstantial evidence is the appropriate way to
9 proceed. In part that's because that's not the basis on
10 which the Eighth Circuit decided this case.

11 The Eighth Circuit said that it interpreted
12 Justice O'Connor's separate opinion calling for direct
13 evidence as talking about a specific link between the
14 proof -- in the proof of the discriminatory
15 considerations and the adverse action that was taken.
16 So, direct versus circumstantial doesn't even -- you
17 know, if you remand to -- to evaluate non-circumstantial
18 evidence, you are still not going to be in a position
19 where that's going to affect the outcome.

20 JUSTICE GINSBURG: As I understand the court
21 of appeals, it said that Justice O'Connor's opinion was
22 the controlling opinion, it was the decision on the
23 narrowest ground; therefore, the lower courts ought to
24 take that decision as the law made by Price Waterhouse.

25 Then there's a question of what did she mean

1 by "direct evidence"? But I think the Eighth Circuit
2 certainly did say Justice O'Connor's opinion states the
3 law of Price Waterhouse, and that was the basis on which
4 their decision turned.

5 MR. PHILLIPS: Well, then -- of course, they
6 go on to say what they think that decision means. But
7 there's no question, Justice Ginsburg, that that is the
8 basis for that holding.

9 So, I mean, I suppose the Court could say,
10 no, we disagree with the basis of Price Waterhouse as
11 Justice White's separate concurring opinion, which,
12 frankly, I think it is -- you know, having read it more
13 times than I care to admit, is not exactly clear as to
14 what he thinks the appropriate standard would have been.
15 At least Justice Ginsburg's provides a formulation that
16 the lower courts can use to try to provide some kind of
17 a jury instruction --

18 JUSTICE GINSBURG: Justice O'Connor.

19 MR. PHILLIPS: Did I say Ginsburg?

20 JUSTICE GINSBURG: Yes.

21 (Laughter.)

22 MR. PHILLIPS: I'm going to hear about this
23 one.

24 (Laughter.)

25 MR. PHILLIPS: I apologize.

1 But the problem -- you know, the -- but the
2 fundamental problem is, it's just simply not clear what
3 Justice White's opinion means. And, therefore, the
4 lower courts have seized upon an opinion that at least
5 provided serious guidance that they could embody into --
6 into a jury instruction.

7 It goes to the point that Justice Alito was
8 making, which is that, you know, it's one thing when you
9 are dealing with bench trials and what do you ask the
10 judge to do. It's something fundamentally different
11 when you are shifting the burden of proof.

12 Justice Kennedy asked the question, does it
13 make a difference tactically? The same question Justice
14 Souter in some ways was asking. And the answer is
15 clearly it does, and you can see it in this case.
16 Here's a situation where the defendant prior to the
17 trial shows up, or when the jury gets selected. Opening
18 statement says there is going to be no evidence of
19 actual age discrimination in this case. The case is
20 tried on that theory. The basis for the judgment that
21 there's going to be no evidence of age discrimination in
22 this case is the discovery -- extensive discovery that
23 has taken place, where there is no statements by anyone
24 talking about age, no other employee who believes that
25 he or she had been ever been affected by age. It's all

1 of this very abstract claim and the notion that somehow
2 there's no better explanation for what happened except
3 for age.

4 You go through the entirety of the trial
5 saying to the jury, there's no evidence of age, there's
6 no evidence of age discrimination, and then at the last
7 minute, not because you have asserted an affirmative
8 defense -- because we didn't assert an affirmative
9 defense -- one is foisted on us by the jury instruction
10 that the plaintiff asked for in this particular case,
11 that says that if there is a motivating factor, if you
12 can prove a motivating factor -- which it's interesting
13 to get to the specifics of a motivating factor, which
14 means it played a part or a role, which is about as
15 minimalist as you can have it -- then the burden shifts,
16 and we then have the burden to prove that we would have
17 taken the same action notwithstanding age.

18 Well, that's a very different inquiry, and
19 when you go to the jury at the end, you can't concede --

20 JUSTICE STEVENS: Mr. Phillips, can I ask
21 you --

22 MR. PHILLIPS: I'm sorry.

23 JUSTICE STEVENS: Can I ask you your views
24 on a question that I've asked myself over and over again
25 and had trouble finding the answer? Supposing a company

1 appointed a committee to decide whether or not to fire
2 X. And the committee came back and said: Yes, you
3 should fire him. He's too old, and he's late to work
4 every day.

