No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

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

BRIEF FOR RESPONDENTS

Of counsel:

RODNEY E. GADDY
SUZANNE A. ENNIS
FLORIDA POWER CORPORATION
Bank of America Tower
One Progress Plaza
200 Central Avenue,
Suite 1500
St. Petersburg, FL 33701
(727) 820-5593

J. LEWIS SAPP
NANCY F. REYNOLDS
ELARBEE, THOMPSON & TRAPNELL, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 659-6700

GLEN D. NAGER
(Counsel of Record)
ALISON B. MARSHALL
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents

QUESTION PRESENTED

Whether and, if so, in what circumstances disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34.

RULE 29.6 STATEMENT

Respondent Florida Power Corporation is a wholly-owned subsidiary of respondent Florida Progress Corporation, which is in turn a wholly-owned subsidiary of Progress Energy Corporation. Progress Energy Corporation has issued stock to the public, and the only publicly-held company owning more than 10% of its stock is State Street Bank and Trust Co.

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

COUNTERSTATEMENT OF THE CASE

1. In 1992, Congress passed the Energy Policy Act of 1992, 106 Stat. 2776 (1992), opening utilities such as respondent Florida Power Corporation to increased competition. In response, Florida Power reengineered its business processes and, between 1992-1996, eliminated more than 1,200 positions. J.A. 32, 54-57, 64-65, 104-06. Petitioners are 117 former employees, then ranging from ages 40 to 62, who lost their jobs. Resp. App. 7a; J.A. 33-43.

2. Petitioners sued Florida Power and its parent, respondent Florida Progress Corporation, for, *inter alia*, allegedly violating the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34. The district court decertified an opt-in class that it had earlier certified to facilitate settlement, finding that petitioners' intentional discrimination claims were dissimilar, because petitioners were "terminated at different times by different decision makers based on different considerations o[r] criteria," and holding that "the disparate impact theory of liability is not applicable to ADEA claims." Pet. App. 22a-23a, 24a.

3. On interlocutory appeal, the Eleventh Circuit affirmed. Siding with five other circuits, it held that the ADEA does not allow disparate impact claims. Pet. App. 5a-8a.

The court found that the ADEA's approval of differentiations "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), "raise[s] doubts about extending the disparate impact theory of liability to ADEA cases." Pet. App. 7a. It also found that the report of the Secretary of Labor on which the ADEA is based had recommended that "factors addressing older workers, such as policies with disparate impact, be addressed in alternative ways." *Id*. Finally, it found that the reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), is "inconsistent with the viability of a disparate impact theory of liability." Pet. App. 8a.

Judge Barkett concurred. In her view, petitioners had not pled a viable disparate impact claim. Pet. App. 9a. She otherwise would have allowed such claims. Pet. App. 9a-18a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that blameworthy discrimination requires unlawful intent, this Court has indicated that it will extend Title VII's "disparate impact" doctrine—i.e., liability based on unjustified adverse effects rather than on intent—to other contexts only where there is "convincing evidence" that Congress intended it. The ADEA contains no such evidence.

I. Section 4(a) of the ADEA applies only to employer actions taken "because of" age, a conventional reference to intent. Moreover, by providing that an action is lawful where "based on reasonable factors other than age," Section 4(f)(1) further refers to intent and thereby confirms that intent is outcome-determinative under the statute. In addition, other statutory provisions and legislative history reveal that, rather than prohibit neutral practices with adverse effects, the ADEA addresses disadvantages for older workers through education, training, and manpower programs. Finally, disparate impact claims are functionally incompatible with the ADEA's jury trial provision, opt-in procedures, and continuum of protected individuals. Indeed, because non-age factors having differential age-specific impacts are likely to be ubiquitous and inescapable, recognition of disparate impact claims would predictably force employers to abandon valuable practices and/or make use of quotas. There is no warrant for construing the ADEA to do so.

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny do not direct recognition of disparate impact claims under the ADEA. Even under Title VII, disparate impact claims are not recognized where statutory provisions and purposes foreclose them; by making intent outcome-determinative, Sections 4(a), 4(f)(1) and other provisions of

the ADEA so foreclose disparate impact claims. Moreover, there are substantial reasons for not carrying this Court' s construction of Title VII over to the ADEA: In addition to being enacted before *Griggs,* the ADEA addresses much more limited concerns than does Title VII and, in particular, lacks the concerns that led to recognition of disparate impact claims under Title VII. Because older workers have not suffered a history of purposeful unequal treatment, shortcomings in their abilities and performance cannot be attributed to prior discrimination. Moreover, discrimination against older workers is not motivated by deep-seated prejudice, but rather by generalizations about older workers' ability to do the job. Disparate treatment doctrine fully addresses this concern.

III. The contrary arguments of petitioners are without merit. The suggestion that Section 4(a) cannot reasonably be construed to require intent is unfounded. Moreover, the disparate impact doctrine cannot properly be inferred from Section 4(f)(1)'s "reasonable factors other than age" ("RFOA") provision. Disparate impact doctrine is not needed to give meaning and effect to that RFOA provision, which substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases, and which also clarifies that employers are permitted to use neutral criteria not directly dependent on age. Nor does it matter whether the RFOA provision is an affirmative defense (which it is not); in either event, the RFOA provision confirms that, under the ADEA, intent is outcome-determinative.

Contrary to petitioners' argument, neither the legislative history nor the early interpretations of the Department of Labor ("DOL") recognize adverse impact claims. Furthermore, the interpretations later offered by the Equal Employment Opportunity Commission ("EEOC") conflict with the position of the Department of Justice ("DOJ"), are not worthy of judicial deference or respect, and are contrary to law. Finally, there is no subsequent congressional enactment that amends the ADEA to now allow disparate impact claims.

ARGUMENT

Consistent with traditional notions of blameworthiness, as well as with concerns about undue interference with legislative prerogatives and a free-functioning economy, this Court has historically construed American anti-discrimination laws, whether constitutional or statutory, to require a finding of unlawful intent. *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). The Court has allowed appropriate statistics to be used as circumstantial evidence of such unlawful intent. *See, e.g., Mayor v. Educ. Equality League*, 415 U.S. 605, 620 (1974). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny, however, the Court went a substantial step further in holding that, in certain Title VII cases, appropriate statistics may themselves establish liability, without regard to intent, where a particular selection practice is shown disproportionately to exclude racial minorities or females and does not have a demonstrated business justification. The question in this case is whether any such "disparate impact" claims are cognizable under the ADEA.

The Court has rejected other efforts to extend "disparate impact" doctrine beyond Title VII. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 61-74 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (Equal Protection Clause); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982) (42 U.S.C. § 1981); *Alexander v. Sandoval*, 121 S. Ct. 1511, 1520-23 (2001) (Title VI). The Court has emphasized the tradition of requiring intent in discrimination cases. *See, e.g., Gen. Bldg. Contractors Ass'n,* 458 U.S. at 389-91. Moreover, since "[i]t would be . . . unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (op. of O'Connor, J.), the

Court has warned that disparate impact doctrine is "far reaching and would raise serious questions about, and perhaps invalidate, a whole range" of facially-neutral laws and/or common selection practices. *Washington v. Davis*, 426 U.S. at 248; *see also Watson*, 487 U.S. at 991-92. Indeed, because so many important selection criteria are not subject to precise evidentiary verification, *accord id.*, the Court has expressed concern that promiscuous use of disparate impact doctrine could lead employers to rely on quotas as liability-avoidance measures. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989). The Court has indicated that it will recognize disparate impact claims only where there is "convincing evidence" that Congress intended it. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 391; *see also Washington v. Davis*, 426 U.S. at 248 ("legislative prescription" necessary).

The ADEA contains no such convincing evidence. As this Court recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), where it held lawful actions based on neutral factors highly correlated with age (such as salary, seniority, and pension eligibility), "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper* holds that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612 (emphasis in original). While not addressing whether disparate impact claims are cognizable, *id.* at 610, *Hazen Paper* shows that they are not cognizable, as the decision rests on the premise that, under the ADEA, mere proof that a selection practice statistically correlates with age is not legally sufficient to establish a *prima facie* case of discrimination. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

In all events, the text, legislative history, and structure of the ADEA reveal that disparate impact claims were not

intended. As Chief Justice Rehnquist observed over 20 years ago, a neutral selection practice does not differentiate "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" ("RFOA") provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employers that disparate impact claims would have. *Markham v. Geller*, 451 U.S. 945, 946-47 (1981) (Rehnquist, J., dissenting from denial of certiorari). On the contrary, the ADEA accepts the Secretary of Labor's determination that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such adverse effects are better addressed through non-coercive education, training, and manpower programs. *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-25 (1965) (J.A. 403- 16). It is "inappropriate simply to transplant [Title VII's] standards . . . into [such] a different statutory scheme having a different history." W*ashington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring); *accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

I. DISPARATE IMPACT CLAIMS ARE NOT COGNIZABLE UNDER THE ADEA

A. The Text of the ADEA Precludes Disparate Impact Claims

Under Section 4(a) of the ADEA, it is generally 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* . . . .

