SUPREME COURT OF THE UNITED STATES

No. 08–441

JACK GROSS, PETITIONER *v.* FBL FINANCIAL SERVICES, INC.

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

[June 18, 2009]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, makes it unlawful for an employer to discriminate against any employee "because of" that individual's age, §623(a). The most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee. The "but-for" causation standard endorsed by the Court today was advanced in JUSTICE KENNEDY's dissenting opinion in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 279 (1989), a case construing identical language in Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(a)(1). Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

I

The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it acknowledges, this was not the question we granted certiorari to decide.[1] Instead, the question arose for the first time in respondent's brief, which asked us to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent 26 (boldface type deleted). In the usual course, this Court would not entertain such a request raised only in a merits brief: "'We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.'" *Alabama* v. *Shelton*, 535 U. S. 654, 660, n. 3 (2002) (quoting *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999)). Yet the Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.[2]

Unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his com-

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[1] "The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]." *Ante*, at 1.

[2] The United States filed an *amicus curiae* brief supporting petitioner on the question presented. At oral argument, the Government urged that the Court should not reach the issue it takes up today. See Tr. of Oral Arg. 20–21, 28–29.

pensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U. S. C. §623(a)(1) (emphasis added). As we recognized in *Price Waterhouse* when we construed the identical "because of" language of Title VII, see 42 U. S. C. §2000e–2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge 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" (emphasis added)), the most natural reading of the text proscribes adverse employment actions motivated in whole or in part by the age of the employee.

In *Price Waterhouse*, we concluded that the words "'because of' such individual's . . . sex . . . mean that gender must be irrelevant to employment decisions." 490 U. S., at 240 (plurality opinion); see also *id.*, at 260 (White, J., concurring in judgment). To establish a violation of Title VII, we therefore held, a plaintiff had to prove that her sex was a motivating factor in an adverse employment decision.[3] We recognized that the employer had an affirmative defense: It could avoid a finding of liability by proving that it would have made the same decision even if it had not taken the plaintiff's sex into account. *Id.*, at 244–245 (plurality opinion). But this affirmative defense did not alter the meaning of "because of." As we made clear, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'be-

[3]Although Justice White stated that the plaintiff had to show that her sex was a "substantial" factor, while the plurality used the term "motivating" factor, these standards are interchangeable, as evidenced by Justice White's quotation of *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977): " '[T]he burden was properly placed upon [the plaintiff to show that the illegitimate criterion] was a "substantial factor"—or, *to put it in other words*, that it was a "motivating factor" ' " in the adverse decision. *Price Waterhouse*, 490 U. S., at 259 (emphasis added); see also *id.*, at 249 (plurality opinion) (using "substantial" and "motivating" interchangeably).

cause of" sex." *Id.*, at 241; see also *id.*, at 260 (White, J., concurring in judgment). We readily rejected the dissent's contrary assertion. "To construe the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them." *Id.*, at 240 (plurality opinion).[4]

Today, however, the Court interprets the words "because of" in the ADEA "as colloquial shorthand for 'but-for' causation." *Ibid.* That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978)). See generally *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) *(per curiam)*. For this reason, JUSTICE KENNEDY's dissent in *Price Waterhouse* assumed the plurality's mixed-motives framework extended to the ADEA, see 490 U. S., at 292, and the Courts of Appeals to have considered the issue unanimously have applied *Price Waterhouse* to ADEA claims.[5]

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[4] We were no doubt aware that dictionaries define "because of" as "by reason of" or "on account of." *Ante*, at 7–8. Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define "because of" as "*solely* by reason of" or "*exclusively* on account of." In *Price Waterhouse*, we recognized that the words "because of" do not mean "*solely* because of," and we held that the inquiry "commanded by the words" of the statute was whether gender was a motivating factor in the employment decision. 490 U. S., at 241 (plurality opinion).

