No. 11-5117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JORGE PONCE
Appellant,
v.
JAMES H. BILLINGTON, LIBRARIAN, UNITED STATES LIBRARY OF CONGRESS
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF AARP, METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION (MWELA) AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF APPELLANT

Yuval Rubinstein (#503489)
ROSE LEGAL ADVOCATES, P.C.
1726 M Street, N.W.
Suite 203
Washington, D.C. 20036
(202) 331-8555
*Counsel of Record
Counsel for *Amicus Curiae* Metropolitan Washington Employment Lawyers Association

Thomas W. Osborne (#428164)
AARP FOUNDATION LITIGATION

Melvin Radowitz (#384834)
AARP

601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
Counsel for *Amicus Curiae* AARP

Rebecca M. Hamburg (#233610)
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street
Fourth Floor
San Francisco, CA 94101
(415) 296-7629
Counsel for *Amicus Curiae* National Employment Lawyers Association

GLOSSARY

ADEA	Age Discrimination in Employment Act
ADA	Americans with Disabilities Act
EEOC	Equal Employment Opportunity Commission
MWELA	Metropolitan Washington Employment Lawyers Association
NELA	National Employment Lawyers Association
USERRA	Uniform Services Employment and Reemployment Rights Act

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, AARP is not a publicly-held corporation, has no parent corporation, and has not issued shares or debt securities. The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951. Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, AARP Financial, AARP Global Network, and Focalyst. AARP is not a publicly-held corporation, has no parent corporation, and has not issued shares or debt securities.

The Metropolitan Washington Employment Lawyers Association (MWELA) is not a publicly-held corporation, has no parent corporation, and has not issued shares or debt securities.

The National Employment Lawyers Association (NELA) is not a publicly-held corporation, has no parent corporation, and has not issued shares or debt securities.

/s/ Yuval Rubinstein
Yuval Rubinstein

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici* certifies the following:

A. Parties, *Amici*, and Intervenors

All parties, *amici*, and intervenors are listed in the Brief of Plaintiff-Appellant.

B. Rulings Under Review

References to the ruling at issue appears in the Brief of Plaintiff-Appellant.

C. Related Case

Amici understand that oral argument for this appeal has been consolidated with *Perry v. Shinseki*, Appeal No. 11-5141.

/s/ Yuval Rubinstein
Yuval Rubinstein

RULE 29 (C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29 (c)(5), counsel for *amici* states that:

(a) no party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(c) no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ Yuval Rubinstein
Yuval Rubinstein

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Rules and Regulations

Legislative History

Treatises

Miscellaneous

* Authorities upon which we chiefly rely are marked with asterisks.

INTERESTS OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's members are in the workforce and are protected by Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and other anti-discrimination statutes. Vigorous enforcement of these and other workplace civil rights laws is of paramount importance to AARP, its working members, including those who are federal employees, and the millions of other workers who rely on them to deter and remedy workplace discrimination.

The Metropolitan Washington Employment Lawyers Association (MWELA) is the local chapter of the National Employment Lawyers Association (NELA). Its members are primarily plaintiffs' counsel who specialize in employment law. MWELA has frequently submitted *amicus curiae* briefs in cases of interest to its 300 members, including in this Court, the Fourth Circuit Court of Appeals, the District of Columbia Court of Appeals, and the United States District Court for the District of Columbia.

The National Employment Lawyers Association (NELA) is the largest

professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, 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 are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws. A substantial number of NELA members represent federal employees, and thus NELA has an interest in ensuring that the proper standard of proof is applied to federal workers seeking to vindicate their rights under Title VII of the Civil Rights Act of 1964.

The ability of employees who seek to vindicate their Title VII right to a discrimination-free workplace will be profoundly affected by this Court's ruling in this case. The District Court's "sole cause" jury instruction is inconsistent with Title VII's text, legislative history, and precedent in both the Supreme Court and this Court. *Amici* submit that the ruling below will preclude the successful prosecution of even the most meritorious cases under Title VII, and therefore must

be reversed.

