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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? Are you --

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 it does have
9 to be direct evidence is Justice O'Connor's opinion,
10 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: As I understand the White
16 opinion, it had nothing to do with the character of the
17 evidence. It had to do with the degree of
18 persuasiveness of the evidence. Is that correct?

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

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

24 MR. SCHNAPPER: "Substantial factor" was
25 somewhere on a scale of a very unimportant factor or a

1 very, very important factor, which is separate from how
2 clear the evidence was that it was a small or large
3 factor.

4 JUSTICE SOUTER: Okay.

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

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

24 CHIEF JUSTICE ROBERTS: I understand the
25 difficulty of figuring out who is controlling in -- in

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

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

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

22 I think you must concede that, in order to
23 fit within this double motive frame, you must show not
24 simply a prima facie case, but by a preponderance of the
25 evidence that the discriminatory factor was a motivating

1 factor.

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

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

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

23 JUSTICE SOUTER: Well, correct me if I am
24 wrong. I assume that in a jury case that simply was
25 left to the jury, and the instruction would be something

1 like this: If you find that the plaintiff has shown
2 that age was a motivating factor, then you look to the
3 next question. And that is: Has the defendant shown
4 that he would have fired the plaintiff anyway? Isn't
5 that the way it works?

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

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

20 MR. SCHNAPPER: No more than would normally
21 be the case. What happened here in terms of jury
22 instructions was typical, which was the parties proposed
23 their differing instructions a week before trial, the
24 instructions were resolved at the end of trial. That --
25 that happens all the time.

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

4 Thank you.

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

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

1 with that.

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

8 The plurality and Justice White, and I think
9 the whole court rejected that.

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Ms. Blatt.

24 ORAL ARGUMENT OF LISA S. BLATT

25 ON BEHALF OF THE UNITED STATES,

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AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

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

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

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

JUSTICE ALITO: Can I ask you this? Do you think that there is a tenable distinction between a

1 mixed motives case and a non-mixed motives case? In
2 every employment discrimination case that gets beyond
3 summary judgment, aren't there mixed motives at play?

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

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

24 And I think it's important for the Court to
25 understand, as we -- the law exists now under Title VII

1 and under all the other anti-discrimination acts, there
2 are two regimes out there. There's a mixed motive
3 regime and a determining factor regime.

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

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

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

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

23 MS. BLATT: The third reason --

24 CHIEF JUSTICE ROBERTS: I will let you get
25 your third reason in, in a minute, but why -- do you

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

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

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

23 MS. BLATT: Unless you overrule Price
24 Waterhouse, which would be an upheaval in the law, and
25 certainly -- this wouldn't be the appropriate case to do

1 it, all of the courts of appeals have unanimously held
2 under the Age Act and under a wide variety of State
3 statutes and other Federal discrimination statutes that
4 the Price Waterhouse burden-shifting framework applies.

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

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

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

23 Since Desert Palace, there is the decision
24 of Sprint/United v. Mendelsohn. And I think that case a
25 fortiori forecloses all the arguments made by the other

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

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

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

1 causation --

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

4 MS. BLATT: And it --

5 CHIEF JUSTICE ROBERTS: Tell the jury that.

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

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

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

23 So I -- and sometimes counsel just agree on
24 what the instruction should be. And it hasn't caused
25 that much of a problem, although there is a lot of

1 confusion about this kind of case, where the defendant
2 is insisting on one instruction and the plaintiff wants
3 another instruction. And that's what Judge Colloton is
4 reserving in a footnote saying: On remand I am going to
5 have to sort this out.

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

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

19 MS. BLATT: I mean -- there are two kinds of
20 jury findings. There's the -- but the problem in all
21 this area, if you do ever get a case that's appropriate,
22 I think what the Court should start with the assumption
23 which Justice Alito alluded to: Price Waterhouse was a
24 bench trial. The 1991 amendments under Title VII were
25 against the backdrop of non-jury trials. And both the

1 Price Waterhouse decision and the language of Title VII
2 are written ex post. What -- it's assuming some
3 artificial world where there was a finding of mixed
4 motives.