29 U.S.C. § 623(a) (emphasis added). While other constructions are perhaps possible, "[a] commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination." *Mullin v. Raytheon Co*., 164 F.3d 696, 700 (1st Cir. 1999); *accord Ellis v. United States*, 73 F.3d 999, 1007 (10th Cir. 1996). And, as Chief Justice Rehnquist observed in *Geller,* other provisions of the text compel this particular interpretation.

1. Section 4(a) Is Naturally Read to Prohibit Only Intentional Discrimination.

Although the ADEA does not define the term "discriminate," the "concept of 'discrimination,' of course, was well known at the time of the enactment of [the ADEA], having been associated with the Fourteenth Amendment for nearly a century and carrying with it a long history of judicial construction." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976). In that context, blameworthy "discrimination" requires unlawful intent. *See Washington v. Davis*, 426 U.S. at 238-48; *Akins*, 325 U.S. at 403-04. Indeed, when the ADEA was passed, the "prevailing view" was that "discrimination required a purpose or motive to harm an individual because of [the protected trait]," Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69 (1972), and, as scholars and petitioners' own *amici* have noted, the concept of "disparate impact" discrimination was not even then known to Congress, as it had not yet been officially formulated by courts, enforcement agencies, or even academics. *See*, *e.g.*, *id.* at 70-71; Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Practitioners* 95 (1983) [hereinafter "*Interpreting the ADEA: Intent or Impact*"];

Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 838-39 (1982); Cornell AAUP Br. at 2, 22-24. In such circumstances, the Court "should not readily infer" that the discrimination expressly mentioned by Section 4(a)(1), and further addressed by Section 4(a)(2), means "something different from what the concept of discrimination has traditionally meant." *Gen. Elec. v. Gilbert*, 429 U.S. at 145.

Far from departing from this traditional conception, Sections 4(a)(1) and 4(a)(2) provide that actions are unlawful only where taken "because of" age. Actions taken "because of" age are actions taken "by reason of" or "on account of" age. *Webster's Third New Int'l Dictionary* 194 (1986). This Court has thus long equated discrimination "because of" a protected trait with intentional discrimination. *See*, *e.g.*, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (observing that a "[d]iscriminatory purpose" implies an action "selected or reaffirmed . . . *because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group") (emphasis added); *Hazen Paper*, 507 U.S. at 609 (explaining that "disparate treatment" occurs when an employer takes action "*because of* such individual's age") (emphasis in original). Under this convention, it is not enough for an ADEA plaintiff to prove that an action adversely affected older workers (or that, if the employer had considered the matter further, it could have used another practice that would have proven more advantageous for older workers); as long as the decision was based on reasons other than age, the employer's practice was not "because of" age.

While Section 4(a)(2) refers to practices that "adversely affect[]" older workers, that reference is not comfortably read to embrace a disparate impact doctrine. The comma between the "adversely affects" and "because of" language makes grammatically inappropriate a junction between the "adversely affects" language preceding it and the "because of" language following it. *See DiBiase v. SmithKline Beecham Corp.*, 48

F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Krop, *supra,* 34 Stan. L. Rev. at 842 & n.27. Rather, the "because of" language is most naturally read as modifying the phrase "to limit, segregate, or classify," which is the set of employment practices to which Section 4(a)(2)'s prohibition applies. Moreover, the clause "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" is itself most naturally read as a statement of the harm due to an improper decision "to limit, segregate, or classify." Such harm becomes relevant, however, only if the other conditions for liability have been established; and the "because of" phrase strongly suggests that unlawful intent is necessary to establish liability.

This reading of Section 4(a)(2) also provides a more natural congruence with Section 4(a)(1). The "because of" language in Section 4(a)(1) plainly modifies the practices covered by that section (*i.e.*, "to fail or refuse to hire or to discharge . . . or otherwise discriminate . . . . "). As a matter of parallelism, the "because of" language in Section 4(a)(2) is also best read as modifying the practices covered by that provision (*i.e.,* "to limit, segregate, or classify"). In short, if Section 4(a)(1) is limited to acts of intentional discrimination (as its use of the term "discriminate" and the language "because of" would suggest), Section 4(a)(2) is best understood to be so limited as well. Not only is the text of the two sections structured in parallel fashion, but it would be odd for the two subsections to adopt different theories of wrong and yet key them to the same phrase "because of."

2. The RFOA Provision Precludes Disparate Impact Claims.

Any interpretive doubt about Section 4(a) is resolved by Section 4(f)(1), which states that "[i]t shall not be unlawful . . . to take any action otherwise prohibited" by Section 4(a) "where the differentiation is based on reasonable

factors other than age." 29 U.S.C. § 623(f)(1). The "differentiation[s]" to which this RFOA provision refers undoubtedly encompass the actions subject to challenge under Section 4(a); and, as petitioners concede (Pet. Br. 26), the phrase "'based on' requires a principal component or foundation—a requirement that would appear to require intent where, as here, the term is combined with a reliance on 'reasonable factors.'" *Accord Webster's Third New Int'l Dictionary* 180. In legal usages, the term "factor" is commonly used as a reference to motive. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (op. of Brennan, J.); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Moreover, while the term "reasonable" has many usages, one accepted use is to refer to something that is "[a]ccording to reason," *Black's Law Dictionary* 1272 (7th ed. 1999), and/or "using or showing reason." *Webster's New World Dictionary* 1183 (2d ed. 19__). So read, Section 4(f)(1) makes lawful any practice ("differential") founded ("based") on motives ("factors") other than age that are amenable to reason ("reasonable").

This understanding of the RFOA provision reflects the traditional conception of anti-discrimination law (and the use of the term "reasonable" in the equal protection cases of the time of the ADEA's enactment). As noted, under that traditional conception, "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (citations omitted). If a plaintiff produces sufficient evidence of unlawful intent to survive directed verdict, the defendant must then offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (emphasis added). *Accord*, *e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (employer must offer "reasonable basis" for differentiation); *Gallagher v. Crown Kosher Super Market of*

Mass., Inc., 366 U.S. 617, 624 (1961) (a "classification having some reasonable basis does not offend against (the equal protection) clause"); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (finding no equal protection violation because there was "no indication of the *unreasonableness* of this *differentiation*") (emphasis added); *see also Ballentine's Law Dictionary* 1057, 1060 (3d ed. 1969) (equating "reasonable basis" and "rational basis"). Even then, a plaintiff may still challenge the reasonableness of the defendant's proffer, not for the purpose of showing that it is unwise or ill-considered or unnecessary, but for the purpose of showing that it is a "pretext" for unlawful intent. *See Reeves*, 530 U.S. at 143; *Furnco*, 438 U.S. at 576-78. As Judge Levin Campbell explained in his influential *Loeb v. Textron* opinion:

> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.

600 F.2d 1003, 1012 n.6 (1st Cir. 1979), *cited with approval* in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

For these reasons, the courts of appeals have long held that the RFOA provision confirms that an action is lawful where the employer's explanation is not a pretext for discrimination— with the plaintiff at all times carrying the burden of persuasion. *See, e.g.*, *Schwager v. Sun Oil Co.,* 591 F.2d 58, 61 (10th Cir. 1979) ("Once the defendant produces evidence tending to show that the termination was based on reasonable factors other than age, the plaintiff must still bear the ultimate burden of establishing his or her case of discrimination by a preponderance of the evidence."). *Accord Crimm v. Missouri Pac. R.R. Co*., 750 F.2d 703, 712 (8th Cir. 1984); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (*per curiam*); *Loeb*, 600 F.2d at 1016; *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975).

Moreover, the courts of appeals have construed the RFOA provision as providing the ADEA's answer to the so-called "mixed motives" dilemma; as Judge J. Skelly Wright wrote for the D.C. Circuit in an oft-cited decision:

> Differentiation "because of" age is unlawful, but not differentiation attributable to "reasonable factors other than age." A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome.

Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C Cir. 1982) (citations omitted). Notably, *Hazen Paper* similarly observed that, under the ADEA, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." 507 U.S. at 610.

The RFOA provision's recognition that intent is outcome-determinative forecloses disparate impact claims, whether or not Section 4(a) would by itself allow such claims. The RFOA provision "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 648 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). Correlatively, the RFOA provision "insure[s] that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). As Judge Frank Easterbrook has observed, the ADEA's structure

is "'incomprehensible unless the prohibition [in Section 4(a)] forbids disparate treatment and the exception [in Section 4(f)(1)] authorizes disparate impact.'" *Metz v. Transit Mix, Inc*., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting) (internal citation omitted).

