No. 06-1505

IN THE

Supreme Court of the United States

Clifford B. Meacham, *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory, *et al*.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 U.S.C. § 623, bears the burden of persuasion on the "reasonable factors other than age" defense.

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 KAPL, Inc., Lockheed Martin Corp., and John J. Freeh.

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BRIEF FOR THE PETITIONERS

Petitioners Clifford B. Meacham *et al*. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-32a) is published at 461 F.3d 134. A prior decision of the court of appeals (Pet. App. 33a-69a) is published at 381 F.3d 61. The magistrate judge's order denying respondents' motion for judgment as a matter of law (Pet. App. 70a-154a) is published at 185 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on January 8, 2007. Pet. App. 155a-56a. On April 3, 2007, Justice Ginsburg extended the time in which to file a petition for certiorari until May 9, 2007. The petition was filed on that date and granted January 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Appendices to this brief reproduce the relevant provisions of: (A) the Age Discrimination in Employment Act, 29 U.S.C. § 623; (B) the Equal Pay Act of 1963, 29 U.S.C. § 206; (C) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2;

(D) regulations of the Department of Labor, 29 C.F.R. §§ 860.102, 860.103 (1968); and (E) regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1625.7(e).

STATEMENT

In *Smith v. City of Jackson,* 544 U.S. 228 (2005), this Court held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, prohibits employment practices that have an unjustified disparate impact on older workers, subject to the "reasonable factors other than age" (RFOA) defense in Section 4(f)(1) of the Act.

In this case, after a five and a half week trial, a jury found that respondents had violated the ADEA by implementing a reduction in force process that had just such an unjustified disparate impact on older workers. Respondents never asked the jury to decide whether that disparate impact was caused by "reasonable factors other than age." Nonetheless, a divided panel of the Second Circuit held that there was insufficient evidence to sustain the jury's verdict because petitioners, as the plaintiffs, bore the burden of disproving the reasonableness of respondents' conduct under the RFOA provision and failed to sustain that burden. The question before this Court is whether the court of appeals was correct in placing that burden of proof on the plaintiffs or whether, instead, the RFOA provision establishes a traditional affirmative defense upon which the defendant bears the burden of persuasion.

1. Section 4(a) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2).

In deciding that this provision authorizes a disparate impact claim, *City of Jackson* relied in large part on the Court's prior interpretation of the virtually identical language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2). See 544 U.S. at 233-37. In particular, the Court relied heavily on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Court had construed Title VII to prohibit practices that have an unjustified disparate impact on protected employees as well as intentionally discriminatory employment practices. 401 U.S. at 429-30. The Court later held that *Griggs*'s disparate impact analysis applies not only to employment tests and criteria, like those at issue in *Griggs* itself, but also to an employer's "system of subjective decisionmaking," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1989), like the one challenged in this case.

In subsequent decisions, including *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court provided a framework for considering disparate impact claims under Title VII. First, the "'plaintiff must begin by identifying the specific employment practice that is challenged'" and show that the challenged practice has a significantly disparate "impact . . . on employment opportunities" for protected workers. *Id.* at 656 (quoting *Watson*, 487 U.S. at 994). If that burden is satisfied, "the case will shift to any business justification [the employer] offers for [its] use of these practices . . . ." *Id.* at 658.

This so-called "business necessity test"[1] contains two components: "first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less [disparate] impact." *Id*. With respect to the business justification, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id*. at 659. On this question, the "employer carries the burden of producing evidence of a business justification for his employment practice" but the "burden of persuasion . . . remains with the disparate-impact plaintiff." *Id*. If the employer produces evidence of a business justification, and the employee fails to rebut it, the employee may yet prevail by identifying "alternatives to [the employer's] hiring practices that reduce the racially disparate impact of practices currently being used" and would be "equally effective . . . in achieving [the employer's] legitimate employment goals." *Id*. at 660-61.

In *City of Jackson*, the Court affirmed that the same test governs disparate impact claims under the ADEA. The Court observed that while Congress had acted to modify the *Wards Cove* framework in the Civil Rights Act of 1991, Pub. L. No. 02-166, 105 Stat. 1071, it had not extended those revisions to the ADEA. "Hence, *Wards Cove*'s pre-1991 interpretation

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[1] In *Griggs*, the Court used the term "business necessity." 401 U.S. at 431. In *Wards Cove*, the Court used the term "business justification." 490 U.S. at 658. Like the court of appeals, petitioners use the terms interchangeably in this brief.

of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

The Court further recognized a second difference between the ADEA and Title VII, arising from Section 4(f)(1) of the ADEA, which provides that:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623(f)(1). In light of this "reasonable factors other than age" (RFOA) provision, it is not enough that the employee makes out a case of discrimination under *Wards Cove*. "Unlike the business necessity test" under Title VII, "which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." 544 U.S. at 243.

2. Respondent KAPL, Inc., operates the Knolls Atomic Power Laboratory under a contract with the Department of Energy. Pursuant to that contract, the Department sets annual staffing levels for the Lab. Pet. App. 37a. The present litigation arose after the Department notified respondents that the staffing level for the Lab for fiscal year 1996 would be 108 positions below the prior year's level. *Id.* at 38a. When informed of the Government's decision, some managers expressed concern about the prospect of losing younger workers in the impending staffing reductions and about the aging of KAPL's workforce in general. *See, e.g.*, Tr. 1952-57, 1641-45; C.A. App. A-672.

To meet the reduced staffing budget, and to accommodate additional hiring the laboratory wished to undertake, respondents concluded that they would need to eliminate 143 positions. Pet. App. 38a. They initially attempted to meet this goal though a voluntary separation plan (VSP), offering workers financial incentives to take early retirement. Planners estimated that up to 250 employees at the Lab would be interested in taking the offer, more than enough to meet the Lab's lowered staffing budget. *Id*. Respondents, however, decided to limit participation in the VSP to only those workers with twenty or more years of service. *Id*. As a result, respondents granted early separation to only 107 workers, leading to the need for an involuntary reduction in force (IRIF). *Id*. at 39a.

Respondents' plan for the IRIF proceeded in two steps. *See generally* J.A. 94-98. First, respondents developed staffing budgets for units within the lab. Pet. App. 39a. Managers of over-budget units were then required to identify particular positions within the unit for inclusion in the IRIF based on an "excess skills" analysis. *Id*. Respondents then considered individuals within those positions for termination.

At the second stage, respondents required over-budget managers to put the termination candidates from their units into a "matrix." Each manager then evaluated the employees on his or her matrix, giving up to ten points in each of four categories: (1) performance; (2) "flexibility"; (3) "criticality of [the worker's] skills"; and (4) years of service. Pet. App. 39a; *see also* J.A. 94-95. Respondents gave managers substantial discretion, and little guidance, in scoring workers on "flexibility" and "criticality." They told

managers that scores for "flexibility" should take into account whether an "employee's 'documented skills [could] be used in other assignments that [would] add value to current or future Lab work . . . .'" Pet. App. 39a; *see also* J.A. 95. As for guidance on "criticality," respondents told managers that "[c]ritical skills were those skills that were critical to continuing work in the Lab as a whole," taking into account whether the skill was a "key technical resource" and whether it was available elsewhere in the external labor market. Pet. App. 5a-6a; *see also* J.A. 95. Although respondents were aware of their obligation to avoid imposing an unjustified disparate impact on older workers, Pet. App. 39a-40a, a number of managers testified at trial that "they received no training on avoiding age discrimination in the IRIF." *Id.* at 64a.

This highly subjective process produced "startlingly skewed results." Pet. App. 7a. At the time of the terminations, KAPL employed 2,063 exempt employees,[2] 58% of whom were forty years of age or older. *Id.* at 74a-75a. Managers selected 245 employees to be included in the matrices and considered for termination. Of those, 73% were over forty. *Id*. at 75a. Of the thirty-one eventually selected for termination, all but one (97%) were over forty. *Id*.

Petitioner's expert later testified at trial that the chances of randomly selecting thirty-one employees from KAPL's workforce and ending up with thirty over the age of forty was approximately one in

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[2] "Exempt employees" are workers, generally salaried professionals, who are exempted from the minimum wage and overtime requirements of the FLSA. *See* 29 U.S.C. § 213(a)(1).