5 Now -- and that's all the evidence in the
6 record. Would the -- would the judge be obliged to
7 enter a judgment on summary judgment -- at the end of
8 the plaintiff's case, to enter judgment for the
9 defendant?

10 MR. PHILLIPS: No, I don't believe he would
11 be required to enter judgment for the defendant.

12 JUSTICE STEVENS: Because all that would
13 have been proved was that there was one motivating
14 factor there, but not necessarily a decisive one.

15 MR. PHILLIPS: Right, but I -- it does seem
16 to me that the jury -- it would be fair to ask the jury
17 to decide which of those two considerations probably
18 played the greater role. But I think -- and that's why
19 I think taking it to the jury is one thing. Switching
20 the burden of proof to insist that we prove that the --
21 that the nondiscriminatory ground was the primary reason
22 for the decision is -- is an inappropriate way to
23 proceed because there is no basis in the statute for
24 that. The plaintiff still retains the burden to prove
25 that there was discrimination "because of."

1 JUSTICE STEVENS: But he has only proved
2 that it had been one of two possible motivating factors.
3 But that's sufficient in your view to get to the jury?

4 MR. PHILLIPS: I would think that that would
5 be sufficient to get to the jury, because I don't think
6 we have to prove -- I don't think the plaintiff has to
7 prove, you know, obviously, beyond a reasonable doubt or
8 anything. I mean, I think the jury could fairly say
9 that those are the two grounds. And I think in some
10 ways that -- that is the sort of commonsense basis on
11 which Price Waterhouse was decided. And it's -- you
12 know, it's important -- if -- you know, the Chamber of
13 Commerce brief actually focuses a great deal, Justice
14 Stevens, on this multi-member decisionmaking body. And
15 you know, it seems to me if you look at cases like Mt.
16 Healthy and Price Waterhouse, those are all cases where
17 you have multi-member decisionmakers, and some of whom
18 may have expressed some biases and others of whom
19 clearly didn't, and how do you deal with that situation,
20 which impresses me as fundamentally different than the
21 situation here where you have a single supervisor
22 dealing with a single employee and where the case is
23 tried on the theory that there has been no
24 discrimination whatsoever, and it's up to the jury to
25 make that determination at the end, and at the last

1 minute we have the jury instruction that shifts the
2 burden to us notwithstanding that --

3 JUSTICE BREYER: Would you --

4 MR. PHILLIPS: -- we never sought to make
5 this an affirmative defense.

6 JUSTICE BREYER: Would you think you should
7 have the burden in the following situation? At 10:00
8 o'clock on March 21st the employer says: I'm going to
9 get rid of Smith because he's too old. All right?
10 That's it. Writes out the letter, "Good-bye, Smith."
11 An hour later someone walks into the employer's office
12 and says: I've discovered that Smith was just convicted
13 of larceny. All right? Now, he already fired Smith
14 because he was too old. But I take it he can make the
15 defense: Well, Smith would have been fired anyway; that
16 isn't the reason I fired him, but he would have been
17 fired anyway. And he can get off, but he should make
18 that defense, shouldn't he?

19 MR. PHILLIPS: I mean, that's the Banner
20 case.

21 JUSTICE BREYER: Fine. So the answer is
22 yes?

23 MR. PHILLIPS: Yes, absolutely.

24 JUSTICE BREYER: All right. So now we have
25 the same situation, but the jury has said this bad

1 reason, his age, was a motivating factor.

