No. 09-___

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM *et al.*,

Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Two terms ago, this Court granted certiorari in this case to decide whether the "reasonable factors other than age" (RFOA) defense in the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), is an affirmative defense or an element of the plaintiff's case-in-chief. *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008). The Court held that the RFOA provision establishes a traditional affirmative defense and "remanded for further proceedings consistent with [its] opinion." *Id.* at 2398. On remand, the district court reinstated the jury verdict in plaintiffs' favor on the ground that defendants had waived the RFOA defense by failing to press it at trial. The Second Circuit reversed, holding that although this Court's opinion had not discussed whether defendants had waived the defense, the Court had implicitly decided the issue in defendants' favor. The question presented is:

Whether the court of appeals misconstrued this Court's decision and mandate, and erred in reversing the district court's reinstatement of the jury verdict.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case include Raymond Adams, Wallace Arnold, Deborah Bush, William Chabot, Allen Cromer, Thedrick Eighmie, Belinda Gundersen (as appointed representative of her late husband, Paul Gundersen), Clifford Levendusky, Clifford Meacham, Bruce Palmatier, Neil Pareene, James Quinn, Margaret Reynheer (as appointed representative of her late husband, William Reynheer), John Stannard, Allen Sweet, David Townsend, and Carl Woodman.

The defendants include Knolls Atomic Power Laboratory, Lockheed Martin Corp., and John J. Freeh.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clifford B. Meacham *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit most relevant to this petition (Pet. App. 1a-5a and 35a-39a) are unpublished. Prior decisions of the court of appeals are published at 461 F.3d 134 and 381 F.3d 61. The magistrate judge's order (Pet. App. 6a-34a) is published at 627 F. Supp. 2d. 72.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2009. Pet. App. 1a. The court denied plaintiffs' and defendants' timely petitions for rehearing and rehearing en banc on February 17, 2010 and February 23, 2010 respectively. Pet. App. 62a-65a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f), provides in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization–
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is

based on reasonable factors other than age * * * *.

Rule 50 of the Federal Rules of Civil Procedure provides in relevant part:

> **(a) Judgment as a Matter of Law.**
>
> > **(1) In General.** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
> >
> > > **(A)** resolve the issue against the party; and
> > >
> > > **(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
> >
> > **(2) Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have

submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment–or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged–the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law. * * * *

STATEMENT

In 2008, this Court granted certiorari in this case to decide whether the "reasonable factors other than age" (RFOA) provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f)(1), creates an affirmative defense. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008). The Court held that the RFOA provision establishes a traditional affirmative defense upon which the defendant bears the burden of proof. *See id.* at 2398. The Court then vacated the decision below and "remanded for further proceedings consistent with [its] opinion." *Id.* at 2407. On remand, plaintiffs argued that because RFOA is an affirmative defense, defendants' failure to press the defense at trial precluded them from raising it for the first time on appeal in seeking to overturn the jury's verdict in plaintiffs' favor. The Second Circuit remanded the case to the district court and ordered it to decide that question, among others.

On remand, the district court found as a matter of fact that although defendants initially pled RFOA as a defense in their answer, they later knowingly abandoned the defense before trial, apparently as a matter of strategy. It therefore denied defendants' motion for judgment as a matter of law and reinstated the original jury verdict in plaintiffs' favor. On appeal, a new panel held that this Court's mandate barred consideration of plaintiffs' waiver argument. Although this Court's opinion did not mention the waiver issue, the panel construed the decision to implicitly reject any claim that defendants had waived the defense. The panel then ordered a new trial to allow defendants to assert the

RFOA defense the district court found, and the panel did not dispute, defendants knowingly waived at the original trial ten years earlier.

Factual Background

This age discrimination case has followed a long and tortured path, involving two trips to this Court and multiple, conflicting decisions by different panels of the Second Circuit.

As described in greater detail in this Court's most recent decision, *see* 128 S.Ct. at 2398, in 1996, defendants implemented an involuntary reduction in force. They selected workers for termination based on several factors, including the worker's "criticality" and "flexibility." Pet. App. 22a. The heavy and unaudited reliance on these highly subjective factors had the effect of singling out older workers for termination. When KAPL later terminated thirty-one employees, all but one were above the age of forty. *See* 128 S.Ct. at 2398. A statistical expert later testified that the likelihood of this deeply skewed result occurring by chance was one in 348,000. *Id.* at 2399 n.4.

