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No. _____

In the
Supreme Court of the United States

DESERT PALACE, INC., DBA CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*?

2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment, Inc., which is a publicly traded corporation. Park Place Entertainment, Inc. is unaware of any publicly traded company owning 10 percent or more of its stock.

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OPINIONS BELOW

The August 2, 2002, *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F.3d 838 (9th Cir. 2002) and is reprinted at App. 1a - 53a. The October 2, 2001, Ninth Circuit panel opinion is reported at 268 F.3d 882 (9th Cir. 2001) and is reprinted at App. 54a - 69a. The January 28, 1999, order of the United States District Court for the District of Nevada is reprinted at App. 70a - 87a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its *en banc* opinion on August 2, 2002. This petition for certiorari is timely in that Petitioner has filed it within 90 days of August 2, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. § 2000e *et. seq.* Specifically, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) and 2000e-5(g)(2)(B) are the relevant statutes involved in this Petition.

42 U.S.C. § 2000e-2(a)(1) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating

factor, the court —

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

I. Overview of the Case

The Ninth Circuit panel held that the district court committed reversible error by giving a mixed-motive jury instruction on Title VII claims in the absence of direct evidence of discriminatory animus. A 7-4 majority of the *en banc* Ninth Circuit reversed and ruled that direct evidence is not required to trigger a mixed-motive analysis in cases brought under Title VII.

The *en banc* majority holding directly conflicts with the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) on an important question of federal law and, as noted by the *en banc* dissent, places the Ninth Circuit "in conflict with almost all others." App. 51a.

II. Background of the Case

Catharina Costa was hired by Petitioner Desert Palace, Inc. dba Caesars Palace Hotel Casino ("Caesars") in 1987, and her employment was terminated in 1994 after a physical/verbal confrontation with a co-worker. App. 51a - 52a. Costa had a number of prior warnings and suspensions because of her inability to get along with others. *Id.* Costa was represented by the Teamsters Union and took her termination to arbitration through the Union. *Id.* After a hearing, the arbitrator ruled that Costa was terminated for just cause and denied the grievance. *Id.*

Costa filed this Title VII case alleging gender discrimination in connection with the conditions of her employment and her termination.[1] Over the objection of counsel for Caesars, the district court gave the jury the following "mixed-motive" instruction.

> **You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex** and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons,

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[1]The district court had federal question jurisdiction over this Title VII case under 28 U.S.C. § 1331.

> you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

App. 33a - 34a. (Emphasis added.)

No doubt guided by the first sentence of the mixed-motive instruction, the jury answered the first question on the verdict form as follows:

> Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment.
>
> Yes _X_ No ____

App. 88a.

III. Proceedings Below

At trial the district court overruled Caesars' objection to giving the mixed-motive jury instruction and subsequently denied Caesars' post trial motion for judgment as a matter of law. App. 57a - 58a, 86a. On appeal, the Ninth Circuit panel held that the district court erred in giving the mixed-motive jury instruction that impermissibly shifted the burden of proof on causation to Caesars. Citing *Price Waterhouse* and numerous circuit court decisions addressing the issue, the panel concluded that a mixed-motive jury instruction is only proper if a Title VII plaintiff

produces "direct and substantial evidence of discriminatory animus." App. 59a - 65a. After reviewing the evidence presented by Costa, the panel concluded that Costa did not present sufficient "direct and substantial" evidence to allow the mixed-motive jury instruction. *Id.*[2]

The Ninth Circuit granted Costa's petition for a rehearing *en banc*. In a 7-4 decision, the *en banc* majority overruled the panel and held that the district court properly gave the mixed-motive jury instruction and shifted the burden of proof to Caesars. The *en banc* majority did not hold that Costa presented direct evidence of discrimination sufficient to justify mixed-motive treatment of her case. Rather, the *en banc* majority held that direct evidence of discrimination is simply not required in Title VII cases to trigger application of the mixed-motive analysis. That holding is in direct conflict with the Court's *Price Waterhouse* decision, and it places the Ninth Circuit in conflict with all other circuit courts.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important

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[2]The panel vacated the judgment with respect to the gender discrimination claim and reversed the district court's refusal to enter judgment as a matter of law on the termination claim. App. 66a, 69a.

question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ."

All of these considerations are present in this case. Employment discrimination claims filed in federal court constitute the second most numerous type of federal claim filed.[3] Evidentiary and proof requirements under Title VII raise important questions of federal law. The *en banc* majority's holding that direct evidence of discrimination is not required to trigger a mixed-motive analysis is in direct conflict with the Court's holding in *Price Waterhouse*. In fact, the *en banc* majority considers Justice O'Connor's direct evidence requirement not as the holding of the Court, but rather as a mere "passing reference." App. 8a, 17a. The *en banc* majority's holding is also in direct conflict with decisions from other circuit courts that interpret *Price Waterhouse*. The *en banc* majority's opinion allowing the burden of proof in Title

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[3]In 2001, there were 21,157 employment discrimination cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2001 *Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, ⟨ http. // www.uscourts.gov / judbususc / judbus.html ⟩. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

VII cases to shift to the employer without any heightened evidentiary showing is such a departure from the usual course of judicial proceedings that the Court should exercise its supervisory powers. Finally, review is warranted to provide guidance to the lower courts on the appropriate standards to follow in making direct evidence determinations in mixed-motive cases brought under Title VII.

