No. 08-441

In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; ASIAN AMERICAN JUSTICE CENTER; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

JOHN BRITTAIN
AUDREY WIGGINS
SARAH CRAWFORD
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005
(202) 662-8600

MICHAEL L. FOREMAN, DIRECTOR
Counsel of Record
CIVIL RIGHTS APPELLATE CLINIC
DICKINSON SCHOOL OF LAW
THE PENNSYLVANIA STATE UNIVERSITY
Lewis Katz Building, 121B
University Park, PA 16802
(814) 865-3832

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

JOSEPH M. SELLERS
CHRISTINE E. WEBBER
JENNY R. YANG
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW
Suite 500 West Tower
Washington, DC 20005
(202) 408-4600

VINCENT A. ENG
AIMEE J. BALDILLO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036

JOHN TRASVINA
NINA PERALES
ELISE SANDRA SHORE
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
634 S. Spring Street
Los Angeles, CA 90014

JUDITH L. LICHTMAN
SHARYN TEJANI
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Ave., NW
Suite 650
Washington, DC 20009

DINA LASSOW
JOCELYN SAMUELS
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW
Suite 800
Washington, DC 20036

Counsel for Amici Curiae

QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case?

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Petitioner's argument that a plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of

[1] The parties have consented to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC and its Affiliates have a long-standing interest in addressing matters of employment discrimination that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

The Mexican American Legal Defense and Education Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos in the United States.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from all forms of discrimination.

This case, involving the types of evidence an employee may be required to offer to obtain a mixed-motive jury instruction, is a matter of significant concern to all *amici* and those they serve. *Amici* have consistently fought against imposing an artificial direct evidence requirement both in litigation and through legislative efforts, including the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Court in *Desert Palace*, *Inc. v. Costa*, 539 U.S. 90 (2003), held that Title VII does not require direct evidence in mixed-motive cases. *Amici* believe the same standard should be applied to similar anti-discrimination statutes, and therefore respectfully request this Court to extend that rule to non-Title VII cases, including the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a).

SUMMARY OF ARGUMENT

In *Desert Palace*, *Inc. v. Costa*, 539 U.S. 90 (2003) the Court rejected the distinction between direct and other types of evidence in the context of Title VII mixed-motive claims. Applying the reasoning of

Desert Palace, the Court should also reject this distinction for ADEA mixed-motive claims.

Following *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) courts struggled to develop a uniform application of what some courts believed was a direct evidence requirement. Part of the uncertainty resulted from disagreement about whether Justice O'Connor's concurrence in *Price Waterhouse* was the holding of the Court. This opinion required employees to present direct evidence to obtain a mixed-motive instruction. However, on the issue of whether direct evidence is required, Justice O'Connor's concurrence in *Price Waterhouse* is not the narrowest grounds of agreement by the Court, and therefore it is not controlling.

In practical application, a direct evidence requirement proved to be unworkable, dragging courts into unproductive and time-consuming attempts to draw indecipherable lines between what does and does not constitute direct evidence. This has led to confusion and inconsistency, both between and within the circuit courts. Nothing in the text or purpose of the ADEA suggests that the allocation of the burden of proof should turn on the type of evidence employees rely upon. Further, such a distinction does not serve a useful purpose, as circumstantial evidence may be as probative, or more probative, than direct evidence. In *Desert Palace*, the Court rejected this artificial distinction between direct and circumstantial evidence. The Court should reject the requirement under the ADEA for the same reasons the Court

rejected a direct evidence requirement under Title VII.

ARGUMENT

Employees in non-Title VII cases should not be required to present direct evidence in order to obtain a mixed-motive instruction. If an employee establishes that an unlawful purpose was a motivating factor – regardless of whether this is established by direct or circumstantial evidence – the employer should bear the burden of proving that it would have made the same decision in the absence of discrimination.

I. *Price Waterhouse* Does Not Require An Employee To Have "Direct" Evidence To Shift The Burden Of Persuasion To The Employer.

A. Justice O'Connor's Requirement Of "Direct" Evidence In *Price Waterhouse* Is Not The Holding Of The Case.

The type of evidence required to obtain a mixed-motive instruction in a discrimination case has been a subject of continuing dispute in the lower courts.[2] This confusion stems from the Court's divided ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[2] *See* discussion *infra* in Part III.

In *Price Waterhouse*, four justices joined Justice Brennan's plurality opinion, stating that burden shifting occurred when the plaintiff proved that a discriminatory intent played a "motivating part" in the disputed action. *Id.* at 258. Justice O'Connor's concurring opinion alone required that this showing be based on "direct" evidence. *Id.* at 276 (O'Connor, J., concurring).

