IN THE SUPREME COURT OF THE UNITED STATES

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JACK GROSS, :

Petitioner :

v. : No. 08-441

FBL FINANCIAL SERVICES, :

INC. :

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Washington, D.C.

Tuesday, March 31, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

ERIC SCHNAPPER, ESQ., Seattle, Wash.; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

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

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

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

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

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

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

MR. SCHNAPPER: No. I --

JUSTICE KENNEDY: Or maybe -- maybe I misheard.

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

JUSTICE KENNEDY: All right.

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

CHIEF JUSTICE ROBERTS: There is some

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

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

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

MR. SCHNAPPER: The --

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

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

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

mean that.

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

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

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

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

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

JUSTICE ALITO: Price Waterhouse was a bench trial.

MR. SCHNAPPER: Yes.

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

MR. SCHNAPPER: I believe so, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: I take it the only issue

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

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

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

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

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

MR. SCHNAPPER: That's certainly the origin.

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

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

would be happy to get into it, Your Honor.

JUSTICE SOUTER: All right. I think you should.

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

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

JUSTICE SOUTER: As I understand the White opinion, it had nothing to do with the character of the evidence. It had to do with the degree of persuasiveness of the evidence. Is that correct?

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

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

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

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

JUSTICE SOUTER: Okay.

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

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

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

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

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

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

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

factor.

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

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

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

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

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

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

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

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

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

Thank you.

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

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

with that.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Why don't you --

MS. BLATT: The third reason --

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

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

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

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

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

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

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

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

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

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

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

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

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

causation --

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

MS. BLATT: And it --

CHIEF JUSTICE ROBERTS: Tell the jury that.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: You can't know it --

MS. BLATT: -- going in.

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

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

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

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

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

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

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

Thank you.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

their decision turned.

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

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

JUSTICE GINSBURG: Justice O'Connor.

MR. PHILLIPS: Did I say Ginsburg?

JUSTICE GINSBURG: Yes.

(Laughter.)

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

(Laughter.)

MR. PHILLIPS: I apologize.

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

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

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

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

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

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

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

MR. PHILLIPS: I'm sorry.

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

every day.

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

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

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

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

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

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

JUSTICE BREYER: Would you --

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

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

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

JUSTICE BREYER: Fine. So the answer is yes?

MR. PHILLIPS: Yes, absolutely.

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

MR. PHILLIPS: Played a role.

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

played a role.

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

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

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

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: Right. And, Justice --

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

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

JUSTICE BREYER: Yes.

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

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

MR. PHILLIPS: -- as instructed in this

particular case.

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

(Laughter.)

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

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

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

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

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

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

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

MR. PHILLIPS: I'm sorry?

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

of Mt. Healthy.

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: But, Justice --

JUSTICE STEVENS: -- and he wins.
MR. PHILLIPS: Clearly he would win under those circumstances, but the problem there is --
JUSTICE STEVENS: So he does not lose just because you say it's a motivating factor.
MR. PHILLIPS: No, he doesn't lose, but the question is, what do you do once you make that finding? Do you, in fact, at the plaintiff's behest, shift the burden of proof to the defendant? I mean, it's one thing -- and -- and the Solicitor General, you know, has properly identified that in some instances the defendants as a tactical matter are willing to accept as an affirmative defense and -- and pursue the course you just articulated, Justice Stevens.
But that's not what happened in this case. We were not prepared to accept the idea that age played a role in this case. We still don't think the evidence supports that. That's obviously not the issue here before us, but it does make it extremely important to resolve the question of, at what stage can you foist, essentially --
JUSTICE BREYER: Will you --
MR. PHILLIPS: --- an affirmative defense on the other side?
JUSTICE BREYER: Will you go back? I'm

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

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

MR. PHILLIPS: Well --

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

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

JUSTICE BREYER: You can say that.

MR. PHILLIPS: I think that, in ordinary

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

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

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

JUSTICE BREYER: -- if you have to --

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

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

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

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

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

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

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

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

MR. PHILLIPS: Determinative factor, right.

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

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

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

JUSTICE KENNEDY: You -- pardon me?

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

JUSTICE KENNEDY: Because it's statutory.

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

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Yes, I believe it could.

CHIEF JUSTICE ROBERTS: And is it under an

instruction that simply says "because of"?

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

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

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

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

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

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

lawyers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whose is the controlling opinion, and how do

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

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

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

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

But I think what the -- what the Court needs

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

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

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

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

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

place. And I -- I think that --

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Now, Mr. Schnapper, 2 minutes.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

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

We are in agreement with the government that

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

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

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

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

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

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

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

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

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

Is there an analogy to that in tort law?

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

above-entitled matter was submitted.)