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

REPLY BRIEF FOR PETITIONER

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I. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING WHAT TYPE OF EVIDENCE IS SUFFICIENT TO SHIFT THE BURDEN OF PROOF IN A MIXED MOTIVE CASE

A. WHETHER DIRECT EVIDENCE IS NEEDED TO SHIFT THE BURDEN OF PROOF DOES NOT DEPEND ON WHETHER THE ISSUE ARISES AT SUMMARY JUDGMENT OR AT TRIAL

The Eighth Circuit in the instant case held that the standard adopted in *Desert Palace v. Costa*, 539 U.S. 90 (2003), does not apply to ADEA claims, and that a shift in the burden of proof (and a burden shifting jury instruction) requires direct evidence of discrimination. In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir.2004), the Fifth Circuit reached the opposite conclusion, holding that the *Desert Palace* standard does apply to ADEA claims, and that direct evidence is not required to shift the burden of proof.[1] The Second and Third Circuits endorse a direct evidence requirement in non-Title VII cases; several other circuits reject any such requirement. (Pet.14-22).

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[1] The decision in *Rachid* is not called into question by the subsequent decision in *Septimus v. University of Houston*, 399 F.3d 601 (5th Cir.2005). *Septimus* was a Title VII case, not an ADEA case, and thus clearly was controlled by *Desert Palace*. The issue in *Septimus* was not what evidence is needed to shift the burden of proof in a mixed motive case. "The parties agree that this case was litigated and tried as a 'pretext' (rather than 'mixed-motive') retaliation case." 399 F.3d at 607.

Respondent insists that the decisions (and conflict) outside the Eighth Circuit are generally irrelevant to the question presented because most of those cases concern whether direct evidence is required at summary judgment, whereas the instant case concerns whether direct evidence is required at trial. (Br.Opp.9-17). But respondent does not explain why, or even argue that, the standard at summary judgment and at trial *should* be any different. At both stages the question is the same: is a plaintiff required to meet some sort of "heightened standard" to shift the burden of proof to the defendant. See *Desert Palace*, 539 U.S. at 101. The standards to be utilized at trial are equally applicable at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Respondent suggests that in an ADEA case the Eighth Circuit standard for assessing burden shifting at summary judgment is "not the same" as the Eighth Circuit standard for deciding whether a burden-shifting instruction should be given in such a case. (Br.Opp.11n.10). But respondent nowhere explains what the differences are between those assertedly distinct Eighth Circuit standards. In the court of appeals respondent took the contrary position, maintaining that the *same* standard applies at summary judgment and in determining whether to give a burden-shifting instruction. In arguing below that a burden-shifting instruction is never permissible if a plaintiff relies on circumstantial evidence, respondent

relied on two Eighth Circuit summary judgment decisions.[2]

This Court does not recognize any such distinction between the summary judgment and trial standard. In *Desert Palace* this Court described the intercircuit conflict that prompted the grant of review in that case.

> [A] number of courts have held that direct evidence is required to establish liability under [Title VII]. See, *e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (C.A.8 2002); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.2d 572, 580 (C.A.1 1999); *Trotter v. Board of Trustees of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (C.A.11 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (C.A.4 1995). In the decision below, however, the Ninth Circuit concluded otherwise.

539 U.S. at 95. The Ninth Circuit decision in *Desert Palace* concerned the standard for giving a burden-shifting instruction; among the conflicting decisions, cited without distinction in this regard, *Fernandes* and *Trotter* were summary judgment decisions, *Trotter* concerned a motion for judgment as a matter of law, and only *Mohr* was a dispute about jury instructions.

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[2] Appellant's Brief, p. 32 (citing *E.W. Blanch Co., Inc. v. Enan*, 124 F.3d 965, 970 (8th Cir.1997); *Thomas v. First Nat'l Bank of Wayne*, 111 F.3d 64, 65-66 (8th Cir.1997)).