Following this ruling, lower courts split on whether Justice O'Connor's requirement of direct evidence was necessary to shift the burden of proof to the employer. However, Justice White's concurrence is the narrowest ground of agreement and therefore it controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when no rationale receives five votes, the holding of the Court is the position taken by those who concurred in the judgment on the narrowest grounds).

Writing for a plurality of four in *Price Waterhouse*, Justice Brennan relied upon *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), as the basis for the burden shifting framework. *Price Waterhouse*, 490 U.S. at 247-50, 254, 257. In his concurrence, Justice White largely agreed with the plurality's approach. He concurred with the plurality's reliance on *Mt. Healthy* as the source for the framework the Court was adopting in *Price Waterhouse*. *Id.* at 258-60. Justice White articulated that *Mt. Healthy* provided the exact framework for analyzing Title VII cases and required an employee to

show that unlawful bias was "a substantial factor," not just "a motivating factor," in the employer's action, to shift the burden of persuasion. *Price Waterhouse*, at 258-60.

Justice O'Connor's concurrence parted ways with the plurality more fundamentally than did Justice White's. Justice O'Connor concluded the words "because of" in Title VII meant "but-for" causation. *Id.* at 262-63.[3] Like Justice White, Justice O'Connor required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," to shift the burden of persuasion. Unlike Justice White, Justice O'Connor required the plaintiff to demonstrate this through "direct" evidence.[4] *Id.* at 276.

The Eighth Circuit contends that Justice O'Connor's opinion is the holding of the Court in *Price Waterhouse*, viewing it as the "narrowest" ground of decision. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 362 (8th Cir. 2008). This is clearly incorrect. *See Marks*, 430 U.S. at 193 (*quoting Gregg v. Georgia*, 428 U.S. 153 (1976)); *Nichols v. United States*, 511 U.S.

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[3] Justice White took no position on this question, as he considered the difference to be mere semantics, given that six Justices agreed the plaintiff recovered nothing if the defendant proved a same action defense. *Price Waterhouse*, 490 U.S. at 259.

[4] Indeed, what Justice O'Connor referred to as "direct" evidence is not consistent with the manner in which many lower courts have interpreted "direct" evidence, to require evidence that directly proves the existence of a fact without requiring any inferences, as discussed below at Part III.

738, 743-47 (1994); *Waters v. Churchill*, 511 U.S. 661, 685-86 (1994) (Souter, J., concurring) (explaining how to apply *Marks* where five Justices agree on some, but not all, aspects of the plurality opinion).[5]

In *Price Waterhouse*, five Justices (Blackmun, Brennan, Marshall, Stevens, and White) agreed that there was no requirement for a plaintiff to introduce direct evidence to shift the burden to the defendant. Justice White's strict adherence to *Mt. Healthy*, which does not require a plaintiff to have direct evidence to shift the burden,[6] leaves no doubt where he stood on

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[5] Although the Eighth Circuit has treated Justice O'Connor's opinion as controlling, the Court, in *Desert Palace*, acknowledged that the question of which opinion from *Price Waterhouse* was controlling was an open question, one that it was not necessary to address to decide that case. *Desert Palace*, 539 U.S. at 93, 97-98.

[6] Nine of the ten circuits to have considered the question have held that *Mt. Healthy* does not have a direct evidence requirement: *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990); *Gonzales v. Dallas County*, 249 F.3d 406, 412 n.6 (5th Cir. 2001); *Sowards v. Loudon County*, 203 F.3d 426, 431 n.1 (6th Cir. 2000); *Pugh v. City of Attica*, 259 F.3d 619, 629 (7th Cir. 2001); *Allen v. Iranon*, 283 F.3d 1070, 1074-75 (9th Cir. 2002); *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001); *Spanier v. Morrison's Mgmt. Servs. Inc.*, 822 F.2d 975, 979-80 (11th Cir. 1987). The Eighth Circuit is internally inconsistent in whether to require direct evidence under *Mt. Healthy*. *Compare Davison v. City of Minneapolis*, 490 F.3d 648, 655 n.5 (8th Cir. 2007) (noting the inconsistent usage and allowing circumstantial evidence to be used in a First Amendment case) *with Graning v. Sherburne County*, 172 F.3d

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this question. Only four Justices in *Price Waterhouse* – Justice O'Connor and the three dissenters – concluded that a Title VII plaintiff must have direct evidence to shift the burden of persuasion. Therefore, the holding of *Price Waterhouse*, properly construed, is that plaintiffs can prove their case by direct or circumstantial evidence.