Of course, the more strictly one construes Section 4(a)'s language to apply only to age-motivated actions, the less technically necessary the RFOA provision becomes (except, perhaps, for "mixed-motive" cases). But legislation frequently includes clarifying provisions that are not technically necessary in order to, among other things, remove argued ambiguities, reassure skeptics, and/or constrain future interpretations by administrative agencies and/or courts. *See, e.g.*, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 259-262 (1994); *Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989); *Mackey v. Lanier Collection Agency Serv., Inc.*, 486 U.S. 825, 838-39 & n.13 (1988). This Court has even noted that insertion of "technically unnecessary" provisions "out of an abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cantela*)." *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990). *Accord Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1316 (2001) (Stevens, J., dissenting); *id.* at 1322 (Souter, J., dissenting). So, in addition to substantively governing "pretext" and "mixed-motive" cases, the RFOA provision serves a perfectly proper clarifying function insofar as it "underscore[s] the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination law." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

3. The ADEA Addresses Disproportionate Effects Through Non-Coercive Education, Training, and Manpower Programs

Other portions of the ADEA reinforce the conclusion that intent is outcome-determinative under the statute. They make it clear both that the ADEA's prohibitions apply only to aspects of intentional age discrimination and that adverse effects of neutral practices are addressed through non-coercive education, training, and manpower programs.

As enacted, the ADEA did not apply to all individuals age 40 and over, but only to those individuals age 40 to age 65. *See* 81 Stat. 602, 607. Mandatory retirement was permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was other intentional age discrimination under the terms of a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181-82 (1989). Even now, the ADEA permits mandatory retirement for certain firefighters, executives, and policymakers, *see 29* U.S.C. §§ 623(j), 631(c), and permits early retirement plans and benefit plan provisions that are cost-justified, *see* 29 U.S.C. § 623(f)(2). Moreover, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of the employer's business. 29 U.S.C. § 623(f)(1).

In addition, "[t]he statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *McKennon*, 513 U.S. at 361. Section 4(f)(3) states that it "shall not be unlawful to . . . discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) provides that it "shall not be unlawful to . . . observe the terms of a bona fide seniority system . . . ." 29 U.S.C. § 623(f)(2). And the RFOA provision states that it "shall not be unlawful . . . to take any action . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Not only do these "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is 'arbitrary,'" *Betts*, 492 U.S. at 176, but by

their terms they clarify that the ADEA's prohibitions do not reach neutral practices, whether or not such practices have disproportionate effects.

Rather, Section 3 of the ADEA addresses such disproportionate effects. Section 3 charges the Secretary of Labor with undertaking and promoting research "with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills." 29 U.S.C. § 622(a)(1). Section 3 also requires the Secretary to publish "the findings of studies and other materials for the promotion of employment" of older workers, *id.* § 622(a)(2), and to foster programs for "expanding the opportunities and potentials of older persons," *see id*. § 622(a)(3). Finally, it requires the Secretary to increase educational opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id*. § 623(a)(4). Section 3 thus provides a broad range of non-coercive measures for helping older workers overcome, for example, the barriers to employment that they may disproportionately face from neutral selection criteria.

The ADEA's findings and purposes reflect this dichotomy between coercive and non-coercive measures. Section 2 of the ADEA recognizes not only that the "setting of arbitrary age limits regardless of potential for job performance ha[d] become a common practice," but also that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). The only jurisdictional finding in the ADEA, however, is that "arbitrary discrimination in employment because of age[] burdens commerce and the free flow of goods." *Id*. § 623(a)(4). Accordingly, the stated statutory purposes distinguish between the ADEA's effort to "prohibit arbitrary age discrimination in employment" and its distinct effort to "help employers and workers find ways of meeting the problems arising from the impact of age on employment." *Id*. § 621(b). In short, the ADEA's findings and purposes indicate that the statute

prohibits only "arbitrary" age discrimination—that is, aspects of intentional age discrimination—and addresses other problems facing older workers—including disproportionate effects of neutral practices—through education, training, and other manpower programs.

B. The Legislative History Confirms that Disparate Impact Claims Are Not Cognizable

Because the text is clear, there is no need to consult legislative history. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). However, as counsel for one of petitioners' *amici* has written, "[t]he legislative history of the ADEA is a model of lucidity," and it "drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination and that actions which have 'adverse effect' on older workers were not to be considered illegal." Blumrosen, *Interpreting the ADEA: Intent or Impact*, *supra*, at 68, 73.

1. In passing Title VII, Congress "did not yet have enough information to make a considered judgment about the nature of age discrimination." *EEOC v. Wyoming*, 460 U.S. at 229. It therefore directed the Secretary of Labor to study the issue and make "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 265 (1964).

In his June 1965 report, the Secretary discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 360. The Secretary found that, unlike race discrimination, age discrimination is not based upon "feelings about people entirely unrelated to their ability to do the job." J.A. 355; *see also id*. ("There is *no* significant discrimination of this kind so far as older workers are concerned."). Instead, the Secretary found that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain

age, without consideration of a particular applicant's individual qualifications." J.A. 364. This form of intentional discrimination, the Secretary noted, is what is meant by "arbitrary discrimination." J.A. 355.

To be sure, the Secretary found that the "force of certain circumstances," such as health problems, historically lower levels of educational attainment, and technological changes, "affect older workers more strongly, as a group, than younger workers." J.A. 378-389. He also found that certain institutional arrangements such as pension and benefit plans could adversely affect older workers, sometimes by leading employers to refuse to hire older workers. J.A. 356, 389-97. But the "firmest conclusion" from his study was that "the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' . . . ." J.A. 403. The Secretary recommended that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 406-07, counseling, job placement, and job training programs, J.A. 407-11, and a system of continuing education, J.A. 412-16.

2. On January 23, 1967, the Secretary transmitted proposed legislation, entitled "Age Discrimination in Employment Act of 1967." Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary informed Congress that "[t]he prohibitions of the legislation would be directed to arbitrary discrimination . . . ." *Id.* at 62. Importantly, the Secretary noted that, while the proposed bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," "[r]easonable differentiations not based solely on age . . . would not fall within the prescription" of the

legislation. *Id.* at 62-63. Rather, "research would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id*. at 63.

In Senate testimony, the Secretary explained that his bill was not intended to prohibit "differentiations or distinctions being made on the basis of age so far as there is a legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Subcomm. on Labor and Public Welfare,* 90th Cong., 37 (1967) (quotations omitted). He further indicated that the bill would prohibit only "the 'unjust'" or "'arbitrary' discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Id*. This limitation, the Secretary explained, was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which was "obviously broad" and which, among other things, reaffirmed that there was no violation "*where the differentiation is based on reasonable factors other than age.*" *Id*. at 39 (emphasis in original). The Secretary so testified in the House too. *See Hearings on H.R. 3651, H.R. 3768, & H.R. 4221 Before the General Comm. on Labor of the House Committee on Education and Labor*, 90th Cong. 8 (1967).

The bill proposed by the Secretary was signed into law. *See EEOC Legislative History* 173. Both committee reports acknowledge that the bill was based upon the Secretary's proposals. *See id.* at 74-75, 106. Moreover, the findings and purposes in Section 2 were enacted as the Secretary had proposed, as were the education and research programs in Section 3, the prohibitions on discrimination in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 8 *with* 91 Stat. 602-04.

3. This legislative history cannot be reconciled with the disparate impact doctrine. The Secretary's sweeping inquiry into "the entire range of factors tending to have adverse

effects" on older workers directly encompassed neutral practices having adverse effects. But the Secretary explained that such practices were not even properly called "discrimination." J.A. 355. Moreover, the Secretary recommended that only "arbitrary" age discrimination — that is, unjustified intentional discrimination—be prohibited and that other problems facing older workers be dealt with through education, reform, and programmatic measures such as job placement and training. As Congress enacted the very language the Secretary proposed, the Secretary's intent should be deemed the intent of Congress as well. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. The Disparate Impact Doctrine Is Incompatible with the ADEA

Though the text and legislative history are wholly dispositive of the question presented, there are also important structural reasons for not construing the ADEA to recognize disparate impact claims. The disparate impact doctrine under Title VII is immensely complicated and, in many respects, has confounded courts. *See, e.g., Watson*, 487 U.S. at 995-97 & n.3 (discussing lack of judicial consensus on, for example, the standard for determining whether a disparity is "substantial"); Michael Gold, Grigg's *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 439-66 (1985) (discussing multiple problems confronting courts). These problems multiply exponentially in the context of the ADEA's structure and show that disparate impact claims are not functionally compatible with the ADEA.

1. In Title VII cases, disparate impact claims are tried to the court, not to a jury. Indeed, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims. *See* 42 U.S.C. § 1981(a)(1) & (c).

In contrast, this Court has held that ADEA claims are subject to jury trial. *See Lorillard v. Pons*, 434 U.S. 575, 585

(1978). Moreover, Section 7(c) of the ADEA provides that "a person shall be entitled to a trial by jury of any issue of fact in any such action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c). Accordingly, in circuits where ADEA disparate impact claims have been allowed, they have been tried to juries. *See*, *e.g.*, *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997).