The Trial (1997-2000)

In January 1997, plaintiffs sued KAPL, alleging disparate treatment and disparate impact under the ADEA. 128 S.Ct at 2398. In their answer, defendants asserted several affirmative defenses, including that they acted on the basis of "reasonable factors other than age." Pet. App. 15a. Subsequently, defendants abandoned that defense, along with several others pled in their answer, as the issues in the case narrowed for trial.

Thus, when defendants moved for summary judgment, they made no mention of the RFOA defense, but focused instead on other arguments, including an assertion that disparate impact liability was unavailable under the ADEA, and that plaintiffs failed to establish the elements of a disparate impact claim in any event. *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 66 (2d Cir. 2004).

Nor did defendants assert any RFOA defense at trial. At the close of plaintiffs' evidence, defendants moved for a directed verdict under Fed. R. Civ. P. 50(a), but made no reference to the RFOA defense. Pet. App. 16a. Likewise, defendants did not request a jury instruction on the RFOA defense, although they requested instructions on other affirmative defenses. Pet. App. 16a. And when the district court issued its jury charge and special verdict form containing no mention of the defense, defendants did not object. Pet. App. 16a-17a.

After deliberation, the jury found that plaintiffs had proven a disparate impact violation and that the violation was willful. *Meacham*, 128 S.Ct. at 2399; 381 F.3d at 62. Defendants then renewed their Rule 50 motion, but again did not mention the RFOA provision. Pet. App. 16a, 52a.

Approximately one year later, the district court denied defendants' motion and upheld the jury's verdict. Pet. App. 8a.

The First Appeal (2002-2004)

Defendants appealed, arguing that the ADEA did not provide for disparate impact claims, and that plaintiffs had failed to prove the elements of a disparate impact claim in any event. Defendants did

not, however, argue that they were entitled to judgment as a matter of law under the RFOA provision. Pet. App. 17a.

The appeal remained pending before Judges Jacobs, McLaughlin, and Pooler, for two and a half years. Eventually, the panel unanimously affirmed. *Meacham*, 381 F.3d at 56. The court reaffirmed prior circuit precedent recognizing a disparate impact cause of action under the ADEA, and held that plaintiffs had established all the elements of a disparate impact claim. *Id.* at 62. The court also upheld the jury's finding of a willful violation, concluding that a reasonable jury could have found that defendants' actions "evinced a desire not to know that the overwhelming – and overwhelmingly disparate – impact of the [layoffs] was on older workers." *Id.* at 77.

The First Petition For Certiorari (2004)

Defendants petitioned this Court for a writ of certiorari. Among other things, the petition challenged the Second Circuit's recognition of a disparate impact cause of action under the ADEA, a question the Court had recently granted certiorari to decide in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The Court held the petition pending its decision in *City of Jackson*, which subsequently affirmed the existence of an ADEA disparate impact cause of action. *Id.* at 232. In the course of its decision, the Court noted that the ADEA provides a defense for employers who can show that their otherwise unlawful conduct was based on "reasonable factors other than age." *Id.* at 233.

The Court then granted defendants' petition, vacated the judgment, and remanded for reconsideration in light of *City of Jackson*. *Knolls Atomic Power Lab. v. Meacham*, 544 U.S. 957 (2005).

The First Remand To The Second Circuit (2005-2006)

On remand, defendants argued for the first time since their answer that they were entitled to prevail under the RFOA provision. Pet. App. 18a. Plaintiffs objected that defendants had waived any right to raise an RFOA defense on appeal because they had failed to press it at trial. Remand Brief of Plaintiffs-Appellees at 4-5, *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006) (No. 09-2037).

In a divided opinion, the Second Circuit reversed and ordered entry of judgment as a matter of law in defendants' favor. Writing for himself and Judge McLaughlin, Judge Jacobs concluded that the RFOA provision was not an affirmative defense, but rather an element of the plaintiffs' case-in-chief upon which the plaintiff bears the burden of persuasion. *Meacham*, 461 F.3d at 141. Although it acknowledged that defendants' practices were seriously flawed, the majority concluded that plaintiffs had failed to meet their burden of showing that defendants' practices were unreasonable. *Id.* at 146.

Judge Pooler dissented, interpreting the RFOA provision to establish a traditional affirmative defense. And because the defendants had failed to request a jury charge on the defense at trial, she concluded, they had waived any right to rely upon it on appeal. *Id.* at 152.