SUMMARY OF ARGUMENT

In this Title VII case, after a four-day trial the District Court instructed the jury that it could find in favor of the plaintiff only if he proved that discrimination was the "sole reason" for the challenged employment decision. So instructed, the jury found against Ponce. In its order denying Ponce's motion for a new trial, the District Court explained that it had "determined that this matter was pleaded as a single-motive discrimination claim" and instructed "accordingly," holding that *Ginger v. District of Columbia*[1] compelled this jury instruction.[2]

The District Court erred in requiring a "sole reason," or "sole cause," standard of causation. In fact, while there is some variation in wording among statutes and different courts regarding the proper causation standard, with a single exception,[3] "sole cause" is never the proper standard under federal anti-discrimination statutes.

Flexibility is the hallmark of the courts' approach to proof in EEO cases.

---

[1] 527 F.3d 1340 (D.C. Cir. 2008).

[2] District Court Order dated March 16, 2011 at 2.

[3] Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be … subjected to discrimination." 29 U.S.C. §794(a).

The Supreme Court's very first protocol for analyzing Title VII evidence, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), came with a warning: "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.* at 802, n.13. The method set forth in *McDonnell Douglas*, and the subsequent cases refining it, exists to sort out unlawful motives from other valid reasons for the same action. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) *(Price Waterhouse*) captured situations where ferreting out the illegal motive was more difficult because the employee's protected status blended with other reasons motivating the adverse action. In those situations, a plurality of the Court held that the burden should shift to the employer to disprove that the protected status was a factor. *Id.* at 242. This is consistent with the familiar principle requiring an alleged tortfeasor to shoulder the burden on causation when it would be unreasonable to require an injured party to tease out the tortious and non-tortious concurrent factors.

Price Waterhouse did not hold that there were two mutually exclusive means of proving an EEO claim – "single-motive" and "mixed-motives." Nevertheless, the rigid decision in *Ginger* appeared to compartmentalize

discrimination cases into those two discrete categories. It posited a false dichotomy that has increased confusion, and fuels the substantial tension between *Ginger* and this Court's recent decision in *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010) (*Ford*).

The confusion arising from the false dichotomy of "single-motive" and "mixed-motives" claims led this Court in *Ginger* to view the converse of "mixed-motives" as "single-motive." In fact, the only difference between *McDonnell Douglas* cases and so-called "mixed-motives" cases is which party has the burden of proof on causation.[4] In *McDonnell Douglas* cases, the burden remains with the plaintiff to prove that the unlawful motive was a determining factor in the challenged decision, even if other motives also affected it (also known as "but-for" causation). In so-called "mixed-motives" cases, the employee can establish liability by showing merely that the protected characteristic was a motivating factor in the challenged decision.

The District Court's reliance on *Ginger* to support a "sole cause" jury instruction was misplaced for several reasons. First, the "sole cause" standard conflicts with the "free from any discrimination" language of Section 717 of Title

---

[4] Hence, what are labeled – incorrectly – as "mixed-motives" cases are simply a subset of cases where the issue of "but-for" causation is shifted to the employer to disprove under the "same decision" language of § 2000e-5(g)(2)(B).

VII, 42 U.S.C. § 2000e-16(a), the standard governing federal employee discrimination cases under which Ponce brought suit. In *Ford*, this Court recognized that the "free from any discrimination" standard is materially different from and broader than the "because of" or "but-for" standard governing private-sector Title VII cases. The "sole cause" requirement is also inconsistent with existing Supreme Court precedent, including the recent decision in *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), which confirmed the Court's long ago rejection of "sole cause" as the causation standard under 42 U.S.C. § 2000e-2(a)(1). Further, the administrative determinations of the U.S. Equal Employment Opportunity Commission (EEOC) have consistently rejected a "sole cause" standard under Title VII.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH PLAINTIFF'S BURDEN UNDER THE FEDERAL-SECTOR PROVISION OF TITLE VII.

