No. 08-441

IN THE
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JILL R. GAULDING
Counsel of Record
SCHAEFER LAW FIRM, LLC
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 341-1292

LISA C. STRATTON
WORKERS' RIGHTS CLINIC
UNIVERSITY OF MINNESOTA
LAW SCHOOL
190 Mondale Hall
229 - 19th Ave. South
Minneapolis, MN 55455
(612) 625-5515

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to U.S. Supreme Court Rule 37.2(b), the **National Employment Lawyers Association** moves this Court for leave to file a brief *amicus curiae* in support of Petitioner. Petitioner Jack Gross, through counsel, gave his consent. Respondent FBL Financial Services, Inc., after timely notice to its counsel of the intention of *amicus curiae* to file this brief, indicated that it would not consent.

REASONS FOR GRANTING THE MOTION

NELA members represent thousands of individuals in this country who have suffered unlawful employment discrimination, including age discrimination. (See fuller description at pages 1-2 of the attached brief under "Statement of Interest of *Amicus Curiae*.") NELA is thus uniquely positioned to explain the importance of the issues at bar. NELA's brief will assist the Court in determining whether to grant *certiorari* because it explains the full scope of the issues presented by the petition. Specifically, the brief explains that the question presented here has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule as a prerequisite to obtaining a so-called "mixed-motive" instruction in cases arising across the entire federal statutory landscape, not only under the Age Discrimination in Employment Act, but also under the Family and Medical Leave Act, the Americans with Disabilities Act, and 42 U.S.C. § 1981, as well as under the retaliation provisions of Title VII. But the brief argues further that the Court's resolution of the question presented here will not merely settle lingering questions about lower courts' use of the direct evidence rule. It should also help to clarify an

important corollary question: in the absence of a direct evidence rule, what proof framework (or standard of causation) should courts apply to discrimination cases?

For these reasons, *amicus* respectfully requests that the Court accept and file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

JILL R. GAULDING
Counsel of Record
SCHAEFER LAW FIRM, LLC
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 341-1292

LISA C. STRATTON
WORKERS' RIGHTS CLINIC
UNIVERSITY OF MINNESOTA
LAW SCHOOL
190 Mondale Hall
229 - 19th Ave. South
Minneapolis, MN 55455
(612) 625-5515

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

Counsel for Amicus Curiae

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes

Other Authorities

Cited Authorities

Cited Authorities

Page

Cited Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The **National Employment Lawyers Association (NELA)** is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of the Age Discrimination in Employment Act and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of*

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. Both parties have been given at least 10 days notice of *amicus*'s intention to file.

Nashville & Davidson County (No. 06-1595)*; Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008)*; CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Kentucky River Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008). NELA also filed an *amicus curiae* brief in *Desert Palace v. Costa*, 539 U.S. 90 (2003), the case at the heart of the underlying action here.

SUMMARY OF THE ARGUMENT OF *AMICUS CURIAE*

Petitioner has asked the Court to resolve the question explicitly reserved in *Desert Palace v. Costa*, 539 U.S. 90 (2003), namely, whether plaintiffs must continue to "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case." Pet. for Writ of Cert. at i. The answer to that question (over which the circuit courts are conflicted) has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule in discrimination cases arising across the entire federal statutory landscape.

Amicus curiae the National Employment Lawyers Association (NELA) joins Petitioner in urging the Court to grant *certiorari*, not only to answer this important question regarding the direct evidence rule, but also to answer an important related question: if courts in non-Title VII cases should not continue to use the direct evidence rule to select which standard of causation to apply, how *should* they determine which standard of causation applies?

This brief argues that in the absence of a direct evidence rule, courts face a choice among possible causation standards. Under one possible approach, which might be termed "the uniform approach," courts would use ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute, and then apply that causation standard to every case that arises under that statute. Under another possible approach, which might be termed "the split approach," courts would divide every case that came before them into one of two categories, labeled "single motive" and "mixed motive," based on the court's interpretation of the evidence submitted or on the plaintiff's theory of the case. That categorization would then determine the causation standard to be applied.