The Court's review is warranted for all of these reasons.

I. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with the Court's *Price Waterhouse* Decision

Disparate treatment claims under Title VII can be proven by direct or circumstantial evidence. Direct evidence of intentional discrimination is "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). *See also Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("direct evidence is relatively rare"). The Court established a framework for analyzing the typical circumstantial evidence case brought under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and later elaborated in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

The *McDonnell Douglas/Burdine* framework is a three step, burden-shifting method to prove intentional discrimination despite the unavailability of direct evidence. The first step requires the plaintiff to establish a prima facie case of

discrimination. Once a prima facie case is established, the burden of production, but not proof, "shifts to the employer to articulate some legitimate, nondiscriminatory reason for [the adverse action]." *McDonnell Douglas*, 411 U.S. at 802. If the employer makes such a showing, the burden shifts back to the plaintiff to prove that the articulated reason is pretextual. *Burdine*, 450 U.S. at 253-55. If the plaintiff cannot prove pretext, the employer prevails. *McDonnell Douglas*, 411 U.S. at 807. Throughout the *McDonnell Douglas/Burdine* procedure the ultimate burden of proof remains at all times with the plaintiff, *id.* at 256, and it is never the employer's burden to prove the absence of discriminatory motive. *Bd. of Tr. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1978).

In 1989, the Court in *Price Waterhouse* articulated a "mixed-motive" analysis for Title VII cases that in narrow circumstances shifts the burden of persuasion on causation to the employer. The *Price Waterhouse* plurality opinion[4] stated that when mixed-motives drive an employment decision, the *McDonnell Douglas/Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47. If the plaintiff proves that an unlawful criterion "played a motivating part in an employment decision," the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent

[4]Justices Brennan, Marshall, Blackmon and Stevens.

the unlawful criterion. *Id.* at 258.[5] The plurality decision did not articulate what evidence is necessary to shift the burden of persuasion to the employer in mixed-motive cases. The *Price Waterhouse* dissent[6] asserted that the *McDonnell Douglas/Burdine* framework fully addressed the different measures through which a plaintiff could prove illegal discrimination, without shifting the burden of persuasion to the employer in a mixed-motive case. *Id.* at 279-80, 288.

Justice O'Connor's deciding concurrence agreed with the plurality's burden-shifting approach, but clarified the type of evidence necessary to trigger the mixed-motive analysis. *Id.* at 261-79. Justice O'Connor wrote separately in part to "express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262. Specifically, Justice O'Connor stated that a mixed-motive burden shifting analysis is triggered only by "**direct evidence** that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added). The concurring opinion of Justice O'Connor is the holding of the

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[5]The plurality further stated that when an employer carries its burden of proof, it avoids liability outright. *Id.* This part of the opinion was changed by the 1991 amendments to Title VII, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments allow limited remedies even when the employer succeeds in proving the "same decision" defense. As demonstrated below, these amendments were silent on the portion of *Price Waterhouse* that addressed the nature of the evidence necessary to trigger the mixed-motive analysis.

[6]Justices Kennedy, Rehnquist and Scalia.

Court because it was the narrowest ground supporting the judgment. *See* Part III A, below.

The Ninth Circuit panel opinion noted that it had not previously addressed the evidentiary burden on a plaintiff in a Title VII mixed-motive case. App. 60a. The panel properly concluded that Justice O'Connor's direct evidence requirement was controlling when it decided whether to apply the mixed-motive analysis. App. 65a. After analyzing Costa's evidence, the panel concluded that Costa did not present direct evidence of discrimination. App. 63a - 65a. Consequently, the panel held that the district court erred in giving the mixed-motive jury instruction and vacated the lower court judgment . *Id.*

In a 7-4 decision, the *en banc* Ninth Circuit held that direct evidence is not required to trigger the mixed-motive analysis and that no heightened evidentiary burden is necessary to trigger such an analysis. App. 17a - 18a. The *en banc* majority opinion directly conflicts with the Court's holding in *Price Waterhouse.* The *en banc* majority concluded that Justice O'Connor's direct evidence requirement was a mere "passing reference," and that courts that interpret *Price Waterhouse* as requiring such evidence to trigger a mixed-motive analysis are simply wrong. App. 17a - 24a. For this reason alone, the Court should grant this Petition.