The District Court decision denying Ponce's motion for a new trial conflicts with decisions of this Court construing plaintiffs' burden under Section 717 of Title VII, 42 U.S.C. § 2000e-16(a), the so-called "federal-sector" provision under which Ponce brought suit. Unlike Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination "*because of* race, color, religion,

sex, or national origin" (emphasis added), or 42 U.S.C. § 2000e-2(m), the "mixed-motives" provision of Title VII, which provides that discrimination is established when one of those characteristics "was a *motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added), Section 717 provides that "[a]ll personnel actions affecting employees" of federal government agencies "*shall be made free from any discrimination* . . ." (emphasis added).

The federal-sector provision of the ADEA, 29 U.S.C. § 633a(a), contains identical language, requiring that "[a]ll personnel actions affecting employees" of federal government agencies "shall be made free from any discrimination" based on age. In *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008), the Supreme Court found that this "free from any discrimination" language "differs sharply from that in the corresponding ADEA provision relating to private-sector employment," 29 U.S.C. § 623(a)(1), that, like § 2000e-2(a)(1) of Title VII, prohibits discrimination "because of" age. The Supreme Court concluded that the "free from any discrimination" language of § 633a(a) reflected Congress' intent "to enact a broad, general ban on discrimination." *Id.* at 488. This Court has also agreed that the "free from any discrimination" language is "sweeping." *See Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001).

In *Ford*, this Court reversed a trial court's imposition of a "but-for" causation standard in a federal-sector ADEA case, where the "free from any discrimination" standard applies, as it does in this case. *Ford*, 629 F.3d at 205-07. Based on the clear, textual differences between the private-sector and federal-sector provisions of the ADEA, this Court concluded that imposing the "but-for" standard on a plaintiff in a federal-sector ADEA case would "divorce the phrase 'free from any discrimination' from its plain meaning." *Id.* at 206. The textual analysis in *Ford*, which is equally applicable to the identical language contained in the federal-sector provisions of Title VII, cannot be reconciled with the District Court's decision to require the plaintiff to demonstrate "sole cause." Indeed, "any" cause and "sole" cause stand at opposite ends of the causation continuum.

This Court in *Ginger*, by contrast, concluded that "'Title VII places the same restrictions on . . . District of Columbia agencies as it does on private employers.'" 527 F.3d at 1343 (quoting *Borgo v. Goldin*, 204 F.3d 252, 255 n.5 (D.C. Cir. 2000)). This Court then said:

> 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-motives case," in which he does not contest the *bona fides* of the employer's justifications but rather argues race was also a factor motivating the adverse action. *See* 42 U.S.C. § 2000e-2(m).

527 F.3d at 1345.

Ginger affirmed summary judgment for the defendant because this Court found fault in the plaintiffs' asserted legal theory, while acknowledging that the facts may have supported a finding for the plaintiffs under an alternative legal theory. *See Ginger*, 527 F.3d at 1345-46 ("The officers might have had a compelling case had they argued race was one of multiple motivating factors behind the reorganization, but they did not. Rather, they brought a single motive case: According to the officers, race was the sole reason for the reorganization . . . In sum, the officers never contended this was a mixed-motive case . . .").

Thus, under *Ginger*, a Section 717 plaintiff must choose to proceed under one of the two private-sector provisions of Title VII, 42 U.S.C. § 2000e-2(m) or 42 U.S.C. § 2000e-2(a)(1), the latter of which, according to *Ginger*, requires proof of "sole cause." The *Ginger* Court, however, reached this conclusion without analyzing the significance of the "free from any discrimination" language appearing in the federal-sector provisions of both Title VII and the ADEA. The *Ford* Court, by contrast, concluded that because of this language, the plaintiff in

such cases is entitled to a less restrictive causation standard than under the corresponding private-sector provisions. By holding that a federal-sector plaintiff may prevail by proving that the protected trait was merely "a factor" in the adverse action, *Ford* resolved the textual interpretation issues left unaddressed in *Ginger.*

II. THE SUPREME COURT HAS EXPRESSLY REJECTED "SOLE CAUSE."

A. The Supreme Court's Recent Decision in *Staub v. Proctor Hospital* Rejects The "Sole Cause" Standard.

Title VII generally prohibits employment actions taken "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This "because of" causation standard embraces the likelihood that many motivations, legitimate and illegitimate, may prompt an adverse employment action. Nothing in the plain language of the Act suggests that discrimination must be the only reason for the action, or that an employee is required to prove the falsity of every reason asserted as legitimate by an employer.