The Second Petition For Certiorari (2007)

Plaintiffs then petitioned for certiorari on two questions. Plaintiffs first sought review of the Second Circuit's holding that an employee alleging disparate impact under the ADEA bears the burden of persuasion on the RFOA defense. Petition for Writ of Certiorari at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). Second, plaintiffs asked the Court to decide whether the defendants' "practice of conferring broad discretionary authority on individual managers" to select workers for termination constituted a "reasonable factor other than age" as a matter of law. *Id.* This Court granted certiorari "limited to Question 1 presented by the petition." *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 1118 (2008) (mem.).

In addition to briefing that question, both parties urged this Court to go further and apply its holding to the facts of this case. Plaintiffs acknowledged that "[u]nder the Court's normal practice, the judgment below would be vacated and the case remanded to the Second Circuit for proceedings consistent with the Court's resolution of the burden of proof question." Brief for Petitioners at 51, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). However, plaintiffs argued that "a remand is not required in this case" because "respondents have forfeited any right to assert the RFOA provision as an affirmative defense" by failing to raise it at trial. *Id.* at 51-52. Defendants, on the other hand, argued that even if this Court held that the RFOA was an affirmative defense, it should nevertheless find that defendants had sustained

their burden of proving the reasonableness of their conduct. Brief for Respondents at 49-56, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505).

This Court accepted neither invitation and, instead, simply decided the question upon which it had granted certiorari. The Court observed that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Meacham*, 128 S.Ct. at 2400 (citation omitted). "After looking at the statutory text," the Court remarked, "most lawyers would accept that characterization as a matter of course." *Id.*

The Court expressly declined defendants' invitation to decide whether they had sustained their burden of proving the defense. The Court acknowledged that the Second Circuit "showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion." *Id.* at 2406. But "[w]hether the outcome should be any different when the burden is properly placed on the employer," the Court concluded, "is best left to th[e] [circuit] court in the first instance." *Id.* at 2406-07.

Likewise, the Court did not address plaintiffs' waiver argument, but instead remanded the case to the Second Circuit "for further proceedings consistent with this opinion." *Id.* at 2407.

The Second Remand To The Second Circuit (2008)

On remand, the court of appeals directed the parties to submit supplemental briefs. Among other things, the court ordered the parties to address whether "the employer waive[d] the affirmative defense of a reasonable factor other than age by not requesting a charge on that defense and/or not objecting to the court's charge?" and whether "defendants [should] prevail as a matter of law on their reasonable factor other than age defense." Pet. App. 39a.

In their letter brief, defendants argued that they had preserved their RFOA defense at trial, but never contested plaintiffs' assertion that the waiver question had been left open by this Court for consideration on remand. *See* Pet. App. 46a-47a; Pet. App. 51a n.1.

Six months later, the panel issued a summary order remanding the case to the district court with instructions to decide, among other things, "[d]id the employer waive the RFOA affirmative defense by its conduct at the district court" and "[i]f so, was any such waiver excused as 'the result of conflicting statements in our case law, for which [the employer] should not be penalized?" Pet. App. 37a (quoting *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir. 2008)).

The Remand to District Court (2009)

In the district court, defendants again argued that they had not waived their RFOA defense, without suggesting that this Court's mandate had precluded the Second Circuit or the district court

from considering that question on remand. Pet. App. 20a-29a.[1] After extensive briefing and argument, and drawing on its direct participation in the original trial, the district court issued an opinion finding that defendants had knowingly and intentionally waived their RFOA defense, that this waiver could not be excused, and that as a result, the jury verdict should be reinstated. Pet. App. 13a-20a, 29a-33a.

First, the court found as a factual matter that at the time of trial, defendants were aware of their right to assert the RFOA defense and intentionally relinquished the defense prior to trial, apparently as a matter of trial strategy. Pet. App. 18a. The court found that there was "no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before" this Court's remand for reconsideration in light of *City of Jackson*. Pet. App. 16a.[2] The decision to abandon the RFOA defense, the court found, was "fully intentional." Pet. App. 29a, 18a. Although, in retrospect, that choice may have proven unwise, the district court found that at the time of trial, "it

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[1] To the contrary, when asked directly by the district court at oral argument whether this Court had made any finding on waiver, defendants' counsel answered "[t]hey made no finding on that, none at all." C.A. J.A. A-5196 (transcript of Mar. 26, 2009 argument).