Lower courts have been uncertain how to determine the appropriate standard of causation since the Court's decision in *Desert Palace*, and many commentators have described the caselaw as being in "disarray." Courts have historically relied on the "direct evidence" distinction to decide which framework to apply. After *Desert Palace*, most courts have continued to employ a variant of the "split approach," but often use strained and conflicting reasoning to get there – suggesting that in the absence of the direct evidence rule, courts lack an adequate basis on which to determine which proof framework or causation standard to apply. This uncertainty underscores the need for greater clarity in the wake of *Desert Palace*.

As a result, *amicus curiae* NELA, on behalf of its members who litigate these cases every day, and the courts that must decide them, respectfully asks this

Court to grant *certiorari* in this case and resolve the lingering questions regarding the direct evidence rule, while also providing as much guidance as possible on the proper causation standard for discrimination cases, going forward.

ARGUMENT

I. Petitioner Asks the Court to Answer an Important Question Left Unresolved in *Desert Palace v. Costa*, 539 U.S. 90 (2003): Whether Courts in Non-Title VII Discrimination Cases Should Continue to Use the Direct Evidence Rule to Select Between Two Distinct Proof Frameworks

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), this Court was asked to decide whether "direct evidence is . . . required in Title VII cases to trigger the application of the 'mixed motive' analysis set out in *Price Waterhouse v. Hopkins*." Br. for Pet'r, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 742558 at *i. Petitioner now asks the Court to resolve a closely related question, namely, whether, given the Court's reasoning in *Desert Palace*, plaintiffs must continue to "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a *non*-Title VII case." Pet. for Writ of Cert. at i (emphasis added).

Both questions make use of a familiar shorthand. As the Eighth Circuit explained in the decision below, courts in discrimination cases have generally applied one of two proof frameworks, arising under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Gross*

v. FBL Fin. Servs., Inc., 526 F.3d 356, 359-60 (8th Cir. 2008). Courts have decided which of these two frameworks to apply according to the type of evidence submitted by the plaintiff: if the plaintiff submits "direct evidence" (defined by the Eighth Circuit in *Gross* as evidence "showing a specific link between the alleged discriminatory animus and the challenged decision"), then the *Price Waterhouse* or "mixed motive" framework will apply; otherwise, the *McDonnell Douglas* framework will apply. *See Gross* at 359.

While descriptions of the two frameworks vary, courts have assumed that the *Price Waterhouse* framework imposes a lower standard of causation, under which plaintiffs can prove that illegal discrimination occurred if they prove that the protected characteristic was at least "a motivating factor" for the adverse action. *Gross* at 360. The *McDonnell Douglas* framework has been understood by many courts to impose a higher standard of causation, requiring plaintiffs to prove that the discriminatory motive was a "but for" or "determining" cause of the adverse action, *see*, *e.g.*, *Gross* at 360, or even the sole cause of the adverse action, *see*, *e.g.*, *Ginger v. District of Columbia*, 527 F.3d 1340, 1345 (D.C. Cir. 2008).

Thus, the question presented in the instant case might also be phrased, "Should courts in non-Title VII cases continue to use the direct evidence rule to select between the *McDonnell Douglas* and *Price Waterhouse* proof frameworks?" or, more succinctly, "Should courts in non-Title VII cases continue to use the direct evidence rule to select which standard of causation to apply?"

As Petitioner has explained, the Court in *Desert Palace* reserved this question, and the circuit courts are conflicted over it. Some courts, like the Eighth Circuit below, have concluded that the Court's rejection of the direct evidence rule in *Desert Palace* was limited to cases brought under 42 U.S.C. § 2000e(m), a statutory provision added to Title VII by the 1991 Civil Rights Act which expressly mentions the "a motivating factor" causation standard (and contains no mention of a direct evidence requirement). Pet. for Writ of Cert. at 8, 11-12. Other courts have concluded that the reasoning in *Desert Palace* applies more generally, barring any use of the direct evidence rule because the rule is inconsistent with the usual standard of proof in both civil and criminal cases. Pet. for Writ or Cert at 12-15; *see also Desert Palace*, 539 U.S. at 100 (noting that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted").[2]