2 MR. PHILLIPS: Played a role.

3 JUSTICE BREYER: To me -- no, didn't say
4 played a role.

5 MR. PHILLIPS: Yes, it did. That's what --

6 JUSTICE BREYER: Well, what it says in this
7 instruction that I have -- I don't see the other one --

8 MR. PHILLIPS: It's on page 10 of the joint
9 appendix.

10 JUSTICE BREYER: Well, I have on page 7 of
11 --- of the appellant's brief that the instruction was
12 "the plaintiff's age was a motivating factor --

13 MR. PHILLIPS: Right.

14 JUSTICE BREYER: -- in defendant's
15 decision."

16 MR. PHILLIPS: Right. And, Justice --

17 JUSTICE BREYER: Now, when I read that, I
18 think --

19 MR. PHILLIPS: In fairness -- can I just --
20 if you go to the next instruction --

21 JUSTICE BREYER: Yes.

22 MR. PHILLIPS: -- it says a -- "plaintiff's
23 age was 'a motivating factor,' if plaintiff's age played
24 a part or a role in the defendant's decision." So "a
25 motivating factor" is a very narrow formulation --

1 JUSTICE BREYER: Fine. Okay. All right.
2 Fine.

3 MR. PHILLIPS: -- as instructed in this
4 particular case.

5 JUSTICE BREYER: Perfect, perfect. I didn't
6 want to complicate it, but that may work in your favor
7 to complicate it, and I want to be fair.

8 (Laughter.)

9 JUSTICE BREYER: Fine. It played a part.
10 It did have a role: Age motivated in part. Now, why
11 isn't that the end of the matter? Because we have a
12 statute that says age shouldn't play a role in. "Play a
13 role" means it made a difference. I mean, to me.
14 Otherwise it played no role. It was an understudy, a
15 ghost. It "played a role" if it would have made a
16 difference. "Played a part," it would have made a
17 difference, just like my first case.

18 So we have an action, other things being
19 equal, that should be illegal under this statute. But
20 then, just as in the first case, we give the employer a
21 defense: If you can show that in the absence of that
22 age there in your mind, you would have done it anyway,
23 which means the mix of motives would have been
24 different, then you get off.

25 So, if in the first case we in fact say it

1 should be on the -- burden should be on the employer,
2 why shouldn't it be in the second case?

3 MR. PHILLIPS: Well, I mean -- in the first
4 place, saying that something is a motivating factor or
5 played a role is -- as a sufficient basis on which to
6 impose liability, is flatly inconsistent with what this
7 Court has said numerous times. It said it in Burdine,
8 it said it in Reeves, it said it in Hazen Paper, it said
9 it I think last term in a Kentucky case, where it says
10 it has to play a role and be determinative. And that's
11 the standard the Court has announced over and over again
12 in age discrimination cases.

13 The "a motivating factor" formulation does
14 come in Title VII, but that's because of the 1991
15 statute that specifically frames the argument in terms
16 of "a motivating factor." So the -- the bottom line
17 here is that, unless the Court deviates from the
18 historic practice, which is if you are in civil
19 litigation the plaintiff retains the burden of proof
20 throughout the process --

21 JUSTICE GINSBURG: But Price Waterhouse
22 deviated -- that was --

23 MR. PHILLIPS: I'm sorry?

24 JUSTICE GINSBURG: We have these two regimes
25 out there. You are reciting McDonnell Douglas and say

1 everything should follow that pattern, but to do that
2 you have to overrule Price Waterhouse, which gave
3 recognition to the mixed motive framework that comes out
4 of Mt. Healthy.

5 MR. PHILLIPS: Well, my basic point on Price
6 Waterhouse is that it seemed to me reasonably clear that
7 a majority of the Court, whether you -- whether you rely
8 upon Justice White or Justice O'Connor -- clearly didn't
9 intend for the jury -- for the burden of proof to shift
10 willy-nilly. That it's supposed to be an exception to
11 the rule, narrowly defined. And the reality --

12 JUSTICE GINSBURG: Mr. Schnapper recognized
13 when I asked this question, how does this differ from
14 the prima facie case that you make under McDonnell
15 Douglas and Burdine? He said: We don't have to just
16 make a preliminary showing; we have to establish by a
17 preponderance of the evidence that the prohibited
18 discrimination was a motivating factor.

19 MR. PHILLIPS: Played -- played a role.
20 There's no question about that, Justice Ginsburg, but
21 that is not much different, frankly, from a prima facie
22 showing. The truth is, if you only make a prima facie
23 showing and the defendant doesn't show up, you will have
24 in fact satisfied your burden.