[2] The district court rejected defendants' contention that although they did not mention the RFOA provision explicitly, they "pressed and preserved the defense in functionally equivalent terms." Pet. App. 20a.

constituted a rational choice given the competing considerations." Pet. App. 19a.

The court further held that defendants' waiver could not be excused on the basis of any "conflicting statements in [the Second Circuit's] case law, for which [defendants] should not be penalized." Pet. App. 29a. The court explained that "[d]efendants have cited no decisions in the Second Circuit prior to the trial which could reasonably be construed as in conflict over the RFOA exception or the burden of proof on that defense." Pet. App. 30a. "Absent demonstration of such conflicting statements," the court held, "no basis is presented to excuse defendants' waiver." Pet. App. 30a. "The fact that the issue was recognized by a party only after trial or that a post-trial appellate court ruling may have alerted a party to an additional argument cannot excuse silence on that issue at trial lest no judgment ever be final." Pet. App. 32a.

The Second Appeal (2009)

Defendants again appealed and seven months later, a new panel – consisting of Chief Judge Jacobs, the author of the opinion this Court reversed, and two new judges[3] – overturned the district court's ruling, concluding that the prior panel's remand order was in conflict with this Court's mandate.[4]

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[3] The prior panel had ordered that any further appeals in the case should be "assigned to a new panel in the ordinary course." Pet. App. 37a.

[4] When defendants asserted on appeal that this Court's mandate precluded consideration of the waiver question, plaintiffs argued that this contention was waived because

The new panel recognized that its predecessor had ordered the district court to decide whether defendants had waived their RFOA defense. However, it concluded that the inquiry was precluded by this Court's decision, which it read "as impliedly but necessarily rejecting plaintiffs' waiver argument." Pet. App. 4a. The panel acknowledged that the Court's opinion said nothing explicit about waiver. Furthermore, it did not give any reason *why* this Court would have rejected plaintiffs' waiver argument, nor did it question the district court's factual finding that the defense had in fact been waived.

Nonetheless, the panel concluded that this Court must have decided the question in defendants' favor, even if only implicitly. Pet. App. 4a. It found support for that conclusion in this Court's statement that "the only thing at stake . . . is the gap between production and persuasion." Pet. App. 3a (quoting *Meacham*, 128 S.Ct. at 2406). And it pointed as well to the Court's observations that "the [Second Circuit] court . . . showed no hesitation in finding that Knolls prevailed on the RFOA defense" and that "whether the outcome should be any different when the burden is properly placed . . . should be left to that court in the first instance." Pet. App. 3a (quoting 128 S.Ct. at 2406-07). The panel further observed that "waiver principles are analytically antecedent to an analysis on the merits," and that

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defendants had not raised it earlier in their supplemental briefing to the initial panel or in the district court. Pl. C.A. Br. 19-20. The new panel did not address this contention.

plaintiffs asked the Court to rule on the waiver question in their briefs. Pet. App. 4a.

The panel then decided that "uncertainty and multiple changes in the governing law ha[d] complicated the issues in this case to such an extent that neither party [was] entitled to judgment as a matter of law, either on the merits or on procedural grounds." Pet. App. 4a.[5] The court therefore vacated the district court's decision and remanded the case for further discovery and a new trial on liability. Pet. App. 4a.

The court subsequently denied rehearing, Pet. App. 62a-65a, and this petition followed.

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[5] It is unclear why the panel refered to "neither party" being entitled to judgment as a matter of law, as only defendants were seeking that relief; plaintiffs sought only to have the jury's verdict enforced.

REASONS FOR GRANTING THE PETITION

The district court found, as a matter of fact, that defendants made a knowing and deliberate decision to abandon the RFOA defense they pled in their answer, apparently as a matter of trial strategy. Without questioning the correctness of that finding, the court of appeals nonetheless ordered a new trial, fourteen years after this age discrimination case first arose, to allow defendants an opportunity to litigate that waived defense. The court made no effort to defend this result on the merits. Instead, it laid responsibility for this inexplicable result at the feet of this Court. Although this Court's opinion never mentioned waiver, and remanded the case for "proceedings consistent with this opinion," the panel nonetheless concluded that the Court had implicitly resolved the waiver question in defendants' favor and barred further consideration of the issue by the district court on remand.