"[T]he very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the latter law." *Lorillard*, 434 U.S. at 585 n.14. Factual questions about discriminatory intent are "typical grist for a jury's judgment." *Teamsters v. Terry*, 494 U.S. 558, 583 (1990) (op. of Stevens, J.). But the complex evaluative judgments made in disparate impact cases—about, *e.g.*, differential rates of selection, validity of selection practices, and effective alternative selection practices—plainly are not. *Accord* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination In Employment Act: Is a Transplant Appropriate?*, 14 U. Toledo L. Rev. 1261, 1272 (1983) [hereinafter "Player, *Title VII Transplant*"]; Douglas Herbert & Lani Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine In Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 652-56 (1996). Moreover, particularly given the lack of consensus about applicable legal standards, "the jury instructions that they will be given will be difficult, if not impossible, to follow." *Id.* at 657. In short, the "practical abilities and limitations of juries" (*Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970)) could actually "impair the functioning of the legislative scheme" (*Granfinanciera v. Nordberg*, 492 U.S. 33, 42 n.4 (1989)), which suggests that the ADEA does not contemplate disparate impact claims. *Cf. Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) ("most acute" potential for jury confusion relevant interpretive construct).

2. Furthermore, in Title VII cases, disparate impact claims are almost always pursued as class actions under Rule

23(b)(2). Because such claims challenge practices generally applicable to all in a group and can be remedied by common equitable relief, disparate impact cases are among the "prime examples" of cases where individualized notice and an opportunity to opt out of a class are neither necessary nor appropriate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

In contrast, ADEA claims are not subject to Rule 23(b)(2) at all. They are instead subject to the "opt-in" procedures established in 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

While these "opt-in" procedures allow age discrimination plaintiffs to group their resources and achieve economies of scale, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing potentially inconsistent remedial obligations is quite possible. Player, *Title VII Transplant*, *supra*, at 1272-73. These procedural differences show that the ADEA is ill-suited for, and thus is reasonably construed not to contemplate, disparate impact claims.

3. It is also unclear how properly to define the comparison groups for evaluating an ADEA disparate impact claim. Even acknowledging the complication of multi-racial blood lines (of persons such as Tiger Woods), race, sex, national origin, and religion are basically dichotomous variables. Thus, in Title VII cases, assessing the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc*., is relatively straightforward.

The same is not true for ADEA cases, since "age is a continuum." *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985). While the statute covers all individuals age 40 and over, it applies when the alleged

discrimination is in favor of "substantially younger" individuals who are age 40 or over. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313-14 (1996). "[I]mpact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Player, *Wards Cove Packing or Not Wards Cove Packing? That Is the Question & Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. Rich. L. Rev. 819, 829 (1997) [hereinafter "Player, *Impact Analysis Under the ADEA*"].

One possible approach would allow plaintiffs to specify the applicable groupings on a case-by-case basis (e.g., workers age 55 and over versus those under age 55, age 50 and over versus under age 50, etc.). However, such an approach is subject to gross manipulation and provides no manageable standards to employers for self-examination and/or voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); *Ellis*, 73 F.3d at 1009; Player, *Impact Analysis Under the ADEA*, *supra*, at 829-30. Indeed, under this view, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'subgroup' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A less manipulable approach compares the effects of a selection practice on individuals age 40 and over to its effects on those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is inconsistent with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor*, 517 U.S. at 313. Thus, other courts have rejected the over age 40/under age 40 approach. *See* Philip J. Pfeifer *et al*., *Lindeman & Grossman's Employment Discrimination Law* 367 (3d ed. Supp. 2000) (noting cases and disagreement).

Moreover, neither of these approaches solves the problem posed by the transient nature of age. Age is not merely a

continuous variable; it is also a changing one. An individual not covered by the ADEA at age 39 becomes protected by the statute the next year; and an individual under age 40 (or age 50 or age 55 or age 60) may age sufficiently to move into a different comparison group over the course of litigation. Thus, "[t]he attempt to define 'aged persons' as all persons over 40 makes sense as an effort to wipe out specific age limits, but not as creating a 'protected class' like race or sex, precisely because of the transient composition of the group." Blumrosen, *Interpreting the ADEA: Intent or Impact* at 104.

4. For related reasons, there are also substantial questions about the legal relevance of the disproportionate effects that might be measured in an age case. Although it may be unduly idealistic, *see Watson*, 487 U.S. at 992 (op. of O'Connor, J.), a working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). Based on this assumption (that skills, performance and interest are not inherently different by race, gender or religion), the disparate impact doctrine requires a special justification for any selection practice with disparate effects on otherwise similarly situated persons. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In contrast, "statistics showing a deviation from such a 'norm' would not prove anything in the ADEA context . . . ." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 110. It is in the nature of labor markets that those who remain or enter tend over time to be younger than those who leave. *See Laugesen v. Anaconda Corp.*, 510 F.2d 304, 312-13 n.4 (6th Cir. 1975). Moreover, as this Court has recognized, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 317 (1976). In addition, because the payback period is shorter, older persons have less incentive than younger persons to invest in human capital and,

accordingly, tend statistically to have more dated and less valuable technological skills and/or education. *See* Posner, *Aging and Old Age* 51-58 (1995). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *see generally* Douglas H. Powell, *Profiles in Cognitive Aging* 68-89 (1994). To be sure, age frequently brings with it more experience and (sometimes) wisdom. *See* Posner, *supra*, at 105-06. But, as much research confirms, in many occupations and professions, age is negatively correlated with needed skills, performance and interest. *See, e.g., id*. at 72-78, 115-117, 358-60. Consequently, "'non-age factors having differential age-specific impacts'" are likely to be "'ubiquitous and inescapable.'" *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (quoting Peter H. Schuck, T*he Graying of Civil Rights Law: the Age Discrimination Act of 1975*, 89 Yale L. J. 27, 65 (1979)).

Indeed, as the Secretary noted in his report, J.A. 392-97, some neutral practices adversely affect older workers precisely because employers have previously treated older workers better than younger workers. For example, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines*, *Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus, salary caps in payroll systems (such as those employed by federal and state governments) will adversely affect the annual percentage pay increases statistically available for older workers. *See EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 743 (E.D. Pa. 1985). Moreover, in tough times, across-the-board cuts in, for example, wages and/or vacation leave will have disproportionate effects on older workers. *Finnegan*, 967 F.2d at 1165. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting).

In short, in contrast to the working assumption in Title VII cases, it is to be expected that many selection practices will disproportionately affect older workers. Since such adverse

effects are so predictable and yet so unavoidable, it is not reasonable to equate them with a *prima facie* case of employment discrimination and in effect "force employers to carry the burden of justifying all of their work and selection standards." Player, *Impact Analysis Under the ADEA*, *supra*, at 830. That many of the work and selection standards would survive this scrutiny is no basis for allowing the challenges to be based on so little in the first instance. *Accord City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 444 (1985). Moreover, given the costs and risks of litigation generally, allowing such challenges (especially in jury trials) would impose such burdens on employers that they would predictably be forced to either abandon valuable practices—particularly those that are not subject to precise evidentiary verification—and/or make rampant use of quotas. *See Watson*, 487 U.S. at 993 (op. of O'Conner, J.); *see also Connecticut v. Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting). There is no judicial warrant for construing the ADEA to so unduly disrupt the free market, and certainly no "convincing evidence" that Congress intended the ADEA to so dramatically depart from the traditional conception of discrimination, where intent is outcome-determinative.

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT DIRECT RECOGNITION OF DISPARATE IMPACT CLAIMS UNDER THE ADEA

As the court below noted (Pet. App. 5a-6a), the majority of circuits to address the issue have held that disparate impact claims are not cognizable under the ADEA. As Judge Greenberg has noted, the courts holding to the contrary have not "even purported to conduct an analysis of the issue" (*DiBiase*, 48 F.3d at 722); indeed, the seven cases cited by petitioners (Pet. Br. at 5) devote a combined total of nine sentences to it. The sole rationale offered is that *Griggs* and its progeny construed a similarly worded prohibition in Title VII to allow such claims. This analogy fails.

A. Even Under Title VII, Disparate Impact Claims Are Not Recognized Where, As Here, Statutory Provisions And Purposes Foreclose Them

Even under Title VII, this Court has been careful to say that the disparate impact doctrine is available only "in some circumstances" (*Gen. Elec. v. Gilbert*, 429 U.S. at 136-37), and only "in certain cases" (*Watson,* 487 U.S. at 986-87, 988). The Court has declined to decide whether such claims are allowed under Section 703(a)(1), the provision applicable to discriminatory discharge claims like those asserted by petitioners. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977). Moreover, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another," the Court has stated that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Thus, the Court has held that Section 703(h) of Title VII, which makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority system," 42 U.S.C. § 2000e-2(h), forecloses disparate impact claims involving seniority systems. *See, e.g., Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982). Likewise, the Court has suggested that the Bennett Amendment to Title VII, which allows wage differentiations "authorized by the provisions of section 206(d) of title 29," 42 U.S.C. § 2000e-2(h), precludes disparate impact claims for gender-correlated wage disparities. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). And the Court has held that 29 U.S.C. § 206(d) would bar a disparate impact claim by male employees against a gender-neutral pension plan. *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C.§ 206(d), Section 4(f)(1) of the ADEA makes intent outcome-determinative. Indeed, as explained above, disparate impact doctrine is incompatible

with the ADEA as a whole. *See supra,* at ___-___. Under *Griggs* and its progeny, disparate impact doctrine has no application in such circumstances.