25 JUSTICE SOUTER: Well, you will get to the

1 jury, and if the jury accepts all your evidence, the
2 jury can find in your favor. But the difference between
3 a prima facie showing and what has to be shown here is,
4 the jury must actually find, based on your at least
5 prima facie evidence, that age was a motivating factor.
6 And until the jury makes that finding, if it is properly
7 instructed, it doesn't get to the question of whether
8 the defendant has any burden to show something in
9 response. Isn't that correct?

10 MR. PHILLIPS: Well, there's no question --
11 I mean, although, again, what a motivating factor means
12 is still to my mind extraordinarily narrow in this --

13 JUSTICE STEVENS: Mr. Phillips, let me
14 just --

15 MR. PHILLIPS: -- or limited in terms of
16 what's required here.

17 JUSTICE STEVENS: -- make sure I understand
18 one thing. If it's a motivating factor, it's enough
19 to get by summary judgment and get the case to the
20 jury, but the -- the defendant will still win, if I
21 understand all this, if he -- if the defendant proves,
22 yes, I did do and it may have had an influence on it,
23 but we would have fired him anyway. And if he -- if he
24 can prove under Mt. Healthy that, yes, he thought about
25 age and that -- what raised the issue and everything

1 else, but after he got all through, he was clear he
2 fired him because he was a lousy salesman --

3 MR. PHILLIPS: But, Justice --

4 JUSTICE STEVENS: -- and he wins.

5 MR. PHILLIPS: Clearly he would win under
6 those circumstances, but the problem there is --

7 JUSTICE STEVENS: So he does not lose just
8 because you say it's a motivating factor.

9 MR. PHILLIPS: No, he doesn't lose, but the
10 question is, what do you do once you make that finding?
11 Do you, in fact, at the plaintiff's behest, shift the
12 burden of proof to the defendant? I mean, it's one
13 thing -- and -- and the Solicitor General, you know, has
14 properly identified that in some instances the
15 defendants as a tactical matter are willing to accept as
16 an affirmative defense and -- and pursue the course you
17 just articulated, Justice Stevens.

18 But that's not what happened in this case.
19 We were not prepared to accept the idea that age played
20 a role in this case. We still don't think the evidence
21 supports that. That's obviously not the issue here
22 before us, but it does make it extremely important to
23 resolve the question of, at what stage can you foist,
24 essentially --

25 JUSTICE BREYER: Will you --

1 MR. PHILLIPS: --- an affirmative defense on
2 the other side?

3 JUSTICE BREYER: Will you go back? I'm
4 sorry to be hung up on this point. Maybe there are
5 15 cases that just prove I am wrong. But I'm -- I'm
6 trying to figure out -- let's try other areas of the
7 law. The dam is a nuisance. We now show, to prove that
8 it's a nuisance, that it played a role in the death of
9 my fish. I mean, isn't that the end of the case?
10 Damages might be at issue -- how much of a role -- but
11 as far as liability is concerned the gears were rusty.
12 The rusty gears played a role in the derailing of the
13 train.

14 Again, it might be a question of who is
15 responsible for what, but that there is liability I
16 think in most areas of tort law would be over once you
17 prove that the defendant's factor played a role.

18 MR. PHILLIPS: Well --

19 JUSTICE BREYER: So is the law here -- am I
20 wrong about ordinary tort law? Possibly. I don't know
21 it that well. Is it that I -- is it that this area is
22 special? Is it that there are cases so you can say any
23 of those three? I am prepared to be totally wrong.
24 Though I'd hope not.

25 MR. PHILLIPS: I am always reluctant to say

1 that, Justice Breyer.

2 JUSTICE BREYER: You can say that.

3 MR. PHILLIPS: I think that, in ordinary
4 tort law, the standard of causation is both a
5 combination of "but for" and proximate causation, so --

6 JUSTICE BREYER: And I think "played a role"
7 combines at least the necessary condition, but I don't
8 know --

9 MR. PHILLIPS: Well, I don't think --

10 JUSTICE BREYER: -- if you have to --

11 MR. PHILLIPS: -- that's a fair --

12 JUSTICE BREYER: "Played a role" -- how did
13 it play a role if it was not a necessary condition?

14 MR. PHILLIPS: Justice Ginsburg, at least as
15 I read the difference between the plurality opinion in
16 Price Waterhouse and -- and all of the other opinions in
17 that case, Price Waterhouse's plurality said a
18 motivating factor is actually a standard below "but for"
19 causation. The plurality was unwilling to accept even
20 "but for" causation as a requirement under the Age
21 Discrimination in Employment Act. The -- the rest of
22 the Justices seemed to not -- not accept that. But that
23 seems to me the very -- yes, the basic holding of the
24 plurality -- again, not of the Court -- is that
25 something less than "but for" causation is required.