[5] See *Febres* v. *Challenger Caribbean Corp.*, 214 F. 3d 57 (CA1 2000); *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F. 2d 171 (CA2 1992); *Starceski* v. *Westinghouse Elec. Corp.*, 54 F. 3d 1089 (CA3 1995); *EEOC* v. *Warfield-Rohr Casket Co.*, 364 F. 3d 160 (CA4 2004); *Rachid* v. *Jack*

The Court nonetheless suggests that applying *Price Waterhouse* would be inconsistent with our ADEA precedents. In particular, the Court relies on our statement in *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993), that "[a disparate-treatment] claim 'cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*.'" *Ante*, at 8. The italicized phrase is at best inconclusive as to the meaning of the ADEA's "because of" language, however, as other passages in *Hazen Paper Co.* demonstrate. We also stated, for instance, that the ADEA "requires the employer to *ignore* an employee's age," *id.*, at 612 (emphasis added), and noted that "[w]hen the employer's decision is *wholly motivated* by factors other than age," there is no violation, *id.*, at 611 (emphasis altered). So too, we indicated the "possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status," *id.*, at 613—a classic mixed-motives scenario.

Moreover, both *Hazen Paper Co.* and *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133 (2000), on which the majority also relies, support the conclusion that the ADEA should be interpreted consistently with Title VII. In those non-mixed-motives ADEA cases, the Court followed the standards set forth in non-mixed-motives Title VII cases including *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). See, *e.g.*, *Reeves*, 530 U. S., at 141–143; *Hazen Paper Co.*, 507 U. S.,

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In The Box, Inc., 376 F. 3d 305 (CA5 2004); *Wexler* v. *White's Fine Furniture, Inc.*, 317 F. 3d 564 (CA6 2003); *Visser* v. *Packer Eng. Assocs., Inc.*, 924 F. 2d 655 (CA7 1991) (en banc); *Hutson* v. *McDonnell Douglas Corp.*, 63 F. 3d 771 (CA8 1995); *Lewis* v. *YMCA*, 208 F. 3d 1303 (CA11 2000) *(per curiam);* see also *Gonzagowski* v. *Widnall*, 115 F. 3d 744, 749 (CA10 1997).

at 610. This by no means indicates, as the majority reasons, that *mixed-motives* ADEA cases should follow those standards. Rather, it underscores that ADEA standards are generally understood to conform to Title VII standards.

II

The conclusion that "because of" an individual's age means that age was a motivating factor in an employment decision is bolstered by Congress' reaction to *Price Waterhouse* in the 1991 Civil Rights Act. As part of its response to "a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," H. R. Rep. No. 102–40, pt. 2, p. 2 (1991) (hereinafter H. R. Rep.), Congress eliminated the affirmative defense to liability that *Price Waterhouse* had furnished employers and provided instead that an employer's same-decision showing would limit only a plaintiff's remedies. See §2000e–5(g)(2)(B). Importantly, however, Congress ratified *Price Waterhouse*'s interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See §2000e–2(m) ("[A]n 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").

Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ADEA.[6] But it proceeds to ignore the conclusion com-

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[6]There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H. R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §621, et seq., are modeled after and have been

pelled by this interpretation of the Act: *Price Waterhouse*'s construction of "because of" remains the governing law for ADEA claims.

Our recent decision in *Smith* v. *City of Jackson*, 544 U. S. 228, 240 (2005), is precisely on point, as we considered in that case the effect of Congress' failure to amend the disparate-impact provisions of the ADEA when it amended the corresponding Title VII provisions in the 1991 Act. Noting that "the relevant 1991 amendments expanded the coverage of Title VII [but] did not amend the ADEA or speak to the subject of age discrimination," we held that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U. S., at 240 (discussing *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989)); see also *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U. S. ___, ___ (2008) (slip op., at 15). If the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies.

Curiously, the Court reaches the opposite conclusion, relying on Congress' partial ratification of *Price Waterhouse* to argue against that case's precedential value. It reasons that if the 1991 amendments do not apply to the ADEA, *Price Waterhouse* likewise must not apply because Congress effectively codified *Price Waterhouse*'s holding in the amendments. *Ante*, at 5–6. This does not follow. To the contrary, the fact that Congress endorsed this Court's interpretation of the "because of" language in *Price Waterhouse* (even as it rejected the employer's affirmative de-

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interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions).

fense to liability) provides all the more reason to adhere to that decision's motivating-factor test. Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII. See, *e.g.*, H. R. Rep., pt. 2, at 17 ("When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions"); *id.*, at 2 (stating that the Act "reaffirm[ed] that any reliance on prejudice in making employment decisions is illegal"); see also H. R. Rep., pt. 1, at 45; S. Rep. No. 101–315, pp. 6, 22 (1990).