B. There Are Substantial Reasons Not To Carry This Court's Construction of Title VII Over To The ADEA

The Court should in any event decline to carry its construction of Title VII over to the ADEA. The ADEA is not part of Title VII; it is an entirely separate statute, with its own text, history, and purposes. The Court has not hesitated elsewhere to construe the ADEA differently from Title VII. *See, e.g., EEOC v. ARAMCO*, 499 U.S. 244, 256 (1991) (ADEA but not Title VII applies outside of United States); *Lorillard*, 434 U.S. at 583-84 (ADEA but not Title VII allows jury trials). Moreover, while the Court has noted that "the prohibitions of the ADEA were derived *in haec verba* from Title VII," *e.g., id.* at 584, the Court has also declined, for example, to decide whether the *McDonnell Douglas* framework applies in ADEA cases, *see, e.g., Reeves,* 530 U.S. at 142; *O'Connor*, 517 U.S. at 311; and, in every case, the Court has examined *de novo* whether Title VII precedent is appropriately applied to the ADEA's distinct scheme. *See, e.g., Astoria v. Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109-14 (1991); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756-58 (1979). Here, "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

1. To start, the construction of Section 703(a) of Title VII as embracing disparate impact claims cannot conceivably be characterized as having constituted "a well-known meaning at common law or in the law of this country" at the time of the ADEA's enactment. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). *Griggs* was not decided until four years after the ADEA's enactment in 1967. Moreover, in 1967, "disparate treatment" was the prevailing conception of

discrimination and the "disparate impact" doctrine had not yet even been officially formulated. *See, supra*, at ___. Thus, the 1967 Congress cannot be presumed to have embraced disparate impact doctrine when it used Section 703(a)'s language in Section 4(a) of the ADEA.

2. Moreover, the construction of Title VII in *Griggs* is not binding on the ADEA. To accept this point, one need not agree with critics who have argued that "*Griggs* perverted both the language and the legislative history of the act." Richard A. Epstein, *Forbidden Grounds* 197 (1992). *See also* Gold, 7 Ind. Rel. L. J. at 479 n.170. Rather, one need only accept that the language of Section 703(a) (and thus of Section 4(a)) can *also* be construed as embracing only intentional discrimination claims, particularly when read in light of other statutory provisions (such as Section 703(h) or Section 4(f)(1)). As explained above (*supra*, at ___), this alternative construction is plainly reasonable, and has in fact been embraced by Justices of this Court. *See Connecticut v. Teal*, 457 U.S. at 456-57 (Powell, J., joined by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor, dissenting) ("Although this language suggests that discrimination occurs only on an individual basis, in *Griggs* . . . the Court held that discriminatory intent on the part of employer . . . need not be shown . . . [and] that the 'disparate impact' of an employer's practices . . . can violate § 703(a)(2) of Title VII."). That being the case, disparate impact is not a necessary construction of the statutory language, and the appropriate construction for the ADEA can only be determined by separately examining the ADEA's particular structure, history, and context. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

3. In this regard, *Griggs* and its progeny did not purport to derive the disparate impact doctrine solely from the text of Title VII itself; a review of the cases reveals very little examination of the text. Rather, as courts and commentators have noted, in interpreting Section 703(a)(2) of Title VII to embrace the disparate impact doctrine, *Griggs* and its progeny

"looked primarily to the larger objectives underlying Congress' enactment of Title VII." *Ellis*, 73 F.3d at 1008 n.13. *Accord DiBiase*, 48 F.3d at 733; Michael C. Sloan, *Disparate Impact in the Age Discrimination Employment Act*, 1995 Wis. L. Rev. 507, 517 (1995). In analogous circumstances, this Court has indicated that it will construe two similarly worded statutory texts differently if the policy objectives relied upon in construing one statute do not fully extend to the other statute. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-24 (1994) (declining to extend "prevailing party" analysis of *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to identical language in Copyright Act, 17 U.S.C. § 505, because goals of statute were "not completely similar"). That is the situation here.

Griggs was concerned that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their life." *McDonnell Douglas*, 411 U.S. at 806. Similarly, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), was concerned that women, another suspect class, could cumulatively suffer from actions based on largely immutable characteristics (*e.g.*, height and weight). But, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or sex, older persons as a class "have not experienced a 'history of purposeful unequal treatment,' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313; *accord Kimel*, 120 S. Ct. at 645. Moreover, where older workers (who of course were once young) are concerned, the lack of a diploma, test score, or skill "cannot be viewed as a product of lifelong discrimination." Krop, *supra*, at 850. Rather, as the Secretary reported, for older workers, the issue is usually not the denial of skills or opportunity in the first instance, but rather the deterioration of skills and performance

(which, as discussed above, is generally but unevenly correlated with advancing age). *See supra*, pp. ___-___.

The Court has suggested that disparate impact doctrine is also concerned with the "problem of subconscious stereotypes and prejudices . . . that Title VII was enacted to combat." *Watson*, 487 U.S. at 990. But "the kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly worker," "because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities." Posner, *supra*, 320-21. Consistent with this observation, the Secretary reported that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination," *EEOC v. Wyoming,* 460 U.S. at 231, where prejudices and misunderstandings having no relation to employment may cause unfair and erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary reported that age discrimination in employment results from generalizations about work abilities that may not be applicable to particular individuals. J.A. 355, 361-78. Accordingly, *Hazen Paper* determined that, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." 507 U.S. at 611 (emphasis in original).

In short, the policies that motivated the disparate impact doctrine under Title VII have no application in the context of the ADEA's different and more limited objectives. When the *Watson* Court indicated "that some employment practices, adopted without a deliberately discriminating motive, may in operation be functionally equivalent to intentional discrimination" (*Watson*, 487 U.S. at 987), it was referring to employment practices of concern to Title VII—specifically, those that perpetuate historical deprivations or that potentially allow deep-rooted animus to operate. Since older workers do not suffer from historical deprivations or deep-rooted animus,

the disparate treatment doctrine fully protects their interests under the ADEA. That is the teaching of *Hazen Paper*.

4. In addition to subjecting numerous unobjectionable practices to suit, carrying disparate impact over to the ADEA might actually undermine Title VII. The more senior employees in most work forces, and the typical claimants in ADEA cases, are "middle or upper class white collar workers who are white males." Blumrosen, *Interpreting the ADEA: Intent or Impact* at 105-06; *accord* Posner, *supra*, at 344-47. Correlatively, from a statistical perspective, the more recent entrants to the work force are racial minorities and women. *See* Posner, *supra*, at 347. Application of disparate impact doctrine to the ADEA may threaten the job gains made by these racial minorities and women; and "[r]estrictions on terminations of senior employees, beyond those necessary to avoid the rigid age limits and stereotyped judgments, will inevitably reduce the scope for affirmative action for minorities and women." Blumrosen, *Interpreting the ADEA: Intent or Impact* at 105. These are precisely the circumstances in which disparate impact doctrine should not be extended. *See Manhart*, 435 U.S. at 710-11 n.20.

III. THE ARGUMENTS OF PETITIONERS AND THEIR *AMICI* FOR RECOGNIZING DISPARATE IMPACT CLAIMS ARE WITHOUT MERIT

Petitioners do little to defend the appellate cases that have carried Title VII's disparate impact doctrine over to the ADEA. Moreover, they make no effort to satisfy Title VII's requirement (*see Wards Cove Packing v. Atonio*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B)) that the specific practice causing the purported disparate impact be identified (and instead continue to assert (Pet. Br. 16, 43) a gross percentage statistics claim that even the concurring judge below found legally deficient). Rather, with their *amici*, petitioners contrive a series of arguments that no court has adopted for recognizing ADEA disparate impact claims. These arguments are without merit.

A. Petitioners' Suggestion That Section 4(a)(2) Cannot Properly Be Construed To Have An Intent Requirement Is Unfounded

Petitioners initially argue (Pet. Br. at 18-27) that Section 4(a)(2) cannot properly be construed to have an intent requirement. This argument is unfounded.

Contrary to the suggestion of the two student notes upon which petitioners rely (Pet. Br. at 13, 18), Section 4(a)(2) is easily read to include an intent requirement; it applies only to actions taken "because of" age, which is a traditional statement of an intent requirement (as explained *supra*, at ___). Nor does the omission of the word "discriminate" from Section 4(a)(2) suggest otherwise. Section 4(a)(2) is merely one of many provisions in a general age *discrimination* statute, which under traditional concepts would as a whole only apply to intentionally discriminatory acts.