Even assuming, *arguendo*, that *Ginger* is correct that the alternative theories for proving liability under § 2000e-2(a) and § 2000e-2(m) are mutually exclusive, the Supreme Court's recent decision in *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), directly undermines *Ginger*'s holding that the plaintiff's burden under the former provision is to prove "sole cause." *Staub* construed the Uniformed Services

Employment and Reemployment Rights Act ("USERRA"), which provides:

> A person who is a member of … or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention, in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . or obligation.

38 U.S.C. § 4311(a).

The Supreme Court established in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009) that "the statutory phrase, 'based on,' has the same meaning as the phrase, 'because of,'" 129 U.S. at 2350, found in Title VII and the ADEA. USERRA further establishes:

> An employer shall be considered to have engaged in actions prohibited … under subsection (a), if the person's membership … is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership.

38 U.S.C. § 4311(c). The Supreme Court declared in *Staub* that USERRA is:

> . . . very similar to Title VII, which prohibits discrimination 'because of . . . race, color, religion, sex, or national origin' and states that such discrimination is established when one of those factors 'was a motivating factor for any employment practice, even though other factors also motivated the practice.'

131 S.Ct. at 1191 (quoting 42 U.S.C. § 2000e-2(m). *Staub*, therefore, clearly rejects the "sole cause" standard for USERRA as well as for Title VII and supports the conclusion that, contrary to *Ginger*, proof that the plaintiff's protected trait

was a motivating factor is sufficient to establish liability not only under § 2000e-2(m), but also under the less restrictive "free from any discrimination" standard found in 42 U.S.C. § 2000e-16(a).

B. *Ginger* Cannot Be Reconciled With The Supreme Court's Longstanding Interpretation Of The "Because Of" Standard Of § 2000e-2(a)(1) As Excluding "Sole Cause."

Staub confirms the Supreme Court's earliest Title VII decision holding that the "because of" standard allows a plaintiff to prevail despite other valid motivations for the employer's actions. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court explicitly rejected the suggestion that a plaintiff must demonstrate that discrimination was the "sole cause" of the contested employment action under § 2000e-2(a)(1). In *McDonald*, the Court considered the case of three men who were charged with stealing from their employer. The one African-American among them was retained while the two white men were fired. *See id.* at 276. Although the theft was taken as true (and is indisputably a valid reason for the adverse employment action), the Court held that the white plaintiffs were still terminated "because of" their race under Title VII. *See id.* at 281-83. Relying on *McDonnell Douglas*, the Court held:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race . . . as

> [*McDonnell Douglas*] makes clear, no more is required to be shown than that race was a "but for" cause.

McDonald, 427 U.S. at 282 n.10 (emphasis added) (citing *McDonnell Douglas*, 411 U.S. at 804).

In *McDonnell Douglas*, decided three years before *McDonald*, the employer had asserted as its non-discriminatory reason the fact that the employee had engaged in illegal conduct, a reason the Court readily accepted as true and valid for refusal to hire the plaintiff. *McDonnell Douglas*, 411 U.S. at 803-04. Notwithstanding the presence of the valid reason, the Court held that the plaintiff was entitled to a trial to determine whether discrimination was also at issue. *See id.* at 804-05.

