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3	ERIC SCHNAPPER, ESQ.
4	On behalf of the Petitioner
5	LISA S. BLATT, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting the Petitioner
8	CARTER G. PHILLIPS, ESQ.
9	On behalf of the Respondent
10	REBUTTAL ARGUMENT OF
11	ERIC SCHNAPPER, ESQ.
12	On behalf of the Petitioner
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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 burden of
14 proof-shifting requirement absent a directive from
15 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 the terms that for example
4 Judge Collatin put it in the decision below.

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

8 CHIEF JUSTICE ROBERTS: So you are telling
9 us we never required direct evidence, but you are not
10 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, the Court hasn't put
16 those two things together in the way you did. I think
17 that's fair. The Court's statement in Desert Palace
18 didn't define direct evidence. It's not -- it's not
19 clear in that sense exactly what the Court meant. I
20 think it's fair to say it certainly meant that the Court
21 hadn't required direct evidence in the sense of
22 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 special evidence is required to get the instruction in
4 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 burden on the plaintiff is to
15 show by a preponderance of the evidence that in this
16 case age was a motivating factor, but it's not required
17 to show it by any particular kind of evidence or to show
18 it by strong evidence as opposed to merely evidence
19 sufficient to establish that by a preponderance of the
20 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 a number of reasons. At
19 the least, the Court would have to finally resolve what
20 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 judge sitting as the trier of
24 fact finds that there is direct evidence, strong
25 evidence supporting the plaintiff's claim, then the

1 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 you were to announce this
9 as a rule, you would -- I think the time has come to
10 explain definitively what "direct evidence" means. The
11 courts of appeals are in wide disagreement about that,
12 and --

13 JUSTICE GINSBURG: And it was the view of
14 only one justice, Justice O'Connor alone. She did make
15 the fifth vote, but no one else accepted a direct
16 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 urge that
23 we should count Justice white's decision as the
24 controlling decision rather than Justice O'Connor's?

25 MR. SCHNAPPER: To the extent that you were

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

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

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

21 JUSTICE KENNEDY: But your -- your position,
22 you rest heavily on the argument, I think, but there is
23 no textual support in the ADEA for a heightened evidence
24 requirement in order to shift the burden of proof. But
25 isn't it true there is no textural support for shifting

1 the burden of proof at all? I mean, I don't see how
2 you can -- can convince us of the first proposition
3 without confronting the second.

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

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

16 MR. SCHNAPPER: In Justice -- in the case of
17 Price Waterhouse, Justice White characterized this
18 allocation as the burden, as an affirmative defense.
19 But this sort of thing routinely with regard to the
20 allocation of burdens. It does not happen routinely
21 with regard to heightened evidence requirement.

22 JUSTICE SOUTER: I take it the only issue
23 that you have raised before us is whether the evidence
24 that does raise a burden on the defendant's part has got
25 to be, whatever this means, direct or not? That's the

1 only issue?

2 MR. SCHNAPPER: That's the only issue before
3 the --

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

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

11 JUSTICE SOUTER: There are arguments about
12 the need for substantial evidence. But the argument for
13 direct evidence goes back to the separate O'Connor --
14 O'Connor opinion.

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

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

22 MR. SCHNAPPER: Well, I would be happy -- I
23 would be happy to get into it, Your Honor.

24 JUSTICE SOUTER: I think you should.

25 MR. SCHNAPPER: As -- as Justice Ginsburg

1 pointed out, there are -- there were actually six
2 members of the Court in Price Waterhouse who concurred
3 in the result. Four members of the Court in the
4 plurality expressly rejected a direct evidence
5 requirement and said there were no limit on the type of
6 evidence that could be used.

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

11 JUSTICE SOUTER: As I understand the White
12 opinion, it had nothing to do with the character of the
13 evidence. It had to do with the degree of
14 persuasiveness of the evidence; is that correct?