The question presented here has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule in discrimination cases

---

2. Although the Court did not elaborate on this point in the short *Desert Palace* opinion, its rejection of the direct evidence rule was presumably based, not just on the arbitrariness of any distinction between direct and circumstantial evidence, but also on the arbitrariness of any link between the type of evidence produced (direct or circumstantial) and the number of motives alleged. *See Griffith v. City of Des Moines*, 387 F.3d 733, 742-44 (8th Cir. 2004) (Magnuson, J., concurring) (labeling this link "capricious" and noting, "[t]here is no rational connection between the type of evidence presented by a plaintiff and whether a case involves single or mixed-motives").

arising across the entire federal statutory landscape, not only under the Age Discrimination in Employment Act, but also under the Family and Medical Leave Act, the Americans with Disabilities Act, and 42 U.S.C. § 1981, as well as under the retaliation provisions of Title VII. Pet. for Writ of Cert. at 25. But the Court's resolution of the question presented here will not merely settle lingering questions about lower courts' use of the direct evidence rule. As explained further below, it should also help to clarify an important related question: in the absence of a direct evidence rule, what proof framework (or standard of causation) should courts apply to discrimination cases?

II. The Court's Decision in this Case Will Have Even Broader Implications for Discrimination Law than the Question Presented Might Suggest, Since the Court's Rejection of the Direct Evidence Rule Calls into Question the Continued Existence of Two Distinct Proof Frameworks

Lower courts have been using the direct evidence rule to select between two proof frameworks, arising under *McDonnell Douglas* or *Price Waterhouse*, which have been understood to impose different standards of causation. *Desert Palace* made clear that this was a mistake: at least in Title VII cases, courts are barred from using the direct evidence rule to choose between the frameworks. Petitioner now asks this Court to grant *certiorari* in order to extend the logic of that holding, to bar courts from using the direct evidence rule to analyze discrimination claims under any federal statute. But this begs another question, one which *Desert Palace* also left unresolved: if courts should not use the direct evidence rule to choose between proof frameworks, how should they decide which proof framework to apply?

A. In the Absence of a Direct Evidence Rule, Courts Face A Choice

In traditional terms, the choice faced by courts would be defined by the contrasting labels "*McDonnell Douglas* framework" and "*Price Waterhouse* framework." However, the former term is ambiguous, since courts nominally operating under this framework have actually applied different standards of causation. *Compare Gross*, 526 F.3d at 360 (imposing but for standard) *with Ginger*, 527 F.3d at 1345 (imposing sole cause standard). Moreover, it is not clear, in light of subsequent caselaw, whether it is correct to say that *McDonnell Douglas* created a "proof framework" that conflicts with the framework in *Price Waterhouse*.[3] Given

---

3. *McDonnell Douglas* is usually cited as the source of a "burden-shifting framework" for proof of discrimination. *See, e.g.*, *Gross*, 526 F.3d at 359. But the label is anachronistic. Prior to this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), some lower courts read *McDonnell Douglas* to impose a type of burden shift, by requiring an employer to identify the non-discriminatory reason or reasons for its action, and granting judgment to the plaintiff as a matter of law if he or she could disprove the reason(s) provided by the employer. *See Hicks* at 508-09. In the language of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), some courts read *McDonnell Douglas* to "progressively . . . sharpen the inquiry into the elusive factual question of discrimination." *Burdine* at 256 n.8. But *Hicks* held that this was an over-reading of *McDonnell Douglas*: the plaintiff's disproof of the proffered reason(s) creates only a permissible inference, not a mandatory presumption of discrimination. *Hicks* at 511. Thus, ever since *Hicks*, it has arguably been inaccurate to say that *McDonnell Douglas* is a "burden-shifting framework" or even that it is a

(Cont'd)

this, it is clearer to refer to the choice facing courts, post-*Desert Palace*, as a choice between possible causation standards.