In *Price Waterhouse*, 490 U.S. at 241 n.7 (plurality opinion), the Court pointed out that when considering the bill that eventually became Title VII, "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'" in § 2000e-2(a)(1). *Id.* (citing 110 Cong. Rec. 2728, 13837 (1964)). As Senator Clifford Case, the Republican floor manager of Title VII, stated in explaining why such a requirement should be rejected, "[i]f anyone ever had an action that was motivated by a single cause, he is a different animal from any I know of." 110 Cong. Rec. 13, 837-38. Adding the

word "solely" to Title VII would, according to Senator Case, "render Title VII nugatory." *Id.* Therefore, "since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Price Waterhouse*, 490 U.S. at 241; *see, e.g., Miller v. CIGNA Corp.*, 47 F.3d 586, 593-94 (3d Cir. 1995) ("We find it clear from the opinions in *Price Waterhouse*, and from the legislative history they cite, that Congress, by using the phrase "because of" did not mean "solely because of.").

Hence, Title VII is violated when discrimination is a but-for cause, even if other valid motives are present. Due to the presence of lawful as well as illegal motivations for the employer's actions, the term "single-motive" to describe such a § 2000e-2(a) case, as opposed to "mixed-motives" to describe a case where the "same decision" affirmative defense is available, is inaccurate; this dichotomy fails to differentiate the case where the affirmative defense is available from one where it is not.

C. The Supreme Court's Interpretation Of "Because Of" In *Gross* Precludes "Sole Cause."

In *Gross*, an ADEA case, the Court construed the meaning of the identical

"because of" statutory text that appears in both Title VII and the ADEA.[5] The Court held that "because of" means but-for causation, which in a disparate treatment case requires the plaintiff to prove that "the employee's protected trait actually played a role in [the employer's decisionmaking process] *and had a determinative influence on the outcome*." 129 S.Ct. at 2350 (emphasis in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). That standard does not require proof of "sole cause." Neither does the tort definition of but-for cause adopted by the *Gross* majority: "An act or omission is not regarded as the cause of an event if the particular event would have occurred without it." 129 S.Ct. at 2350 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and

---

[5] Title VII at 42 U.S.C. § 2000e-2(a) states:

> 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. (Emphasis added).

The ADEA at 29 U.S.C. § 623(a) provides:

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age. (Emphasis added).

Keeton on Law of Torts 265 (5th ed. 1984)); *accord Cuddy v. Carmen*, 694 F.2d 853, 858 (D.C. Cir. 1982)("Thus, the 'but for' reformulation is not more than the traditional factual inquiry into whether consideration of the impermissible criterion made a difference toward causing the adverse action to occur.").

Thus, contrary to *Ginger*'s confusing analysis, even if but-for causation could be applied here that standard cannot be construed to require the plaintiff to prove "sole cause."

III. THE EEOC HAS NEVER INTERPRETED "FREE FROM ANY DISCRIMINATION" STATUTORY LANGUAGE TO REQUIRE PROOF OF "SOLE CAUSE."

Ford and this Court's earlier cases interpreting the "free from any discrimination" language of Title VII and the ADEA are also consistent with the position taken in federal-sector discrimination claims adjudicated by the EEOC. The EEOC has consistently held that a personnel action is "not made free from any discrimination" if the complainant can show by a preponderance of the evidence

that a protected trait "was, at least in part, a basis"[6] or "a factor"[7] in the personnel action. EEOC precedent makes clear that complainants never have the burden of proving that discrimination was the "sole cause" of a personnel action. Indeed, the EEOC has never articulated a "sole cause" standard of causation for disparate treatment claims. Nor has the EEOC ever cited *Ginger* as controlling or persuasive authority.

IV. *GINGER*'S "SINGLE-MOTIVE/MIXED-MOTIVES" DICHOTOMY IS MISLEADING AND INCONSISTENT WITH TITLE VII.

The question arises, then, as to the genesis of this Court's use in *Ginger* of the "sole motive" or "single-motive" terms despite the established meaning of the "because of" causation standard. The terms appear to have arisen largely by convenience. In *Ginger*, this Court borrowed the language from its opinion in

---

[6] *Nguyen v. Prouty*, 2011 EEOPUB LEXIS 2970, *6-*7 (September 28, 2011) ("To prevail in a complaint of discrimination, the preponderance of a Complainant's evidence must be sufficient to persuade the finder of fact that Complainant's protected group status was, at least in part, a basis for the alleged treatment at issue.").