The *en banc* majority opinion not only conflicts with the Court's *Price*

Waterhouse holding, by but failing to impose the heightened evidentiary requirement as mandated by *Price Waterhouse*, it effectively circumvents the *McDonnell Douglas/Burdine* analysis. Without the *Price Waterhouse* evidentiary restraint on when Title VII plaintiffs may invoke the mixed-motives analysis, every plaintiff will opt for that analysis in order to shift the burden of proof on causation to the employer. "It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis." *Fernandes*, 199 F.3d at 580.

Improperly shifting the burden of proof to Caesars is exactly what the *en banc* majority did in this case. The majority recognized that: "In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different." App. 34a. Caesars suggests that this is the scenario in virtually all Title VII discharge and disciplinary cases. Following the *en banc* majority's holding, which ignores the *Price Waterhouse* heightened evidentiary burden, would result in an impermissible shift of the burden of proof on causation to the employer in virtually all Title VII cases. Such a result is contrary to over 25 years of jurisprudence under Title VII since *McDonnell Douglas*.

II. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with Circuit Court Decisions on This Important Aspect of Federal Law

The *en banc* majority's opinion that direct evidence is not required to trigger a mixed-motive analysis creates a conflict between the Ninth Circuit and all other circuit courts that have considered the question. As the *en banc* dissenting opinion correctly noted:

> The majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990).

App. 51a.

Recent decisions from the circuit courts further confirm this conflict. *See Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (direct evidence is required to trigger the mixed-motive analysis set forth in *Price Waterhouse*); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 163 (2d Cir. 2001)

("where a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendant's proffered motives as pretextual, a jury must be instructed, if requested, to apply the *Price Waterhouse* burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff's claims of pretext"); *Fakete v. Aetna, Inc.*, 2002 U.S. App. LEXIS 22156, at *8 (3rd Cir. 2002) ("Under *Price Waterhouse*, when an ADEA plaintiff alleging unlawful termination presents 'direct evidence' that his age was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if it had not considered his age."); *Wagner v. Dillard Dep't. Stores, Inc.*, 2001 WL 967495, at *5 (4th Cir. 2001) ("In order to merit the more favorable mixed-motive jury instruction, a plaintiff must present 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion,'" *quoting Price Waterhouse*, 490 U.S. at 277); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 (5th Cir. 1999) (failing to reach the issue of defendant's mixed-motive defense because plaintiff failed to provide "direct evidence" of discrimination); *Laderach v. U-Haul of Northwestern Ohio, et al.*, 207 F.3d 825, 829 (6th Cir. 2000) ("Once there is direct evidence, the burden of persuasion shifts to the defendant . . ."); *Maldonado v. U.S. Bank and Manufacturers Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (court explains the difference

between *Price Waterhouse* direct evidence case and *McDonnell Douglas* circumstantial evidence case); *Mohr v. Dustrol, Inc.*, 2002 U.S. App. LEXIS 20652, at **7-8 (8th Cir. 2002) (holding that if a plaintiff "can produce direct evidence that an illegal criterion was a motivating factor in the disputed employment decision . . . the plaintiff is relieved of the ultimate burden of persuasion and the so-called 'mixed-motive' analysis is applied"); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 (10th Cir. 1999) ("Generally, a mixed-motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998) (The plaintiff did not present sufficient direct evidence to trigger the *Price Waterhouse* burden-shifting analysis.).

The conflict in the circuits created by the Ninth Circuit *en banc* majority opinion further warrants review by the Court.

III. The Reasoning of the *En Banc* Majority for Refusing to Follow *Price Waterhouse* and Other Circuit Courts Is Erroneous

As demonstrated above, the *en banc* majority held that direct evidence is not necessary to trigger the mixed-motive analysis in Title VII cases. The majority concluded that the direct evidence requirement was a mere "passing reference" and not the holding of the Court. App. 8a, 17a. The majority felt it "unnecessary" to get

"mired in the debate over whether Justice O'Connor's opinion was controlling or not" because, in the majority's view, the 1991 amendments to Title VII "wholly abrogated" the premise for Justice O'Connor's direct evidence "comment." App. 17a. Finally, the majority characterized other circuit court decisions interpreting and applying the direct evidence requirement as a "quagmire," "this morass," "chaos" and "a veiled excuse to substitute their own judgment for that of a jury." App. 18a, 21a, 23a - 24a. Rather than "get bogged down in this debate" and decide whether Costa presented direct evidence, the *en banc* majority elected to simply ignore the *Price Waterhouse* direct evidence requirement altogether. App. 18a.

None of the reasons articulated by the majority for refusing to follow the *Price Waterhouse* direct evidence requirement is valid. The majority's refusal further warrants the granting of this Petition and the exercise of the Court's supervisory power.