This holding is consistent with Court precedent allowing circumstantial evidence in mixed-motive non-Title VII cases. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (using both "circumstantial and direct evidence" in an equal protection case involving race discrimination); *Hunter v. Underwood*, 471 U.S. 222 (1985) (same). This result is the same even after *Price Waterhouse*. *See Bd. of County Comm'rs*, *Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996) (applying the *Mt. Healthy* framework in a First Amendment claim).

B. *Desert Palace* Provides Important Guidance.

Desert Palace is the Court's most recent statement on this question; it deserves significant attention in determining whether or not direct evidence is

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611, 615 n.3 (8th Cir. 1999) (defining the Eighth Circuit's "direct evidence" requirement in mixed-motive claims under the *Mt. Healthy* framework as "evidence that directly reflects the use of an illegitimate criterion in the challenged decision") (citation omitted).

required for a mixed-motive instruction in non-Title VII cases. While the Eighth Circuit correctly notes that the Supreme Court "declined to address which opinion in *Price Waterhouse* was controlling," the Eighth Circuit then mistakenly asserts that Justice O'Connor's concurrence should continue to be controlling where applicable. *Gross*, 526 F.3d at 362.

The Eighth Circuit suggests that the ruling in *Desert Palace* turned on the addition of 42 U.S.C. § 2000e-2(m) to Title VII, and thus that *Desert Palace* has no bearing on interpretation of the ADEA. *Gross*, 526 F.3d at 362. This is incorrect. Neither § 2(m) nor any other part of the Civil Rights Act of 1991 makes any reference to the direct evidence standard of *Price Waterhouse*. The substantive changes made by § 2(m) and 42 U.S.C. § 2000e-5(g)(2)(B) were to confirm that an unlawful practice was established when a plaintiff demonstrated that a protected characteristic was a motivating factor for an employment practice, and that the employer had a limited affirmative defense in such circumstances which did not absolve it of liability. This changed the *Price Waterhouse* rule which had permitted employers a complete defense, rather than merely limiting the relief available. *Compare Price Waterhouse*, 490 U.S. at 245-46 *with* § 2000e-5(g)(2)(B).

Indeed, the legislative history of the 1991 Civil Rights Act makes clear that Congress did not read *Price Waterhouse* to establish any sort of a direct evidence requirement, and thus had no need to take any action to eliminate such a requirement. The

legislative history demonstrates that Congress considered there to be the three significant holdings of *Price Waterhouse*: (1) sex-stereotyping evidence is sufficient to prove gender discrimination; (2) the defendant need not prove a "same action defense" by clear and convincing evidence; and (3) where such a defense is proved, the plaintiff receives no relief. H.R. Rep. No. 102-40(I), pt. 1, at 45 & n.39 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 583. Conspicuously absent is any mention of a direct evidence holding, indicating that Congress did not believe *Price Waterhouse* required the plaintiff to produce direct evidence of discrimination. Thus, the particular changes made by the Civil Rights Act of 1991 cannot be the basis for this Court's ruling in *Desert Palace* that direct evidence was not required.

These statutory changes to Title VII were completely silent as to the evidentiary standard for establishing a "motivating factor." Significantly, the Court in *Desert Palace* noted that silence as to any heightened evidentiary standard weighed in favor of finding that no such standard applied. *Desert Palace*, 539 U.S. at 99. The ADEA is equally silent on the evidentiary standard, and thus *Desert Palace* provides useful guidance on this issue.

II. *Desert Palace* Rejected A Requirement Of Direct Evidence To Shift The Burden Of Proof In Mixed-Motive Cases.

A. Neither Congress Nor The Supreme Court Distinguishes Between Direct And Circumstantial Evidence For The Purpose Of Proving Violations Of Discrimination Laws.

The Court's opinion in *Desert Palace* recognized that Congress is explicit when it wants to impose a higher standard of evidence for establishing a claim. *Desert Palace*, 539 U.S. at 99. Commenting on the absence of statutory text requiring a more rigorous standard, Justice Thomas observed that

> [s]ilence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases."

Desert Palace, 539 U.S. at 99 (*citing Price Waterhouse*, 490 U.S. at 253 (plurality opinion) and *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). Similarly, the ADEA specifies no heightened evidentiary standard for proof of intentional discrimination in a mixed-motive case.