1 I would be delighted, candidly, if the Court
2 would go back to just "but for" causation as the element
3 of age discrimination because I think, if you get to
4 that point, you get out of this business of trying to
5 figure out at what point you shift the burden. If you
6 --

7 JUSTICE GINSBURG: But that -- that question
8 -- I think it can't be before us. We would certainly
9 want to know what the government's position is on it.
10 And Ms. Blatt was very clear that the government is not
11 taking a position on that issue today. Your brief in
12 opposition did not so much as mention McDonnell Douglas.
13 So how is anybody to think that was at stake, that that
14 regime, which you later clarify in your Respondent's
15 brief, you think should be the sole test? How could
16 that come into this case when it's not in the brief in
17 opposition and, therefore, it's not in the Petitioner's
18 brief and it's not in the government's brief?

19 MR. PHILLIPS: Well, to be clear about this,
20 I'm not pushing so much the, quote, McDonnell Douglas
21 framework as I am Burdine, Hazen Paper, and the other
22 cases that talk about "determinative factor." And --
23 and all -- all we're saying is --

24 JUSTICE GINSBURG: But your line is
25 following that same formula. All those cases are

1 following that litany: prima facie case,
2 non-discriminatory reason --

3 MR. PHILLIPS: Determinative factor, right.
4 I think the answer to the question, Justice Ginsburg, is
5 the -- the way the Chief Justice asked the question,
6 which is, how sensible is it to pull the one thread out
7 of the -- out of the Price Waterhouse analysis, assuming
8 that Justice O'Connor speaks for the Court in some
9 sense, you know, without examining how that plays in,
10 given the underlying theory of the case? And I think
11 that's a perfectly valid point. If the Court thinks
12 additional briefing is warranted, then it would seem to
13 me the right answer is to -- is to call for additional
14 briefing, but I think --

15 JUSTICE KENNEDY: The Solicitor General
16 says, well, this is going to affect Title VII. It's
17 going to affect all kinds of other acts. This is
18 watershed.

19 MR. PHILLIPS: Well, Justice Kennedy --
20 clearly not going to affect Title VII.

21 JUSTICE KENNEDY: You -- pardon me?

22 MR. PHILLIPS: Clearly isn't going to affect
23 Title VII.

24 JUSTICE KENNEDY: Because it's statutory.

25 MR. PHILLIPS: Right, because there's a

1 specific statute that defines it as a motivating factor,
2 shifts the burden, and creates an entire remedial regime
3 that doesn't exist under the age discrimination statute.

4 JUSTICE KENNEDY: Let's -- let's assume that
5 we have authority to incorporate the Title VII
6 jurisprudence into the ADEA area as a matter of choice.
7 Are there reasons why there should be distinctions
8 between the two regimes?

9 MR. PHILLIPS: Well, I think the primary one
10 is the 1991 amendment, where Congress clearly changed
11 the language in Title VII.

12 JUSTICE KENNEDY: Are there reasons of
13 administration or fairness other than -- I recognize
14 that one is statutory and the others would -- would be
15 our case law.

16 MR. PHILLIPS: Well, it seems to me it's
17 beyond that. I mean, there's almost a separation of
18 powers problem when you say it's statutory because,
19 again, Congress very consciously decided to modify Title
20 VII, created a complete regime. It would be a bit of a
21 stretch for this Court not only to modify the standards
22 in a way that would change substantive liability but
23 would create the -- the affirmative defense as a
24 remedial component of it.

25 JUSTICE ALITO: Well, in addition to that,

1 Mr. Phillips, isn't age more closely correlated with
2 legitimate reasons for employment discrimination than
3 race and other factors that are proscribed by Title VII?