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

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

20 MR. SCHNAPPER: The "substantial factor" was
21 somewhere on the scale of a very unimportant factor or a
22 very, very important factor, which is separate from how
23 clear the evidence was that it was a small or large
24 factor.

25 JUSTICE SOUTER: Okay.

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

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

20 CHIEF JUSTICE ROBERTS: I understand the
21 difficulty of figuring out who is controlling in -- in
22 Price Waterhouse. But at least as it has been applied,
23 my understanding -- I understand it has been applied in
24 different ways. My understanding of what people mean
25 when they say "the Price Waterhouse approach," which is

1 that there is a higher showing of evidence, direct
2 evidence, whatever -- people don't agree on what that
3 means. But if you meet that showing, then the burden of
4 persuasion shifts to the employer on the issue of
5 causation.

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

12 JUSTICE GINSBURG: But, Mr. Schnapper, there
13 is a difference -- and I think it's critical to your
14 case -- between what is called the prima facia case that
15 the plaintiff would make under the McDonnell Douglas
16 test and proving by a preponderance of the evidence that
17 in this case age discrimination was a motivating factor.
18 I think you must concede that in order to fit within
19 this double motive frame you must show not simply a
20 prima facia case, but by a preponderance of the evidence
21 that the discriminatory factor was a motivating factor.

22 MR. SCHNAPPER: Yes. We -- we are obligated
23 to do that, and the -- the defendant has argued below
24 and would, I think, on remand still be in a position to
25 argue that we didn't have enough evidence to meet that

1 burden. But that question isn't before us.

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

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

18 JUSTICE SOUTER: Well, correct me if I am
19 wrong. I assume that in a jury case that simply was
20 left to the jury, and the instructions would be
21 something like this: If you find that the plaintiff has
22 shown that age was a motivating factor, then you look to
23 the next question. And that is: Has the defendant
24 shown that he would have fired the plaintiff anyway?
25 Isn't that the way it works?

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

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

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

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

24 Thank you.

25 JUSTICE SCALIA: Could -- before you sit

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

11 That was not Justice White's, because -- he
12 said "because the court of appeals required Price
13 Waterhouse to prove by clear and convincing evidence
14 that it would have reached the same" -- "in the absence
15 of the improper motive. Rather than merely requiring
16 proof by a preponderance of the evidence, I concur in
17 the judgment reversing this case in part and remanding.
18 With respect to the employer's burden, however, the
19 plurality seems to require that the employer submit
20 objective evidence." And he disagreed with that.

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

1 burden with clear and convincing evidence.

2 The plurality and Justice White, the whole
3 court rejected that.

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

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

15 Thank you. I would like to reserve the --
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Ms. Blatt.

18 ORAL ARGUMENT OF LISA S. BLATT
19 ON BEHALF OF THE UNITED STATES,
20 AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONER

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

24 I think both on a substantive level and a
25 procedural level Desert Palace largely resolves this

1 case. The question presented is the one of should you
2 have a direct evidence requirement to obtain a mixed
3 motive instruction under the Age Act. And there is the
4 procedural posture, which is Desert Palace left
5 unresolved a lot of very difficult and complicated
6 questions about when do you get to the jury on mixed
7 motive and what is the requirement that separates a
8 mixed motive motivating factor instruction from the
9 "but-for" or commonly known as the McDonnell Douglas.
10 And Desert Palace left all that unresolved.

11 On the question presented, there is the same
12 conflict in the circuits under the Age Act. It is the
13 same conflict in the circuits that was under Title VII
14 -- is do you need any kind of evidentiary special
15 showing to get to a mixed motive; and, if so, is it non-
16 circumstantial evidence or evidence that directly ties
17 --

18 JUSTICE ALITO: Could I ask you this? Do
19 you think that there is a tenable distinction between a
20 mixed motives case and a non-mixed motives case? In
21 every employment discrimination case that gets beyond
22 summary judgment, aren't there mixed motives at play?