348,000. Pet. App. 42a.[3] Moreover, her statistical analysis demonstrated that the age disparity among those selected from the matrices for termination arose principally from the scores managers gave older workers for "flexibility" and "criticality." *Id*.

Perhaps aware that the substantial discretion given to front-line supervisors under the plan could be used to give effect to overt or subconscious bias, *cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), respondents identified a number of auditing measures they deemed both necessary and reasonable to protect against that risk. Pet. App. 40a; J.A. 96-98. First, the plan called for managers to conduct adverse impact analyses to determine whether there was evidence that the discretionary authority bestowed on lower level managers was being misused to give effect to unlawful bias. *Id.* Second, respondents established a review board to "assess[] the managers' selections 'to assure adher[e]nce to downsizing principles as well as minimal impact on the business and employees.'" *Id.* Third, "KAPL's general manager, John Freeh, and its chief counsel, Richard Correa, were to review the final IRIF selection and the impact analyses." *Id*.

Respondents, however, failed to implement any of these precautions in a meaningful manner. First, although the plan called for managers to conduct a disparate impact analysis, none did. Instead, a single employee, Linda Geiszler in the human resources

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[3] The chances of selecting 31 workers from the matrices (upon which older workers were disproportionately represented) and ending up with all but one over the age of forty was 1 in 73, also a statistically significant number. *Id*. at 42a.

department, reviewed the results of the IRIF on behalf of the company. Ms. Geiszler "neither received instruction on how to conduct such an analysis . . . nor read any book or articles on how to do it." Pet App. 41a. Although the plan suggested using the traditional four-fifths rule – under which, the plan stated, "if the selection rate for a protected group is greater than 120% of the rate for the total population[,] a serious discrepancy exists," *id.* at 40a – Geiszler instead "compared the average age of KAPL's 2000-plus employees before and after the IRIF and found no significant difference." *Id.* at 64a. Respondents subsequently admitted that the analysis "was incapable of identifying any disparate impact on older employees." *Id.* at 100a.[4]

Although the inadequacy of Geiszler's review was "self-evident," Pet. App. 100a, the review board did nothing about it. *Id*. at 64a. In fact, like Ms. Geiszler, the board members "received no training on age discrimination," and perhaps as a consequence, they made no attempt to monitor for age discrimination at all. *Id*.

Nor did KAPL's general manager or chief counsel take adequate steps to determine whether the IRIF had been infected with age discrimination. KAPL officials were aware of the skewed results. Pet. App. 99a. Nonetheless, chief counsel Correa did not object to Geiszler's patently inadequate disparate impact analysis, asserting at trial both that "an impact

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[4] To reduce the average age of a 2,000-person work force by five years, from an average of forty-five to forty, the thirty-one terminated workers would have had to be, on average, 362 years old.

analysis is only required for race and sex"[5] and that there was "no way to determine whether [Geiszler's analysis was] appropriate or not, since there's no guidance on it." *Id.* at 41a. And although he purported to conduct a "complete legal review of the IRIF process," *id*., his "review was far from systematic and appears to have consisted primarily of having a paralegal check the managers' math" on the matrices. *Id.* at 61a. Indeed, Correa "did not look at who was placed on the matrices," id. at 41a, and did not consider their ages, Tr. 1287. Of the more than twenty-nine managers who participated in the rating system, Correa interviewed only three. Tr. 1290-91.

At trial, petitioners' expert testified that "the procedures established for review of the decisions made by individual managers 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome.'" Pet. App. 18a. The Second Circuit later agreed that the evidence "could easily have led the jury to conclude that KAPL could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs." *Id*. at 61a.

The district court likewise found that the jury could reasonably conclude that respondents "were aware that the implementation of the guidelines for the IRIF would result in a disparate impact on older employees . . . but took no meaningful steps to avoid or mitigate that impact." Pet. App. 99a. Indeed, the court found that the "jury was entitled to infer from

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[5] Respondents would later insist that despite binding circuit precedent to the contrary, the ADEA does not prohibit disparate impact. *See* Pet. App. 43a.

[the] evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees." *Id*. at 100a.

3. Petitioners, twenty-eight of the KAPL employees terminated during the IRIF,[6] sued respondents[7] in January, 1997, asserting disparate treatment and disparate impact claims under the ADEA.[8]

At the close of evidence, the court instructed the jury to determine disparate impact liability on the basis of the burden-shifting analysis of *Wards Cove*, in accordance with then-current circuit law. *See Smith v. Xerox Corp*., 196 F.3d 358, 364-65 (2d Cir. 1999); Tr. 4711-41 (jury charge); J.A. 73-74 (Special Verdict Form). Although respondents had raised the ADEA's "reasonable factors other than age" provision as an affirmative defense in their answer, C.A. App. A-139, they did not ask for a jury instruction on the defense[9] or object when the Special Verdict Forms did

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[6] Of those, seventeen are petitioners in this Court, nine settled their claims before final judgment, and two non-exempt employees did not bring disparate impact claims.

[7] The defendants were KAPL, Inc., its parent company, Lockheed Martin Corp., and KAPL's general manager, John J. Freeh.

[8] Petitioners also sued under the New York Human Rights Law, N.Y. Exec. Law § 290 *et seq*. (McKinney 2001). Those claims are not before the Court.

[9] Respondents did ask that the jury be instructed that petitioners were required, during the first step of the *Wards Cove* analysis, to prove that the disparate impact felt by older workers was the result of their age. Tr. 4733-34. However, they did not request an instruction directing the jury to consider the reasonableness of the practices creating the disparate impact.

not require the jury to decide whether respondents had, in fact, acted on the basis of an RFOA. J.A. 73-74; Tr. 4453-4458, 4741. Moreover, while they contested the validity of the Second Circuit's recognition of disparate impact liability under the ADEA, they did not challenge that court's determination that the standards for proving disparate impact under the ADEA (if such a cause of action existed) were set forth in *Wards Cove*.

After receiving the charge and deliberating on the evidence, the jury returned a verdict for petitioners on the disparate impact claims and for respondents on the claims of disparate treatment. J.A. 62-75.

On December 19, 2000, defendants filed a Rule 50(b) motion seeking judgment as a matter of law. C.A. App. A-1646 to A-1647. The district court denied the motion, Pet. App. 102a, and respondents appealed.

4. The Second Circuit affirmed. Pet. App. 36a. After reaffirming circuit precedent recognizing a disparate impact cause of action under the ADEA, *id*. at 52a, the court rejected respondents' assertion that petitioners had submitted insufficient evidence to sustain their burdens under *Wards Cove.*

In particular, the court held that plaintiffs had made out a prima facie case of disparate impact by identifying a specific employment practice – the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 60a – which caused a substantial disparate impact on older workers. *Id.* at 59a. The court then found that respondents had proffered a legitimate business justification for the practice, namely the need to "reduce its workforce while still retaining employees

with skills critical to the performance of KAPL's functions." *Id*. However, the court concluded that plaintiffs had succeeded at establishing "at least one suitable alternative": "KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.* at 60a-61a.

5. Shortly thereafter, this Court issued its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). When respondents petitioned for certiorari, the Court vacated the Second Circuit's judgment and remanded for reconsideration in light of *City of Jackson*. 544 U.S. 957 (2005).

6. On remand, a divided panel of the Second Circuit reversed course and ordered entry of judgment for respondents as a matter of law.

a. The panel majority concluded that the court's prior analysis was "untenable on this remand because, in *City of Jackson*, the Supreme Court held that the 'business necessity' test is not applicable in the ADEA context; rather the appropriate test is for 'reasonableness' . . . ." Pet. App. 9a. Although respondents had never asked the jury to determine whether their IRIF practices fell within the "reasonable factors other than age" defense of Section 4(f)(1), the majority nonetheless undertook to decide for itself whether the evidence supported a finding under that provision. *Id.* at 11a.[10]

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[10] In so doing, the court rejected, without discussion, petitioners' argument that respondents' had waived any right to rely on the RFOA provision. *See* C.A. Plaintiffs' Remand Reply Br. 4-5.