4 MR. PHILLIPS: Both Congress and this Court
5 have recognized precisely that as a problem. I mean,
6 there are reasons to treat age discrimination
7 differently from other forms of discrimination. But,
8 again, you know, there's no question that if you revisit
9 Price Waterhouse, it will change some -- the Americans
10 with Disabilities Act and some of the other provisions.

11 But the reality is, if you are talking about
12 a mess to begin with, the truth is the lower courts are
13 in a state of -- of disrepair at this point in any
14 event. And it's even shown in this case.

15 I mean, the truth is the Eighth Circuit has
16 three different formulations of Justice O'Connor's
17 direct evidence standard: circumstantial, strong
18 evidence, and substantial evidence, substantial factor.
19 So if you are a district court judge sitting in the
20 Eighth Circuit, you can pick any one of those -- those
21 three to go with.

22 CHIEF JUSTICE ROBERTS: Can I get back to
23 Justice Stevens's hypothetical? You have two people
24 making a decision; one says it's because of age, the one
25 because of something, and -- a legitimate factor -- and

1 you acknowledge that that could get to the jury?

2 MR. PHILLIPS: Yes, I believe it could.

3 CHIEF JUSTICE ROBERTS: And is it under an
4 instruction that simply says "because of"?

5 MR. PHILLIPS: Yes -- I mean, if you were
6 asking me how I would decide that case, yes, I think it
7 ought to be -- it ought to be "because of."

8 Now, if the Court wants to formulate some
9 greater specificity of how the causation standards
10 apply, that's fine. But, at a minimum, it seems to me
11 the Court would do well to go back at least to the
12 notion of "but for" causation as embodied in the Age
13 Discrimination in Employment Act.

14 CHIEF JUSTICE ROBERTS: Well, but I mean --
15 you say --

16 MR. PHILLIPS: It has never rejected that as
17 a Court.

18 CHIEF JUSTICE ROBERTS: You say "but for"
19 causation, but my understanding of Justice Stevens's
20 hypothetical is that it's going to be very hard to say
21 that one would not have had -- the discrimination, the
22 alleged action, would not have happened but for one
23 factor or the other if they are just two different
24 factors. You would just leave that up to the jury to
25 say "because of"?

1 MR. PHILLIPS: I -- it seems to me juries
2 are asked to make that kind of a decision. I agree with
3 Justice Souter: Juries are a lot smarter than the
4 lawyers.

5 JUSTICE STEVENS: Well, but not only that,
6 but the jury would be free to say, well, there were both
7 causes, and the one was illegal. But under the Mt.
8 Healthy defense, if they are convinced they would have
9 fired this guy anyway, the company gets off.

10 MR. PHILLIPS: Right, and I understand that.
11 And in those situations -- look, Justice O'Connor's
12 analysis of this certainly -- certainly plays to a kind
13 of gut feeling. When you -- and Mt. Healthy is a good
14 illustration of it, even maybe more so, when you say:
15 We are firing you for two reasons; one of them is
16 completely invalid, and the other one is completely
17 valid. What are you supposed to do in that situation?

18 But it seems to me that under -- under
19 normal civil litigation rules, and the ones that
20 Congress clearly had in its mind, the approach you would
21 take under those circumstances say that's enough to get
22 you to the jury, but that's not enough to force the jury
23 to be instructed that they have to rule in favor of the
24 plaintiff unless the defendant can show that but for --
25 that -- that no matter -- regardless of the

1 discriminatory animus, they nevertheless would have
2 taken precisely the same action. That, to me, is the
3 guts of -- of what -- of what this case is about.

4 It's not about direct versus circumstantial
5 evidence. It's about under what circumstances does the
6 burden of proof shift? And -- and in a case like this
7 where there's no assertion of an affirmative defense --
8 whereas, I think, Justice Stevens, in your situation,
9 there were -- you know, most likely you would expect a
10 defendant to say, I want to accept that burden because I
11 think I can in fact prove something.

12 JUSTICE STEVENS: No, but inevitably in
13 these cases the employer is really -- whether he calls
14 it an affirmative defense or -- or just a regular
15 resistance to the plaintiff's case, the issue is: Did
16 -- would he have fired him anyway? And -- and if he --
17 if -- if that's what the jury believes, you can take
18 Justice Breyer's view and say that's -- that's not a
19 sufficient defense because they acted illegally.