23 MS. BLATT: I think there is a lot to be
24 said for that argument, and this is a very difficult and
25 unsettled question under Title VII. I think what would

1 be on the table if this Court ever had an appropriate
2 vehicle -- and this certainly is not the appropriate
3 vehicle to get into this question -- there would be
4 several options on the table. You could have what your
5 view suggests, which is after summary judgment you could
6 get a motivated factor instruction that the jury would
7 be permitted to find both impermissible and permissible
8 motives.

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

18 And I think it's important for the Court to
19 understand, as we -- the law exists now under Title VII
20 and under all the other anti-discrimination acts, there
21 are two regimes out there. There is a mixed motive
22 regime and a determining factor regime.

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

25 MS. BLATT: Yes. But this is -- I will also

1 give you, which I think is important especially when you
2 write your opinion, the three reasons why you should not
3 resolve this very difficult question in this case. And
4 the first is that it wasn't pressed or passed on below
5 or raised in the brief in opposition and did not receive
6 full briefing by the parties and all the amici.

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

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

17 MS. BLATT: The third reason --

18 CHIEF JUSTICE ROBERTS: I will let you get
19 your third reason in in a minute, but why -- do you
20 really think it's fair to pick one part of a complicated
21 test that the court has constructed and say, well, this
22 one doesn't make any sense, and pull it out? I mean,
23 maybe it only makes sense in the context of the whole
24 construct, or maybe none of the elements actually make
25 sense. But it seems to me very artificial to focus on

1 one aspect and say, let's fix this, without assessing
2 what its impact is on the rest of the text.

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

13 CHIEF JUSTICE ROBERTS: That was -- that was
14 because -- that was because of the 1991 Act which
15 addressed Title VII and quite deliberately left ADEA
16 out.

17 MS. BLATT: Unless you overrule Price
18 Waterhouse, which would be an upheaval in the law, and
19 certainly -- this wouldn't be the appropriate case to do
20 it, all the courts of appeals have unanimously held
21 under the Age Act and under a wide variety of State
22 statutes and other Federal discrimination statutes that
23 the Price Waterhouse burden-shifting framework applies.

24 CHIEF JUSTICE ROBERTS: You are asking us to
25 overrule the aspect of Price Waterhouse involving direct

1 evidence, at least if you look at Justice O'Connor's
2 opinion.

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

9 You did it in the recent crack cocaine case
10 in Spears, you did it in your nude dancing case, and you
11 did it in a case called Jefferson v. City of Tarrant
12 County, an opinion Justice Ginsburg authored, that you
13 said: Well, there is language here that substantive
14 cases make clear, and there is lots of reasons why you
15 would not impose a direct evidence requirement, however
16 you define that term.

17 Since Desert Palace, there is a decision of
18 Sprint/United v. Mendelsohn. And I think that case a
19 fortiori forecloses all the arguments made by the other
20 side that, well, even if it doesn't mean
21 non-circumstantial evidence, it must mean something that
22 is highly relevant to the issue of discrimination. In
23 Sprint/United you said we're not going to have a per se
24 rule about what is relevant to prove discrimination.
25 The Court said the same thing in Reeves. I think that

1 was a unanimous decision.

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

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

21 CHIEF JUSTICE ROBERTS: The statute -- the
22 statute has language. It says "because of." Tell the
23 jury that.

24 MS. BLATT: Absolutely. And it did in Title
25 VII, and this Court, for better or worse -- regardless

1 of what you think, in Price Waterhouse six Justices
2 defined the language "because of." And we have Price
3 Waterhouse now that is codified. And so --

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

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

16 And sometimes counsel just agree on what the
17 instruction should be. And it hasn't caused that much
18 of a problem, although there is a lot of confusion about
19 this kind of case, where the defendant is insisting on
20 one instruction and the plaintiff wants another
21 instruction, and that's what Judge Collatin is reserving
22 in a footnote saying: On remand I am going to have to
23 sort this out.