To decide that question, the panel first asked "who bears the burden of persuasion with respect to the 'reasonableness' of the employer's proffered business justification under the ADEA disparate-impact framework." Pet. App. 11a. The majority acknowledged that the Equal Employment Opportunity Commission (EEOC) – which is charged with administering the statute and had filed an amicus brief in the case addressing the question – took the view that the RFOA provision creates an affirmative defense upon which the defendant bears the burden of persuasion. *Id.* at 13a n.6; *see also* C.A. EEOC Remand Br. 14-17, 461 F.3d 134 (2d Cir. 2006) (No. 02-07378(L)). The court likewise acknowledged that the language of the provision – permitting an exemption for "otherwise prohibited" conduct – "suggests an affirmative defense." *Id*. at 13a. Indeed, the majority recognized that the RFOA defense "is listed in the statute after the bona fide occupational qualification (BFOQ) exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion." *Id*. (citations omitted). But the majority nonetheless concluded that, contrary to the apparent plain meaning of the text, this Court's decision in *City of Jackson* required a different result.

In particular, the court believed that *City of Jackson* required "substituting the 'reasonableness' test" of the RFOA provision "for the 'business necessity test'" of *Wards Cove*. Pet. App. 11a. Because the plaintiff bears the burden of proof on the business necessity test, the majority reasoned, the Court must have intended the plaintiff to bear the burden of proof on the replacement RFOA test as well. *Id*. at 11a-12a. To hold otherwise, the majority

thought, would "compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification." *Id*. at 12a. Moreover, imposing the burden on the employer would also, the majority concluded, conflict with *City of Jackson*'s observation that disparate-impact liability is narrower under the ADEA than under Title VII. *Id*. at 12a-13a.

The majority further found support for its view in "the history of the development of the 'business necessity' test," which, the majority believed, arose from an interpretation of Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).[11] Pet. App. 14a. That provision, the majority noted, "like the RFOA provision in the ADEA, lends itself to interpretation as an affirmative defense." *Id*. at 15a. However, the court concluded, "the Supreme Court has determined that it is not," *id*. at 15a, thereby supporting the view that the RFOA provision is not either.

The majority then applied its standard of proof to the evidence in this case and concluded that the district court had erred in denying respondents' Rule 50(b) motion. The court acknowledged the many serious deficiencies in the IRIF process, including respondents' failures to implement the protections they themselves had determined to be reasonable means to guard against age discrimination. Pet. App. 17a-18a. But the majority nevertheless found that the measures respondents had taken were "not unreasonable." *Id*. at 19a (citation omitted).

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[11] Section 703 is reproduced in Appendix C to this brief.

b. Judge Pooler dissented, concluding that that the RFOA provision creates an affirmative defense and that respondents had waived the defense by not asserting it to the jury. Pet App. 21a-32a.

In the dissent's view, the majority "impermissibly conflate[d] the Supreme Court's holding on an age discrimination disparate impact analysis with its holding on the RFOA defense." *Id*. at 23a. Properly read, the dissent argued, *City of Jackson* held that the RFOA defense serves as "a statutory exemption to liability otherwise established by plaintiffs under a disparate impact analysis." *Id*. at 24a. Whether the plaintiff has established that liability, in turn, is determined by applying "the entire *Wards Cove* analysis." *Id*. Thus, "the burden of proving a disparate impact claim remains exactly as it is described in *Wards Cove*," Judge Pooler concluded, "but that does not mean that the burden of proving the statutory RFOA exemption has been changed by *Wards Cove* or by *City of Jackson*." *Id*. at 30a.

Instead, the dissent argued, the nature of the RFOA provision should be determined by ordinary rules of statutory construction. Pet. App. 25a. In Judge Pooler's view, "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a[n] RFOA [defense]." *Id.* This conclusion was further supported, she argued, by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). That statute was passed in reaction to this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989), which had held that "the benefit plan exemption" under Section 4(f)(2) did not

create an affirmative defense. Judge Pooler explained that at the time of *Betts*, Section 4(f)(2) did not include any language specifying that its exemptions applied only to conduct "otherwise prohibited" by the ADEA, in contrast with Section 4(f)(1) and the RFOA provision. *Id.* at 26a. When this Court construed Section 4(f)(2) as not creating an affirmative defense, Congress overruled that result by, among other things, inserting the "otherwise prohibited" language of Section 4(f)(1) into Section 4(f)(2). *Id.* at 28a. That change, and the legislative history explaining it, demonstrated Congress's understanding that the employer would also bear the burden under the similarly worded RFOA exemption. *Id*.

Having concluded that the RFOA provision establishes an affirmative defense, Judge Pooler would have found the defense waived by respondents' failure to assert it to the jury. Pet. App. 31a-32a. "From all that appears in the record before us," she observed, "defendants may have made a strategic decision not to press the RFOA defense, believing that it would be easier to require plaintiffs to establish disparate impact under the *Wards Cove* analysis than for defendants themselves to prove a reasonable factor other than age." *Id*. at 32a.

7. The Second Circuit denied petitioners' subsequent petition for rehearing and rehearing en banc, Pet. App. 155a-56a, and this Court then granted certiorari limited to the first question presented by the petition. 128 S. Ct. 1118 (2008) (mem.).

SUMMARY OF ARGUMENT

Petitioners proved to the satisfaction of a jury, the district court, and the court of appeals that respondents' unaudited reliance on subjective decisionmaking during an involuntary reduction in force had a substantial and unnecessary negative impact on the employment rights of older workers. Under the basic standards for disparate impact claims applicable to most cases, that showing would conclusively establish liability. Respondents nonetheless seek shelter in a special provision of the ADEA that exempts "otherwise prohibited" conduct from liability when based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Congress's formulation of the defense – as an exemption from the general prohibitions of a statute – marks it as a classic example of an affirmative defense upon which the defendant bears the burden of proof. Having found that the defendant has inflicted significant harms on older workers that could have been avoided through equally effective alternative means, a jury should be entitled to view with modest skepticism the employer's claims of innocence, requiring the employer to show that its conduct was at least "reasonable" before leaving the injured employees to bear the cost of the employer's otherwise unlawful conduct.

That conclusion flows from the language, history, and purposes of the RFOA provision. Indeed, this Court has read similarly worded exceptions in the ADEA and the Equal Pay Act as creating affirmative defenses. Thus, the Court has construed the RFOA provision's immediate neighbor – the "bona fide occupational qualification" exemption – as an

affirmative defense. And the Court has construed the nearly identically worded "any other factor other than sex" defense of the Equal Pay Act as also imposing the burden of proof on the employer who claims its shelter.

Giving consistent meaning to common textual formulations in related statutes is important in its own right and in this case yields an entirely sensible result. Employers are better positioned to defend the reasonableness of their practices, having greater access to the information that is most likely to be relevant to the jury's deliberations. At the same time, placing the burden of persuasion on the employer strikes an appropriate balance between the need to ensure effective enforcement of the Act with the employers' interest in maintaining substantial leeway in determining how to conduct their operations.

If there is any ambiguity in the statute, the Court should defer to the reasonable construction consistently applied by the federal agencies charged with administering the ADEA. Within six months of the Act's passage, the Department of Labor authoritatively construed the RFOA provision as establishing an affirmative defense. In the years since enforcement responsibility was transferred to the EEOC, that agency has continued to express the same understanding. These agencies' longstanding, contemporaneous view of the statute is entirely reasonable and entitled to deference.

The court of appeals' reliance on this Court's decisions in *City of Jackson* and *Wards Cove* to reach a contrary conclusion is misplaced. The Court was clear in *City of Jackson* that the RFOA provision, by

its terms, comes into play only after the plaintiffs have established that the challenged practice is "otherwise prohibited" by the general proscriptions of the ADEA. And that determination, the Court explained, is made under the traditional *Wards Cove* analysis. Accordingly, the RFOA provision operates independently of the *Wards Cove* analysis, providing an additional affirmative defense to employers who would otherwise be held liable under the *Wards Cove* analysis standing alone. The fact that the employee bears the burden of proof on all the elements of the *Wards Cove* analysis, including "business necessity," provides no basis for believing that the employee also bears the burden of negating the employer's reliance on the entirely separate RFOA defense that is unique to the ADEA and bears all the markings of a traditional affirmative defense.