20 But if you are allowed that, you are saying,
21 notwithstanding the illegal motive, if you show that the
22 real reason I fired him was unrelated to that, then --
23 the compelling reason -- you win. And you win despite
24 the fact that the process may have violated the statute.

25 MR. PHILLIPS: There -- there's no question

1 about that. And it's -- again, the only question is:
2 Who bears the burden of proof? And what do you do with
3 all of those decisions of this Court that say that
4 the -- that the -- burden to -- to show that age, or
5 whatever, was the determinative factor rests throughout
6 on the plaintiff?

7 JUSTICE GINSBURG: But those weren't --
8 those weren't thought of in the mixed motive framework.
9 And what you want to do is get rid of the mixed motive
10 and say, in a discrimination case, there should be only
11 one regime, and the plaintiff should have the burden of
12 persuasion from start to finish. But that's not what
13 McDonnell Douglas did. It's not what the Eighth Circuit
14 did, which you acknowledge by not even bringing this up
15 until your brief on the merits.

16 So -- and you also said that Title VII is
17 out of it. The statute has taken care of it in 1991.
18 Ms. Blatt, I heard her say distinctly that -- that Title
19 VII would be affected. She urges not to touch this
20 question.

21 MR. PHILLIPS: Well, I think you have to go
22 back to the -- to the question that Justice Alito posed
23 actually, to say -- when he asked her: How do you --
24 how much sense does it make to think about mixed motive
25 versus other motive? Isn't it true that by the time the

1 case gets to the jury, everything is mixed motive,
2 because there is going to be the claim that this was --
3 and this is a great illustration of that concept.
4 There's a claim that age was the basis for the decision,
5 and then there's a claim that there are any of a
6 thousand other possible reasons that are out there, and
7 age just didn't happen to be one.

8 And under those circumstances the question
9 is: What's the reasonable way to proceed?

10 Now, Justice Ginsburg, I apologize that we
11 didn't raise this specifically in the brief in
12 opposition. On the other hand, the reality is that the
13 primary position that was taken by the other side was
14 that this Court essentially can ignore or should
15 overrule a portion of Price Waterhouse as a consequence
16 of the -- of the intervening Costa decision.

17 And it seems to me under those
18 circumstances, if you are going to put the issue of the
19 validity of Price Waterhouse -- whatever it means -- at
20 issue, then it seems to us a reasonable response on the
21 merits to say, well, you shouldn't do it as -- as a --
22 in isolation. That that's a completely artificial
23 inquiry, and you ought to take a step back and say,
24 maybe we haven't gotten this right in the first place,
25 particularly given the difficulty of the lower courts in

1 trying to figure out exactly what Price Waterhouse
2 means.

3 Whose is the controlling opinion, and how do
4 you allocate these burdens and under what circumstances?
5 And given that the lower courts are in disarray, it
6 would seem to me this is a situation where I don't know
7 whether this is the best vehicle or the worst vehicle,
8 but it is certainly an appropriate vehicle for the Court
9 to step back and evaluate it.

10 And if the Court is concerned about whether
11 it has enough information to allow it to assess what
12 would be the -- the significant impact of revising Price
13 Waterhouse, then it seems to me the right answer would
14 be to ask the parties to -- to brief that in addition to
15 the way they briefed it at this stage. Not to simply
16 throw up your hands.

17 JUSTICE GINSBURG: And I assume -- and I
18 assume the government, because it would certainly be
19 informative to know what the agency responsible for the
20 administration of Title VII thinks of this question.

21 MR. PHILLIPS: I -- I don't disagree with
22 that, Justice Ginsburg. I -- I don't think there are
23 any -- any guidelines out there that speak directly to
24 this specific question. But, obviously, to the extent
25 that the Solicitor General could speak for the EEOC,

1 that would -- I am not denying that that would -- that
2 might be helpful.