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

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

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

15 MS. BLATT: -- going in.

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

20 MS. BLATT: I think you are basically
21 catching on the point that a lot of counsel in the real
22 world are basically deciding, what do we think the jury
23 is going to be most on our side with, with which
24 instruction? And it's not always clear going into the
25 case, maybe depending on the relative strength of the

1 legitimate factor being asserted. Some defendants may
2 prefer the affirmative defense. Some may think, no,
3 it's prejudicial, we don't want that, we want a straight
4 determining-factor instruction.

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

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

15 JUSTICE SOUTER: Juries -- juries are
16 smarter than judges.

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Go ahead and make
24 your third point briefly.

25 MS. BLATT: Oh, on why you shouldn't decide

1 it? I mean, it's essentially this: That this is
2 complicated, difficult under Title VII. That's the
3 leading anti-discrimination statute. I think the Court
4 may want to resolve these very legitimate important
5 questions in a Title VII case, because you have got
6 statutory language.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Phillips.

9 ORAL ARGUMENT OF CARTER G. PHILLIPS

10 ON BEHALF OF THE RESPONDENT

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

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

20 That said, I would hope that the Court would
21 seize upon this as an opportunity to provide some
22 significant clarity in the law, rather than seize this
23 as an opportunity to decide this case on the potentially
24 most narrow ground, which, frankly, as far as I can
25 tell, will not only not decide this case, ultimately,

1 but certainly will not do anything to resolve the mass
2 confusion that seems to exist among the lower courts.

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

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

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

22 Then there's a question of what did she mean
23 by "direct evidence"? But I think the Eighth Circuit
24 certainly did say Justice O'Connor's opinion states the
25 law of Price Waterhouse, and that was the basis on which

1 their decision turned.

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

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

15 JUSTICE GINSBURG: Justice O'Connor.

16 MR. PHILLIPS: Did I say Ginsburg?

17 JUSTICE GINSBURG: Yes.

18 (Laughter.)

19 MR. PHILLIPS: I'm going to hear about this
20 one.

21 (Laughter.)

22 MR. PHILLIPS: I apologize.

23 But the problem -- you know, the -- but the
24 fundamental problem is, it's just simply not clear what
25 Justice White's opinion means. And, therefore, the

1 lower courts have seized upon an opinion that at least
2 provided serious guidance that they could embody into --
3 into a jury instruction.

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

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

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

15 Well, that's a very different inquiry, and
16 when you go to the jury at the end, you can't concede --
17 JUSTICE STEVENS: Mr. Phillips, can I ask
18 you --

19 MR. PHILLIPS: I'm sorry.

20 JUSTICE STEVENS: Can I ask you your views
21 on a question that I've asked myself over and over again
22 and had trouble finding the answer? Supposing a company
23 appointed a committee to decide whether or not to fire
24 X. And the committee came back and said: Yes, you
25 should fire him. He's too old, and he's late to work

1 every day.

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

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

9 JUSTICE STEVENS: Because all that would
10 have been proved was that there was one motivating
11 factor there, but not necessarily a decisive one.

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

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

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

25 JUSTICE BREYER: Would you --

1 MR. PHILLIPS: -- we never sought to make
2 this an affirmative defense.

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

16 MR. PHILLIPS: I mean, that's the Banner
17 case.

18 JUSTICE BREYER: Fine. So the answer is
19 yes?

20 MR. PHILLIPS: Yes, absolutely.

21 JUSTICE BREYER: All right. So now we have
22 the same situation, but the jury has said this bad
23 reason, his age, was a motivating factor.

24 MR. PHILLIPS: Played a role.

25 JUSTICE BREYER: To me -- no, didn't say

1 played a role.

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

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

5 MR. PHILLIPS: It's on page 10 of the joint
6 appendix.

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

10 MR. PHILLIPS: Right.

11 JUSTICE BREYER: -- in defendant's
12 decision."

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

14 JUSTICE BREYER: Now, when I read that, I
15 think --

16 MR. PHILLIPS: Can I just -- if you go to
17 the next instruction --

18 JUSTICE BREYER: Yes.

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

23 JUSTICE BREYER: Fine. Okay. All right.
24 Fine.

25 MR. PHILLIPS: -- as instructed in this

1 particular case.

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

5 (Laughter.)