ARGUMENT

I. The Text, Structure, And History Of The RFOA Provision Establish It As An Affirmative Defense.

The ADEA does not expressly state which party bears the burden of persuasion under the RFOA exception in Section 4(f)(1). 29 U.S.C. § 623(f)(1). However, the text and structure of the provision follow a familiar pattern this Court has long construed as establishing an affirmative defense under which the defendant invoking the exception bears the burden of proof. Moreover, because the defense is relevant only to conduct "otherwise prohibited" by the act – and therefore, presumptively illegal – requiring the employer to sustain the burden of proving the reasonableness of its otherwise

unlawful conduct strikes an appropriate balance between the need to protect employers from unwarranted liability and the equally important need to ensure that the ADEA's disparate impact cause of action can serve its intended function.

A. The RFOA Provision Creates An Exception To A General Prohibition, A Formulation Long Understood To Establish An Affirmative Defense.

The "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . ." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *see, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (applying rule to hold that the "burden of proving the applicability of the supervisory exception [to the protections of the National Labor Relations Act] should thus fall on the party asserting it"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (applying the "general rule" that "the burden of proof is on . . . [the] one [who] claims the benefits of an exception to the prohibition of a statute"); *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910) ("When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it.") (collecting cases); *see also Dixon v. United States*, 126 S.Ct. 2437, 2443 (2006) (noting that "at common law, the burden of proving affirmative defenses—indeed, all circumstances . . . of justification, excuse or alleviation—rested on the defendant.") (citations omitted).

As the Court recognized in *City of Jackson*, the RFOA provision operates as just such an exception to liability for otherwise unlawful conduct. *See* 544 U.S. at 238-39 (plurality opinion); *id*. at 246 (Scalia, J., concurring in part and concurring in the judgment). Section 4 of the ADEA begins by defining a series of unlawful employment practices for employers, employment agencies, and labor organizations.[12] Subsection (f) then contains "the ADEA's five affirmative defenses," *TWA v. Thurston*, 469 U.S. 111, 122 (1985), three of which are contained in subsection (f)(1):

> 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 age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or ***where the differentiation is based on reasonable factors other than age***, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located . . . .

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[12] The text of Sections 4(a)-(f) of the ADEA is set forth in Appendix A to this brief.

29 U.S.C. § 623(f)(1).[13]

"As this text makes clear, the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA." *City of Jackson*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment).[14] And as such, it represents a classic example of an affirmative defense.

B. This Court Has Applied The General Rule That Exceptions To Liability Operate As Affirmative Defenses With Special Vigor In Interpreting The Fair Labor Standards Act, Through Which The ADEA Is Enforced.

Application of the general rule treating exceptions to liability as affirmative defenses is particularly appropriate in the case of the ADEA because the statute is enforced through the Fair Labor Standards Act.

Nearly half a century ago, this Court was able to say that it was "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell v. Ky. Finance Co.*, 359 U.S. 290, 295 (1959) (collecting cases). *See also A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend

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[13] Subsection (f)(2) provides exemptions for certain "bona fide seniority system" and "bone fide employee benefit plans." Subsection (f)(3) exempts employee discharge and discipline decisions based on "good cause." 29 U.S.C. §§ 623(f)(2)-(3).

[14] Unsurprisingly, both the House and Senate reports on the ADEA explicitly referred to the Section 4(f) defenses as "exceptions." H.R. Rep. 90-805, at 9 (1967), *reprinted in* 1967 U.S.S.C.A.N. 2213, 2218; S. Rep. No. 90-723, at 9 (1967).

an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). This Court continues to recognize the rule to this day. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993).

As a corollary to the narrow construction principle, the "general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). *See also, e.g.*, *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966) ("[T]he burden of proof respecting exemptions is upon the company . . . ."); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 393 (1960) (holding that "any employer who asserts that his establishment is exempt [from the FLSA] must assume the burden of proving" entitlement to the exemption) (citation omitted); *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 547-48 (1947) (same).

Congress was undoubtedly aware of these principles when it declared that violations of the ADEA "shall be deemed prohibited under section 15 of the Fair Labor Standards Act," 29 U.S.C. § 626(b), and when it created an exemption to such "otherwise prohibited" conduct in the RFOA provision using language drawn from of the Equal Pay Act,[15] which

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[15] *Compare* 29 U.S.C. § 206(d)(1) (prohibiting sex-based pay differentials for equal work with exception for "differential[s] based on any other factor other than sex") *with id.* § 623(f)(1) (prohibiting age discrimination with exception for

was enacted as an amendment to the FLSA. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc*., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ."); *Corning Glass Works*, 417 U.S. at 196-97 (applying narrow construction principle to exemption under the Equal Pay Act); *id*. at 190 (noting that Equal Pay Act was enacted as an amendment to the FLSA).

C. This Court Has Construed Similar Defenses Within The ADEA And Closely Related Employment Discrimination Statutes As Creating Affirmative Defenses.

Applying these established interpretative rules, this Court has repeatedly construed as affirmative defenses other exceptions in Section 4(f)(1) and in other employment discrimination statutes.

1. The language of the RFOA provision can trace its origins to the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Like the ADEA, the EPA begins with a general prohibition against workplace discrimination, in this case prohibiting unequal wages for equal work on the basis of sex. *See* 29 U.S.C. § 206(d)(1).[16] Next, the EPA establishes a series of exceptions to the general rule, including a defense for pay

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"differentiation[s] based on any reasonable factors other than age"). *See* Equal Pay Act of 1963, Pub. L. 88-38 § 3, 77 Stat. 56, 56 (enacting statute as amendment to the FLSA).

[16] The full text of the Equal Pay Act is set forth in Appendix B to this brief.

"differential[s] based on any other factor other than sex.'" *Id*.

In *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), this Court held that the EPA's exceptions to liability, including the "any other factor other than sex" defense, constitute affirmative defenses upon which the employer bears the burden of persuasion. "[W]hile the Act is silent on this question, its structure and history . . . suggest that once the [plaintiff] has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, *the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions*." 417 U.S. at 196 (emphasis added). The Court explained that this holding was "consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Id*. at 196-97. *See also County of Washington v. Gunther*, 452 U.S. 161, 168-69 (1981) (noting that the EPA's "four affirmative defenses" operate to allow differentiations in pay that "might otherwise violate the Act").

"[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *City of Jackson*, 544 U.S. at 233 (plurality opinion) (citation omitted). In this case, just four years after enacting the "any other factor other than sex" affirmative defense in the EPA, Congress used nearly identical language to create the RFOA defense in a

similarly-structured statute that served the same basic purpose of preventing employment discrimination. If Congress had intended a different allocation of burdens of proof under the two defenses, it presumably would have done more than simply insert the word "reasonable" into the RFOA provision.

2. Equally instructive, this Court has held that the employer bears the burden of persuasion on the ADEA's defense for a "bona fide occupational qualification" (BFOQ), an exception codified within the same sentence as the RFOA defense. *See* 29 U.S.C. § 623 (f)(1) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsection (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ."); *City of Jackson,* 544 U.S. at 233 n.3 (observing that "the ADEA provides an affirmative defense to liability where age is a 'bona fide occupational qualification'"); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412-17 & n.24 (1985) (same); *Johnson v. Mayor & City Council of Balt.*, 472 U.S. 353, 361 (1985) (same).

Moreover, while this Court has never confronted the question, the third defense in Section 4(f)(1) – excusing otherwise prohibited discrimination when "compliance with [the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located," 29 U.S.C. § 623(f)(1) – also establishes an affirmative defense. The provision is written as an exemption from

liability and turns on a question that the employer – by definition a multinational corporation that has an independent obligation to discover and abide by the foreign law at issue – is far better positioned to address than an individual employee. Accordingly, in a 1989 policy guidance on the "foreign laws" exemption, the EEOC stated its view that in order to prevail under this provision, the "*employer must prove* that compliance with the ADEA would cause it to run afoul of a foreign law." EEOC, *Policy Guidance: Analysis of the Sec. 4(f)(1) "Foreign Laws" Defense of the Age Discrimination in Employment Act of 1967* (Dec. 5, 1989) (emphasis added), *available at* http://www.eeoc.gov/policy/docs/foreignlaws-adea.html.