Under one possible approach, which might be termed "the uniform approach," courts would use ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute, and then apply that causation standard to every case that arises under that statute. *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead*, *Whither* McDonnell Douglas*?*, 53 Emory L.J. 1887 (2004) (arguing for "a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard

---

(Cont'd)

proof framework at all. *McDonnell Douglas* merely reinforces a truism regarding the possible inference one could draw from the plaintiff's disproof of the employer's proffered reason(s). The *McDonnell Douglas* opinion actually has nothing to say regarding the proper standard of causation in discrimination cases (indeed, one could say that *Price Waterhouse* was decided exactly because *McDonnell Douglas* and its progeny had left the causation issue open.)

One caveat: it remains true, even after *Hicks*, that *McDonnell Douglas* imposes a burden shift, if the employer remains mute in the face of plaintiff's prima facie case. In that instance, the prima facie case alone would allow judgment for the plaintiff. But this is merely a theoretical possibility; in actuality, defendant employers who remain mute (that is, who do not claim to have had *some* non-discriminatory reason for their actions) are rare to the point of non-existence.

to differentiated rules regarding proof structures"). Under the uniform approach, for example, courts might determine, based on the policy expressed in the 1991 Civil Rights Act, that plaintiffs in Title VII cases should be able to prove that illegal discrimination occurred by proving that a protected characteristic such as race was a motivating factor in the employer's decision to take an adverse action. Courts might determine that other statutes, such as the Age Discrimination in Employment Act, also impose the "a motivating factor" standard, or, alternatively, they might determine, based on their differing language and legislative history, that other federal statutes impose a different causation standard, such as the "but for" standard.

Under another possible approach, which might be termed "the split approach," courts would divide every case that came before them into one of two categories, labeled "single motive" and "mixed motive," based on the court's interpretation of the evidence submitted. Cases labeled "single motive" would, by necessity, make use of a "sole cause" causation standard (since, under the assumption that the employer only had one motive, either a non-discriminatory motive was the sole cause of the adverse action or a discriminatory motive was the sole cause of the adverse action). Cases labeled "mixed motive" would be subject to either the "a motivating factor" causation standard or the higher "but for" standard, depending on the court's reading of the pertinent statute. A variation of the split approach would make the causation standard ("a motivating factor," "but for factor" or "sole cause") dependent on the plaintiff's theory of the case rather than the court's interpretation of the evidence.

B. The Court and the Litigants in *Desert Palace* Recognized that the Elimination of the Direct Evidence Rule Created Uncertainty About the Correct Proof Framework to Apply to Title VII and Other Statutes

The Ninth Circuit recognized in *Desert Palace* that it could not resolve the issues on appeal in that case merely by rejecting the direct evidence rule: it could not merely tell district courts in the Ninth Circuit how *not* to choose the standard of causation for discrimination cases; it had to provide some guidance about how courts *should* choose the standard of causation. While emphasizing that "'single-motive' and 'mixed-motive' cases [are not] fundamentally different categories of cases," *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002), the Ninth Circuit nonetheless adopted the split approach:

> If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of"[4] the prohibited reason. . . .
>
> . . . .

4. By "because of," here, the Ninth Circuit apparently meant to express a sole cause standard, even though the phrase "because of" is itself ambiguous; it requires causation but does

(Cont'd)

> In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action.

Costa, 299 F.3d at 856-57.

Desert Palace sought review from this Court in part because it was concerned that the Ninth Circuit's decision would wrongly collapse the two traditional frameworks, making the "a motivating factor" standard the causation standard for "virtually all Title VII cases." Br. for Pet'r, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 742558 at *30. It warned this Court of this "danger": without the "cabining" effect of the direct evidence rule, "the mixed-motive approach . . . has the potential to swallow whole the traditional *McDonnell Douglas* analysis." *Id.* (internal citation and quotation marks omitted).

(Cont'd)

not specify what level of causation. *See generally* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292 (1982) (explaining the ambiguity of the phrase "because of"). Unfortunately, the respondent in *Desert Palace* demonstrated a similar confusion. *See* Br. for Resp't, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No.02-679, 2003 WL 1786628 at *8 (suggesting that "[p]roof of an illicit motivating factor is sufficient to establish liability (under section 703(m)) without regard to whether the evidence also shows discrimination "because of" that factor (under the original section 703(a))").