24 JUSTICE SOUTER: Regardless of what the
25 parties may prefer, isn't it likely that the jury,

1 regardless of instruction, is going to say something
2 like this: If we find that -- that age really was in
3 the boss's mind when he fired the person, and the boss
4 comes in, regardless of the instructions, and says the
5 guy's work was no good, he got late -- he arrived late
6 and so on, the jury is going to say: Did they really
7 fire him because he was old or because he didn't come to
8 work on time?

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

12 MS. BLATT: I mean -- there are two kinds of
13 jury findings. There is -- but the problem in all this
14 area, if you do ever get a case that is appropriate, I
15 think what the Court should start with the assumption
16 which Justice Alito alluded to: Price Waterhouse was a
17 bench trial. The 1991 amendments under Title VII were
18 against the backdrop of non-jury trials. And both the
19 Price Waterhouse decision and the language of Title VII
20 are written ex post. It's assuming some artificial
21 world where there was a finding of mixed motive.

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

25 If you are looking at ex post world, you are

1 exactly right, a jury could either find this was all a
2 pretext, I think what was really going on was ageism or
3 sexism or racism, or it could find, a split the baby, I
4 think it's both. But you can't possibly know that --

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

6 MS. BLATT: -- going in.

7 JUSTICE SOUTER: But if you said to the
8 jury, do the right thing, they'd probably come out the
9 same way it would come out if you gave the burden
10 shifting instruction, I think.

11 MS. BLATT: I think you are basically
12 catching on the point that a lot of counsel in the real
13 world are basically deciding, what do we think the jury
14 is going to be most on our side with, with which
15 instruction. And it's not always clear going into the
16 case, and maybe depending on the relative strength of
17 the legitimate factor being asserted. Some defendants
18 may prefer the affirmative defense. Some may think, no,
19 it's prejudicial, we don't want that, we want a straight
20 determining factor instruction.

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

25 MS. BLATT: Well, I don't think you can

1 ditch Price Waterhouse as a practical matter, because
2 you are going to create -- I mean -- massive confusion,
3 not only under the Age Act, but under the Americans with
4 Disabilities Act, the Family Medical Leave Act, a
5 variety of labor statutes, disciplinary statutes --

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

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

13 Thank you.

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

16 MS. BLATT: Oh, on why you shouldn't decide
17 it? It's essentially this, that this is complicated,
18 difficult under Title VII. That's the leading
19 anti-discrimination statute. I think the Court may want
20 to resolve these very legitimate important questions in
21 a Title VII case, because you have got statutory
22 language.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Phillips?

25 ORAL ARGUMENT OF CARTER G. PHILLIPS

1 ON BEHALF OF THE RESPONDENT

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

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

11 That said, I would hope that the Court would
12 seize upon this as an opportunity to provide some
13 significant clarity in the law, rather than seize this
14 as an opportunity to decide this case on the potentially
15 most narrow ground, which, frankly, as far as I can
16 tell, will not only not decide this case, ultimately,
17 but certainly will not do anything to resolve the mass
18 confusion that seems to exist among the lower courts.

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

24 The Eighth Circuit said that it interpreted
25 Justice O'Connor's separate opinion calling for direct

1 evidence as talking about a specific link between the
2 proof -- in the proof of the discriminatory
3 considerations and the adverse action that was taken.
4 So, direct versus circumstantial doesn't even -- you
5 know, if you remand to evaluate non-circumstantial
6 evidence, you are still not going to be in a position
7 where that is going to affect the outcome.

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

13 Then there's a question of what did she mean
14 by direct evidence? But I think the Eighth Circuit
15 certainly did say Justice O'Connor's opinion states the
16 law of Price Waterhouse, and that was the basis on which
17 their decision turned.