That conclusion is wrong and should be corrected. *See, e.g.*, *United States v. Navajo Nation*, 129 S.Ct. 1547 (2009) (reversing court of appeals' misconstruction of the Court's mandate); *Stanton v. Stanton*, 429 U.S. 501 (1977) (per curiam) (vacating lower court judgment based on misconstruction of the Court's mandate); *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970) (per curiam) (same); *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415 (1958) (per curiam) (same). The court of appeals' decision is an affront to this Court's authority to limit the scope of its own decisions and to assign to the lower courts responsibility for adjudicating other issues that this Court has declined to decide. The decision also inflicts great unfairness on the

plaintiffs, who have been denied any appellate decision on a claim that the district court found to have merit, and will be forced to retry age discrimination claims that are now more than fourteen years old.

Because this intolerable result arises from a decision of this Court, and because only this Court can correct it, the petition should be granted and the judgment below reversed.

I. The Second Circuit Misconstrued This Court's Mandate.

1. By its plain terms, this Court's decision did not resolve whether defendants waived their RFOA defense at trial or preclude the district court from deciding that question on remand.

This Court expressly limited its decision to the question "whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit." 128 S.Ct. at 2398. Although both defendants and plaintiffs asked this Court to go further and decide the ultimate disposition of the case in light of its answer to that question, the Court declined to do so. In particular, although plaintiffs raised the waiver argument in their briefs, the Court did not decide (or even mention) the issue in its opinion. Instead, the Court "remanded for further proceedings consistent with this opinion." *Id.* at 2407.

Under this traditional, open-ended mandate "all questions which appear upon the record and have not already been decided are open for consideration." *Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 554 (1904);

see also, e.g., *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (so construing identically worded mandate); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168 (1939) ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."). This includes issues that were pressed before the Court, but not decided. *See, e.g.*, *Mut. Life Ins. Co.*, 193 U.S. at 553-54.

It is not particularly surprising that this Court chose to leave the waiver question to the lower courts. The Court had granted certiorari to resolve a circuit conflict over the general legal question whether the RFOA provision creates an affirmative defense. Whether defendants had waived that defense in this particular case did not implicate that, or any other, circuit split. Defendants also declined to brief the waiver question in any depth, relegating their response to a two-paragraph footnote. *See* Brief for Respondents at 54 n.20, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). Refusing to decide the waiver question was also consistent with the Court's denial of plaintiffs' second question presented (which asked whether defendants' delegation of discretionary authority to front-line managers to select workers for termination constituted a reasonable factor other than age as a matter of law). Petition for Writ of Certiorari at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505); 128 S. Ct. 1118 (2008) (mem.) (granting on first question only). And it coincided with this Court's express refusal to decide in the first instance whether defendants could satisfy their burden of proof under the RFOA provision on the facts of this case. 128 S.Ct. at 2406-07.

At the same time, it would be surprising indeed if the Court had not only decided the case-specific waiver question, but had done so *sub silentio*. It is not this Court's practice to resolve significant arguments without explaining its reasoning. Nor could the Court have reasonably expected the Second Circuit to discern that it had decided the waiver question without comment. In fact, if that was the Court's intention, the initial Second Circuit panel (including Judge Jacobs, who sat on both panels) completely missed it. *See* Pet. App. 36a.

2. The subsequent Second Circuit panel nonetheless concluded that this Court's opinion resolved the waiver question in defendants' favor for three reasons, none of them persuasive.

First, the panel relied on this Court's statement that "the only thing at stake . . . is the gap between production and persuasion." Pet. App. 3a (quoting 128 S.Ct. at 2406). The panel apparently construed this language to imply that this Court had concluded that the only issue left *in the entire case* was whether defendants had met their relevant burden under the RFOA provision, thereby excluding any consideration of waiver. Just why this Court would have reached that conclusion, the panel does not say, and the answer is far from obvious. In fact, the Court plainly was referring only to the stakes involved in its resolution of the general legal question upon which it had granted certiorari. It was explaining that the only thing at stake in its construction of the RFOA provision was the gap between production and persuasion, given that "nobody is saying that even the burden of production should be placed on the plaintiff." 128 S.Ct. at 2406. And it made that

statement in the context of explaining why its decision, although imposing some additional burden on employers, would not have the broad effects feared by defendants and their amici. *Id.* What issues were left for remand in this particular case had no bearing on those broader policy concerns.

Second, the panel pointed to this Court's statement that the Second Circuit previously "showed no hesitation in finding that Knolls prevailed on the RFOA defense" and that "[w]hether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance." Pet. App. 3a (quoting 128 S.Ct. at 2406). The court of appeals read this as precluding consideration of plaintiffs' waiver claim given that waiver is "analytically antecedent to an analysis on the merits." Pet. App. 4a.