In response, Costa explained to this Court that it was not necessary to read in a "direct evidence" requirement into Title VII in order "to avoid any conflict with the method of proof established by *McDonnell Douglas*," since *McDonnell Douglas* merely described one possible method of proving that the employer was motivated, at least in part, by a protected factor:

> Litigation in which a plaintiff relies on *McDonnell Douglas* and disputes involving mixed motives are not two distinct, mutually exclusive types of Title VII cases. Rather, as the Ninth Circuit correctly observed, the *McDonnell Douglas* caselaw and the mixed-motives analysis each address quite distinct issues. *McDonnell Douglas* concerns one manner in which a plaintiff might establish the existence of an unlawful *motive*. A mixed-motives analysis (under either section 703(m) or *Price Waterhouse*), on the other hand, is a method of proof on *causation*, after a plaintiff, by reliance on *McDonnell Douglas* or otherwise, has demonstrated the existence of an impermissible motive.

Br. for Resp't, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No.02-679, 2003 WL 1786628 at *29-*30. In contrast to Petitioner Desert Palace, who argued for the direct evidence rule, and to the Ninth Circuit, which adopted the split approach (distinguishing between "single motive" and "mixed motive" cases), Respondent Costa urged this Court to adopt a uniform approach, under

which all Title VII plaintiffs would face the "a motivating factor" causation standard:

> In all cases the burden of proof as to the existence *vel non* of a discriminatory motive remains on the plaintiff. If a plaintiff demonstrates that an illegitimate consideration was "a motivating factor," that will establish liability. . . .

Id. at 30.

Several of the *amici curiae* briefs submitted to the Court in *Desert Palace* focused on this aspect of the question presented. The Association of Trial Lawyers of America (now the American Association for Justice), for example, argued that "juries should be instructed consistent with the motivating factor standard in all cases" and explained that "[t]he distinction recognized by the Ninth Circuit between single-motive and multiple-motive cases is illusory." *Amicus Curiae* Br. of the Association of Trial Lawyers of America, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 1786625 at *23-*25.

Other *amici* also argued for the uniform approach:

> [The Ninth Circuit] assumes that the trial judge will always be able to decide whether to categorize a particular case as "single motive" or "mixed-motives" *before* submitting it to the jury. Unfortunately, this may not be true. There will be cases where the defendant argues that all of its motives were non-

> discriminatory but, as a second line of defense, contends it would have made the same decision in any event. Where the defendant offers multiple reasons for its actions, the plaintiff may initially argue that *all* of them are pretexts for discrimination. As a fall-back position, the plaintiff may contend that even if some of the defendant's given reasons are factually true, discrimination was at least "a motivating factor" in the employer's actions. Sometimes the plaintiff will frame the case as "single motive," but the defendant will frame it as "mixed-motives." Furthermore, the trier-of-fact may choose not to accept either party's litigating position as reflecting the whole truth.
>
> [Thus] [j]ury instructions must take into account the practical reality that whether a case is actually "single motive" or "mixed-motives" may depend on the jury's resolution of specific disputed facts.

Amici Curiae Br. for the Lawyers' Committee for Civil Rights Under Law, et al., *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 1785777 at 21-22 (internal citations and quotation marks omitted).

In fact, as the *amici* pointed out, the argument in *Desert Palace* over the proper proof framework for Title VII cases reached back to *Price Waterhouse* itself, where the United States, acting as *amicus curiae*, argued in

favor of a uniform approach. *See id.* at 20 n.10. According to the United States' brief in *Price Waterhouse*:

> In assessing the role of causation under Title VII, a number of lower courts have suggested that either the definition of causation or the burden of persuasion in establishing causation should vary depending on whether the case is categorized as one involving "mixed motives" or "single motives." We think this is a mistake.

Amicus Curiae Br. of the United States, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), No. 87-1167, 1988 WL 1025861 at *16 (citation omitted) (also available at *http://www.usdoj.gov/osg/briefs/1987/sg870104.txt*).