The citations in *Desert Palace* to Justice Brennan's plurality opinion in *Price Waterhouse* and to *Aikens*, reaffirms that "the plaintiff may prove his case by direct or circumstantial evidence" and that the "trier of fact should consider all the evidence,

giving it whatever weight and credence it deserves." *Aikens*, 460 U.S. at 714 n.3.[7] This language from *Desert Palace* also indicates that Justice O'Connor's view in *Price Waterhouse* – that direct evidence is required for the burden to shift in a mixed-motive case – does not control.

Recognizing that the distinction between direct and other types of evidence is sometimes indecipherable, the Court in *Desert Palace* discussed the value, historical acceptance, and the practical necessity of using circumstantial evidence in employment discrimination cases as well as in other types of civil and criminal cases. To illustrate the utility of circumstantial evidence, the Court cited *Reeves v. Sanderson Plumbing Products*, *Inc.*, 530 U.S. 133 (2000), an ADEA case that permitted a jury to base a finding of intentional discrimination, in part, on inferences that the employer's stated reason for discharge was false. *Desert Palace*, 539 U.S. at 100.

The Court's citation to *Reeves* is instructive. If circumstantial evidence can be used to determine the ultimate issue, namely "whether the employer intentionally discriminated," there is no reason to adopt a rule that direct evidence must be presented to shift the burden of proof in a mixed-motive case. *Reeves*, 530 U.S. at 146.

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[7] *Aikens* emphasized that "trial courts or reviewing courts should [not] treat discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

The importance of adhering to "conventional rule[s] of civil litigation" applies with equal weight in light of the ADEA's statutory silence on any heightened evidence standard in mixed-motive cases. *See*, *e.g.*, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992) (stating that a direct evidence requirement "runs afoul of more general evidentiary principles") (*quoting Price Waterhouse*, 490 U.S. at 253). *Desert Palace* rejects the distinction drawn by the lower court here between direct and circumstantial evidence. This Court should again reject this artificial distinction under the ADEA.

B. *Desert Palace* Acknowledges That Circumstantial Evidence Can Be As Probative As Direct Evidence.

The Court in *Desert Palace* emphasized the value of both direct and circumstantial evidence. "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace*, 539 U.S. at 100 (*quoting Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

> [The Court] ha[s] often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products*, *Inc.*, 530 U.S. 133 (2000), [the Court] recognized that evidence that a defendant's explanation for an

> employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination."

Desert Palace, 539 U.S. at 99-100 (*quoting Reeves*, 530 U.S. at 147). If, as *Desert Palace* posits, circumstantial evidence is sometimes better suited than direct evidence to provide the most thorough account of the truth, a "direct evidence-only" rule can only operate to hamper courts in search of that truth. This is especially true when "the direct evidence of a positive eyewitness can be quite undone by contradictory circumstantial evidence."[8]

C. The ADEA Contains No Heightened Evidentiary Standards For Mixed-Motive Cases.

The Court routinely interprets similar statutory language of Title VII and the ADEA in a comparable manner. *See*, *e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 233-34 (2005) ("We have consistently applied that presumption to language in the ADEA that was derived *in haec verba* from Title VII.") (citation

[8] Hon. Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503, 521-22 (2008) (addressing the "problem with the direct and indirect evidence dichotomy" under the *McDonnell Douglas* framework).

omitted). Circuit courts have also applied similar statutory principles when analyzing the ADEA.[9]

Given its analysis of Title VII in *Desert Palace*, the Court provides the framework to examine the ADEA's silence regarding a heightened evidence standard. In *Desert Palace*, the Court noted that, "[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." 539 U.S. at 99. The Court recognized that Congress is unequivocal when it intends to require a certain type of evidence. *Cf*. *id.* at 99 (listing situations where Congress explicitly requires a "clear and convincing evidence" standard). A lower court, applying the Court's reasoning in *Desert Palace*, has held that direct evidence of discrimination is not required to shift the burden of proof in an ADEA mixed-motives case.[10] It is appropriate for the Court to extend *Desert Palace* to the ADEA.

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[9] *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 698 (3d Cir. 1995) (noting that because the prohibition against age discrimination contained in the ADEA is similar in text, tone, and purpose to the prohibition against discrimination contained in Title VII, courts routinely look to law developed under Title VII to guide an inquiry under the ADEA); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1164 (8th Cir. 1985) (applying Title VII evidentiary burdens to the ADEA, because the ADEA grows out of Title VII and much of the language of the ADEA parallels that of Title VII).