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

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

22 So, if in the first case we in fact say it
23 should be on the -- burden should be on the employer,
24 why shouldn't it be in the second case?

25 MR. PHILLIPS: Well, I mean -- in the first

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

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

18 JUSTICE GINSBURG: But Price Waterhouse
19 deviated -- that was --

20 MR. PHILLIPS: I'm sorry?

21 JUSTICE GINSBURG: We have these two regimes
22 out there. You are reciting McDonnell Douglas and say
23 everything should follow that pattern, but to do that
24 you have to overrule Price Waterhouse, which gave
25 recognition to the mixed motive framework that comes out

1 of Mt. Healthy.

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

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

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

22 JUSTICE SOUTER: Well, you will get to the
23 jury, and if the jury accepts all your evidence, the
24 jury can find in your favor. But the difference between
25 a prima facie showing and what has to be shown here is,

1 the jury must actually find, based on your at least
2 prima facie evidence, that age was a motivating factor.
3 And until the jury makes that finding, if it is properly
4 instructed, it doesn't get to the question of whether
5 the defendant has any burden to show something in
6 response. Isn't that correct?

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

10 JUSTICE STEVENS: Mr. Phillips, let me
11 just --

12 MR. PHILLIPS: -- or limited in terms of
13 what's required here.

14 JUSTICE STEVENS: I'm not quite sure I
15 understand one thing. If it's a motivating factor, it's
16 enough to get by summary judgment and get the case to
17 the jury, but the -- the defendant will still win, if I
18 understand all this, if he -- if the defendant proves,
19 yes, I did do and it may have had an influence on it,
20 but we would have fired him anyway. And if he -- if he
21 can prove under Mt. Healthy that, yes, he thought about
22 age and that -- what raised the issue and everything
23 else, but after he got all through, he was clear he
24 fired him because he was a lousy salesman --

25 MR. PHILLIPS: But, Justice --

1 JUSTICE STEVENS: -- and he wins.

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

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

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

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

22 JUSTICE BREYER: Will you --

23 MR. PHILLIPS: --- an affirmative defense on
24 the other side?

25 JUSTICE BREYER: Will you go back? I'm

1 sorry to be hung up on this point. Maybe there are
2 15 cases that just prove I am wrong. But I'm -- I'm
3 trying to figure out -- let's try other areas of the
4 law. The dam is a nuisance. We now show, to prove that
5 it's a nuisance, that it played a role in the death of
6 my fish. I mean, isn't that the end of the case?
7 Damages might be at issue -- how much of a role -- but
8 as far as liability is concerned the gears were rusty.
9 The rusty gears played a role in the derailling of the
10 train.

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

15 MR. PHILLIPS: Well --

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

22 MR. PHILLIPS: I am always reluctant to say
23 that, Justice Breyer.

24 JUSTICE BREYER: You can say that.

25 MR. PHILLIPS: I think that, in ordinary

1 tort law, the standard of causation is both a
2 combination of "but for" and proximate causation, so --

3 JUSTICE BREYER: And I think "played a role"
4 combines at least the necessary condition, but I don't
5 know --

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

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

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

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

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

23 I would be delighted, candidly, if the Court
24 would go back to just "but for" causation as the element
25 of age discrimination because I think, if you get to

1 that point, you get out of this business of trying to
2 figure out at what point you shift the burden. If you
3 --

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

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

21 JUSTICE GINSBURG: But your line is
22 following that same formula. All those cases are
23 following that litany: prima facie case,
24 non-discriminatory reason --

25 MR. PHILLIPS: Determinative factor, right.

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

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

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

18 JUSTICE KENNEDY: You -- pardon me?

19 MR. PHILLIPS: Clearly isn't going to affect
20 Title VII.

21 JUSTICE KENNEDY: Because it's statutory.

22 MR. PHILLIPS: Right, because there's a
23 specific statute that defines it as a motivating factor,
24 shifts the burden, and creates an entire remedial regime
25 that doesn't exist under the age discrimination statute.

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

6 MR. PHILLIPS: Well, I think the primary one
7 is the 1991 amendment, where Congress clearly changed
8 the language in Title VII.