The court below also drew no distinction between the standard applicable at summary judgment and the standard governing jury instructions. The panel held that the giving of the disputed burden-shifting instruction in this case was error "[u]nder our court's application of *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]." (App.6a). The two earlier Eighth Circuit decisions cited as setting "our precedents regarding the ADEA" (App.10a) were both summary judgment cases. (App.5a).[3] To buttress its decision that direct evidence is required, even after *Desert Palace*, to warrant a burden-shifting instruction in an ADEA case, the court below cited three post-*Desert Palace* decisions in other circuits; all were summary judgment cases.[4] (App.8a-9a).[5]

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[3] The cited cases were *Thomas v. First Nat'l Bank of* Wynne, 111 F.3d 64 (8th Cir.1997) and *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718 (8th Cir.2001).

[4] The cited cases were *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506 (3d Cir.2004), *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160 (4th Cir.2004), and *Mereish v. Walker*, 359 F.3d 330 (4th Cir.2004).

[5] Respondent suggests the court below did not follow the holding in *Rachid* only because that Fifth Circuit decision concerned the evidence required to warrant a mixed motive analysis at summary judgment. (Br.Opp.11). The footnote on which respondent relies, however, merely asserts that the Eighth Circuit precedent conflicts with *Rachid* regarding the impact of *Desert Palace* on summary judgment motions in Title VII cases. (App.10a n.2).

The panel refused to accept the reasoning of *Rachid* in the instant case because it disagreed with the Fifth Circuit's analysis of the significance of *Desert Palace* for ADEA cases.

(Continued on following page)

B. THE VARIOUS STANDARDS APPLIED BY THE COURTS OF APPEALS ARE SUBSTANTIVELY DIFFERENT

(1) For nineteen years since this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the lower courts in hundreds of cases have struggled with the issue of whether a plaintiff must adduce direct evidence of discrimination in order to shift the burden of proof to a defendant.[6] Two circuits thought the issue was of such significance as to warrant consideration en banc.[7] In *Desert Palace* this Court granted certiorari to resolve a conflict as to whether or not direct evidence is required in a Title VII mixed motive case. Because of the importance of the issue in *Desert Palace*, the United States participated in this Court, and a range of amici filed briefs insisting (from different points of view) that whether or not there would be a direct evidence requirement would be of considerable significance to the enforcement of Title VII.

> *Rachid*...applied the analysis of *Desert Palace* to claims under the ADEA....We are not persuaded that *Desert Palace* dictates modifications of our precedents regarding the ADEA.

(App.9a-10a).

[6] A Westlaw search for federal decisions containing both a reference to *Price Waterhouse* and the phrase "direct evidence" enumerates 2000 opinions.

[7] *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir.2003)(en banc); *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir.2002)(en banc).

The circuits today remain divided regarding whether to require direct evidence in a non-Title VII case, as they were prior to *Desert Palace* regarding Title VII. But, respondent insists, that disagreement simply does not matter, because the standard actually used by circuits requiring direct evidence, and by circuits rejecting that requirement, are "effectively the same." (Br.Opp.21). This supposed consensus imposes no restrictions at all on how a plaintiff can seek to show that an impermissible consideration was a motivating factor and thus shift the burden of proof to the defendant. "The standard articulated by the courts of appeals requires nothing more than some evidence an illegitimate criterion actually motivated the decision." (Br.Opp.24).

Respondent does not contend that the Eighth Circuit's assertedly undemanding direct evidence rule, or this supposed nationwide consensus, arose only after the 2003 decision in *Desert Palace*; to the contrary, the direct evidence formula applied by the court below was taken from a 1997 Eighth Circuit opinion[8] and from Justice O'Connor's 1989 opinion in *Price Waterhouse*. (App.5a). If respondent is correct, then there never was any meaningful disagreement among the lower courts, even regarding Title VII cases; the last nineteen years of litigation did not matter at all, and this Court's decision to grant

[8] App.5a (*quoting Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (8th Cir.1997)).

certiorari in *Desert Palace* was a mistake. In *Desert Palace* this Court held that "no heightened showing is required" to support a mixed motive claim under Title VII. Respondent suggests that this Court's decision was quite unnecessary, because the lower courts never required more than "some evidence" to support such a claim.