[10] *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (footnotes omitted) ("Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of

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III. A Direct Evidence Requirement Creates An Impractical And Unworkable Rule For Courts To Apply.

Justice O'Connor's use of "direct" evidence has produced inconsistent standards in the circuit courts. Justice O'Connor stated that to obtain a mixed-motive instruction in a Title VII case, the plaintiff must provide "direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring). However, Justice O'Connor provided courts with little guidance as to the meaning of the direct evidence requirement other than offering that it is not "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse*, 490 U.S. at 277.

Indeed, the evidence Justice O'Connor deemed "direct" evidence in *Price Waterhouse*, does not constitute direct evidence as formally defined. *Price Waterhouse*, 490 U.S. at 277. Black's Law Dictionary defines "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 596 (8th ed. 2004). In *Price Waterhouse*, the plaintiff did not put forth evidence

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heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim.").

meeting this definition. As the United States Court of Appeals for the District of Columbia observed:

> The decisionmakers who denied Ann Hopkins a partnership never admitted or stated expressly that the action was based on her gender. Rather, the Court cites gender-related, stereotyping evaluations and comments made by some partners as suggesting to the factfinder that gender played a role in the denial.

Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997) (citations omitted).

By accepting such evidence as "direct" evidence, "Justice O'Connor relie[d] on circumstantial evidence . . . to show that the employer's discriminatory motive played a substantial role in the disputed employment decision." *Id.* In doing so, Justice O'Connor made a causal inference – which a strict definition of direct evidence would prohibit.

In his dissent in *Price Waterhouse*, Justice Kennedy predicted that under the burden shifting framework Justice O'Connor proposed: "[t]rial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift" and "to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." *Price Waterhouse*, 490 U.S. at 291. This prediction proved to be accurate. Courts have been mired in a hopeless and unproductive endeavor to distinguish between direct and

circumstantial evidence. Courts and commentators have written volumes attempting to define direct evidence and have arrived at a variety of conflicting definitions.[11]

The Second Circuit has observed, "the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). Other circuit courts have also recognized the difficulty in determining what constitutes direct evidence. *See Dominguez-Cruz v. Suttle Caribe*, *Inc.*, 202 F.3d 424, 429 (1st Cir. 2000) ("[i]t is often quite difficult to draw the line between what is 'direct evidence' and what is 'circumstantial evidence'") (*citing Fernandes v. Costa Bros. Masonry*, *Inc.*, 199 F.3d 572, 582-83 (1st Cir. 1999); *Bartlik v. Dep't of Labor*, 73 F.3d 100, 103 n.5 (6th Cir. 1996) (noting "[t]he distinction between direct and circumstantial evidence in employment discrimination cases is not self-evident").

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[11] *See* Michael Zubrensky, *Despite the Smoke There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 Stan. L. Rev. 959, 970-80 (1994); Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement*, *Not a Revolution*, 2 Stan. J. Civ. Rts. & Civ. Liberties 1, 25-27 (2005); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 Lab. Law. 371 (1997); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995).

The difficulty circuit courts have had in developing a direct evidence standard since *Price Waterhouse* is illustrated by the divergent approaches the courts have adopted. At least three distinct approaches have emerged. Under one definition of direct evidence – what has been termed the classical approach – evidence is only viewed as direct evidence where it "proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings*, 188 F.3d 1204, 1207 (10th Cir. 1999). Under this standard, the statement "[f]ucking women, I hate having fucking women in the office" by a supervisor in the context of a performance problem related to the plaintiff was found not to constitute direct evidence, and therefore insufficient to shift the burden to the employer. *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993).

A more lenient standard adopted by several other circuits allows limited inferences to be made by the trier of fact. Under this standard "'direct evidence' means evidence sufficient to allow the jury to find that 'the decision makers placed substantial negative reliance on [the plaintiff's age] in reaching their decision.'" *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002) (citation omitted). Using this standard the Third Circuit found the statement made by a non-decision maker that he wanted to "fire [the plaintiff] and replace her with an exceptionally endowed, younger woman . . . fraught with permissible inferences that he desired to fire [the plaintiff] at least in

part because of her age." *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 513-14 (3d Cir. 2004).