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

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

22 JUSTICE ALITO: Well, in addition to that,
23 Mr. Phillips, isn't age more closely correlated with
24 legitimate reasons for employment discrimination than
25 race and other factors that are proscribed by Title VII?

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

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

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

19 CHIEF JUSTICE ROBERTS: Can I get back to
20 Justice Stevens's hypothetical? You have two people
21 making a decision; one says it's because of age, the one
22 because of something, and -- a legitimate factor -- and
23 you acknowledge that that could get to the jury?

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

25 CHIEF JUSTICE ROBERTS: And is it under an

1 instruction that simply says "because of"?

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

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

11 CHIEF JUSTICE ROBERTS: Well, but I mean --
12 you say --

13 MR. PHILLIPS: It has never rejected that as
14 a Court.

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

23 MR. PHILLIPS: I -- it seems to me juries
24 are asked to make that kind of a decision. I agree with
25 Justice Souter: Juries are a lot smarter than the

1 lawyers.

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

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

15 But it seems to me that under -- under
16 normal civil litigation rules, and the ones that
17 Congress clearly had in its mind, the approach you would
18 take under those circumstances say that's enough to get
19 you to the jury, but that's not enough to force the jury
20 to be instructed that they have to rule in favor of the
21 plaintiff unless the defendant can show that but for --
22 that -- that no matter -- regardless of the
23 discriminatory animus, they nevertheless would have
24 taken precisely the same action. That, to me, is the
25 guts of -- of what -- of what this case is about.

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

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

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

22 MR. PHILLIPS: There -- there's no question
23 about that. And it's -- again, the only question is:
24 Who bears the burden of proof? And what do you do with
25 all of those decisions of this Court that say that

1 the -- that the -- burden to -- to show that age, or
2 whatever, was the determinative factor rests throughout
3 on the plaintiff?

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

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

18 MR. PHILLIPS: Well, I think you have to go
19 back to the -- to the question that Justice Alito posed
20 actually, to say -- when he asked her: How do you --
21 how much sense does it make to think about mixed motive
22 versus other motive? Isn't it true that by the time the
23 case gets to the jury, everything is mixed motive,
24 because there is going to be the claim that this was --
25 and this is a great illustration of that concept.

1 There's a claim that age was the basis for the decision,
2 and then there's a claim that there are any of a
3 thousand other possible reasons that are out there, and
4 age just didn't happen to be one.

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

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

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

25 Whose is the controlling opinion, and how do

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

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

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

18 MR. PHILLIPS: I -- I don't disagree with
19 that, Justice Ginsburg. I -- I don't think there are
20 any -- any guidelines out there that speak directly to
21 this specific question. But, obviously, to the extent
22 that the Solicitor General could speak for the EEOC,
23 that would -- I am not denying that that would -- that
24 might be helpful.

25 But I think what the -- what the Court needs

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

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

18 JUSTICE SOUTER: But we can't get into that,
19 can we? I mean, there's no question about quantity of
20 evidence here.

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

23 JUSTICE SOUTER: The adequacy of the jury
24 instruction, but there isn't a question as to whether
25 the issue should have gone to the jury in the first

1 place. And I -- I think that --

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Now, Mr. Schnapper, 2 minutes.

21 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

22 ON BEHALF OF THE PETITIONER

23 MR. SCHNAPPER: Mr. Chief Justice, and may
24 it please the Court:

25 We are in agreement with the government that

1 the Court should decide the -- the narrow question
2 presented and not revisit Price Waterhouse. If I might
3 respond to the question from Justice Breyer -- and I am
4 going to summarize to some extent materials which were
5 referred to in footnote 18 of our reply brief.

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

13 And the rule in those cases was that -- that
14 either cause -- that the tortfeasor involved with either
15 cause could be held liable.

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

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

22 JUSTICE BREYER: What they are trying to
23 say, which is -- which is making me think is a lot
24 about -- we have a human being who did certain acts.
25 And we know this. We know that human being had a mix of

1 motives and that the bad motive played a role. It was a
2 motivating force. And that might be sufficient. It is
3 under Title VII. And if you want to interpret this like
4 Title VII, that's fine. That's the end of it.

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

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

12 Is there an analogy to that in tort law?

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

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

1 above-entitled matter was submitted.)

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