[7] *Humphries v. Holder*, 2011 EEOPUB LEXIS 3164, *17 (October 7, 2011) ("For complainant to prevail, he must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was *a factor* in the adverse employment action.") (emphasis added); *Burch v. Runyon, Jr.*, 1994 EEOPUB LEXIS 3616, *15 (April 28, 1994) ("Appellant can show that the agency's articulated reasons are pretext for race discrimination by showing that race was *a factor* in the agency's decision.") (emphasis added).

Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007), and no further authority was relied upon to reach its conclusions with respect to the "single-motive" language. *See Ginger*, 527 F.3d at 1345-46. In *Fogg*, however, this Court gave no indication that its "single-motive" *dictum* was anything more than shorthand for cases that were not "mixed-motives" under the Civil Rights Act of 1991. *See Fogg*, 492 F.3d at 451 ("[T]he district court concluded the jury had found for Fogg on the 'single motive' or 'pretext' theory of discrimination, as provided in 42 U.S.C. § 2000e-2(a)(1), and not on a 'mixed-motive' theory under § 2000e-2(m)."). Importantly for this case, this Court held in *Fogg* that Congress did not intend to supplant the "because of" causation standard of § 2000e-2(a)(1) when it passed the Civil Rights Act of 1991. *Fogg*, 492 F.3d at 453 ("[W]e cannot infer from the addition of § 2000e-2(m) the implicit repeal of § 2000e-2(a) as the standard for establishing liability. . . .").

Therefore, the "sole cause" requirement in *Ginger* cannot be reconciled with Supreme Court precedent holding that a plaintiff can prove "but-for" causation even if other valid factors contributed to the adverse employment decision. *See, e.g., McDonald*, 427 U.S. at 281-83, *supra* Section II (B). As an example, one may consider an entity undergoing a reduction-in-force that identifies underperforming employees, but selects only the women from among that group

for termination. Although there remains a true and a valid reason for the adverse employment action, the women may state a claim under § 2000e-2(a) because they would not have been terminated "but-for" their sex. *Accord id.* The manner in which other federal circuit courts address the interplay between proving "but-for" causation and the presence of multiple, competing reasons for an adverse employment decision, is also instructive in this regard. The Sixth Circuit, for example, utilizes the following framework that describes the different ways in which pretext can be demonstrated:

> A plaintiff can refute the legitimate, nondiscriminatory reason articulated by an employer to justify an adverse employment action "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

Johnson v. Kroger Co., 319 F.3d 858, 866 (6th Cir. 2003). Methods two and three address the possibility of multiple and valid causes, consistent with the statutory language and Supreme Court authority. If we apply the Sixth Circuit framework to the above hypothetical, we find that even if the terminated employees admit their poor performance, such an admission does not prevent their claim from succeeding under Title VII. A jury could still find that while their performance was unsatisfactory, that fact either did not actually motivate, or was by itself

insufficient to cause the adverse employment action. *See also Pardo-Kronemann v. Donovan*, 601 F.3d 599, 604 (D.C. Cir. 2010) (one method of proving discrimination, in the face of a proffered legitimate reason, is proof "that a discriminatory reason more likely motivated the employer") (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)); *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005) (same).

This same analysis applies to the Library's refusal to hire Ponce. The fact that the Library may have had some lawful motivations for the non-selection decision does not resolve the question of whether a jury could still find the decision was made "free from any discrimination." For example, even if the jury believed the Library's stated reason(s) for Ponce's non-selection, it could have also believed that he would have been hired but-for his race, or sex, or national origin, or all three. Under such a scenario, Ponce would prevail under either a "motivating factor" or a "but-for" causation standard, but not under a "sole cause" standard.