There is no reason to believe that Congress intended that the various defenses in Section 4(f)(1) – separated by nothing more than commas – would vary fundamentally in their allocation of burdens of proof. Indeed, in indistinguishable circumstances, this Court concluded in *Corning Glass Works* that *all* of the defenses listed together in Section 3(d) of the Equal Pay Act – including both that statute's BFOQ exemption and its neighboring "any other factor other than sex" defense, 29 U.S.C. § 206(d)(1) – constitute affirmative defenses. 417 U.S. at 196; *see also Gunther*, 452 U.S. at 168-69 (same).

It is thus understandable that in *Thurston*, this Court referred to Section 4(f) of the ADEA as setting out "the ADEA's five affirmative defenses." 469 U.S. at 122. While the statement in *Thurston* is not controlling, the statutory text and structure which presumably led to the observation also lead

inexorably to the conclusion that the Second Circuit erred in placing the burden of disproving the RFOA defense on the plaintiffs.

3. The court of appeals nonetheless found support for its position in Section 703(h) of Title VII, which provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h). *See* Pet. App. 14a.

The court started from the premise that this provision was "the source of the 'business necessity' test" in Title VII. *Id*. (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 n.21 (1975)). It then reasoned that because the employee bears the burden of proof on the business necessity test under *Wards Cove*, Section 703(h) must not be an affirmative defense, notwithstanding all appearances to the contrary. Pet. App. 14a-15a. And if Section 703(h) of Title VII is not an affirmative defense, the court reasoned, the RFOA provision of the ADEA – which the court viewed as a substitute for the business necessity test in age discrimination cases – must not be one either. *Id*. at 15a. This line of reasoning is flawed at every step.

First, Section 703(h) is not the source of the business necessity test. Although the Court did discuss Section 703(h) in *Griggs*, it did not base the

business necessity test on that provision. To the contrary, the Court developed the test without any reference at all to Section 703(h), relying instead "primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view." *City of Jackson*, 544 U.S. at 235 (plurality opinion). *See Griggs*, 401 U.S. at 432. In fact, the Court turned to Section 703(h) only after concluding that the employer's practice *failed* the business necessity test. *See id*. at 432. *Two pages later*, the opinion discusses the employer's contention that one of its challenged practices – employing general intelligence tests – was "specifically permitted by § 703(h) of the Act." 401 U.S. at 433. The Court rejected that contention not on the ground that the practice failed the business necessity test, but rather because it did not satisfy the requirements the EEOC had developed for applying Section 703(h) to professionally developed tests. *See id*. at 433-36. While the considerations were similar, the Court made clear that Section 703(h) was not the source of the business necessity test, as the provision by its plain terms "applies only to tests. It has no applicability to the high school diploma requirement." *Id*. at 433 n.8.[17]

Second, as discussed below, the court of appeals was wrong to conclude that the RFOA provision

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[17] Accordingly, the passing dicta in *Albemarle* – stating that "[i]n *Griggs*, the Court was construing" Section 703(h), 422 U.S. at 425 n.21 – is accurate as far as it goes. The Court *did* construe Section 703(h) in *Griggs*. But to the extent the *Albemarle* footnote could be read to suggest that Section 703(h) was the *source* of the disparate impact test developed in *Griggs*, the statement, which had no bearing on the holding in *Albemarle*, is incorrect.

operates as a substitute for the "business necessity" analysis in disparate impact cases. *See infra*, Section III(A).

Third, even if *Griggs* had established that the employee bears the burden of proof with respect to professionally developed tests under Section 703(h), there is a significant textual difference between Section 703(h) and the RFOA provision.

As discussed above, the RFOA provision provides a defense for conduct "otherwise prohibited" by the Act. 29 U.S.C. § 623(f)(1). As a result, the RFOA provision unmistakably creates an exception to liability, invoking the rule that exceptions to liability are construed as affirmative defenses. *See supra,* Section I(A). Section 703(h), on the other hand, contains no such language. While the provision does begin with the phrase "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . .", that formulation does not establish an exception for conduct that is *necessarily* otherwise unlawful. Such language can be used to provide a safe harbor for conduct that, while otherwise lawful under the other provisions of the Act, might be subject to dispute. Accordingly, while the formulation used in Section 703(h) does strongly suggest the creation of an affirmative defense – as demonstrated by the Court's construction of the similar language in Title VII's BFOQ provision as an affirmative defense[18] – the

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[18] *See* 42 U.S.C. § 2000e-2(h); *Criswell*, 472 U.S. at 416-17 (noting that its construction of the ADEA BFOQ defense was consistent with "the parallel treatment of such questions under Title VII"); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (treating Title VII BFOQ provision as an affirmative

inclusion of the "otherwise prohibited" language in Section 4(f)(1) of the ADEA removes any doubt that Congress intended *that* provision to establish an affirmative defense.[19]

Thus, the RFOA provision bears a far greater resemblance to its companion Section 4(f)(1) BFOQ defense, which this Court has already construed to be an affirmative defense. Likewise, in looking to other statutes for analogs, the Court would do far better to look to the nearly identically worded "any other factor other than sex" affirmative defense in the Equal Pay Act.

* * * * *

Just as "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments," *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), Congress is entitled to rely on this Court to give the same construction to commonly used terms and formulations across similar statutes and over time. Treating the RFOA provision as an affirmative defense is necessary both to maintain coherence in the law and to maintain stable background principles against which Congress may legislate with confidence.

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defense); *id*. at 221-22 (White, J., concurring in part and concurring in the judgment) (same); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989) (same).

[19] In *City of Jackson*, this Court rejected the dissent's suggestion that the RFOA provision operates as a "safe harbor" for conduct that would not violate the statute in any event. *See* 544 U.S. at 238-39; *see also id*. at 252 (O'Connor, J., concurring in the judgment).

D. Construing The RFOA Provision As An Affirmative Defense Is Consistent With Traditional Policy Rationales For Distributing Burdens And With The Balance Of Interests Struck By The Statute.

Placing the burden of proof on the employer also is consistent with the policy considerations that often underlie Congress's allocation of the burdens of proof, as well as with the purposes underlying the ADEA.

1. It is "entirely sensible to burden the party more likely to have information relevant to [the matter] with the obligation to demonstrate [those] facts . . . ." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993); *see also Dixon v. United States*, 126 S. Ct. 2437, 2443 (2006) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.") (quoting 2 J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)).

In general, the employer is "more likely to have information relevant" to the reasonableness of its actions. *Concrete Pipe & Prods*, 508 U.S. at 626. For one thing, the employer is best positioned to establish the purposes behind its business practices. *Cf. City of Jackson*, 544 U.S. at 242 (assessing reasonableness in light of employer's "goal of raising employees' salaries to match those in the surrounding communities"). Likewise, the employer is best positioned to establish the reasonableness of the methods by which it has chosen to pursue those objectives. For example, the employer in *City of Jackson* justified its pay practices in part by asserting that its revised pay scales were "based on a survey of comparable communities," *id*. at

241-42, evidence uniquely within the province of the employer that created it.[20] Rather than require plaintiffs to hypothesize and debunk every conceivable basis for a decision, based on information often in the employer's sole possession, Congress sensibly chose to establish the RFOA provision as an affirmative defense and to place the burden on the defendant. *Cf. Ky. River Cmty. Care, Inc.*, 532 U.S. at 711 (noting that "practicality" weighs against requiring a party to disprove the applicability of all of the many potential justifications for an exemption from liability).

2. Giving the employer the burden of proving its RFOA defense also strikes a sensible balance between the interest in providing employers reasonable protection from ADEA liability and the equally important need to ensure that the Act remains a potent tool for rooting out action (often founded in hidden or unconscious stereotypes that are difficult to discover or prove) that unjustifiably deprives older workers of the employment opportunities Congress intended to afford them.

Even bearing the burden of proof under the RFOA provision, employers still enjoy substantial protections from unwarranted liability under the

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[20] In this case, respondents likewise attempted to explain the skewed results of their IRIF process by pointing to their evaluation of which positions had "excess skills" and which workers had skills that would "add value to current or future lab work." Pet. App. 39a. Respondents naturally had much better access to information relevant to the distribution of skills throughout the facility and which skills were likely to be of value to the future work of the laboratory (as well as the what that "future work" might be).