A third standard defines direct evidence in a manner that expressly includes circumstantial evidence. Courts using this standard have interpreted direct evidence as consisting of "'any sufficiently probative direct or indirect evidence' that unlawful discrimination was a substantial factor in the employment decision." *Thomas*, 131 F.3d at 204 (*quoting White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991). Indeed, courts have classified statements unconnected to the contested employment action as direct evidence and inferred discriminatory action from them.[12]

Returning to the comment which the Tenth Circuit in *Heim* found not to constitute direct evidence, illustrates the confusion and inconsistency that is created by a direct evidence requirement. Under the standards adopted in the Third Circuit it is not clear whether or not this would constitute direct evidence for burden shifting purposes. There is no doubt however that the parties would spend considerable judicial time and resources arguing these imprecise distinctions in trying to categorize this piece of evidence. Under the third standard

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[12] *See Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 174 (2d Cir. 1992) (holding statements that older people "should have retired years ago" and "should have stayed retired" constitute direct evidence).

adopted by some courts it would appear that this evidence would constitute direct evidence.

Regardless of which model is used, requiring direct evidence for the ADEA will also complicate the analysis for claims based upon more than one protected class. For example, suppose that a supervisor made the statement, "I really have had problems with old black folks like you but I don't think you are qualified anyhow."[13] In light of *Desert Palace*, the court does not need to decide whether this constitutes direct evidence in the context of Title VII. Rather the court will look at all the evidence, regardless of how it is categorized in deciding whether a mixed-motive instruction is proper. If, however, the ADEA is interpreted to require direct evidence, the court will first have to try to "make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." *Price Waterhouse*, 490 U.S. at 291. If the court finds the statement not to be direct evidence it would lead to inconsistent application of anti-discrimination laws. The statement above may receive a mixed-motive instruction in the Title VII claim but not on the ADEA claim.

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[13] While this is posed as a hypothetical, these types of claims exist. *Cf. Burton v. Town of Littleton*, 426 F.3d 9, 13 (1st Cir. 2005) (plaintiff alleged that employer "call[ed] her an 'old Jew bitch'" during a phone conversation – the claim was ultimately dismissed based on insufficient evidence).

IV. A Direct Evidence Requirement Undermines The Congressional Goals Of The Anti-Discrimination Laws.

In passing civil rights legislation, Congress's goal has been to eliminate all forms of discrimination in the workplace. With the Civil Rights Act of 1991, Congress reiterated that "[i]t is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest." H.R. Rep. No. 102-40(I), at 46-47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584-85. With this and other civil rights legislation, Congress has been unequivocal about its intent to eliminate discrimination in the workplace. The ADEA is one of these statutes. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (referring to the ADEA as a "national employment policy").

In the employment context, the Court has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716 (1983). Moreover, "[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare." *Fernandes v. Costa Bros. Masonry*, *Inc.*, 199 F.3d 572, 580 (1st Cir. 1999). Requiring direct evidence imposes a heavy and arbitrary burden on employees seeking a mixed-motive jury instruction. Because direct evidence is extremely rare, most plaintiffs will be unable to obtain a mixed-motive instruction.

Similarly, in applying statutes that reflect an important national policy, like the ADEA,[14] courts should not "make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof.'" *Aikens*, 460 U.S. at 716 (*citing Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)).

By imposing this often insurmountable burden on employees, a direct evidence requirement lessens the deterrent effect of employment discrimination statutes, by rendering them nearly inapplicable to many discriminatory decisions. Further, it would allow some employers to evade responsibility for their actions even though one of the protected classifications, here age, actually motivated the adverse employment action. Courts serve society best when they base their decisions on the strongest evidence regardless of whether that evidence is designated under various amorphous definitions as either direct or circumstantial.

[14] *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (referring to the ADEA as a "national employment policy").

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Eighth Circuit should be REVERSED.

Respectfully submitted,

MICHAEL L. FOREMAN, DIRECTOR
Counsel of Record
CIVIL RIGHTS APPELLATE CLINIC
DICKINSON SCHOOL OF LAW
THE PENNSYLVANIA STATE UNIVERSITY
Lewis Katz Building, 121B
University Park, PA 16802

JOHN BRITTAIN
AUDREY WIGGINS
SARAH CRAWFORD
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005

JOSEPH M. SELLERS
CHRISTINE E. WEBBER
JENNY R. YANG
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW
Suite 500 West Tower
Washington, DC 20005

VINCENT A. ENG
AIMEE J. BALDILLO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036

JOHN TRASVINA
NINA PERALES
ELISE SANDRA SHORE
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
634 S. Spring Street
Los Angeles, CA 90014

JUDITH L. LICHTMAN
SHARYN TEJANI
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Ave., NW
Suite 650
Washington, DC 20009

DINA LASSOW
JOCELYN SAMUELS
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW
Suite 800
Washington, DC 20036

Counsel for Amici Curiae