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

22 So, I mean, I suppose the Court could say,
23 no, we disagree with the basis of Price Waterhouse as
24 Justice White's separate concurring opinion, which,
25 frankly, I think it is -- you know, having read it more

1 times than I care to admit, is not exactly clear as to
2 what he thinks the appropriate standard would have been.
3 At least Justice Ginsburg's provides the formulation
4 that the lower courts can use to try to provide some
5 kind of a jury instruction --

6 JUSTICE GINSBURG: Justice O'Connor.

7 MR. PHILLIPS: Did I say Ginsburg?

8 JUSTICE GINSBURG: Yes.

9 (Laughter.)

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

12 (Laughter.)

13 MR. PHILLIPS: I apologize.

14 But the problem -- you know, the -- but the
15 fundamental problem is, it's just simply not clear what
16 Justice White's opinion means. And therefore, the lower
17 courts have seized upon an opinion that at least
18 provided serious guidance that they could embody into a
19 jury instruction.

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

25 Justice Kennedy asked the question does it

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

17 You go through the entirety of the trial
18 saying to the jury, there is no evidence of age, there
19 is no evidence of age discrimination, and then at the
20 last minute, not because you have asserted an
21 affirmative defense -- because we didn't assert an
22 affirmative defense -- one is foisted on us by the jury
23 instruction that the plaintiff asked for in this
24 particular case that says that if there is a motivating
25 factor, if you can prove a motivating factor -- which it

1 is interesting to get to the specifics of a motivating
2 factor, which means it played a part or a role, which is
3 about as minimalist as you can have it -- then the
4 burden shifts and we then have the burden to prove that
5 we would have taken the same action notwithstanding age.

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

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

10 MR. PHILLIPS: I'm sorry.

11 JUSTICE STEVENS: Can I ask you your views
12 on a question that I've asked myself over and over again
13 and had trouble finding the answer. Supposing a company
14 appointed a committee to decide whether or not to fire
15 X. And the committee came back and said: "Yes, you
16 should fire him; he's too old and he's late to work
17 every day."

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

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

25 JUSTICE STEVENS: Because all that would

1 have been proved was there is one motivating factor
2 there, but not necessarily a decisive one.

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

14 JUSTICE STEVENS: But he has only proved
15 that it is one of two possible motivating factors, but
16 that is sufficient in your view to get to the jury.

17 MR. PHILLIPS: I would think that that would
18 be sufficient to get to the jury, because I don't think
19 we have to prove -- I don't think the plaintiff has to
20 prove, you know, obviously, beyond a reasonable doubt or
21 anything. I mean, I think the jury could fairly say
22 that those are the two grounds, and I think in some ways
23 that -- that is the sort of common sense basis on which
24 Price Waterhouse was decided. And it's -- you know,
25 it's important -- if -- you know, the Chamber of

1 Commerce brief actually focuses a great deal, Justice
2 Stevens, on this multi-member decisionmaking body. And
3 you know, it seems to me if you look at cases like Mt.
4 Healthy and Price Waterhouse, those are all cases where
5 you have multi-member decisionmakers, and some of whom
6 may have expressed some biases and others of whom
7 clearly didn't, and how do you deal with that situation,
8 which impresses me as fundamentally different that the
9 situation here where you have a single supervisor
10 dealing with a single employee and where the case is
11 tried on the theory that there has been no
12 discrimination whatsoever, and it's up to the jury to
13 make that determination at the end, and at the last
14 minute we have the jury instruction that shifts the
15 burden to us notwithstanding that --

16 JUSTICE BREYER: Would you --

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

19 JUSTICE BREYER: Would you think you should
20 have the burden in the following situation? At 10:00
21 o'clock on March 21st the employer says: I am going to
22 get rid of Smith because he's too old.