During the oral argument in *Desert Palace*, the Court demonstrated that it recognized the importance of this aspect of the question presented. Indeed, the discussion during the oral argument centered on the correct proof framework to apply in discrimination cases, in the absence of a direct evidence rule:

> Justice O'Connor: How do we know that those amendments [under the 1991 Civil Rights Act] apply only to mixed-motive cases? . . . [I]n theory, it could apply across the board.
>
> . . . .

> Justice Stevens: If there was no second motive [that is, if plaintiff did not argue or prove that motives were mixed], but merely there's evidence of . . . a motivating factor, period, isn't that enough?
>
> . . . .
>
> Justice Souter: [I]s this correct, that *McDonnell Douglas* survives [only] in a case in which the defendant does not go forward with anything? . . . . So *McDonnell Douglas* survives [only] in the case of the mute defendant. In the non-mute defendant, [42 U.S.C. § 2000e](m) governs everything.
>
> . . . .
>
> Justice Scalia: So any case that goes forward . . . is a mixed motive case.
>
> Mr. Peccole: Yes.
>
> Chief Justice Rehnquist: Yes.

Oral Argument, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 2011040 at *17-*37 (available in full on *http://www.oyez.org*).

However, while this aspect of the question presented in *Desert Palace* was thoroughly briefed and occupied much of the discussion during oral argument, it was not addressed in the Court's decision. Instead, the decision answered a narrower question, namely, whether in a

"mixed motive case" brought under 42 U.S.C § 2000e-2(m), courts should require direct evidence of discrimination before instructing the jury on the "a motivating factor" standard of causation. The answer to this narrow question was no; according to *Desert Palace*, every plaintiff in a "mixed motive case" bringing suit under § 2000e-2(m) can prove discrimination under the "a motivating factor" standard. *Desert Palace*, 539 U.S. at 92.

III. The Court Should Grant the Writ in Order to Provide Badly Needed Guidance to the Lower Courts Regarding the Correct Proof Framework to Apply in Discrimination Cases, in the Absence of a Direct Evidence Rule

Petitioner Jack Gross now asks the Court to grant *certiorari* in order to decide whether the reasoning behind the Court's rejection of the direct evidence rule in *Desert Palace* applies across the board, to every federal statute. *Amicus curiae* NELA joins Petitioner in urging the Court to grant *certiorari*, not only to answer this important question regarding the direct evidence rule, but also to answer an important related question: if courts in non-Title VII cases should not continue to use the direct evidence rule to select which standard of causation to apply, how *should* they determine which standard of causation applies? Should courts follow the split approach to causation, as described by the Ninth Circuit in *Desert Palace*, and suggested by this Court's apparent limitation of its holding in *Desert Palace* to "mixed motive cases"? Or should they follow the uniform approach urged by respondent and *amici* in *Desert Palace*, and by the United States in *Price Waterhouse*?

A. Courts' Uncertainty After *Desert Palace* Has Led to Caselaw in "Disarray"

Lower courts have been uncertain how to apply the holding in *Desert Palace*. This uncertainty, stemming from "the limited nature of the *Desert Palace* opinion," has led to "disarray" in the caselaw. Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 512 (2008). As Petitioner explains, courts have sharply divided over the question whether it is proper to continue to use the direct evidence rule outside of the Title VII context. But courts have also sharply divided over the related question regarding the proper standard of causation, both inside and out of the Title VII context. According to observers, courts are "plagued by confusion over the causal standard." *Id.* at 513; *see also* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 Hastings L. J. 643, 651 (2008) ("[E]ven in 1991 Act cases after *Desert Palace*, there remains some debate over the proper role of *McDonnell Douglas*. Some courts have found ingenious ways (a euphemism) to require certain 1991 Act plaintiffs to use *McDonnell Douglas*. So even after the demise of the 'direct evidence' distinction in 1991 Act cases, there remains some uncertainty over which framework might apply in those cases.")