The 1991 amendments to Title VII also provide the answer to the majority's argument that the mixed-motives approach has proved unworkable. *Ante*, at 10–11. Because Congress has codified a mixed-motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment. Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.

The Court's resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up—whether a mixed-motives jury instruction is ever proper in an ADEA case—is plainly yes.

III

Although the Court declines to address the question we granted certiorari to decide, I would answer that question by following our unanimous opinion in *Desert Palace, Inc.*

v. *Costa*, 539 U. S. 90 (2003). I would accordingly hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

The source of the direct-evidence debate is Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse*. Writing only for herself, Justice O'Connor argued that a plaintiff should be required to introduce "direct evidence" that her sex motivated the decision before the plurality's mixed-motives framework would apply. 490 U. S., at 276.[7] Many courts have treated Justice O'Connor's opinion in *Price Waterhouse* as controlling for both Title VII and ADEA mixed-motives cases in light of our statement in *Marks* v. *United States*, 430 U. S. 188, 193 (1977), that "[w]hen 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.'" Unlike the cases *Marks* addressed, however, *Price Waterhouse* garnered five votes for a single rationale: Justice White agreed with the plurality as to the motivating-factor test, see *supra*, at 3, n. 3; he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer's credible testimony could suffice. 490 U. S., at 261. Because Justice White provided a fifth vote for the "rationale explaining the result" of the *Price Waterhouse* decision, *Marks*, 430 U. S., at 193, his concur-

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[7] While Justice O'Connor did not define precisely what she meant by "direct evidence," we contrasted such evidence with circumstantial evidence in *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90 (2003). That Justice O'Connor might have intended a different definition does not affect my conclusion, as I do not believe a plaintiff is required to introduce any special type of evidence to obtain a mixed-motives instruction.

rence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.

Any questions raised by *Price Waterhouse* as to a direct evidence requirement were settled by this Court's unanimous decision in *Desert Palace*, in which we held that a plaintiff need not introduce direct evidence to meet her burden in a mixed-motives case under Title VII, as amended by the Civil Rights Act of 1991. In construing the language of §2000e–2(m), we reasoned that the statute did not mention, much less require, a heightened showing through direct evidence and that "Congress has been unequivocal when imposing heightened proof requirements." 539 U. S., at 99. The statute's silence with respect to direct evidence, we held, meant that "we should not depart from the '[c]onventional rul[e] of civil litigation . . . [that] requires a plaintiff to prove his case by a preponderance of the evidence', . . . using 'direct or circumstantial evidence.'" *Ibid.* (quoting *Price Waterhouse*, 490 U. S., at 253 (plurality opinion), and *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711 (1983)). We also recognized the Court's consistent acknowledgment of the utility of circumstantial evidence in discrimination cases.

Our analysis in *Desert Palace* applies with equal force to the ADEA. Cf. *ante*, at 9–10, n. 4. As with the 1991 amendments to Title VII, no language in the ADEA imposes a heightened direct evidence requirement, and we have specifically recognized the utility of circumstantial evidence in ADEA cases. See *Reeves*, 530 U. S., at 147 (cited by *Desert Palace*, 539 U. S., at 99–100). Moreover, in *Hazen Paper Co.*, we held that an award of liquidated damages for a "willful" violation of the ADEA did not require proof of the employer's motivation through direct evidence, 507 U. S., at 615, and we have similarly rejected the imposition of special evidentiary rules in other ADEA cases. See, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S.

506 (2002); *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308 (1996). *Desert Palace* thus confirms the answer provided by the plurality and Justice White in *Price Waterhouse:* An ADEA plaintiff need not present direct evidence of discrimination to obtain a mixed-motives instruction.

IV

The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking. I respectfully dissent.