23 MR. PHILLIPS: Uh-huh.

24 JUSTICE BREYER: That's it. Writes out the
25 letter, "Good-Bye, Smith." An hour later someone walks

1 into the employer's office and says: "I've discovered
2 that Smith was just convicted of larceny." All right?
3 Now, he already fired Smith because he was too old. But
4 I take it he can make the defense: Well, Smith would
5 have been fired anyway; that isn't the reason I fired
6 him, but he would have been fired anyway, and he can get
7 off. But he should make that defense, shouldn't he?

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

9 JUSTICE BREYER: Fine. So the answer is
10 yes?

11 MR. PHILLIPS: Yes, absolutely.

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

15 MR. PHILLIPS: Played a role.

16 JUSTICE BREYER: To me -- it didn't say
17 played a role.

18 MR. PHILLIPS: Yeah, it did.

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

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

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

1 defendant's decision."

2 MR. PHILLIPS: Right. But -- right. It
3 just --

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

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

8 JUSTICE BREYER: Yes.

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

13 JUSTICE BREYER: Fine, okay, all right,
14 fine.

15 MR. PHILLIPS: -- as instruction in this
16 particular case.

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

20 (Laughter.)

21 JUSTICE BREYER: Fine. It played a part.
22 It did have a role: Age motivated in part. Now why
23 isn't that the end of the matter? Because we have a
24 statute that says age shouldn't play a role in. "Play a
25 role" means it made a difference. I mean, to me.

1 Otherwise it played no role. It was an understudy, a
2 ghost. It "played a role" if it would have made a
3 difference. "Played a part," it would have made a
4 difference, just like my first case.

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

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

15 MR. PHILLIPS: Well, I mean -- in the first
16 place, saying that something is a motivating factor or
17 played a role is, as a sufficient basis on which to
18 impose liability, is flatly inconsistent with what this
19 Court has said numerous time. It said it in Burdine, it
20 said it in Reeves, it said it in Hazen Paper, it said it
21 I think last term in the Kentucky case, where it says it
22 has to play a role and be determinative. And that's the
23 standard the Court has announced over and over again in
24 age discrimination cases.

25 The "a motivating factor" formulation does

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

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

10 MR. PHILLIPS: I'm sorry?

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

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

24 JUSTICE GINSBURG: Mr. Schnapper recognized
25 when I asked this question, how does this differ from

1 the prima facie case that you make under McDonnell
2 Douglas and -- he said: We don't have to just make a
3 preliminary showing; we have to establish by a
4 preponderance of the evidence that the prohibited
5 discrimination was a motivating factor.

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

12 JUSTICE SOUTER: Well, you will get to the
13 jury and if the jury accepts all your evidence, the jury
14 can find in your favor. But the difference between a
15 prima facie showing and what has to be shown here is,
16 the jury must actually find, based on your at least
17 prima facie evidence, that age was a motivating factor,
18 and until the jury makes that finding, if it is properly
19 instructed, it doesn't get to the question of whether
20 the defendant has any burden to show something in
21 response. Isn't that correct?

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

25 JUSTICE STEVENS: Mr. Phillips, let me

1 just --

2 MR. PHILLIPS: -- or limited in terms of
3 what is required here.

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

15 MR. PHILLIPS: But, Justice --

16 JUSTICE STEVENS: -- and he wins.

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

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

21 MR. PHILLIPS: No, he doesn't lose, but the
22 question is, what do you do once you make that finding?
23 Do you, in fact, at the plaintiff's behest, shift the
24 burden of proof to the defendant? I mean, it admits one
25 thing, and the Solicitor General, you know, has properly

1 identified that in some instances the defendants as a
2 tactical matter are willing to accept as an affirmative
3 defense and -- and pursue the course you just
4 articulated, Justice Stevens.