Rather than implying a rejection of the waiver argument, this statement simply explains why the Court was declining defendants' invitation to rule on the sufficiency of the evidence under the proper standard in the first instance. *See* Brief for Respondents at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505) (proposing additional question presented: "Whether the judgment below should be affirmed regardless of who bears the burden."); *id.* at § II (arguing that "The Judgment Below Should Be Affirmed Even If The Employer Bears The Burden Of Persuasion On Reasonableness"). The Court explained that this question would be open on remand, but it did not limit the remand to that question. Instead, the Court issued its usual open-ended mandate that the

proceedings on remand simply be "consistent with [its] opinion." 128 S.Ct. at 2398.

Nor does the fact that waiver may be "analytically antecedent" to the merits mean that this Court must have decided the waiver issue *sub silentio*. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).[6] Where, as here, the Court simply does not discuss an antecedent question, "the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions *in terms* discussed and decided." *Mut. Life Ins. Co.*, 193 U.S. at 553-54 (emphasis added). "[F]ailure to make explicit mention" of an issue "simply [leaves] the matter open for consideration" on remand. *Perkins*, 399 U.S. at 223.

Third, and for the same reasons, it makes no difference that the waiver argument was "squarely presented" to the Court. Pet. App. 4a. "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested." *Mut. Life Ins. Co.*, 193 U.S. at 553. As a result, "omissions do not constitute a part of a decision and become the law of the case, *nor does a contention of*

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[6] To be sure, this Court sometimes decides antecedent issues in addition to the question upon which it granted certiorari. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (deciding logically antecedent question of class certification); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (deciding standing question). But when the Court addresses such antecedent questions, it does so *explicitly*. *See, e.g., Ortiz*, 527 U.S. at 830-65; *Steel Co.*, 523 U.S. at 102-110.

counsel not responded to." *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 136 (1921) (emphasis added). *See also Chas. Wolff Packing Co. v. Court of Indus. Relations of Kansas*, 267 U.S. 552, 562 (1925) (same).

Accordingly, the Second Circuit's construction of this Court's mandate is in conflict with settled mandate principles and finds no support in the language of the Court's opinion. Nor did the court of appeals offer any explanation as to why this Court would have concluded that defendants had preserved their RFOA defense at trial. As discussed next, the district court's contrary conclusion was plainly correct.

II. The Court Of Appeals' Misconstruction Of The Mandate Led It To Wrongly Set Aside The Jury Verdict And Order A New Trial That Will Add Years To This Already Protracted Age Discrimination Litigation.

If plaintiffs' waiver argument were meritless, the court of appeals' misconstruction of this Court's mandate might not warrant correction. But as explained by the district court – the only court to have considered the argument on the merits – there is no reasonable dispute that having raised RFOA in their answer, defendants subsequently abandoned it, thereby waiving any right to challenge the verdict on the basis of a defense they never presented to the jury at trial. The Second Circuit's refusal to give effect to that waiver – thereby requiring a retrial in an age discrimination case already well into its second decade of litigation – is both wrong and consequential.

1. The deliberate relinquishment of a defense defendants knew was available constitutes a waiver of their right to assert that defense on appeal. *See, e.g.*, *United States v. Broce*, 488 U.S. 563, 571 (1989).

Based on its review of the factual record, and drawing on its own participation at the trial, the district court found that "[t]here can be no doubt . . . that defendants fully knew of the RFOA exemption and that they possessed the right to assert RFOA as a defense." Pet. App. 15a. The district court noted that the statute, by its plain terms, had provided RFOA as an affirmative defense since 1967. Pet. App. 13a. As this Court observed, "after looking at [this] statutory text, most lawyers would accept . . . as a matter of course" that the provision established an affirmative defense. 128 S.Ct. at 2400. Moreover, decisions within the Second Circuit at the time of trial had "recognized the RFOA exemption as a defense available to employers in ADEA cases." Pet. App. 14a (collecting cases). And, of course, defendants demonstrated that they recognized as much when they pled RFOA as a defense in their answer. Pet. App. 15a.