Respondent's account of the law is not merely wrong, it is a straightforward reversal of the position it took in the court of appeals. In the court below respondent argued that under controlling Eighth Circuit precedent a plaintiff cannot rely on circumstantial evidence to shift the burden of proof to a defendant (see p. 8, *infra*), a rule that assuredly is not "effectively the same" as the evidentiary standard in other courts of appeals.

(2) It emphatically is not the case that the Eighth Circuit "require[s] nothing more than some evidence an illegitimate criterion" was a motivating factor. (Br.Opp.24). To the contrary, the court of appeals spelled out a series of types of evidence which a plaintiff is not permitted to use to make such a showing. For example, a plaintiff cannot rely on "statements by decisionmakers unrelated to the decisional process itself." (App.5a)(*quoting* Justice O'Connor's concurring opinion in *Price Waterhouse*). Evidence that the decisionmaker had announced that he disliked minority, female, Muslim or older workers would not support a mixed motive instruction unless the statement was made as part of the very personnel process which led to the adverse action complained of.

This Court has expressly held that such biased remarks are indeed probative of discrimination even if not "made in the direct context" of the assertedly discriminatory decision. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152-53 (2000). In holding that the very evidence that would support a finding of discrimination in *Reeves* cannot be relied on to meet the Eighth Circuit direct evidence requirement, that circuit is obviously requiring just the sort of "heightened showing" disapproved (for Title VII cases) in *Desert Palace*.

In this Court respondent asserts that the Eighth Circuit direct evidence standard can be satisfied by circumstantial evidence. (Br.Opp.12). But in the court below, respondent took precisely the opposite position, insisting that under Eighth Circuit precedent circumstantial evidence is insufficient.

> The framework for evaluating an age discrimination claim is dependent [on] whether the type of evidence presented in support of the claim is direct or circumstantial....Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law. *E.W. Blanch, Inc. v. Enan*, 124 F.3d 965, 970 (8th Cir.1997); *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 65-66 (8th Cir.1997).

Appellant's Brief, pp. 30, 32.

The disposition of this case in the court below turned on the Eighth Circuit's view that the "direct evidence" standard is indeed a stringent one. During

the post-trial motions, counsel for plaintiff summarized the evidence as follows:

> [W]e don't have anything in this case that says we've got to get rid of Gross because of his age or we've got to demote Gross because of his age or Jack [Gross] is old and over the hill and give that position to [the younger worker], it isn't there.
>
> But *if that's what direct evidence is*, then we don't need it, and there's plenty of this record that's circumstantial to support the conclusion and the inference that age was a basis, age was a motivating factor....

(Appellant's App.596)(emphasis added). The court of appeals held that this concession that plaintiff had only circumstantial evidence meant that the Eighth Circuit's direct evidence standard was not satisfied. "Gross conceded that he did not present 'direct evidence' of discrimination, (Appellant's App.596), so a mixed motive instruction was not warranted." (App.7a). The manner in which the court of appeals applied the Eighth Circuit's direct evidence standard to the instant case makes crystal clear that the court of appeals regarded that standard as requiring far more than just "some evidence" of discrimination.

The Second Circuit also requires more than "some evidence." Both before and after *Desert Palace*, the Second Circuit has held that "to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory

treatment." *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 173 (2d Cir.2006)(quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir.1997)). The most Second Circuit decision holds that only a "smoking gun" will suffice.[9] "Direct evidence of discrimination, 'a smoking gun,' is typically unavailable." *Holcomb v. Iona College*, 521 F.3d 130, 140 (2d Cir.2008). Among the types of evidence deemed insufficient to meet the Second Circuit's "smoking gun" standard are statistical evidence of discrimination in favor of white workers and proof that a minority plaintiff was disciplined for conduct "that White employees engaged in with impunity." *Fields v. New York State Office of Mental Retardation*, 115 F.3d 116, 124 (2d Cir.1997). That is precisely the type of evidence that can ordinarily be relied on to prove discrimination. *Reeves*, 530 U.S. at 133 (unequal discipline); *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973)(statistical evidence).