ADEA. As the Court made clear in *City of Jackson*, the RFOA provision only has application with respect to conduct that is "otherwise prohibited under" the Act's general proscription against age discrimination. 544 U.S. at 238 (plurality opinion) (quoting 29 U.S.C. § 623(f)(1)); *id*. at 246 (Scalia, J., concurring in part and concurring in the judgment). Accordingly, the employer is not put to the proof on its RFOA defense until the plaintiffs have sustained their initial burden of proving a disparate impact, without the benefit of the liberalizing provisions of the 1991 Civil Rights Act. *See City of Jackson*, 544 U.S. at 240-41.

At the same time, the Court has also been clear that the burden of establishing an RFOA is not unduly onerous. For example, "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243. Thus, in choosing among reasonable practices, the employer is not required to choose the one with the least disparate impact. *Id*.

The degree of protection afforded employers by these requirements and limitations is demonstrated by the very limited success of ADEA disparate impact claims after *City of Jackson*. *See* Jessica Sturgeon, Note, Smith v. City of Jackson*: Setting An Unreasonable Standard*, 56 DUKE L.J. 1377, 1397 (2007) (surveying post-*City of Jackson* litigation and finding that "[l]ower courts . . . have generally dismissed employees' complaints during the pleading stage"); Aïda M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v.

City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALB. L. REV. 143, 180 (2006) ("[I]t is difficult [even after *City of Jackson*] to imagine scenarios under which disparate-impact cases might be fruitful.").

Thus, there is no reason to think that placing the burden of meeting the modest requirements of the RFOA defense on the employer would lead to any unintended impairment of employer interests. Certainly, there is no evidence, for example, that employers in the Ninth Circuit – which has long treated the RFOA provision as an affirmative defense, *see Criswell v. W. Air Lines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) – have been subjected to pervasive unwarranted liability.

On the other hand, while Congress surely intended to afford employers reasonable protection from unwarranted disparate impact claims under this statute, it just as surely did not intend to establish a cause of action that offered nothing more than a false promise of relief to workers. Congress was aware that older workers faced a very real risk of being "fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). That concern is at its zenith in a case such as this, in which an employer authorizes individual supervisors to exercise substantial discretion in selecting the least competent and flexible workers for termination. While endowing front line supervisors with such discretionary authority is not, in itself, unusual or illegal, it "does not follow, however, that the particular supervisors to whom this discretion is

delegated always act without discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). To the contrary, such discretionary processes create a very real risk that individual managers may act on unspoken, or even unconscious, stereotypes of older workers as inherently less capable and insufficiently flexibility to adapt to the times. *Id*. Thus, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Id*.[21] Requiring the employer to bear the limited burden of proving the reasonableness of an otherwise unlawful business practice allows the disparate impact cause of action to perform its important function of rooting out practices based in illegal discrimination that would otherwise go undetected and unremedied.

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[21] Although the jury ultimately concluded that petitioners failed to meet their burden of proof on their disparate treatment claims, there was evidence suggesting grounds to worry about stereotypes and prejudices infecting the IRIF process. *See* Pet. App. 100a. Beyond the "startlingly skewed results" of the IRIF, *id*. at 7a, petitioners presented evidence that some managers charged with selecting individuals for termination had openly worried about having too many older workers and about the need to make room to hire younger employees. Tr. 1952-57, 1641-45; C.A. App. A-672. "Such remarks may not prove discriminatory intent, but they do suggest a lingering . . . problem" of the type the ADEA was enacted to combat. *Watson*, 487 U.S. at 990.

II. The Agencies Charged With Administration Of The ADEA Have Consistently Viewed The RFOA Provision As Establishing An Affirmative Defense.

To the extent the Court finds any ambiguity in the statute, it should defer to the reasonable interpretation of the federal agencies charged with its enforcement.

1. Just six months after Congress enacted the ADEA, the Secretary of Labor, who had been given initial enforcement authority under the Act,[22] issued interpretative regulations construing two of the Section 4(f)(1) exceptions – the "bona fide occupational qualification" (BFOQ) and the RFOA provisions – as affirmative defenses.

Addressing the BFOQ provision first, the Secretary explained that "as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer . . . which relies upon it." 29 C.F.R. § 860.102 (1968).[23]

The Secretary then reached the same conclusion with respect to the RFOA defense:

> Further, in accord with a long chain of decisions of the Supreme Court of the United

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[22] ADEA, Pub. L. No. 90-202 § 9, 81 Stat. 602, 605 (1967). Enforcement authority was transferred to the EEOC effective July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978. *See* Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R., 1978 Comp. at 321, *reprinted in* 92 Stat. 3781 (1978).

[23] As noted above, this Court subsequently concurred in that interpretation, relying in part on the agency's construction. *See Criswell*, 472 U.S. at 416-17 & n.24.

> States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

29 C.F.R. § 860.103(e) (1968).

When the EEOC assumed responsibility for ADEA enforcement in 1979 it continued to construe the BFOQ and RFOA provision as affirmative defenses, both through its regulations, *see* 29 C.F.R. § 1625.6 (BFOQ); 29 C.F.R. § 1625.7(e) (RFOA),[24] and in amicus briefs. As initially drafted, 29 C.F.R. § 1625.7(e) provided that the "burden of proof in establishing that the differentiation was based on factors other than age is upon the employer." Proposed Interpretations: Age Discrimination in Employment Act, 44 Fed. Reg. 68,861 (Nov. 30, 1979). As finally adopted, the regulation provides that "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e).

While the current regulation speaks most directly to the burden of proof in disparate *treatment* cases, there is no basis to believe that a different allocation

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[24] When the EEOC issued its own ADEA regulations, it rescinded those previously issued by the Department of Labor. *See* 46 Fed. Reg. 47,724 (Sep. 29, 1981).

of burdens would apply in disparate *impact* cases.[25] And in litigation over the past twenty years, including in this very case, the Commission has in fact interpreted its regulations and the statute to place the burden of persuasion on the RFOA defense upon the employer. *See* U.S. Invitation Br. 7 (collecting cases); EEOC C.A. Br. 14.

2. This is "an absolutely classic case for deference to agency interpretation." *City of Jackson*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). The ADEA expressly authorized the Department of Labor, and later the EEOC, to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the statute. 29 U.S.C. § 628. Pursuant to that authority, both agencies promulgated regulations – the EEOC after notice and comment, *see* 46 Fed. Reg. 47,724, 47,727 (1981) – making clear their view that the burden of proof under the RFOA provision falls upon the employer. "[S]uch a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). In this case, the administrative interpretation has remained consistent for nearly 40 years.

Accordingly, the Commission's position is controlling so long as it is reasonable. *See EEOC v.*

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[25] To the extent the present regulation may be unclear, the EEOC's interpretation of that regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted). *See also Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1010 (2008).

Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("[T]he EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-31 & n.12 (2001); *Chevron U. S. A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[26] And as argued above, the Commission's position is not only reasonable, but represents the best view of the language, structure, history and purposes of the statute.[27]

3. Deference is especially warranted in this case because Congress amended the ADEA to address the burden of proof under a related provision in 1990, but did nothing to disturb the Commission and the Department of Labor's long-standing position that the employer bears the burden of proving the RFOA defense. *See, e.g.*, *Associated Dry Goods Corp.*, 449

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[26] Even setting aside the regulations, the agency's interpretation of the statute, expressed in its amicus briefs, is entitled to respect. *See*, *e.g.*, *Fed. Express Corp. v. Holowecki*, No. 06-1322, slip op. 5-8 (U.S. Feb. 27, 2008).

[27] Nor does *City of Jackson* detract from the authority or validity of the relevant regulation, contrary to the court of appeals' suggestion. *See* Pet. App. 13a-14a n.6. To the contrary, the Court in *City of Jackson* agreed in substantial part with the agency's interpretation of the statute as expressed in its regulations, with the possible exception of the Commission's view that liability could be avoided only if a practice causing a disparate impact were justified as a "business necessity." *See* 544 U.S. at 239-40, 243. But that potential disagreement is no ground for declining to defer to the Agency's view on a *different* question, expressed in a *different* subsection of the regulations. *Compare* 29 C.F.R. § 1625.7(d) (addressing business necessity) *with id*. at § 1625.7(e) (addressing burden of proof under RFOA provision). *See City of Jackson*, 544 U.S. at 247 (Scalia, J., concurring in part and concurring in the judgment).