Petitioners also err in suggesting (Pet. Br. 18, 20-22) that the "adversely affects" language in Section 4(a)(2) must be read to embrace disparate impact claims so as to preserve linguistic coherence. As explained above (*supra,* at ___-___), petitioners' construction actually makes a grammatically inappropriate junction between the "adversely affects" language and the "because of" language. Moreover, petitioners' reconstruction creates a "lack of linguistic agreement" by wrongly moving the "because of" language from its proper position at the end of the provision to the beginning; when the language is read as it is written, the sentence structure of Section 4(a)(2) is fine. Further, while perhaps inelegant, it is linguistically proper for the "because of" language to modify (i) the employment practices at issue (*i.e.*, "to limit, segregate, or classify his employees") while, at the same time, applying only (ii) where a practice harms an "individual" in the statutorily specified way. Indeed, rather than reflecting a non-intent-based doctrine, the sentence structure of Section 4(a)(2) plainly reflects its parallel to the similar provision applicable to labor organizations. *See* 29

U.S.C. § 623(c)(2) (it is "unlawful for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's age.").

Petitioners also err in suggesting (Pet. Br. 19 n.10) that construing Sections 4(a)(1) and 4(a)(2) as both containing an intent requirement makes those provisions redundant. Section 4(a)(2) covers intentional discrimination by employers in apprenticeship and other joint union-employer programs not covered by Section 4(a)(1), as the parallel wording of Section 4(c)(2) suggests. Beyond that, Section 4(a)(2) is a general catch-all provision for discriminatory conduct that falls outside of Section 4(a)(1). These provisions are not redundant.

Finally, petitioners contend (Pet. Br. at 24-27) that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to an intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement (when combined with the "reasonable factors" language). But there is no canon of construction which suggests that two roughly synonymous phrases in two different passages of a statute cannot have the same or similar meaning; on the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on reasonable factors" may both properly refer to intent.

B. Disparate Impact Doctrine Is Not Necessary To Give Meaning And Effect To The RFOA Provision

Contradicting their concession (Pet. Br. 26-27) that, when combined with the phrase "reasonable factors," the phrase "based on" refers to intent, petitioners next argue (Pet. Br. 13-15, 23-29, 42-43) that the RFOA provision has meaning and effect only if unintentional conduct is actionable and the

employer has the burden of proving that its conduct is legally justifiable. No court has accepted this argument, and the argument fails at every turn.

1. Contrary to petitioners' essential premise (Pet. Br. 13-14, 24-25, 28), recognition of disparate impact claims is not necessary to fill an "evidentiary void" and thereby give the RFOA provision meaning and effect. As discussed above (*supra,* at ___-___), the RFOA provision substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases; and it also affirmatively clarifies "that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. The RFOA provision thus has full meaning and effect without recognition of disparate impact claims; indeed, even if this clarifying provision were characterized as "technically unnecessary," which it is not, insertion of such a clarifying provision "out of an abundance of caution" is a drafting technique fully accepted by this Court. *See Fort Stewart Schools v. FLRA*, 495 U.S. at 646.

2. Petitioners' argument also assumes (Pet. Br. 13, 15, 23-29, 31-34, 42-43) that the RFOA provision is an affirmative defense upon which an employer bears the burden of proof. This assumption is both irrelevant and erroneous.

a. *First*, whether or not the RFOA provision is an affirmative defense, it bars disparate impact claims under the ADEA. The disparate impact question turns on whether liability may be imposed without regard to intent. By confirming that intent is outcome-determinative under the ADEA, the RFOA provision confirms that the disparate impact doctrine is not cognizable. Petitioners completely miss this basic interpretive point.

b. *Second,* the RFOA is not an affirmative defense upon which the burden of proof shifts. As noted above (*supra*, at ___), the federal courts of appeals have repeatedly said so. Notwithstanding their many contrary assertions on the issue,

petitioners do not cite even a single case that supports their conflicting view.

Petitioners fail to acknowledge that the RFOA provision is part of a section of "lawful employment practices," a statutory heading that has been codified. *See* 104 Stat. 978. In contrast to the BFOQ provision of the ADEA (or the later added foreign workplaces provision), which sanctions an aspect of intentional age discrimination, the RFOA provision is clarifying that certain actions based on reasonable motives other than age are lawful. Section 4(f)(3) does much the same thing in clarifying that actions based upon good cause are lawful. In employment laws at least, such clarifying provisions are typically *not* treated as affirmative defenses that shift the burden of proof. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977). Indeed, in *Betts*, this Court held that even Section 4(f)(2), which allowed the express use of age in benefit plans, was definitional and did not constitute an affirmative defense. *See Betts*, 492 U.S. at 181. In this context, the RFOA provision is not properly treated as an affirmative defense either, as the lower courts have held.

Contrary to petitioners' argument (Pet. Br. 31, 32), the statutory phrase "otherwise prohibited" does not assume that "a violation has already occurred" and require that the RFOA provision be treated as an affirmative defense. The statutory phrase is "otherwise prohibited," not "prohibited." The word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" means that some but not all elements of a violation have been established. That phrase does not necessarily introduce an affirmative defense, because it does not resolve whether the remaining elements in issue are ones upon which the plaintiff or the defendant has the burden of proof.

For example, termination on the basis of age of a 39-year old employee could be seen as "otherwise prohibited" by Section 4(a) of the ADEA, because the only element not

established is the age limit set forth in 29 U.S.C. § 631(a); but petitioners cannot seriously question that an ADEA plaintiff has the burden of proof on this threshold fact. Likewise, under *McDonnell Douglas* and its many progeny, once the *prima facie* case is made, the employment action could be seen as "otherwise prohibited," and thus directed verdict will be entered for the plaintiff, unless the defendant produces evidence of a legitimate nondiscriminatory reason for the action; but the ultimate burden of persuasion still does not shift. *See Reeves*, 530 U.S. at 142-43. Similarly, although discrimination on the basis of race is unlawful, this Court has held that such "otherwise prohibited" actions are lawful if taken pursuant to a valid affirmative action plan; and the burden of proving the invalidity of the affirmative action plan remains with the employee-plaintiff. *See Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 626-27 (1987). In short, while there clearly are counter-examples where an action is "otherwise prohibited" unless the defendant carries a burden of persuasion on an affirmative defense (*e.g.*, a BFOQ), actions may be "otherwise prohibited" and yet leave with the plaintiff the burden of persuasion on remaining legal elements.

This understanding of the "otherwise prohibited" language is in fact confirmed by the 1990 amendments to the ADEA. As petitioners note (Pet. Br. 32-33 n.19), at that time, the "otherwise prohibited" language was also added to Section 4(f)(2) of the ADEA. But, in doing so, the 1990 amendments to the ADEA expressly stated that the employer "shall have the burden of proving" the applicability of the amended requirements of that section. 29 U.S.C. § 4(f)(2). The enactment of this express burden of proof provision in conjunction with the "otherwise prohibited" language shows that the "otherwise prohibited" language does not by itself shift the burden of proof. Indeed, the omission of comparable express burden-shifting language in Section 4(f)(1) is a basis for inferring that the burden of proof does not shift under the RFOA provision. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983); *see also United States v. Fausto*, 484 U.S.

439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense,' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

c. *Finally*, even if the RFOA is an affirmative defense, it does not follow that this provision, which petitioners concede to be intent-based, requires recognition of disparate impact claims. The RFOA provision could be an affirmative defense for "mixed motive" cases and, by making intent outcome-determinative, still preclude disparate impact claims.

3. Equally revealing, petitioners cannot give the RFOA provision any cognizable non-intent-based meaning. That "void" is yet another flaw in their argument.

a. Contrary to petitioners' suggestion (Pet. Br. at 15, 42), the RFOA provision cannot properly be equated with the so-called "business necessity" standard referred to in the EEOC's interpretive guidelines. As set forth in those guidelines (29 C.F.R. § 1625.7(d)), a "business necessity" exists only if the provisions of the Uniform Guidelines for Employee Selection are satisfied, including provisions requiring that a challenged practice be "job related" and that no equally effective alternative practice with less adverse impact be available. *See id.* 1607.3(B), 1607.6(A). There is no dictionary definition or legal precedent that even arguably allows the term "reasonable" to be given such a restrictive meaning, particularly since this Court has long held that the phrase "business necessity," as used in the case law, cannot itself properly be read so restrictively. *See, e.g., Wards Cove*, 490 U.S. at 659; *Watson*, 487 U.S. at 997-99; *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Moreover, the clause preceding the RFOA provision in Section 4(f)(1) expressly applies to any "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). As this Court has recognized, a standard "of 'reasonable

necessity[' is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). The EEOC guidelines just improperly equate these two statutorily distinct standards.

b. Equally problematic is petitioners' alternative suggestion (Pet. Br. 15, 42-43) that the RFOA provision be read to embrace the rebuttal burden standard articulated in *Wards Cove*. Under that standard, a challenged practice with adverse impact is unlawful without regard to intent unless it "serves, in a significant way, the legitimate employment goals of the employer." 490 U.S. at 659. But that standard was articulated by the Court as a gloss on Section 703(a)(2) itself. Thus, to the extent that Section 4(a)(2) is construed to embrace disparate impact claims based on this Court's construction of Section 703(a)(2), petitioners' proposed definition for the RFOA provision, based on *Wards Cove*, is already part of Section 4(a)(2)'s gloss as well. Accordingly, "the reasonable factor clause as interpreted by [petitioners] would be surplusage," *EEOC v. Newport Mesa Unified Sch. Dist.*, 893 F. Supp. 927, 932 (C.D. Cal. 1995).

c. Petitioners further err in arguing (Pet. Br. 14, 29-31, 42-43) that *County of Washington v. Gunther*, 452 U.S. 161 (1981), and the "any other factor other than sex" provision of 29 U.S.C. § 206(d), require that the RFOA provision be read as setting forth a standard that is "higher" than "age-neutral and bona fide." Petitioners never tell the Court what this "higher" standard is; and *Gunther* and the "any other factor other than sex" provision in no way support construing the RFOA provision to embrace a non-intent-based standard.