(3) Such stringent restrictions are absent in the circuits which have rejected the direct evidence requirement.

The Fifth Circuit decision in *Rachid* contains no limitations whatever on the types of evidence that might be used to prove that an unlawful consideration was a motivating factor. It held that "the

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[9] *Beauchat v. Mineta*, 257 Fed.Appx. 463, 463 (2d Cir.2007)(plaintiff's evidence was "not the type of direct evidence or 'smoking gun' needed to establish gender or race discrimination via *Price-Waterhouse* mixed-motive analysis.").

mixed-motives analysis used in Title VII cases post-*Desert Palace* is equally applicable [to the] ADEA." 376 F.3d at 312. *Desert Palace*, of course, disapproves of requiring any "heightened showing" to shift the burden of proof. 539 U.S. at 101. *Rachid* expressly relied on age-related remarks that were not made "in the direct context of the [disputed] termination," the very evidence which the Eighth Circuit will not consider. 376 F.3d at 315 (*quoting Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506-07 (5th Cir.1988)). In *Rachid* the Fifth Circuit applied no special test in evaluating the sufficiency of the plaintiff's evidence; it denied summary judgment because "a rational finder of fact could conclude that age played a role in [the employer's] decision to terminate Rachid." 376 F.3d at 315-16. In the instant case, on the other hand, the Eighth Circuit expressly did not reach that question (App.14a), because it held that a mixed motive claim must meet that circuit's more stringent direct evidence requirement.

Respondent asserts that the District of Columbia Circuit

> requires a plaintiff to present evidence or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision. *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir.1997).

(Br.Opp.21). No such "directness" requirements are to be found anywhere in the decision in *Thomas*. What the D.C. Circuit actually held was that

> the burden of persuasion shifts to the defendant when the plaintiff has shown by a preponderance of "*any* sufficiently probative direct *or indirect* evidence" that unlawful discrimination was a substantial factor in the employment decision.

131 F.3d at 203 (emphasis added)(*quoting White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir.1991)).

Respondent suggests that the Seventh Circuit requires a heightened showing similar to the Eighth Circuit rule, quoting a passage from *Atanus v. Perry*, 520 F.3d 622, 671 (7th Cir.2008), which states that "[t]he focus of the [Seventh Circuit] direct method of proof this is...whether the evidence 'points directly' to a discriminatory reason for the employer's action." (Br.Opp.16). *Atanus* cannot plausibly read as holding that the Seventh Circuit's so-called "direct method" requires a plaintiff to meet a heightened evidentiary standard; both *Atanus* and the decision from which the phrase "points directly" is there quoted[10] are post-*Desert Palace* Title VII cases. The very next sentence in *Atanus*, moreover, makes clear that all traditional circumstantial evidence (not only, as the Eighth Circuit requires, evidence "specific[ally] link[ed]" to the particular disputed decision) is entirely sufficient. 520 F.3d at 672.

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[10] *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 751 n.3 (7th Cir.2006).

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The decision below turned directly and solely on the issue of whether a plaintiff must have direct evidence of discrimination in order to shift the burden of proof to a defendant and to obtain a burden-shifting jury instruction. Whatever the exact contours of the Eighth Circuit's direct evidence requirement, it clearly is just the sort of heightened showing requirement that this Court disapproved for Title VII cases in *Desert Palace*.

Respondent contends that, even if the jury instruction were proper, it would still prevail on remand on the ground that there was insufficient evidence to support the jury's finding that age was indeed a motivating factor in Gross's demotion. (Br.Opp.22-24). The District Judge who tried this case concluded the evidence entirely sufficient. (App.18a-31a). Respondent would of course be free to pursue this argument on remand. But the possibility that a respondent may ultimately prevail on some distinct issue, as yet unresolved by the circuit court, is not a basis for denying review of the question of law that actually was decided by the court of appeals.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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