The *Ginger* Court's focus on the legal theories presented by the plaintiffs is a departure from prior federal-sector provision precedent in this Court. Prior to *Ginger*, this Court's determination of whether to apply a *McDonnell Douglas* burden shifting analysis or a mixed-motives analysis was based on the evidence

produced during the course of the litigation. *See, e.g., Weber v. Battista*, 494 F.3d 179, 182 (D.C. Cir. 2007) ("Where, as here, a plaintiff proffers only indirect evidence of unlawful discrimination, her case is subject to the three-part test of *McDonnell Douglas Corp. v. Green*."); *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007) ("Where, as here, the plaintiff's claim of discrimination is principally supported by circumstantial evidence, we analyze the claim under the framework first set forth in *McDonnell Douglas Corp. v. Green*.").

The *Ginger* Court's reliance on *Fogg v. Gonzales* is similarly unpersuasive. While *Ginger* was brought under § 2000e-16(a), the analysis in *Fogg*, highlighting the alternative approaches to establishing liability under Title VII, is clearly based on § 2000e-2(m) and § 2000e(a)(1). Although the protections under the private-sector provisions of Title VII have been extended to federal-sector employees, the panel erred in *Ginger* when it applied the § 2000e-2(m) and § 2000e(a)(1) proof structures to a § 2000e-16(a) case, as the federal-sector provision is intended to encompass a much broader ban on discrimination. *Cf. Gomez-Perez*, 553 U.S. at 488; *Forman*, 271 F.3d at 296. Further, the issue in *Fogg* turned on the timing of the assertion of a particular legal theory—both the District Court and this Court rejected an attempt to label the case as a "mixed-motives" case after the jury had returned its verdict. *See Fogg*, 492 F.3d

at 454. The *Ginger* Court clearly erred in applying this analysis to a motion for summary judgment.

The analysis in *Ginger* also deviates from this Court's Title VII precedent in non-federal-sector cases. In *Thomas v. NFL Players Ass'n*, 131 F.3d 198 (D.C. 1997), *vacated in part on other grounds*, 1998 U.S. App. LEXIS 3634 (Feb. 25, 1998), this Court clearly rejected the notion that a plaintiff must give a defendant prior notice of a burden shifting analysis. *Id.* at 205-06 ("[T]he argument that a defendant might somehow suffer prejudice absent notice of burden-shifting makes little sense in light of the normal progress of Title VII litigation."). Indeed, this Court stated that the "Title VII algorithm need only govern the trial court's assessment *of the evidence* . . . ." *Id.* at 205 (emphasis added). Further, this Court has previously cautioned against requiring that a plaintiff prove that age was "the" determining factor in an employer's adverse action. *See Cuddy*, 694 F.2d at 858 n.22. In fact, this Court stated that such an approach is both "incorrect and dangerous." *Id.* ("A plaintiff is entitled to prevail even though age is not the *sole* factor in the employment decision" … and "need only show that age was 'a determining factor' in the employment decision.") (emphasis in original).

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the District

Court's order denying Ponce's motion for a new trial.

Respectfully submitted,

Yuval Rubenstein
(#503489)
ROSE LEGAL ADVOCATES, P.C.
1726 M Street, N.W.
Suite 203
Washington, D.C. 20036
(202) 331-8555
*Counsel of Record
Counsel for *Amicus Curiae* Metropolitan Washington Employment Lawyers Association

Thomas W. Osborne
(#428164)
AARP FOUNDATION LITIGATION

Melvin Radowitz
(#384834)
AARP

601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
Counsel for *Amicus Curiae* AARP

Rebecca M. Hamburg
(#233610)
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street
Fourth Floor
San Francisco, CA 94101
(415) 296-7629
Counsel for *Amicus Curiae* National Employment Lawyers Association

Date: December 28, 2011

As Corrected: December 29, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4960 words as measured by WordPerfect Office2000, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced font, Times New Roman 14, using WordPerfect Office2000.

/s/ Yuval Rubinstein
Yuval Rubinstein

CERTIFICATE OF SERVICE

I hereby certify that on this 29th of December, 2011, the foregoing brief was served via Electronic Case Filing and first-class mail upon:

Michael Kator, Esq.
Kator Parks & Weiser, PLLC
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20012

Michelle Lo
Assistant U.S. Attorney
U.S. Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

/s/ Yuval Rubinstein
Yuval Rubinstein