The district court further found that "defendants[] intentionally relinquished their right to assert the RFOA defense." Pet. App. 19a-20a. "There exists no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before *Meacham II*." Pet. App. 16a. Defendants did not raise the defense in their summary judgment papers or in their pretrial memorandum. *Id.* They "remained silent on the RFOA at each critical stage

regarding the jury instructions and the special interrogatories in the verdict form." *Id.* And they failed even to mention RFOA in their motions for judgment as a matter of law under Fed. R. Civ. P. 50(a) and (b). *Id.*

The district court found that these failures were not inadvertent. RFOA was one of several defenses defendants pled in their answer but chose not to pursue at trial. Pet. App. 19a. Although defendants have now claimed that they did not know they could assert the RFOA defense to a disparate impact claim, the district court refused to credit that factual assertion. "There exists no evidence," the court found, "to suggest that defendants were uncertain or confused about the defense at the time of trial." Pet. App. 27a. Instead, "defendants' decision to abandon their RFOA defense appears the product of a rational choice of strategies," the court found. Pet. App. 18a (citation omitted). "It appears that defendants chose to pursue a strategy which minimized their burden of proof and maximized that of plaintiffs." *Id.*

2. Even if defendants had not intentionally abandoned their defense as a matter of trial strategy, their failure to raise the defense at critical junctures of the trial, including most significantly in their Rule 50 motions, forfeited their right to assert it on appeal.[7]

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[7] As the district court explained, forfeiture and waiver differ in that "forfeiture refers to a litigant's failure to make the timely assertion of a right," while "waiver requires demonstration that a party intentionally relinquished a known right." Pet. App. 12a & n.6 (citations omitted). Plaintiffs argued that defendants had both waived and forfeited the RFOA defense, but the district court resolved the case in plaintiffs'

Under Rule 50, absent an "appropriate postverdict motion in the district court," *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), an appellate court is "without power to direct the district court to enter judgment contrary to the one it had permitted to stand," *id.* at 400-01 (citation omitted), or to order a new trial pursuant to Rule 50, *id.* at 404.[8] This rule "assure[s] the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed. R. Civ. P. 50 advisory committee's note to 1991 amdt.

Defendants never asserted an RFOA defense in their Rule 50 motions and, accordingly, may not challenge the jury verdict on that ground now.

3. The district court also rightly rejected defendants' assertion that any waiver or forfeiture should be excused because of uncertainty in the law at the time of trial. Pet. App. 29a-33a.

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favor on waiver grounds without considering plaintiffs' forfeiture argument. Pet. App. 12a n.6.

[8] Even when a defendant files a Rule 50(b) motion, the court of appeals lacks authority to order relief on any ground not asserted in the motion to the district court. *See id.* at 404 (holding that "*the precise subject matter* of a party's Rule 50(a) motion . . . cannot be appealed unless that motion is renewed pursuant to Rule 50(b)") (emphasis added); *id.* at 398 n.2 (defendant in *Unitherm* filed a Rule 50(b) motion but did not raise ground upon which it relied on appeal); *see also, e.g.*, *Ford v. County of Grand Traverse*, 535 F.3d 483, 493 (6th Cir. 2008); *Wallace v. City of San Diego*, 479 F.3d 616, 631 (9th Cir. 2007).

a. In some instances, courts have recognized a narrow exception to the ordinary waiver/forfeiture rules for "defenses which were not known to be available at the time they could first have been made." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967)); *see also Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-606 (4th Cir. 1999); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706-707 (D.C. Cir. 1996).

Defendants argued in the district court that at the time of trial, they were precluded from raising RFOA as a defense to a disparate impact claim. Under then-current Second Circuit precedent, they argued, their only defense was "business necessity" under the burden-shifting regime of *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). After surveying circuit caselaw, the district court rightly rejected that assertion. While circuit precedent plainly provided that the "business necessity" defense was *one* way to defend against a disparate impact claim, none of the cases defendants cited held that it was the *only* defense available. Pet. App. 21a n.12. And while the Second Circuit had not squarely held that RFOA was an affirmative defense, that much was obvious on the face of the statutory text, *see Meacham*, 128 S.Ct. at 2400, and implied by circuit precedent, *see, e.g., E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996) ("[A]n employer *has a defense* if his policy is based on reasonable factors other than age . . . ." (emphasis added) (internal quotation marks omitted)). At the same time, cases from other circuits had expressly

recognized that the RFOA provision established an affirmative defense. *See Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 552-53 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975).