One widely-discussed opinion decided shortly after *Desert Palace* attempted to guide the way to a uniform approach to causation. *See Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003), abrogated by *Griffth*

v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004). The court in *Dare* explained:

> In this case, Dare apparently pleads a single motive case. . . . Although the Supreme Court did not address these types of claims, based on the statutory analysis in *Desert Palace*, this Court finds that the holding in *Desert Palace* applies to Dare's claims. "[T]he words of the statute are unambiguous" and nothing in the plain meaning of § 2000e-2(m) and § 2000e-5(g)(2)(B) expressly restricts the Civil Rights Act of 1991 to mixed-motive cases.

Dare, 267 F. Supp. 2d at 990-91. Thus, the court concluded, all Title VII plaintiffs, including Dare, can establish liability by proving that discrimination was "a motivating factor." *Id.* at 991.

Ironically, perhaps, the judge who decided *Dare*, the Honorable Paul A. Magnuson, later sat by designation on the 8th Circuit panel that effectively abrogated the decision. *See Griffith* at 734. Judge Magnuson reiterated in his concurring opinion in *Griffith* why courts should adopt a uniform approach to causation, suggesting, among other reasons, that without the direct evidence rule, there is simply no apparent "basis on which to determine whether to apply a *McDonnell Douglas* analysis or the alternative mixed-motive analysis." *Id.* at 745 n.8 (Magnuson, J., concurring).

Judge Magnuson's arguments in *Dare* and *Griffith* in favor of the uniform approach to causation are not uniformly accepted, however. Many courts that have set

aside the direct evidence rule in light of *Desert Palace* continue to distinguish between "single motive" and "mixed motive" cases.

Ginger v. District of Columbia, 527 F.3d 1340 (D.C. Cir. 2008) provides one example of this split approach. Plaintiffs in *Ginger* were eight police officers who alleged that the Metropolitan Police Department changed their shifts on racial grounds. *Id.* at 1341. A memorandum by a Department officer seemed to demonstrate that race was a motivating factor in the shift changes, since it expressly stated that "[t]he proposed reorganization of the squads must also take into account the racial make up of those squads." *Id.* at 1342. Nonetheless, the lower court granted summary judgment in favor of the defendant and the Court of Appeals for the District of Columbia affirmed. *Id.* at 1347. The Court of Appeals explained its reasoning under the split approach to causation:

> There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the sole reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. *See* 42 U.S.C. § 2000e-2(a)(1). Alternatively, he may bring a "mixed motive case," in which he does not contest the *bona fides* of the employer's justification but rather argues race was also a factor motivating the adverse action. *See* 42 U.S.C. § 2000e-2(m).

Id. at 1345. According to the court, the plaintiffs in *Ginger* elected to pursue a single motive case. *Id.*

Because there was evidence that the Department had other reasons besides race for changing the plaintiffs' shifts, the court held that no reasonable jury could conclude that "race [was] the sole motivation for reorganizing the unit," and affirmed summary judgment. *Id.* at 1346. In an aside, the court noted that "[t]he officers might have had a compelling case had they argued race was [merely] one of multiple motivating factors behind the reorganization." *Id.* at 1345.

In another example of a decision under the split approach to causation, it was the defendant who – at least in the court's view – elected the single motive framework. In *Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007), the defendant, the United States Marshals Service, "argued in its motion for judgment as a matter of law . . . that Fogg's case 'falls far short of what is necessary to prove that the proffered reason for [his] termination (insubordination) was a pretext for discrimination and retaliation.'" *Id.* at 451. Because the defendant used the label "pretext," the lower court concluded that the defendant had elected to defend the case as a single motive case, and therefore could not argue for a limitation in remedies under the "same decision" affirmative defense. *See id.* at 451-52. The Court of Appeals affirmed on the same grounds. *Id.* at 454.

Fogg and *Ginger* suggest some of the difficulties presented by the split approach to causation. Arguably, they demonstrate that Judge Magnuson was correct when he suggested in *Griffith* that – in the absence of the direct evidence rule – courts lack an adequate "basis on which to determine whether to apply a *McDonnell*

Douglas analysis or the alternative mixed-motive analysis." *Griffith* at 745 n.8 (Magnuson, J., concurring). Taken together, these cases underscore the need for greater clarity in the wake of *Desert Palace.* "In short, there remain many unanswered questions, and courts throughout the nation have been struggling to navigate the morass of competing rationales and instructions when seeking to properly adjudicate employment discrimination claims." *Sawicki v. Morgan State University*, 2005 WL 5351448 at *5 (D. Md. Aug. 2, 2005) (not reported in F. Supp. 2d).