5 But that's not what happened in this case.
6 We were not prepared to accept the idea that age played
7 a role. We still don't think the evidence supports
8 that. That's obviously not the issue here before us,
9 but it does make it extremely important to resolve the
10 question of, at what stage can you foist, essentially --

11 JUSTICE BREYER: Will you --

12 MR. PHILLIPS: --- an affirmative defense on
13 the other side?

14 JUSTICE BREYER: Will you go back? I'm
15 sorry to be hung up on this point. Maybe there are
16 15 cases that just prove I am wrong. But I'm -- I'm
17 trying to figure out -- let's try other areas of the
18 law. The dam is a nuisance. We now show, to prove that
19 it's a nuisance, that it played a role in the death of
20 my fish. I mean, isn't that the end of the case?
21 Damages might be at issue -- how much of a role -- but
22 as far as liability is concerned the gears were rusty.
23 The rusty gears played a role in the derailling of the
24 train. Again, it might be a question of who is
25 responsible for what, but that there is liability I

1 think in most areas of tort law would be over once you
2 prove that the defendant's factor played a role.

3 MR. PHILLIPS: Well --

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

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

12 JUSTICE BREYER: You can say that.

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

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

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

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

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

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

24 MR. PHILLIPS: Justice Ginsburg, at least as
25 I read the difference between the plurality opinion in

1 Price Waterhouse and -- and all of the other opinions in
2 that case, Price Waterhouse's plurality said a
3 motivating factor is actually a standard below "but for"
4 causation. The plurality was unwilling to accept even
5 "but for" causation as a requirement under the Age
6 Discrimination and Employment Act. The rest of the
7 Justices seemed to not -- not accept that. But that
8 seems to me the very -- yes, the basic holding of the
9 plurality -- again, not of the Court -- is that
10 something less than "but for" causation is required. I
11 would be delighted, candidly, if the court would go back
12 to just "but for" causation as the element of age
13 discrimination because I think, if you get to that
14 point, you get out of this business of trying to figure
15 out at what point do you shift the burden. If you --

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

1 therefore, it's not in the Petitioner's brief and it's
2 not in the government's brief?

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

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

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

24 JUSTICE KENNEDY: The Solicitor General
25 says, well, this is going to affect Title VII. It's

1 going to affect all kinds of other acts. This is a
2 watershed.

3 MR. PHILLIPS: Well, Justice Kennedy,
4 clearly it's going to affect Title VII.

5 JUSTICE KENNEDY: You -- pardon me?

6 MR. PHILLIPS: Clearly is it going to affect
7 Title VII.

8 JUSTICE KENNEDY: Because it's statutory.

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

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

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

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

25 MR. PHILLIPS: Well, it seems to me it's

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

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

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

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

24 I mean, the truth is the Eighth Circuit has
25 three different formulations of Justice O'Connor's

1 evidence standard: circumstantial, strong evidence, and
2 substantial evidence, substantial factor. So if you are
3 a district court judge sitting in the Eighth Circuit,
4 you can pick any one of those -- those three to go with.

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

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

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

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

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

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

25 MR. PHILLIPS: It has never rejected that as

1 a Court.

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

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

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

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

1 What are you supposed to do in that situation?

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

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

21 JUSTICE STEVENS: I know, but inevitably in
22 these cases the employer is really -- whether he calls
23 it an affirmative defense or -- or just a regular
24 resistance to the plaintiff 's case, the issue is: Did
25 -- would he have fired him anyway? And -- and if he --

1 if -- if that's what the jury believes, you can take
2 Justice Breyer's view and say that's -- that's not a
3 sufficient defense because they acted illegally.

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

9 MR. PHILLIPS: There -- there is no question
10 about that. And it is -- again, the only question is:
11 Who bears the burden of proof? And what do you do with
12 all of those decisions of this Court that say that
13 the -- that the -- that the burden to -- to show that
14 age, or whatever, was the determinative factor rests
15 throughout on the plaintiff?

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

25 So -- and you also said that Title VII is

1 out of it. The statute has taken care of it in 1991.
2 Ms. Blatt, I heard her say distinctly that -- that Title
3 VII would be affected. She urges us not to touch this
4 question.