U.S. at 600 n.17 (noting where "Congress has never expressed its disapproval" of a long-held position of the EEOC, "its silence in this regard suggests its consent to the Commission's practice").

In 1990, Congress enacted the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, to respond to this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). In that case, the Court considered, among other things, the burden of proof under Section 4(f)(2) of the ADEA, which provided at the time that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623 (f)(2) (1989). Although "it appears on first reading to describe an affirmative defense," the Court had construed the provision to be "not so much a defense . . . as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id*. at 181. Consequently, the Court held that "ADEA plaintiffs must bear the burden of showing subterfuge." *Id*. at 182.[28]

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[28] There are important textual and practical differences between Section 4(f)(2) as it existed at the time that *Betts* was decided and the RFOA defense in Section 4(f)(1). While the RFOA provision applies only to employer conduct "otherwise prohibited" by the Act, 29 U.S.C. § 623(f)(1), the "bona fide employee benefit" provision included no such exemption-creating language at the time of *Betts*. That difference was significant because without it, the Court was able to conclude that the BFOQ provision "redefines the elements of a plaintiff's prima facie case *instead of establishing a defense to what otherwise would be a violation* of the Act." *Betts*, 492 U.S. at 181

Congress acted promptly to overrule *Betts* and "restore the original congressional intent in passing and amending the Age Discrimination in Employment Act." Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990). The statute amended Section 4(f)(2) to expressly provide that the employer bears the burden of proof under the "bona fide seniority" and "bona fide employee benefit plan" exceptions. *Id*. § 103. In so doing, Congress adopted the view of the EEOC regulations, which had construed Section 4(f)(2) – like Section 4(f)(1) and its BFOQ and RFOA defenses – to impose the burden of proof on the employer. *See* 29 C.F.R. § 1625.10 (1989).

Given the express congressional adoption of the EEOC's interpretation of Section 4(f)(2), it is unsurprising that Congress did nothing to reverse the agency's long-standing position that the employer bears the burden of proof on the RFOA defense under Section 4(f)(1) as well. *See* OWBPA, Pub. L. No. 101-433, § 103. The inference of congressional approval is confirmed by the statements of the House Managers of the final bill, which explained that reversing *Betts* was "consistent with the allocation of burdens of proof with respect to other affirmative defenses under

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(emphasis added). Notably, when Congress amended Section 4(f)(2) to clarify its intent that the employer bear the burden of proof under that provision as well, it added the missing "otherwise prohibited" language. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 978 (1990).

In addition, the Court based its decision in *Betts* in part on its recognition of the special status long afforded retirement plans and their accepted use of age as a factor in establishing benefits. *See* 492 U.S. at 177-82. That consideration has no relevance under the general catch-all RFOA defense.

the ADEA." 136 Cong. Rec. H8618, *reprinted in* 1 *Legislative History of the Older Workers Benefit Protection Act* 23 (1991). The legislative history in the Senate likewise reflects Congress's intent to leave the then-current construction of the other ADEA defenses, including the RFOA defense, unaltered. *See* 136 Cong. Rec. S13596 (1990) (sponsors' explanation that the bill was "not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").[29]

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[29] An earlier version of the Senate bill would have expressly codified the EEOC's position that the employer bears the burden of proof under each of the Section 4(f)(1) defenses. S. 1511, 101st Cong. (1990), *reprinted in* 1 *Legislative History of the Older Workers Benefit Protection Act* 394, 400. The Senate Report for that version of the bill expressly "endorse[d] the position of the EEOC that the 'reasonable factors other than age' exception included in Section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and express[ed] approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception." S. Rep. No. 101-263, at 30, *reprinted in* 1990 U.S.S.C.A.N. 1509, 1535. While the final version of the bill deleted the references to the burden of proof with respect to the defenses in Section 4(f)(1), that is no reason to conclude that the Senate disagreed with the EEOC's position. To the contrary, the sponsors of the amendment explained that "[t]his bill overturns the Supreme Court's allocation of the burden of proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill." 136 Cong. Rec. S13596.

III. Nothing In *City Of Jackson* or *Wards Cove* Supports Treating The RFOA Provision As An Element Of The Plaintiff's Case In Chief.

The court of appeals recognized that there was "some force" to the argument that the text and structure of the RFOA provision marked it as an affirmative defense. Pet. App. 13a-14a. The court nonetheless decided that the "best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." Pet. App. 11a. In particular, the Second Circuit understood *City of Jackson* as "substituting the 'reasonableness' test" of the RFOA provision "for the 'business necessity' test" of *Wards Cove*. Pet. App. 11a-12a. The court then concluded that because the plaintiffs bore the burden of proof on the "business necessity" question, it stood to reason that they should also bear the burden of persuasion with respect to its substitute, the RFOA defense. *Id*.

This conclusion is flawed both at its premise and its conclusion: *City of Jackson* did not make the presumed substitution, and even if it had, that would not justify disregarding the plain text and structure of the statute which clearly establishes the RFOA provision as an affirmative defense.

A. *City of Jackson* Did Not Substitute The "Reasonableness" Test Of The RFOA Provision For The "Business Necessity" Test Of *Wards Cove*.

As the court of appeals seemingly acknowledged, Pet. App. 11a-12a, nothing in *City of Jackson* directly addressed the allocation of burdens of proof under the RFOA provision. That is unsurprising. The burden of proof was unimportant in that case as it was "clear from the record that the [employer's] plan was based on reasonable factors other than age." 544 U.S. at 241.

Nor does anything in *City of Jackson's* rationale justify the Second Circuit's holding. While the Court did observe that *Wards Cove* governs the common language of Title VII and the ADEA, 544 U.S. at 240, that common language does not include the RFOA provision. Accordingly, the Court's references to *Wards Cove* say nothing about the proper interpretation of the RFOA provision.

Certainly nothing in the Court's opinion endorsed modification of the *Wards Cove* test to integrate considerations of reasonableness into its analysis in age discrimination cases. To the contrary, the decision explained that the RFOA provision comes into play only *after* the defendant's conduct is found to be otherwise unlawful under the traditional *Wards Cove* analysis. That is, the Court observed that the RFOA provision applies only to "action otherwise prohibited" by the ADEA's general prohibitions. 544 U.S. at 238 (plurality opinion) (quoting 29 U.S.C. § 623(f)); *id*. at 246 (Scalia, J., concurring in part and concurring in the judgment) (same). And the Court further explained that whether an employment

practice is "otherwise prohibited" because of its unlawful disparate impact is determined on the basis of "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language . . . ." *Id*. at 240.

Consequently, as Judge Pooler properly decided, under *City of Jackson* the plaintiffs continue to bear the burden of proof on all the elements of the *Wards Cove* analysis, including on the question of "business justification." If the plaintiffs sustain that burden, they will have established that the employer's practices are "otherwise prohibited" by Section 4(a)(2) of the ADEA and, therefore, potentially subject to an RFOA defense under Section 4(f)(1). It is only at this point that the employer takes on the burden of proving that its otherwise unlawful conduct falls within the RFOA exemption from liability.

For that reason, the Second Circuit was wrong in thinking that its interpretation was necessary to avoid "compromis[ing] the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the "'legitimacy' of its business justification." Pet. App. 12a. Placing the burden of proof on the RFOA defense upon the employer will not relieve plaintiffs of any of the burdens they otherwise must bear under "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language." *City of Jackson*, 544 U.S. at 240.[30]

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[30] Petitioners recognize that there may be some ambiguity as to how much of the *Wards Cove* analysis is based on the language shared by the ADEA and Title VII and, accordingly, how much of the *Wards Cove* three-step analysis plaintiffs must satisfy before the burden shifts to the employer to establish its RFOA defense. Petitioners and Judge Pooler in her dissent below have taken the view that the plaintiffs must satisfy the

For the same reason, there is no question that under petitioners' view the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *City of Jackson*, 544 U.S. at 240; *see* Pet. App. 12a-13a. Employers continue to prevail in every case in which the plaintiffs fail to sustain their burden under *Wards Cove*, and *in addition*, may avoid liability they would otherwise face under Title VII if they can meet the modest burden of establishing that their business practices are reasonable.