B. A Plea for Guidance

The opinion in *Desert Palace* contains fewer than 4000 words. It is, in the words of one commentator, "short and sweet." Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 Emory L.J. 1887, 1919 (2004). As such, some might see it as the perfect example of what Professor Cass Sunstein has referred to – and praised – as "judicial minimalism," that is, "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3-4 (1999).

But even minimalism can go too far. Professor Sunstein argues that "leaving as much as possible undecided" only makes sense in cases in which "American society is morally divided, those in which the Court is not confident that it knows the right answer, and those in which the citizenry is likely to profit from more sustained debate and reflection." *See* Cass R.

Sunstein, *Testing Minimalism: A Reply*, 104 Mich. L. Rev. 123, 128 (2005). Otherwise, minimalism may simply "'export' decision costs to other people, including litigants and judges in subsequent cases who must give content to the law." Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 Mich. L. Rev. 1951, 2005 (2005) (quoting Sunstein, *One Case at a Time*, at 48).

Because *Desert Palace* appears to fit more closely into the latter category, it has been criticized as "cryptic," rather than praised as minimalist. *See Sawicki*, 2005 WL 5351448 at *5. Some of the criticism has been fairly blunt:

> [T]he [*Desert Palace*] Court made no mention of the relationship between its holding and the well-established analytical framework for employment discrimination cases that the lower courts use virtually every day. Although the Court could not possibly have answered all of the questions about the interaction of [*Desert Palace*] with other precedents, its silence suggests a lack of either awareness or concern that [*Desert Palace*'s] impact is likely much further-reaching than its "Questions Presented" suggested.

Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash. & Lee L. Rev. 271, 330 (2006).

Similarly:

> In *Desert Palace*, the Supreme Court was presented with an opportunity to resolve some of this confusion by speaking retrospectively about these strands of disparate treatment law and the relationship, if any, between the competing yet overlapping methods of proof. But the Court did neither.

Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 Stan. J. C.R. & C.L. 1, 6 (2005).

The sheer volume of this criticism is attested to by the numerous law review articles that have been published since *Desert Palace* was decided (23, at last count), promising to make sense of the "fundamental incoherence" in the law. *See*, *e.g.*, Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L.J. 480 (2006); Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas - A Countermemory Reply to Instrumentalism*, 67 Alb. L. Rev. 965, 1002-1011 (2004) (describing the "intellectually flawed" and "misguided" approach being used by many district courts that "try to engraft *Costa* and Section 703(m) into the *McDonnell Douglas* framework"); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 Notre Dame L. Rev. 109 (2007) (attempting to "make sense of the doctrinal morass that currently envelops disparate treatment antidiscrimination law").

But of course, not all of the current confusion can be tied to the cryptic opinion in *Desert Palace*. Discrimination law "suffers under the strain and fissures of 40 years of incremental, common law decision-making," *Kaminshine*, *supra*, at 3, and no one decision – whether it be in *Desert Palace* or in the instant case – can possibly eliminate all of the uncertainties. It would be inappropriate to ask the Court for such "judicial maximalism."

Instead, *amicus curiae* NELA, on behalf of its members who litigate these cases every day, and the courts that must decide them, respectfully asks this Court to grant certiorari in this case and to issue a "right sized" decision – one which resolves the lingering questions regarding the ill-conceived direct evidence rule, while also providing as much guidance as possible on the proper causation standard for discrimination cases, going forward.

CONCLUSION

For the above reasons, amicus curiae NELA respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

JILL R. GAULDING
Counsel of Record
SCHAEFER LAW FIRM, LLC
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 341-1292

LISA C. STRATTON
WORKERS' RIGHTS CLINIC
UNIVERSITY OF MINNESOTA
LAW SCHOOL
190 Mondale Hall
229 - 19th Ave. South
Minneapolis, MN 55455
(612) 625-5515

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

Counsel for Amicus Curiae