A. Justice O'Connor's concurring opinion in *Price Waterhouse* is the narrowest ground for the decision and is therefore controlling; the direct evidence requirement is not a mere "passing reference," but rather the holding of the Court

The concurring opinion of Justice O'Connor in *Price Waterhouse* is the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of

five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .") Applying the principle of *Marks* to *Price Waterhouse*, Justice O'Connor's concurrence that requires direct evidence as the evidentiary prerequisite to a mixed-motive analysis is the narrowest ground supporting the judgment of the Court. *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 573, 580 (1st Cir. 1999); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2nd Cir. 1992), *cert. denied*, 506 U.S. 826 (1992).[7]

The *en banc* majority's view that the direct evidence requirement is a mere "passing reference" is erroneous and contrary to Supreme Court authority.

B. The 1991 Amendments to Title VII did not abrogate the *Price Waterhouse* direct evidence requirement

The *en banc* majority's conclusion that the 1991 amendments to Title VII somehow "abrogated" Justice O'Connor's direct evidence requirement is simply wrong. The 1991 amendments only overruled *Price Waterhouse* to the extent that before the amendment an employer who proved the "same decision" defense in a mixed-motive case could avoid liability outright. 42 U.S.C. § 2000e-2(m) and §

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[7]The *Price Waterhouse* dissent agreed that Justice O'Connor's opinion was the holding of the Court. The dissent read the holding in *Price Waterhouse* as shifting the burden to the employer only "in a limited number of cases" where the "plaintiff proves by **direct evidence** that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added).

2000e-5(g)(2)(B).[8] These statutory amendments, however, were silent to that portion of the *Price Waterhouse* holding that direct evidence is required to trigger a mixed-motive case in the first place. *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997) ("[T]he House Committee report makes it clear that section 107 was enacted solely to overrule the part of *Price Waterhouse* that allowed an employer to avoid liability by prevailing on its dual motivation defense."). *See also Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3rd Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

Congress did not overrule or reject the direct evidence requirement in mixed-motive cases as demonstrated above. All circuit courts after the 1991 amendments still require direct evidence to trigger the mixed-motive analysis. The 1991 amendments did not "abrogate" the direct evidence requirement in *Price Waterhouse* as claimed by the *en banc* majority.

IV. Review Is Also Warranted to Resolve the Confusion Among the Lower Courts Regarding the Appropriate Standards to Follow in Making a Direct Evidence Determination in Mixed-Motive Cases

Another reason cited by the *en banc* majority for rejecting the *Price Waterhouse* direct evidence requirement is the "chaos" created by the efforts of

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[8] After the 1991 amendments an employer who proves the "same decision" defense limits but does not avoid liability altogether.

circuit courts to define and apply the direct evidence requirement. App. 21a. The *en banc* majority cites Judge Selya's description of the various approaches used by the circuit courts to apply the direct evidence requirement that is set out in *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999). App. 19a - 21a. *Fernandes* argues that application of the direct evidence requirement "has created a patchwork of intra-circuit conflicts" and then places the circuit courts within these various camps. *Id.* at 582-83. *Fernandes* categorizes the circuit court approaches on this issue as follows: (1) the "classic" approach, (2) the "animus plus" approach, and (3) the "animus" standard. *Id.* at 579-583.

Circuit courts are using different approaches to apply the *Price Waterhouse* direct evidence requirement, but they are not ignoring the requirement. The "chaos" caused by these different approaches does not provide cover for the *en banc* majority simply to ignore the requirement and shift the burden of proof improperly to the employer in Title VII cases. This is not a case where the *en banc* majority is simply incorrect in its application of the *Price Waterhouse* evidentiary requirement. Rather, the *en banc* majority has decided simply to ignore the requirement.

The "chaos" caused by the various approaches used by the circuit courts to apply the direct evidence requirement does not allow the *en banc* majority to ignore the requirement, but it does provide yet another reason for granting this Petition.

With this Petition, Caesars asks the Court to conclude that the Ninth Circuit *en banc* majority erroneously held that direct evidence is not required to trigger a mixed-motive analysis in Title VII cases. Caesars also asks the Court to use this case to provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis. Such guidance will enable lower courts to discern what evidence is required to trigger the mixed-motive analysis and will put an end to the "chaos" cited by the *en banc* majority and the *Fernandes* case. The *Price Waterhouse* dissent predicted that the holding of the Court that day was "certain to result in confusion." *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). It has. What no one could have predicted was that a lower court would simply ignore the *Price Waterhouse* holding.

CONCLUSION

The petition for a writ of certiorari should be granted. The *en banc* majority opinion conflicts with the holding of the Court in *Price Waterhouse* and with other circuit court decisions. The Court should reverse the *en banc* majority for these reasons. Caesars further requests that the Court grant this Petition and provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis in Title VII cases.

Respectfully submitted.

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