Thus, there is nothing incongruous about placing the burden of disproving business necessity on the plaintiff, while placing the burden of proving reasonableness on the employer. Because the defense only comes into play when the employer's practice has been shown by the plaintiff to have an *unnecessary* disparate impact – a showing that would be sufficient to establish liability under Title VII – it is entirely appropriate for Congress to place the burden to avoid liability on the defendant.[31] An

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entirety of the *Wards Cove* test before the burden shifts to the employer to establish the reasonableness of its practice. On the other hand, the EEOC has taken the position that the RFOA comes into play once the plaintiff has established that a specific employment practice has a significant adverse effect on older workers. *See* U.S. Invitation Br. 7. Because the Second Circuit held that petitioners satisfied their burden under the full *Wards Cove* analysis, see Pet. App. 54a-63a, the different views have no practical consequence in this case.

[31] The court of appeals objected that this construction of the statute added unnecessary complexity to ADEA adjudications. Pet. App. 10a-11a n.5. But nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice. *See, e.g.*, *City of Jackson*, 544 U.S. at 241-43 (resolving case on RFOA defense without first fully analyzing whether

employment practice that unnecessarily harms protected workers, and which the employer cannot show to be even "reasonable," is one that Congress surely intended to prohibit under the ADEA.

B. Even If The Court Were To Modify The *Wards Cove* Analysis To Incorporate The RFOA Provision, The Text, Structure, And Purpose Of The ADEA Still Require Placing The Burden Of Proof On The Employer.

Even if the Court were to modify the *Wards Cove* analysis to incorporate the RFOA defense, the employer should still bear the burden of persuading the jury of the reasonableness of its practices.

The Court's authority to develop a burden-shifting framework does not extend so far as to permit the Court to disregard the plain indications in the text and structure of the statute that Congress intended the RFOA provision to operate as an affirmative defense and for the employer to bear the burden of providing the reasonableness of its "otherwise prohibited" conduct. When this Court developed the concept of "business necessity" in *Griggs*, it was construing Title VII, which has no analog to the ADEA's RFOA provision. Thus, while *Wards Cove* may govern the "interpretation of Title VII's identical language," *City of Jackson*, 544 U.S. at 240, it does not govern, much less trump, the plain and unique language of the ADEA's RFOA provision.

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practice was "otherwise prohibited"); *cf. Price Waterhouse*, 490 U.S. at 247 n.12 (rejecting similar criticism in related context).

Accordingly, if the Court is to adopt a new consolidated burden-shifting scheme, it should adopt the one advanced by the EEOC: the RFOA "comes into play only after the plaintiff has established a significant adverse effect on older workers, and permits the defendant to escape liability only if it can persuade the factfinder that its actions were justified or excusable." U.S. Cert. Br. 7. Under that view, employees continue to bear the burden of proof under the first step of the *Wards Cove* analysis, but once the plaintiffs establish a disparate impact, the employer bears the burden of persuasion on the RFOA affirmative defense. *Id*.

While the employer may be assigned the burden of proof at a somewhat earlier stage in this analysis, it still enjoys significant advantages over a Title VII defendant: under *Wards Cove*, if a Title VII plaintiff can identify another equally effective alternative with less disparate impact, the employer is automatically held liable. 490 U.S. at 660-61. But under the ADEA, the employer can escape liability in all cases by making the modest showing that its actions were reasonable, even if the plaintiffs can identify numerous other reasonable alternatives with less disparate impact. *See City of Jackson*, 544 U.S. at 243.

The EEOC's construction of the statute thus reasonably accommodates both the need to give like meaning to the common language of Title VII and the ADEA, while at the same time respecting Congress's determination to make the reasonableness of an

employers' conduct an affirmative defense under the ADEA's unique RFOA provision.[32]

IV. Because The RFOA Provision Creates An Affirmative Defense, The Court Should Reverse The Judgment Below.

Because the court of appeals applied the wrong standard of proof, its evaluation of the sufficiency of the evidence to sustain the jury's verdict cannot stand. Furthermore, because the Court denied certiorari on the second question presented by the petition – which challenged the court of appeal's application of the RFOA defense to the facts of this case, *see* Pet. i; 128 S. Ct. 1118 (2008) (mem.) – there is no occasion for this Court to undertake the fact-intensive reasonableness inquiry under the proper standards of proof in the first instance. Accordingly, petitioners do not address the evidence regarding the reasonableness of respondents' practices in this brief.

Under 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. However, a remand is not required in this case because it is not necessary for *any* court to undertake the factually complex reasonableness inquiry here. As Judge Pooler rightly found, respondents have

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[32] Were this Court to disagree, it should adopt the view of the statute advanced by Judge Pooler and hold that the employer bears the burden of proving the reasonableness of its conduct, but only after the plaintiffs have satisfied their burdens under the entirety of the *Wards Cove* analysis. *See supra,* Section III(A).

forfeited any right to assert the RFOA provision as an affirmative defense. Pet. App. 31a-32a.

While respondents did plead the RFOA provision in their answer, by the time of trial they had abandoned all reliance upon it. They did not ask for a jury instruction on the RFOA defense; did not object when one was not given; did not complain when the jury was instructed it should rule for petitioners if the petitioners sustained their burden of proof under *Wards Cove*; and did not object to the special verdict form which did not require the jury to consider the RFOA defense or the reasonableness of respondents' practices. *See* Tr. 4437-53 (jury charge conference); Tr. 4453-58 (conference on special verdict form); Tr. 4711-41 (jury charge); J.A. 73-74 (special verdict form).[33]

Under such circumstances, the Court should deem the defense abandoned. *See, e.g.*, *Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000); *Violette v.*

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[33] Respondents did request, and the court did give, an instruction informing the jury that in deciding whether petitioners had established a prima facie case under *Wards Cove*, it was required to determine "whether any statistical deviations you find have been proven were caused by the ages of the plaintiffs, or, on the other hand, by some factors unrelated to the plaintiffs' ages." Tr. 4734. Petitioners argued on remand from this Court that in light of this instruction, the jury's finding that petitioners had established a prima facie case necessarily meant that it had rejected any suggestion that the disparate impact was based on any factor other than age (let alone a reasonable one). Petrs. Remand Reply Br. 4-5. For that reason, we referred to the charge given as an "RFOA charge." *Id*. at 4. However, that nomenclature should not obscure the fact that the charge was not meant to, and did not, embody the defense set forth in Section 4(f)(1), as it plainly did not put before the jury the critical question of reasonableness.

Smith & Nephew Dyonics, Inc., 62 F.3d 8, 10-11 (1st Cir. 1995). While a defendant has no obligation to press an issue upon which the plaintiff bears the burden of proof – and therefore, the Second Circuit may have been justified in reviewing the evidence of reasonableness in light of its holding that petitioners bore the burden of proof – a defendant is not entitled to challenge a jury verdict based on an *affirmative defense* that it never asked the jury to consider.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed or, in the alternative, vacated and remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

AGE DISCRIMINATION IN EMPLOYMENT ACT

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

(a) Employer practices

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;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

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 age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the

laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee

benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

APPENDIX B

EQUAL PAY ACT

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer

having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

APPENDIX C

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII, 42 U.S.C § 2000e-2, provides in relevant part:

(a) Employer practices

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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.* * * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful

employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29. * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate

that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to

demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

APPENDIX D

DEPARTMENT OF LABOR
AGE DISCRIMINATION IN EMPLOYMENT ACT
REGULATIONS

29 C.F.R. § 860.102 (1968) provided in relevant part:

> (a) Section 4(f)(1) of the [Age Discrimination in Employment] Act provides that "it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *"
>
> (b) Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business", will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

29 C.F.R. § 860.103 (1968), provided in relevant part:

> (a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentation is based on reasonable factors other than age; * * *"
>
> (b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.
>
> (c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.
>
> (d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general

or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: Provided, however. That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job

situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, where as another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do no have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose,

necessarily rests on the assumption that the age factor alone may be used to justify a differentiation -- an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

APPENDIX E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AGE DISCRIMINATION IN EMPLOYMENT ACT REGULATIONS

29 C.F.R. § 1625.7 provides in relevant part:

> (e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.