b. In any event, even if *some* reasonable defendants might have had grounds for confusion about whether RFOA was an affirmative defense, the district court found as a matter of fact that *these particular defendants* were not confused, but knowingly and intentionally abandoned the defense, apparently as a matter of litigation strategy. Pet. App. 27a ("There exists no evidence to suggest that defendants were uncertain or confused about the defense at the time of trial."). There is no basis to excuse such a waiver simply because it turns out, in retrospect, to have been unwise. *Cf.*, *e.g.*, *Ohler v. United States*, 529 U.S. 753, 757-59 (2000) (prohibiting a litigant who made a tactical decision to introduce incriminating evidence at trial from arguing on appeal that the evidence was inadmissible); *Reed v. Ross*, 468 U.S. 1, 14 (1984) (a litigant "may not make a tactical decision to forgo a procedural opportunity – for instance, an opportunity to object at trial or to raise an issue on appeal – and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy" on collateral review).

c. Finally, defendants' failure to raise an RFOA defense in their Rule 50 motions cannot be excused under any circumstance. In *Unitherm*, this Court recognized that Rule 50 establishes an inflexible rule barring appellate consideration of sufficiency-of-the-evidence claims not presented at

trial. 546 U.S. at 405 (concluding that the court of appeals is "powerless" to entertain such arguments). The Court thus rejected the assertion (advanced by the dissent) that courts may excuse failures to comply with Rule 50 when necessary "to avoid manifestly unjust results in exceptional cases." 546 U.S. at 407 (Stevens, J., dissenting). Consequently, defendants' failure to raise an RFOA defense in their Rule 50 motions left the court of appeals without power to award defendants any relief on the basis of that defense under Rule 50.

III. This Court Should Reverse The Second Circuit's Misconstruction Of Its Mandate And Affirm The District Court's Reinstatement Of The Jury Verdict.

This Court has repeatedly granted certiorari to correct lower courts' misconstruction of its mandates. *See, e.g., United States v. Navajo Nation*, 129 S.Ct. 1547 (2009); *Smith v. Texas*, 550 U.S. 297 (2007); *Yates v. Aiken*, 484 U.S. 211 (1988); *Stanton v. Stanton*, 429 U.S. 501 (1977) (per curiam); *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970) (per curiam); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415 (1958) (per curiam); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).[9] The Court should do so again in this case.

Ordinarily, that would mean vacating the judgment below and remanding to the Second Circuit

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[9] The Court has sometimes done so summarily and could consider the same course of action here. *See, e.g., Perkins*, 399 U.S. at 223; *Stanton*, 429 U.S. at 503-04; *Alleghany*, 355 U.S. at 416.

to consider the merits of the district court's waiver ruling. But in the extraordinary circumstances of this case, the Court should resolve the waiver question itself, in order to bring this protracted litigation to a final conclusion. *See Yates v. Aiken*, 484 U.S. at 215 (resolving question not addressed below because lower court had misconstrued this Court's mandate in failing to decide the issue). Here, "[t]he factual record is adequate, and would not be improved by a remand to the court of appeals. And the case is decided by a straightforward application of controlling precedent." *Thigpen v. Roberts*, 468 U.S. 27, 32-33 (1984) (footnote omitted). More importantly, deciding that straightforward question would finally bring to an end litigation that has already been pending far too long.[10]

The Second Circuit bears much of the responsibility for this delay. That court took more than two years to decide the initial appeal in this case. After this Court vacated that ruling, the court of appeals took another sixteen months to issue its decision reversing course and awarding judgment to defendants. That decision, this Court subsequently held, was premised on an erroneous interpretation of the statute (an error that required almost two years to correct). On remand, the Second Circuit ordered supplemental briefing and held the case under advisement for six months, before sending it back to the district court to decide, among other things,

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[10] *Cf. Fed. Power Comm'n v. Sunray DX Oil Co.*, 391 U.S. 9, 45-46 n.35 (1968) ("[W]e consider it appropriate in this instance to resolve this question without remand to the court below for initial consideration, in order that this extended proceeding may at last come to an end.").

whether defendants had waived their RFOA defense. A year later, a new panel held that those proceedings were for naught because the original panel's remand order conflicted with this Court's mandate.

Now, fourteen years after the events leading to this litigation, the Second Circuit has ordered the case retried to allow defendants to assert a defense the district court found (and the Second Circuit did not dispute) defendants knowingly and intentionally abandoned at the original trial. In the interim, two plaintiffs have died and the rest have suffered the cost and uncertainty of inordinately protracted litigation. This Court can and should prevent the Second Circuit's latest mistake from adding to that delay and injustice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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