Gunther clearly is of no aid to petitioners. While *Gunther* recognized that the Bennet Amendment's incorporation of the Equal Pay Act's fourth affirmative defense into Title VII could preclude a disparate impact claim under Title VII, it did not derive the underlying disparate impact doctrine from the claim-precluding effect of the defense. Rather, the disparate impact doctrine had already been read into the prohibitions of

Title VII years earlier in *Griggs*. Nothing in *Gunther* suggests that the Bennet Amendment itself would have provided justification for reading a disparate impact doctrine into Title VII; and, contrary to the undisciplined musings of the academic upon whom petitioners rely (Pet. Br. at 31), there is no "injunction" requiring that constructions of Title VII be read into the ADEA.

Nor does the difference in wording between the RFOA provision and the "any other factor other than sex" provision of the Equal Pay Act provide a basis for reading a disparate impact doctrine into the ADEA (or for defining the RFOA to be a non-intent-based rebuttal standard). The Equal Pay Act does not embrace the disparate impact doctrine; it is a strict liability statute. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 932 (7th Cir. 2000). Moreover, petitioners offer no evidence that, in enacting the RFOA provision, the 1967 Congress looked at the Equal Pay Act or its fourth affirmative defense, much less that the word "reasonable" was used in the RFOA provision to distinguish the Equal Pay Act's fourth affirmative defense (or to otherwise create a non-intent-based standard). Further, petitioners fail to consider that the term "reasonable" in the RFOA provision could simply be treated as encompassing *all* of the four affirmative defenses set out in the Equal Pay Act, including the intent-based "any other factor" provision. In addition, petitioners fail to mention that, in construing the "any other factor other than sex" provision, the Department of Labor in 1965 took the position that the employer must "show[] that there is a reasonable relationship between the amount of [a] differential and the weight properly attributable to the factor other than sex" (29 C.F.R. § 800.115(d) (1965))—an interpretation that leaves no possible substantive daylight whatsoever between the Equal Pay Act's fourth affirmative defense and the RFOA provision. *See also EEOC v. J. C. Penny Co.,* 843 F.2d 249, 253 (6th Cir. 1988) (fourth affirmative defense requires proof that "the factor was adopted for a legitimate business reason and used reasonably and in light of the employer's stated purpose");

Randolph Cent. Sch. Dist. v. Aldrich, 506 U.S. 965 (1992) (White, J., dissenting) (discussing circuit split on the issue). Yet, even under this expansive interpretation, the fourth affirmative defense is intent-based; and, by extension, the RFOA provision must be too.

4. In the end, petitioners' argument is (Pet. Br. 27-28) that, when their debatable construction of Section 4(a) is combined with a possible negative implication from the word "reasonable" in Section 4(f)(1), strict adherence to canons of construction creates a "statutory potential" for downloading the powerful engine of disparate impact liability into the ADEA. But the Court has expressed reservations about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect." *Landgraf v. USF Film Products*, 511 U.S. at 259. Moreover, "canons are not mandatory rules . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent even overcome their force." *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). Here, consistent with canons of interpretation that petitioners do not consider, the RFOA provision clarifies that intent is outcome-determinative under the ADEA. No negative implication need be, or should be, drawn from the reference to "reasonable factors" other than age, particularly since Section 4(a) addresses the only "unreasonable" motive of concern to this statute—*i.e.*, disparate treatment. Indeed, any proper negative implication from this provision must be in regard to "pretext" or "mixed motive" cases: The RFOA provision does not require that the "differentiation[s]" themselves be "reasonable," only that the "factors" (*i.e.*, motives) on which they are based be reasonable; and the term "reasonable" is easily read to mean only that the non-age factors are "amenable to reason," much as the *McDonnell Douglas* line of cases speak of "legitimate, non-discriminatory reasons" (or the cases under 29 U.S.C. § 206(d) speak of "bona fide" "factors other than sex"). There

is no plausible negative implication of a non-intent-based theory of liability from these provisions, as the statute's structure and legislative history confirm. In arguing to the contrary, petitioners ask the Court to read way too much from way too little. *Cf. Betts*, 492 U.S. at 174 ("We find it quite difficult to believe that Congress would have chosen such a circuitous route to the result urged . . . .").

C. Petitioners' Legislative History Arguments Are Also Without Merit

Petitioners' legislative history arguments are equally unpersuasive. Contrary to petitioners' suggestion (Pet. Br. 35 n.20), the Secretary of Labor's 1965 report cannot be avoided on the ground that it was "issued seven years before *Griggs*." The value of the report is that its findings provided the foundation for the ADEA, as enacted in 1967; the report thereby provides insight into the ADEA's proper reach. The Secretary did not need *Griggs* in order to properly report to Congress about age discrimination in employment; the Secretary studied the issue and in fact found that Title VII and race discrimination—the issues of concern in *Griggs*—were distinguishable.

Like their *amicus* (AARP Br. at 12-14, 19), petitioners also err in alternatively suggesting (Pet. Br. at 3) that the Secretary's report anticipated *Griggs* in calling for the elimination of neutral practices with adverse impact. While the report noted that certain employment practices (such as generous fringe benefits packages that can make older workers costly to employ) may "unintentionally *lead* to age limits in hiring," the report characterized only the age limits themselves, and not the practices leading to them, as discriminatory. J.A. 356, 392-97, 406 (emphasis added). Moreover, the report recommended "adjust[ing] institutional arrangements disadvantaging older workers" through legislation and other reforms, rather than through the prohibition that petitioners and their *amicus* urge on this Court. J.A. 404, 406-07.

Finally, again like their *amicus* (AARP Br. at 11-14), petitioners erroneously attempt (Pet. Br. 5) to equate the report's emphasis on "arbitrary discrimination" with the "arbitrary barriers" to employment of racial minorities at issue in *Griggs*, 401 U.S. at 431. The report makes it clear that, in the context of age (as opposed to race), "arbitrary discrimination" only "involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions." J.A. 355 (emphasis omitted). This concern is indisputably with intentional discrimination, and not with the neutral practices at issue in *Griggs*.

D. The Interpretive Bulletins Of The DOL And The EEOC Do Not Justify Recognizing Disparate Impact Claims Under The ADEA

Petitioners next seek support from distinct interpretive bulletins issued by the DOL and the EEOC. But these interpretive bulletins do not justify judicial recognition of ADEA disparate impact claims.

1. The DOL's 1968 interpretive bulletin does not construe the ADEA to allow liability to be imposed based on unjustified adverse effects (and without regard to intent). The bulletin does not even address the scope of Section 4(a) and its prohibitions, much less say that Section 4(a) extends to unintentional adverse impact.

Petitioners plainly err in suggesting (Pet. Br. at 5, 34-35) that the bulletin's interpretation of the RFOA provision embraced the disparate impact doctrine. Again, disparate impact is not mentioned. On the contrary, the bulletin states, among other things, that: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" (29 C.F.R. § 860.103(b) (1970)); "[t]he clear purpose is to insure that age . . . is not a determining factor in making any decision regarding . . . employment of an individual" (*id*. § 860.103(c)); "[t]he reasonableness of a differentiation will be determined

on an individual, case by case basis, not on the basis of any general or class concept" (*id.* § 860.103(d)); and "situations in which an employee test is used . . . will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute" (*id.* § 860.104(b); *see also id.* §§ 860.92(d), 860.95(a)). This is disparate treatment language.

To be sure, the bulletin provides a number of essentially objective guides that the DOL indicated would "be recognized as supporting a differentiation based on reasonable factors other than age . . . ." 29 C.F.R. § 860.103 (1970). But those guides do not implicitly reflect, much less expressly embrace, a disparate impact doctrine. Rather, as might be expected in a bulletin that attempts to "provide 'a practical guide to employers and employees as to how the office representing the public interest will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 138 (1944)), these guides explain what an employer must do to ensure that no enforcement action is initiated by the DOL to challenge a putative "reasonable factor other than age." In other words, as this Court held in construing other provisions of this *same* DOL bulletin, these interpretations are "nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the . . . exemption." *Betts*, 492 U.S. at 172.

For these reasons, commentators—including commentators relied upon by petitioners—have repeatedly reported that the original DOL interpretations did *not* embrace the disparate impact doctrine of liability. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact*, *supra*, at 96; Player, *Title VII Transplant*, *supra,* at 1273; *Evan H. Pontz*, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act,* 74 N. C. L. Rev. 267, 316 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L. J. 437, 449 (1985). Petitioners' contrary argument is in error.