5 MR. PHILLIPS: Well, I think you have to go
6 back to the -- to the question that Justice Alito posed
7 actually, to say -- when -- when he asked her: How do
8 you -- how much sense does it make to think about mixed
9 motive versus other motive? Isn't it true that by the
10 time the case gets to the jury everything is mixed
11 motive, because there is going to be the claim that this
12 was -- and this is a great illustration of that concept.
13 There is a claim that age was the basis for the
14 decision, and there is a claim that there are any of a
15 thousand other possible reasons that are out there, and
16 age just didn't happen to be one.

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

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

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

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

19 And if the Court is concerned about whether
20 it has enough information to allow it to assess what
21 would be the -- the significant impact of revising Price
22 Waterhouse, then it seems to me the right answer would
23 be to ask the parties to -- to brief that in addition to
24 the way they briefed it at this stage. And now you
25 simply throw up your hands.

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

5 MR. PHILLIPS: I -- I don't disagree with
6 that, Justice Ginsburg. I -- I don't think there are
7 any -- any guidelines out there that speak directly to
8 this specific question. But, obviously, to the extent
9 that the Solicitor General could speak for the EEOC,
10 that would -- I am not denying that that would -- that
11 might be helpful. But I think what the -- what the
12 Court needs to do is recognize that what it cannot --
13 what it should not do in this case is take the -- the
14 very narrowest way of vacating and remanding. Because
15 if it follows that course, nothing will move. Nothing
16 will have been achieved by all the work that has been
17 put into this case at this point, because the court of
18 appeals didn't believe the difference was between direct
19 and circumstantial evidence. And, therefore, the Court
20 at some point is going to have to evaluate beyond the
21 quality of the evidence what quantity of evidence is
22 appropriate under the circumstances.

23 It seems to me the Court has that in front
24 of it. The jury instruction in this case shifted the
25 burden way too early or on -- on way too little showing.

1 A part, a role, that's not enough to shift the burden
2 under -- I don't even think under Justice White's
3 version.

4 JUSTICE SOUTER: We can't -- I mean there is
5 no question about quantitative evidence here.

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

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

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

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

1 can have a new trial on that issue.

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Now, Mr. Schnapper, two minutes.

6 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONER

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

10 We are in agreement with the government that
11 the Court should decide the -- the narrow question
12 presented and not revisit Price Waterhouse. If I might
13 respond to the question from Justice Breyer -- and I am
14 going to summarize to some extent materials which were
15 referred to in footnote 18 of our reply brief.

16 The Court ruled that there was a
17 circumstance, very well established, which under tort
18 law but-for causation was not the standard. And that
19 was the situation in Cory versus Havener, which is the
20 leading case in this area in which there were two
21 causes, each sufficient to have brought about the
22 result. And Cory was a case of two motorcyclists in
23 district court.

24 And the rule in those cases was that -- that
25 either cause -- that the tort feason involved with

1 either cause could be held liable.

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

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

8 JUSTICE BREYER: What they are trying to
9 say, which is -- which is making me think -- it is a lot
10 about -- we have a human being who did certain acts.
11 And we know this. We know that human being had a mix of
12 motives and that the bad motive played a role. It was a
13 motivating force. And that might be sufficient. It is
14 under Title VII. And if you want to interpret this by
15 Title VII, that's fine. That's the end of it.

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

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

23 Is there an analogy to that in tort law?

24 MR. SCHNAPPER: The -- the problem that
25 comes up with multiple causes is it is hard to

1 reconstruct what would happen. And there is a long line
2 of cases, including a number of decisions by Learned
3 Hand in 1938, one which we have cited, Transportation
4 Management, in which the lower courts have agreed that
5 where multiple factors are involved it's reasonable to
6 put the burden on the defendant which -- of sorting it
7 all out. And we think that is appropriate here.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:08 a.m, the case in the
12 above-entitled matter was submitted.)

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