3 But I think what the -- what the Court needs
4 to do is recognize that what it cannot -- what it should
5 not do in this case is take the -- the very narrowest
6 way of vacating and remanding. Because if it follows
7 that course, nothing will move. Nothing will have been
8 achieved by all the work that has been put into this
9 case at this point, because the court of appeals didn't
10 believe the difference was between direct and
11 circumstantial evidence. And, therefore, the Court at
12 some point is going to have to evaluate beyond the
13 quality of the evidence what quantity of evidence is
14 appropriate under the circumstances.

15 It seems to me the Court has that in front
16 of it. The jury instruction in this case shifted the
17 burden way too early or on -- on way too little showing.
18 A part, a role, that's not enough to shift the burden
19 under -- I don't even think under Justice White's
20 version.

21 JUSTICE SOUTER: But we can't get into that,
22 can we? I mean, there's no question about quantum of
23 evidence here.

24 MR. PHILLIPS: Well, there is a question
25 about the adequacy of the jury instruction.

1 JUSTICE SOUTER: The adequacy of the jury
2 instruction, but there isn't a question as to whether
3 the issue should have gone to the jury in the first
4 place. And I -- I think that --

5 MR. PHILLIPS: Right. No, I don't --
6 there's no question that -- that -- well, there is a
7 question on that. It's not before you. It's -- it's
8 back in front of the Eighth Circuit.

9 But there is still the issue of whether a
10 motivating factor, meaning that it played a role, is a
11 sufficient basis on which to trigger the -- the
12 burden-shifting instruction in this case. That -- that
13 is the narrowest basis on which this Court could affirm
14 by simply saying that Justice White's opinion requires a
15 substantial showing. The instruction in this case
16 clearly doesn't accomplish that, and, therefore, the
17 Court should set that aside, or the Court should affirm
18 the Eighth Circuit and remand so that the district court
19 can have a new trial on that issue.

20 If there are no further questions, I'd urge
21 the Court to affirm.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Now, Mr. Schnapper, 2 minutes.

24 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

25 ON BEHALF OF THE PETITIONER

1 MR. SCHNAPPER: Mr. Chief Justice, and may
2 it please the Court:

3 We are in agreement with the government that
4 the Court should decide the -- the narrow question
5 presented and not revisit Price Waterhouse. If I might
6 respond to the question from Justice Breyer -- and I am
7 going to summarize to some extent materials which were
8 referred to in footnote 18 of our reply brief.

9 The tort rule -- there was a circumstance,
10 very well established and which under tort law "but for"
11 causation was not the standard. And that was the
12 situation in *Corey versus Havener*, which is a leading
13 case in this area in which there were two causes, each
14 sufficient to have brought about the result. And *Corey*
15 was a case of two motorcyclists who spooked a horse.

16 And the rule in those cases was that -- that
17 either cause -- that the tortfeasor involved with either
18 cause could be held liable.

19 JUSTICE ALITO: Don't those cases involve
20 two independent physical causes of an event, not the
21 breaking down of human motivation into -- into separate
22 factors?

23 MR. SCHNAPPER: Well, it's -- it's -- but
24 it's the analogous area of tort law --

25 JUSTICE BREYER: What they are trying to

1 say, which is -- which is making me think is a lot
2 about -- we have a human being who did certain things.
3 And we know this. We know that human being had a mix of
4 motives and that the bad motive played a role. It was a
5 motivating force. And that might be sufficient. It is
6 under Title VII. And if you want to interpret this like
7 Title VII, that's fine. That's the end of it.

8 But then we are going to let someone off if
9 we imagine a different, but hypothetical, situation.
10 The hypothetical is where the bad motive isn't there.

11 Well, it's hard to prove what human beings
12 would do in a hypothetical situation that isn't the real
13 situation. And I take it that's the reason we have
14 imposed this burden upon the employer.

15 Is there an analogy to that in tort law?

16 MR. SCHNAPPER: The -- the problem that
17 comes up with multiple causes is it is hard to
18 reconstruct what would happen. And there is a long line
19 of cases, including a number of decisions by Learned
20 Hand in 1938, one of which we have cited, Transportation
21 Management, in which the lower courts have agreed that
22 where multiple factors are involved it's reasonable to
23 put the burden on the defendant which -- of sorting it
24 all out. And we think that's appropriate here.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:08 a.m., the case in the

4 above-entitled matter was submitted.)

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