2. In contrast, as petitioners note (Pet. Br. at 5-6, 36-37), the EEOC interpretations adopted in 1981 do construe the ADEA to embrace disparate impact claims. *See* 29 C.F.R. § 1625.7 (2000). But, consistent with the longstanding, contrary position of the DOJ, the Solicitor General has commendably chosen not to appear to defend the EEOC's interpretations. This Court should similarly decline to follow these interpretations, as they constitute an inappropriate attempt to revise the statute by administrative fiat.

a. The Court does not owe deference, in the *Chevron* sense, to these interpretations. *Chevron* deference is appropriate only where "the agency interpretation claiming deference was promulgated in the exercise of [congressionally delegated rulemaking] authority." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Here, although the EEOC has substantive rulemaking authority, *see* 29 U.S.C. § 628, it chose to issue its guidelines only as "interpretive rules or statements of policy." Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724, 47724 (1981). Moreover, it did so without complying with the 60-day notice period required for the imposition of substantive rules. *Id. Chevron* is accordingly inapplicable.

b. The real question is whether the Court owes the EEOC interpretations any "respect" under *Skidmore v. Swift*, the answer to which turns on "the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." 323 U.S. at 140. On these standards the EEOC interpretations deserve no judicial respect whatsoever.

First, the EEOC interpretations are not consistent with other administrative pronouncements. Instead, they are "at sharp variance with the original interpretation" by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 33. Moreover, by seeking to require compliance with the Uniform Guidelines on Employee Selection Procedures, which were

jointly issued in 1978 by the Department of Justice, the Department of Labor, the EEOC, and the Civil Service Commission, the EEOC interpretations conflict with the Uniform Guidelines themselves (which specifically state that they "do not apply to responsibilities under the Age Discrimination in Employment Act." 29 C.F.R. §§ 1607.1(A), 1607.2(D)). In addition, the EEOC interpretations conflict with the position that the DOJ has taken in federal court about whether disparate impact claims may be brought under the ADEA. *See, e.g.,* App. A___-___, *reprinting* Brief for Appellant, *Arnold v. Postmaster Gen.*, Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988) ("The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA.").

Second, the EEOC interpretations were adopted without thorough consideration. These interpretations, including the provisions recognizing disparate impact claims, were proposed only months after the EEOC assumed responsibility for enforcement of the ADEA, and long before the EEOC gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,858, 68,861 (1979). They were then issued in September 1981 by an acting chairman on behalf of a commission depleted by resignations and burdened by delays in confirmation. *See* Final Interpretations, 46 Fed. Reg. 47,724 (1981); *see also* Sarah Fitzgerald, *The Federal Report*, Washington Post, October 1, 1981, at A27. And the only justification that the EEOC offered for construing the ADEA to embrace disparate impact claims was citation to this Court's decision in *Griggs*, which of course dealt only with Title VII, and the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307, which did not even involve a disparate impact claim. *See* Final Interpretations, 44 Fed. Reg. at 47,725. Incredibly, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's opinion in *Markham v. Geller*, 451 U.S. 945,

which was issued in April 1981, several months before the guidelines were published.

Third, not only were the guidelines not thoroughly considered at the time of adoption, the EEOC has chosen to ignore important developments since then. While the EEOC interpretations embrace a "business necessity" standard incorporating the Uniform Guidelines on Employee Selection as the test of "reasonable factors other than age," this Court has repeatedly rejected the restrictive requirements of those guidelines. *See supra*, p. ___. Moreover, in *Betts*, this Court rejected other provisions of these same interpretations as contrary to law. *See* 492 U.S. at 170-72. Further, in *Hazen Paper*, this Court made it clear that the disparate impact question was still an open one; Justice Kennedy wrote a concurring opinion calling into question whether Title VII's disparate impact doctrine is properly carried over to the ADEA, *see* 507 U.S. at 618; and several federal courts of appeals thereafter reconsidered their own circuit precedent and held that disparate impact claims are not cognizable under ADEA, *see* Resp. Opp. at 10. Yet EEOC has not even held a hearing on whether its 1981 interpretations should be reconsidered.

Finally, and most fundamentally, the EEOC interpretations are contrary to law. As explained above, the language, legislative history, and structure of the ADEA make intent outcome-determinative under this statute. The EEOC's contrary interpretation cannot legally stand. *See Betts*, 492 U.S. at 171.

E. The Disparate Impact Doctrine Was Not Incorporated Into The ADEA By Subsequent Congressional Action (Or Inaction)

Last, petitioners contend (Pet. Br. 5-7, 14-15, 37-40) that subsequent congressional acts—most particularly, the Older Workers Benefits Protection Act of 1990 ("OWBPA")—effectively ratified a purported administrative

and judicial consensus favoring the disparate impact doctrine. This contention is unfounded.

First, there was no administrative and judicial consensus favoring ADEA disparate impact claims prior to *Hazen Paper*. As noted above, while the EEOC expressed its endorsement of disparate impact claims in 1981, the DOL did not do so during the approximately 12-year period in which it administered the ADEA; and the DOJ expressly opposed such claims in litigation on behalf of federal agencies. Moreover, no court of appeals approved such a claim until *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), and then-Justice Rehnquist instantly set down a prominent opposing marker. *See* 451 U.S. at 946-47. As petitioners have conceded (Petition at 16 n.8), that dissent prompted a substantial, continuing debate in the academic community concerning whether disparate impact claims are properly cognizable under the ADEA. And, while a number of courts may later have "applied, or assumed application of, the Title VII disparate impact model in ADEA cases" (Pet. Br. 5), only a few circuits actually held that such claims were cognizable; and they did so with little to no analysis, and with continuing judicial disagreement. *See, e.g., Metz*, 828 F.2d at 1220 (Easterbrook, J., dissenting). This vigorous disagreement and debate shows that there was no settled understanding on this issue for Congress to ratify. *See Fogarty*, 510 U.S. at 532.

Second, disparate impact doctrine is not necessary to, or assumed by, the operation of the OWBPA. The OWBPA merely imposes certain requirements for a waiver to be "knowing and voluntary" and, in that regard, provides that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide to the potential releasee certain limited statistical information about the individuals "eligible" and "ineligible" for "such program"—*i.e.*, the waiver program. 29 U.S.C. § 626(f)(1)(H). In doing so, the OWBPA expresses a concern that employees may have "little or no basis to suspect that

action is being taken based on their individual characteristics," S. Rep. No. 101-263, at 32, *reprinted in* 1 *OWBPA Legislative History* 351 (1991), that "age may have played a role in the employer's decision," and that, before executing a waiver, an employee should at least be "aware of any potential or actual pattern of discrimination." H. Rep. 101-664, at 22-23, *reprinted in* 1 *OWBPA Legislative History* 229-30. These concerns with the motive for the waiver program, the role that age played in it, and the existence of any pattern of discrimination from the waiver program are the office of disparate treatment doctrine, not disparate impact doctrine. *See generally McDonnell Douglas*, 411 U.S. at 805 (statistical information "may be helpful in disparate treatment cases"). Moreover, since the employer is *not* required to provide any specific statistics about the effects of the different "eligibility factors" used in the waiver program (much less statistics about, *e.g.*, the myriad practices by which employees may have been selected for termination in the first instance), the information required does not even provide a basis for evaluating a potential disparate impact claim. *See Wards Cove*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B). Indeed, since discharge claims arise under Section 4(a)(1), and since petitioners' argument in effect concedes (Pet. Br. 13, 18-19 & n.10) that disparate impact claims are not cognizable under that subsection, there would not even appear to be a tenable disparate impact claim to evaluate. *See also Nashville Gas Co.*, 434 U.S. at 144-45 (questioning whether Section 703(a)(1) recognizes disparate impact claims).

Finally, and in all events, neither the OWBPA nor any other amendment to the ADEA has incorporated the disparate impact doctrine into the ADEA. Petitioners do not even suggest that there is statutory language expressly doing so. Moreover, to do so implicitly, Congress would have at least had to "reenact" or "amend" the substantive prohibitions of the statute at some pertinent point in time. *See Lorillard*, 434 U.S. at 580. Other statutory revisions—even related ones—are not legally sufficient to do so. *See, e.g., Betts,* 492 U.S. at 168.

And, contrary to the entire premise of petitioners' argument, because Congress may legislate only through bills passed by both Houses and presented to the President, legislative ratification may not be found in the failure of Congress to disapprove the EEOC's 1981 guidelines and the few judicial decisions that accepted such claims prior to *Hazen Paper*. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf v. USI Film Products*, 511 U.S. at 256-57.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of counsel:

RODNEY E. GADDY
SUZANNE A. ENNIS
FLORIDA POWER CORPORATION
Bank of America Tower
One Progress Plaza
200 Central Avenue,
Suite 1500
St. Petersburg, FL 33701
(727) 820-5593

J. LEWIS SAPP
NANCY F. REYNOLDS
ELARBEE, THOMPSON & TRAPNELL, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 659-6700

GLEN D. NAGER
(Counsel of Record)
ALISON B. MARSHALL
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents