No. 01-584

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

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 OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the Courts of Appeals, including numerous employment discrimination cases. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

The Chamber fully endorses the Age Discrimination in Employment Act. Reliance on age stereotypes about the abilities of older workers should not be tolerated. Due to natural job progression, however, age affects job terms such as compensation, pension, and seniority. In this context, and where Congress did not so intend, imposing a burden on employers to justify the business necessity of routine and uniform job standards that statistically impact older workers is unjustified.

SUMMARY OF THE ARGUMENT

The disparate impact theory, first recognized in *Griggs v. Duke Power*, a race discrimination case under Title VII of the Civil Rights Act of 1964, does not apply to age

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1/ The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

discrimination claims. When Congress passed Title VII, it expressly recognized that age discrimination differs from other forms of discrimination. Weighing in Congress' effort to balance employees' and employers' interests in any age legislation was the reality that "a person's age catches up to him."[2/] This had no analogue in Congress' consideration of invidious racial prejudice under Title VII. Therefore, Congress directed the Secretary of Labor to prepare a report to assess whether legislation was necessary to "prevent arbitrary discrimination in employment because of age." Civil Rights Act of 1967 § 715.

Based on the Secretary of Labor's report, Congress enacted the Age Discrimination In Employment Act (ADEA) and designed its proscriptions to redress only "arbitrary discrimination," s*ee* 29 U.S.C. §§ 621, 623, which resulted from inaccurate and stigmatizing age stereotypes. Congress decided that other factors adversely affecting older workers' employment were more suitably addressed by education and training programs. *See* 29 U.S.C. § 622 (directing Secretary of Labor to develop an education and research program); *Senate Hearings* at 38-39 (statement of Secretary of Labor) (deliberate acts will be prohibited by the legislation; other acts will be remedied by research, education, and training – to do more would be premature).

2/ *See Age Discrimination in Employment: H'gs on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 36, 37 (1967) [hereinafter "*Senate Hearings*"] (statement of Secretary of Labor) (it is an accepted part of the employment relationship "that when 'a person's age catches up to him' and diminishes his capacity and competence, he must accept the fair-minded economic judgment of those he works for…that his value has fallen below the break-even point").

In *Griggs*, the Court created the disparate impact theory with no textual analysis of the statute. The Court subsequently extended the theory only to other Title VII contexts to redress institutional or societal bias that has produced "built in headwinds," "glass ceilings," or "barriers" to the advancement of protected groups. Unlike groups protected by Title VII, older workers have not suffered from lifelong barriers to advancement due to the perpetuation of effects of historical discrimination. Rather, as Congress recognized in passing the ADEA, older workers are affected by stereotypes that develop only as age progresses. The disparate treatment theory, which focuses on motive, is specifically designed to test for age stereotyping, and it is the sole cause of action intended by Congress. This Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) compels this result. *Id.* at 610 (a disparate treatment claim, requiring proof that age actually played a determining role in the employer's decisionmaking process, "captures the essence of what Congress sought to prohibit in the ADEA").

Moreover, since *Griggs*, the Court has emphasized a rigorous model of statutory construction. Congressional intent is now analyzed with a stricter focus on the statute's language, structure, and legislative history. Petitioner strains the language of the ADEA to suggest that, because disparate treatment theory requires a showing of "intent," it is underinclusive of the rights and protections that Congress intended to create. But the real issue under the disparate treatment theory is *motive*. An inquiry into motive is necessary and the most suitable means to root out age stereotyping, which is the ADEA's focus.

Reading motive out of the ADEA to allow disparate impact claims would upset the balance struck by Congress. If such claims were available, statistical correlation—having nothing to do with motive—would become dispositive,

subject only to the employer's proof of business necessity. Employers, though not motivated by age, would be forced to justify the business necessity of considering factors such as seniority or pay which, because they correlate with age, have a statistical impact on older workers. *DiBase v. Smithkline Beecham Corp.*, 48 F.3d 719, 734 n.21 (3d Cir. 1995) (allowing disparate impact with its defense of business necessity could "subject employers to unreasonable intrusions by juries into their business practices," such as work schedules and medical insurance). Because age-motivation is required by the language of the statute, and is an element only under the disparate treatment theory, the disparate impact theory is not cognizable under the ADEA.

The Civil Rights Act of 1991 also supports this conclusion. The 1991 Act expressly created a disparate impact claim under Title VII with no right to a jury trial, but did not similarly amend the ADEA, which authorizes jury trials. The Act did not similarly amend the ADEA. This underscores that the ADEA, with its focus on non-invidious stereotypes, differs from Title VII. The Older Workers Benefits Protection Act of 1990 has nothing to say about disparate impact liability. The Act merely requires employers to disclose statistics, which are relevant to all types of discrimination claims, to employees asked to sign waivers that include ADEA rights. Finally, an EEOC guideline purports to create an ADEA disparate impact claim, but is contrary to the statute's language. Neither as originally enacted nor as amended does the ADEA include a disparate impact claim. Thus, no such claim exists.

ARGUMENT

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case alleging race discrimination, the Court first

articulated the disparate impact cause of action. Duke Power had openly segregated job titles by race prior to the effective date of Title VII. *Id.* at 427. Upon enactment of Title VII, it adopted a policy requiring a high school diploma or passing scores on two aptitude tests for placement into higher paying jobs. These requirements disparately affected African-American employees. The Court found that the disparate effect was "directly traceable to race," because the long history of societal racism and inferior education in segregated schools had deprived many black employees of the means to manifest their true abilities through standardized tests. *Id.* at 430-31; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*Griggs* was rightly 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 lives."). Because the employer's job requirements operated "to 'freeze' the status quo of prior discriminatory employment practices," and worked as "built-in headwinds" for the advancement of minority groups, the Court held that the requirements were unlawful if not proven to be job-related. *Id.* at 430-32; *id.* at 431 ("The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited."). Proof of a discriminatory motive was not necessary.

Several Circuit Courts had overlooked the special context of *Griggs* and had simply assumed, prior to 1993, that the disparate impact theory was available to ADEA plaintiffs. S*ee* Pet. 5 (citing cases). This view did not go unquestioned. *See Pavlo v. Stiefel Labs., Inc.*, Civ. No. 78-5551, 1979 WL 105, 9 n.22 (S.D.N.Y. Nov. 27, 1979) (questioning applicability of *Griggs* to ADEA); W*illiams v. City and County of San Francisco*, 483 F. Supp. 335 (N.D. Cal. 1979) (same). In 1993, the Court's reasoning in *Hazen*

Paper, focusing on congressional intent and the difference between age and other forms of discrimination, compelled the conclusion that disparate impact theory is not available under the ADEA. *See* 507 U.S. at 609-11; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996) (*Hazen* gives "strong impression" that the Court is suggesting that the ADEA does not encompass a disparate impact claim); *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999) (*Hazen*'s "inescapable implication" is that disparate impact would not address evils that ADEA was designed to purge). The Court held that an employment decision that is motivated by a factor that merely correlates with age, but is analytically distinct from age, does not violate the statute. The Court reasoned that, because the impetus of the ADEA was Congress' "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," disparate treatment—with its focus on motive—"captures the essence of what Congress intended to prohibit." *Id.* at 610. When the employer is wholly motivated by factors other than age (as under the disparate impact theory), the problem of inaccurate and stigmatizing stereotypes disappear. *Id.* at 611.

Hazen Paper made clear that the ADEA is a different statute with a different history and purpose than Title VII. *See Mullin*, 164 F.3d at 701 (divergence in purpose between Title VII and ADEA counsels against mechanistic adherence to *Griggs*). The disparate impact theory should not be mechanically transplanted into the ADEA context without first reexamining *Griggs*' rationale in light of those differences. *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) (inappropriate simply to transplant Title VII standards into a different statutory scheme having a different history). *Griggs*' rationale is not applicable to the ADEA for two reasons, discussed below. First, *Griggs*' policy justification for developing the disparate

impact theory was aimed at invidious race discrimination and is not transferable to the ADEA context. Second, the policy-based interpretation of Title VII that underpins *Griggs* is an inappropriate analytic methodology for interpreting statutes.

A. Age Discrimination Fundamentally Differs From Race Discrimination.

Although the purpose of both the ADEA and Title VII is to eliminate discrimination in the workplace (AARP at 6), the realities of race and age discrimination differ substantially. During the debates on Title VII, proposals were made to include age discrimination within its prohibitions. *EEOC v. Wyoming*, 460 U.S. 226, 229-30 (1983). Such legislation was deferred, however, because Congress had too little information to make a considered judgment about the nature of age discrimination. *Id.* Suspecting that age differed fundamentally from race and other types of discrimination, Congress directed the Secretary of Labor to study the causes and effects of age discrimination and to prepare a report and recommendations on the need for (and scope of) any age legislation (the "Labor Report").[3/] *Id.*

Unlike race discrimination, the Report found "no evidence of prejudice based on dislike or intolerance of the older worker." Labor Report at 6; *id.* at 2 ("discrimination" based on age "means something very different" than race discrimination). According to the Report, such age prejudices are unusual because the process of aging "is inescapable, affecting everyone who lives long enough," and people of all ages "liv[e] in close association rather than in separate and distinct social or economic environments." *Id.* at 6. Thus,

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3/ *The Older American Worker: Age Discrimination In Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965).

"age" is not a restricted class in which segregation and lack of association with other groups, as in *Griggs*, may breed rigid biases. Finally, the Report found that, unlike race, color, religion, and sex discrimination, some work-related abilities do correlate with the inevitable process of aging.[4/] Thus, adverse assumptions about older employees' abilities, if examined, sometimes will prove true. Examples noted by the Labor Report include chronic illness, less education, less mobility, lack of transferability of job skills and experience to meet new technology, and less proficiency in testing. Labor Report at 11-15. Therefore, the virtually irrefutable presumption of equaling that is at the core of the legislation prohibiting racial discrimination is not applicable to people in different age groups.

The Labor Report also identified factors that adversely affect older workers in employment, but, because of the unique qualities of ageism, recommended legislation to address only one: "arbitrary age discrimination." Labor Report at 21. Having no intent to recommend legislation against all factors that disparately affect older workers, the Secretary gave "arbitrary discrimination" a specific meaning: "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for this assumption*." Labor Report at 2.

4/ *See* Labor Report at 2 (identifying acts perhaps not appropriately called "discrimination," such as "decisions not to employ a person for a particular job because of his age when there is in fact a relationship between his age and his ability to perform the job"); *Senate Hearings* at 39 (statement of Secretary of Labor) (challenge in age legislation was drawing a distinction between cases in which there is relevance between age and employment capacity and those cases in which there is not).

(emphasis in original).[5/] Employment policies erecting age limits were the primary and repeated examples of such discrimination. *E.g.*, Labor Report at 6. When Congress enacted the ADEA, it expressly stated its focus on such "arbitrary" age discrimination. *See* 29 U.S.C. § 621.

The ADEA's express focus on "arbitrary" discrimination demonstrates that it was intended to be narrower in scope than Title VII. Pamela S. Krop, *Age Discrimination And The Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 854 (1982) [hereinafter "Krop, *Age Discrimination*"] (Title VII's purpose is broader than the ADEA's, making disparate impact appropriate only for Title VII); Evan H. Pontz, Comment, *What A Difference The ADEA Makes: Why Disparate Impact Theory Should Not Apply To The Age Discrimination In Employment Act*, 74 N.C. L. Rev. 299-300 (1995) (analyzing meaning of "arbitrary discrimination").[6/] Unlike race and other forms of Title VII discrimination, historical prejudices and lingering effects of prior discrimination cannot justify a disparate

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5/ *See* Labor Report at 21 ("[T]he 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'…"); *id.* at 5 ("[T]he findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not.").

6/ The *amicus curiae* brief on behalf of the Academy of Florida Trial Attorneys (AFTL) at p. 5 n.5 cites the work of its counsel, Mr. Alfred W. Blumrosen, where he concludes that "arbitrary" discrimination means only "intentional" age discrimination. AFTL appears to contend, however, that although the ADEA originally was so limited, the OWBPA has expanded its scope. As discussed below, this position is untenable.

impact claim under the ADEA. *Hiatt v. Union Pac. R.R. Co.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (unlike in *Griggs*, correlation between age and ability cannot be traced to a history of past discrimination). All older workers were once younger and able to make choices about their education, training, and jobs free from age discrimination. Any current correlation between age and ability cannot be viewed as a product of lifelong discrimination. *See Mullin*, 164 F.3d at 701 (age discrimination correlates with current job conditions, not past discriminatory practices); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 301, 313 (1976) (unlike race, the aged "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"). Therefore, an employer's facially neutral practice that has a disparate impact on older workers cannot raise an inference that past discrimination is being perpetuated—there is no past discrimination to perpetuate. Older employees, in fact, may have benefited from past age discrimination during their careers. *Hiatt*, 859 F. Supp. at 1436 (individuals were previously younger and possibly beneficiaries of any age discrimination). Thus, *Griggs*' focus on the concept of perpetuating past discrimination simply does not apply.

Further, although the particular evil of invidious discrimination and its distorting affects on decision making may be an additional reason for applying the disparate impact theory, there is little reason to do so in age discrimination cases. As the Labor Report established, invidious age prejudices are uncommon. In this context, the burden of proving "business necessity" is disproportionate to the harm sought to be remedied. Under the circumstances alleged here, for example, disparate impact theory would require Florida Power to prove a compelling need for which there is no alternative to engage in a reduction in force, or to rely, as it

did, on the kind of uniform selection criteria widely used by the nation's businesses. *See e.g., Kirby v. Colonial Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980) (must show a "compelling need," not routine business considerations, for which there is "no alternative"). The disparate impact theory, with no consideration of motive and a defense only of business necessity, is simply too broad and intrusive to serve as a well-tailored means of identifying and correcting age stereotypes. *See* Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 323 (2000) (business necessity too intrusive a means to identify discriminatory motives and is over-predictive of age discrimination).

B. The Court's Contemporary Framework For Statutory Construction Does Not Support An Implied Cause Of Action Based On The Disparate Impact Theory.

The Court has increasingly emphasized that the interpretation of a statute must begin with its text. *See Alexander v. Sandoval*, 121 S. Ct. 1511, 1519 (2001) (delineating evolution of statutory construction from *J.J. Case Co. v. Borak*, 377 U.S. 426 (1964) to *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and refusing to imply a private right of action to enforce disparate impact regulations promulgated under Title VI of Civil Rights Act of 1964); Erwin Chemerinsky, *Federal Jurisdiction* § 6.3.3 (2d ed. 1994) (detailing Court's growing reluctance to imply a cause of action into a federal statute). The focus of statutory interpretation has shifted away from a generalized study of the purpose or spirit of an Act to a progressively sharper inquiry into congressional intent through an Act's language, structure, and legislative history. *See Touche Ross*, 442 U.S. at 578 ("[G]eneralized references to the 'remedial purposes' of the [statute] will not justify reading a provision more

broadly than its language and statutory scheme reasonably permit."). A contemporary interpretation of the ADEA must follow the same framework. *See Sandoval*, 121 S. Ct. at 1520 (rejecting argument that statutes enacted prior to *Cort* should be interpreted within their own contemporary legal context). The precedential value of *Griggs* in such an analysis must take into account not only the differences in context between race and age discrimination, discussed above, but also *Griggs*' emphasis on the "objective" and "thrust" of Title VII rather than on its text to determine congressional intent. *Griggs*, 401 U.S. at 429 ("objective" of Congress in enacting Title VII); *id.* at 432 ("thrust" of the Act directed to the consequences of employment actions)[7/]

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct.

A. The Language Of Section 623(a) Proscribes Only Disparate Treatment.

The language of Section 623(a)(2) of the ADEA gives proof of what *Hazen Paper* implied: Age-motivation is a required element of a cause of action under the Act. The Section reads as follows:

> It shall be unlawful for an employer…to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or

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7/ *See also Ellis*, 73 F.3d at 1007 n.13 (*Griggs* was not based on Title VII's text, but looked primarily to its larger objectives); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying The Disparate Impact Doctrine In Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 629 n.18 (1996) [hereinafter "Herbert & Shelton, *A Pragmatic Argument*"] (*Griggs* has often been characterized as judicial legislation).

> otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). Section 623(a)(2) prohibits conduct taken "because of" such individual's age, which means "on account of" or "by reason of" age. *American Heritage Dictionary of the English Language* 159 (4th ed. 2000). This language requires a showing of age-motivation. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis On Motive Rather Than Intent*, 60 S. Cal. L. Rev. 733, 739, 751 (1987) [hereinafter "Welch, *Removing Barriers*"] (the phrase "because of" reflects motive); *see also Ellis*, 73 F.3d at 1007 (most obvious reading of "because of such individual's age" is that it prohibits an employer from intentionally discriminating). Age-motivation is the linchpin of disparate treatment claims;[8/] disparate impact cannot be used as a surrogate.[9/] Consequently, Section 623(a)(2) can be reasonably read only to proscribe disparate treatment.

Although Petitioner argues that, "by prohibiting practices that 'adversely affect' older employees, the ADEA prohibits decisions having an 'adverse impact' on older employees," Pet. 18, that is not what the statute says.[10/]

8/ *Hazen Paper*, 507 U.S. at 610-11 (liability in a disparate treatment case, depends on whether the protected trait actually motivated the employer's decision); *Mullin*, 164 F.3d at 699 (linchpin of disparate treatment claim is proof of discriminatory motive).

9/ *Hazen Paper*, 507 U.S. at 608 ("Proof of discriminatory motive is not required under a disparate-impact theory.").

10/ If Congress had intended to write a provision like the one hypothesized by Petitioner, it could have used language from the provision governing federal-sector employees, which has been interpreted to proscribe both disparate impact and disparate treatment. 29 U.S.C. § 633a(a) ("All personnel actions affecting employees or

Rather, Section 623(a)(2) prohibits conduct taken "because of" such individual's age. In an attempt to force disparate impact into the meaning of the words, Petitioner argues that Section 623(a)(2)'s use of the phrase "because of" "reflects a cause and effect relationship that can subsume both intentional and unintentional conduct." *See* Pet. 26 & n.26.[11] The critical point, however, is that Section 623(a)(2) prohibits employment decisions that are "caused" by age, Welch, *Removing Barrier*s, 60 S. Cal. L. Rev. at 739; ("Motive is a causal concept."); *American Heritage Dictionary of the English Language* 1147-48 (4th ed. 2000) ("motive" is a cause of motion), not simply employment decisions that "cause" harm to older employees. Petitioner's undefined distinctions between the concepts of "intent" and "consciousness" only confuse the real issue of "motive," which is the pivotal distinction between disparate treatment and disparate impact claims.[12/] Because liability for disparate

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applicants for employment who are at least 40 years of age…shall be made free from any discrimination based on age"); s*ee Lumpkin v. Brown*, 898 F. Supp. 1263 (N.D. Ill. 1995) (differences between Sections 623 and 633a suggest that disparate impact remains available under the latter even after *Hazen Paper*).

11/ It is notable that Section 623(a)(2) uses the exact same phrase (*i.e.*, "because of") and syntax as subsection (a)(1), and the latter proscribes only disparate treatment. *See Wards Cove Packing Co., Inc.*, 490 U.S. 642, 666-67 (1989) (Blackmun, J., dissenting). Therefore, according to Petitioner's own reasoning, "because of" in subsection (a)(2) also proscribes only disparate treatment. *See* Pet. 26 ("*identical* words used in close proximity should be construed to have the same meaning"); *see also Ellis*, 73 F.3d at 1007 n.12 (because Section 623(a)(1) and (a)(2) conclude with the same phrase, both are limited to intentional discrimination).

12/ Although the phrase "intent to discriminate" often has been used in ADEA and Title VII cases, it is a term of art that the Court always has defined in the employment context to mean "motivated"

impact will attach without a showing of age-motivation, the claim is not cognizable under the language of the ADEA.

Petitioner further argues that the key prepositional phrase "because of such individual's age" modifies the verb "affect," rather than "shall be unlawful…to limit, segregate, or classify." Pet. 20. The comma between the word "affect" and "because of," however, indicates that the latter is not dependent on and does not modify "affect," because a comma typically is not used after an adverbial dependent clause. *Instant English Handbook* 276 (1993 ed.). Instead, the comma signals that the phrase "because of" is out if its natural order. *Id.* at 281; *see also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843 n.27 (grammatical construction of Section 623(a)(2) should be interpreted to allow only disparate treatment); *DiBiase*, 48 F.3d at 733-34 (relying on Krop's grammatical analysis). Thus, like every other phrase in the Section, the phrase "because of such individual's age," should be read to modify the verbal phrase "to limit, segregate, or classify." This construction requires a showing of age-motivation, and authorizes only claims of disparate treatment. Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

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by a protected trait. *See McDonnell Douglas*, 411 U.S. at 802 (emphasizing the employer's reason and the question of "racial motivation"); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (using term "intentional discrimination" but focusing on employer's "reasons"); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (using term "intentional discrimination" but focusing on motive); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (focusing solely on "motive"); *see also* Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 766-72 (despite courts' use of the term "intent," the ultimate issue in disparate treatment is motivation).

B. Section 623(f)(1) Does Not Support Creation Of A Disparate Impact Claim.

An analysis of the interaction between the prohibitory language in Section 623(a) with the exception language in Section 623(f)(1) does not support the creation of a disparate impact claim, Pet. 22-27, but confirms that the ADEA proscribes only disparate treatment. Section 623(f)(1)'s "reasonable factors other than age" (RFOA) clause reads:

> It shall not be unlawful for an employer …to take any action otherwise prohibited [where] … the differentiation is based on reasonable factors other than age.

By its plain language, age "differentiation" is lawful if it is based on factors other than age. Accordingly, decisions based on non-age factors that have a disparate impact on older workers are not unlawful under the RFOA clause. *See Mullin*, 164 F.3d at 700-01 (RFOA clause eliminates disparate impact claims); *DiBase*, 48 F.3d at 734 (RFOA clause indicates that neutral employment policies that are not improperly motivated may be permissible).

Petitioner—faced with the fact that Section 623(a)(2), by its own terms, does not authorize a disparate impact claim—attempts to overcome this hurdle by arguing that, for two related reasons, a disparate impact claim can be inferred into Section 623(a) when read in conjunction with the RFOA clause. First, she argues that the different causal terms in the two Sections—"*because of* such individual's age" in Section 623(a)(2) and "*based on* reasonable factors other than age" in Section 623(f)(1)—indicate that Congress intended some difference in meaning, which must be to proscribe "unintentional" discriminatory effects in 623(a)(2) and to excuse those effects in 623(f)(1) so long as an employer "intentionally" acts on non-age factors. Pet. 23-27. She further argues that the RFOA "affirmative defense" would be

superfluous if Section 623(a) proscribed only disparate treatment because "satisfaction of the premise for triggering the defense (the occurrence of a prohibited action) would inherently defeat the defense's application." Pet. 25. She concludes that "unintentional" conduct is proscribed by Section 623(a), while Section 623(f)(1) is available as a defense to liability. This argument has numerous flaws and, in any event, does not support the importation of a disparate impact claim into Section 623(a).

First, Petitioner's starting premise is incorrect: The RFOA clause is not an affirmative defense. It is a definitional provision underscoring what "shall not be unlawful" discrimination under Section 623(a). *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988) (RFOA clause is not an affirmative defense; it is a denial of the plaintiff's prima facie case).[13/] The ADEA's legislative history confirms this interpretation. *E.g.*, 113 Cong. Rec. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription.").

Extrapolating from the Older Workers Benefit Protection Act of 1990 (OWBPA), however, *amicus curiae* contends that the RFOA must be an affirmative defense. Br.

13/ *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (Title VII's Section 703(h) seniority provision is "a definitional provision" that "delineates which employment practices are illegal and which are not"); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 243-53 (1979) (Rehnquist, J., dissenting) (Title VII's Section 703(j) was included to "define[] and clarif[y] the scope of Title VII's substantive provisions" and was proposed to eliminate opposition to the bill).

of Nat'l Employment Lawyers Ass'n (NELA) at 10-14. This argument falls short of its goal. The OWBPA amended the ADEA by expressly placing the burden of proof on the employer to prove the bona fide seniority system and the bona fide employee benefit plan exceptions in Section 623(f)(2). *See* Pub. L. No. 101- 433, § 103, 101 Stat. 978. The OWBPA's amendments were specifically designed to annul the Court's interpretation of the ADEA in *Public Employees Retirement Systems v. Betts*, 492 U.S. 158 (1989). There, the Court held that an employee challenging the validity of a facially age-based employee benefits plan under the ADEA bears the burden of proving that the employer had adopted the plan as a subterfuge for intentional age discrimination. *Id.* at 181. Although Congress altered *Betts*' outcome in the OWBPA, the revision cannot be viewed as "correcting" the Court's reasoning. *See* NELA at 13. This Court has the constitutional responsibility for *interpreting* Congressional statutes. The 1990 Congress in the OWBPA changed the burden that previously existed under the ADEA.

However the OWBPA modified the burden under Section 623(f)(2), it made no changes to the RFOA clause. In fact, although both the Senate and House bills proposed to revise Section 623(f)(1) to expressly allocate the burden of proof to the employer,[14/] this provision was deleted from the final bill that ultimately became the OWBPA.[15/] Given this history, NELA's reading of the OWBPA to infer that the

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14/ *See* H.R. Rep. 101-664, at 3, 46-47 (1990) (BFOQ exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof); S. Rep. No. 101-263, at 2, 29-30 (1990) (employer bears burden to plead and prove defenses in section 4(f)).

15/ *See* 136 Cong. Rec. 13,596-97 (1990) ("not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").

RFOA clause is an affirmative defense is simply without foundation. This is especially true since, unlike Section 623(f)(2), the RFOA clause does not specifically address facially age-based policies.

Moreover, *amicus curiae* and Petitioner make too much of the "affirmative defense" issue. Even if the RFOA is an affirmative defense and Petitioner is correct in her assertion that Section 623(a)(2) includes a proscription of unintentional conduct, the recognition of a disparate impact claim would not necessarily follow. Age-motivated conduct may be "unintentionally" discriminatory. Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 736-40 (motive is the reason for action; intent is the purpose that is being pursued—the goals one has in mind as choices are being made). In other words, conduct may be "age-motivated" even where, as is typically the case, the employer's conscious goal or "intent" is *not* to rid the workplace of older workers. Therefore, construing Section 623(a)(2) to prohibit unintentional conduct does not lead to an inference that disparate impact is an available theory of liability. Disparate treatment theory encompasses "unintentional," age-motivated conduct.

Petitioner dismisses this more natural reading of Section 623(a)'s "because of" language to allow only disparate treatment claims because "there is no reason to believe" that Congress intended to permit employment actions that were "*consciously* age-based, other than those clearly set forth in the ADEA." Pet. 24 n.13 (emphasis in original). Petitioner again confuses "intent" with disparate treatment's actual requirement of "motive." The issue here is whether ADEA liability can attach without a showing of age-motivation. Motives can be either conscious or unconscious, and the issue of whether disparate treatment claims are limited to *consciously* age-motivated conduct need not be

decided here. Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 736 (motive can be conscious or unconscious).

Accordingly, whether or not the RFOA clause is viewed as an affirmative defense, "motive" is the key inquiry under Section 623(a). Thus, the RFOA clause's use of the term "reasonable" cannot be read to require a showing of "business necessity," which forces an employer to justify its practice without respect to motive. The term "reasonable" merely reflects the ADEA's recognition that stereotypical assumptions about older workers' ability to do the job may be true in individual cases. In this context, the term "reasonable factors" is in contradistinction to the word "assumed."[16/] "Reasonable" means rational and in accordance with reason or sound thinking. *American Heritage Dictionary of the English Language* 1457 (4th ed. 2000). Contrary to Petitioner's argument, the RFOA is not superfluous under this analysis: The RFOA's function is to differentiate between age stereotyping and employment decisions reasonably based on facts in an individual case. A

16/ S*ee EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983) (reasonable factor is one "not directly dependent on age"); 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Yarborough) ("a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief" about the capabilities of older workers); *Senate Hearings* at 39 (statement of Secretary of Labor) ("[This bill] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is a legitimate relevance between age and employment capacity. The 'discrimination' it is directed against is the 'unjust' or 'arbitrary' distinction (which is what 'discrimination' is normally taken to mean) which may be made in the absence of any legitimate relevance between age and employment capacity."); Labor Report at 22 (in instances of alleged arbitrary discrimination where the facts indicate that older worker needs reeducation, training, counseling, or health and other services, the individual should be referred to appropriate programs for assistance).

decision may prove "reasonable" even if the employer "consciously" contemplates age. Thus, even on its own terms, Petitioner's contention that there is no reason to believe that Congress intended to permit employment actions that were "consciously age-based" simply is not true.

For example, an employer could discharge an older worker for poor attendance due to chronic health problems, which problems were caused by age. If the company decision maker were asked at the time of the discharge what was in her mind, she might say, "I am firing the employee because his age has affected his health, and I can't rely on him anymore." Even though, in this example, the employer consciously believes that the employee's poor health is because of his age, the employer can lawfully discharge the employee based on the attendance policy, even if that policy has a disparate impact on a group of older workers. If, however, the employer had simply assumed that the older employee was unreliable because of likely health problems related to age, and did not bother to test the assumption in that individual case, the discharge would be *solely* because of age and, therefore, unlawful.[17/] The flexible burden-shifting framework to examine motive (conscious or unconscious), which was established in *McDonnell Douglas* and clarified in

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17/ *See* 113 Cong. Rec. 1,377 (1967) (statements of Secretary of Labor) (reasonable differentiations not based *solely* on age would not fall within the proscription of the proposed ADEA); 113 Cong. Rec. 31,255 (1967) (remarks of Sen. Javits) (question under ADEA as to whether the Act was violated is: "Was the individual discriminated against *solely* because of age?"); Labor Report at 11 (it would not be reasonable to exclude all older workers from consideration for certain jobs because *as a group* they are more subject to health problems associated with growing older, but it does mean that when older workers are considered on their merits, a certain proportion of them fail to qualify) (emphasis in original).

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000), is well-suited to this inquiry, unlike the overly broad and burdensome "business necessity" affirmative defense.

Even if, as in the example, the employer contemplates the employee's age or relies on a factor known to be correlated with age, the problem of inaccurate age stereotypes disappears if the employer's consideration of the individual's performance is the basis of the adverse decision. *See Hazen Paper*, 507 U.S. at 611 ("When the employer's decision is wholly motivated by factors other than age," as in disparate impact, "the problem of inaccurate and stigmatizing stereotypes disappears."). Consequently, under the ADEA, an employer is not required to prove the business necessity of permitting only a certain number of excused absences under its attendance policy, even if the policy has a disparate impact on older workers. The employer's reliance on a factor that correlates with age would be unlawful only if the employer was not only aware of the correlation, but acted because of it. *Hazen Paper*, 507 U.S. at 612-13 (targeting pension status may constitute age discrimination if employer supposes a correlation between the two factors and acts accordingly); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (disparate treatment requires showing that the employer selected a course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group). Since age stereotyping cannot be inferred simply from an empirical correlation with a non-age factor, the disparate impact theory is inapplicable.

Petitioner's only textual argument to suggest that Congress intended all "consciously age-based" decisions to be unlawful also fails. Petitioner argues that, if Congress had intended to allow an employer to consciously contemplate age without violating the Act, it would have said in Section

623(f)(1) something akin to "in addition to age," "besides age," "regardless of age," *etc.*, rather than "other than age." Pet. 24 & n.13. However, the definition of "other than" includes the term "besides," *see American Heritage Dictionary of the English Language* 1246 (4th ed. 2000), which Petitioner herself agrees answers her argument. Further, having already indicated that "otherwise prohibited" age discrimination is at issue, it is not surprising that Congress saw no need to say "in addition to age."

Petitioner's further observation that Section 623(f)(1)'s BFOQ clause expressly allows an employer to consider age under certain conditions does not support her negative inference that the RFOA clause entirely excludes conscious consideration of age. Pet. 24 n.13. The text does not require this interpretation, and the legislative history indicates that a BFOQ is simply a more specific example of an RFOA. *See* 113 Cong. Rec. 1,377 (1967) (statement of Secretary of Labor) ("Reasonable differentiations not based solely on age, including but not limited to bona fide occupational qualifications which may be reasonably necessary to the normal operation of a particular business, would not fall within the proscription."). Both clauses endorse the reading that an employer may consider age without it being unlawful, so long as the decision is not based solely on age. In light of the above, the only reasonable reading of Section 623 is one that limits the claim to situations of disparate treatment.

It also is highly plausible—and fully consistent with the above analysis—to infer that Congress included Section 623(f)(1) to preempt courts from importing into the ADEA a contemporary interpretation of "intent to discriminate" in the labor context. *See Alexander*, 121 S. Ct. at 1520 ("legal context matters…to the extent it clarifies text"). At the time of the ADEA's enactment, the Court, interpreting Section

8(a) of the National Labor Relations Act, had replaced the concepts of "intent to discriminate" and "motivation" with a test for "foreseeable consequences." *E.g., NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 n.8 (1963) (rejecting the employer's argument "that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies"); *see also Note, Discrimination And The NLRB: The Scope Of Board Power Under Sections 8(a)(3) And 8(b)(2)*, 32 U. Chi. L. Rev. 124, 128 (1964) (Court blurred distinction between intent and motive). Such a test would be particularly inappropriate under the ADEA, where an employer may very well foresee a disparate statistical impact on older workers simply because it relies on a legitimate factor, such as seniority, which is empirically correlated with age. Since this does not entail "arbitrary discrimination," Congress may have deemed it necessary to include Section 623(f)(1) to ensure that age-motivation (rather than some variation of "intent") retained a central role in ADEA cases.

C. The Civil Rights Act Of 1991.

If any ambiguity remains on the point, the ADEA's more recent legislative history also demonstrates Congress' intent to provide for disparate impact claims under Title VII but not under the ADEA. The Civil Rights Act of 1991 ("CRA 1991") amended Title VII in a few relevant respects. Most notably, Congress explicitly added a disparate impact cause of action to Title VII, and expressly chose not to permit jury trials in such cases. *See* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). Even though Congress amended the ADEA in other respects,[18/] it added no such parallel

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18/ The CRA 1991 amended the ADEA or expressly referenced the ADEA several times. *See* The CRA 1991, §115 (amending 29 U.S.C. § 626 (e) to strike a paragraph and to add a paragraph to

provision to the ADEA, "thus signaling its intent not to provide for a disparate impact cause of action under the ADEA." *Ellis*, 73 F.3d at 1008.

Further, Congress' decision not to allow jury trials in Title VII disparate impact cases suggests that it would be inappropriate to allow disparate impact cases under the ADEA, where there is a right to a jury trial. Herbert & Shelton, *A Pragmatic Argument*, 37 S. Tex. L. Rev. at 626 (no jury trials in Title VII disparate impact cases likely due to complexity of statistical issues; such issues are even more complex in age cases where jury trials are permitted, which suggests that disparate impact should not apply).

The CRA 1991 also amended Title VII to respond to the "mixed motive" analysis adopted in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a gender stereotyping case. *See* 42 U.S.C. § 2000e-5(g)(2)(b) and § 2000e-2(m). Under 42 U.S.C. § 2000e-2(m), if the plaintiff proves that an identified protected trait was "a motivating factor," a violation is established "even though other factors also motivated the practice." Once a Title VII plaintiff proves a violation of § 2000e-2(m), she is entitled to certain limited relief under § 2000e-5(g)(2)(b), even if the employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(b). Congress did not similarly amend the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000) (Section 2000e-5(g)(2)(B) did not amend the ADEA and therefore is inapplicable to ADEA

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proscribe the time for filing lawsuit after EEOC's issuance of a notice of right to sue); §§ 301-302 (creating the "Government Employee Rights Act of 1991," including provision to require that all personnel actions affecting Senate employees be made free from discrimination based on age, within the meaning of section 15 of the ADEA).

claim). Therefore, unlike under Title VII, a plaintiff will not prevail under the ADEA merely by showing that age played *a* motivating role. *Cf. Hazen Paper*, 507 U.S. at 609 (disparate treatment claim cannot succeed unless protected trait played a role *and* had a determinative influence on the outcome). This amendment provides an additional reason to believe that the ADEA allows employment decisions made because of age under Section 623(a), and even if made "consciously" because of age, so long as the employer also was motivated by non-age factors under Section 623(f)(1).

To counter the implications of the CRA 1991, *amicus curiae* seeks to infer disparate impact into the ADEA from other recent legislation. *See* The Academy of Florida Trial Lawyers (AFTL) at 14-20. AFTL argues that, because the OWBPA requires employers to provide statistics to the employees who are considering whether to waive their ADEA rights, Congress must have assumed the availability of disparate impact under the ADEA. AFTL itself concedes, however, that statistics are relevant to disparate treatment age discrimination cases. AFTL at 14.[19/]

In sum, Petitioner's and *amici*'s analysis of the ADEA to require an inference of a disparate impact claim in Section 623(a) does not withstand scrutiny. The only reasonable interpretation of the interplay between Sections 623(a) and 623(f)(1) is that Congress proscribed only age-motivated conduct in the former. The latter clarified that

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19/ *See also McDonnell Douglas*, 411 U.S. at 805 (statistics "may be helpful" in an individual disparate treatment case); *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (statistics are relevant to proof of a pattern and practice of disparate treatment); 1 Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* Ch. 16, p. 595 (3d ed. 1996) (statistical evidence may be used in a disparate treatment age discrimination case).

decisions, even if caused by age, are not unlawful if also based on factors other than age. Because motive plays an indispensable role under the ADEA, the disparate impact theory is not available.

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim.

Although 29 C.F.R. § 1625.7(d) seeks to transplant disparate impact into the ADEA context and to interpret the RFOA clause to mean "business necessity," Pet. 36-37, it is only an EEOC policy guideline. *See* 46 Fed. Reg. 47,724 (1981) (ADEA guidelines are only statements of EEOC policy and do not comply with legal requirements for rulemaking).[20/] The force of such guidelines is a function of their persuasive value. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000); *United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (no *Chevron*-deference to guidelines).

The latest administrative interpretation of the ADEA relating to disparate impact theory is not persuasive. First, the interpretation has been inconsistent. Herbert & Shelton, *A Pragmatic Argument*, 37 S. Tex. L. Rev. at 642-43. Until 1978, the Department of Labor (DOL) was responsible for the enforcement and administration of the ADEA. *See id.* The DOL interpreted the ADEA to require that any "differentiation" be "reasonable," which would be "determined on an individual, case by case basis, not on the basis of any general or class concept." 29 § 860.103(d) (1969). The DOL obviously did not contemplate disparate impact cases, which, by their nature and as alleged here, are

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20/ Because the EEOC did not, in fact, use its delegated rule-making authority under the ADEA, *amicus curiae* is wrong to suggest the guidelines are "binding." *See* AFTL at 7.

class actions in which statistical correlation, "business necessity" and "job-relatedness" are considered relative to the class. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998). Further, in 1978, the ADEA was specifically exempted from the Uniform Guidelines on Employee Selection Procedures, which was a key disparate impact policy addressing the validation of tests and other selection procedures. 29 U.S.C. § 1607.2. It was not until 1981 that the EEOC issued its guidelines stating that the disparate impact theory is viable under the ADEA. *See* 46 Fed. Reg. 47,727 (1981). This inconsistent regulatory history militates against deference. *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 257-58 (1991) (Title VII) (level of deference afforded EEOC guidelines will depend on thoroughness of its consideration, validity of reasoning, and consistency with other pronouncements).

Further, the EEOC's disparate impact guideline is the product of a flawed analysis. Rather than evaluating the ADEA's language or legislative history, the EEOC simply re-wrote the DOL's prior version of the Section to "make it clear" that disparate impact applied in ADEA cases. 46 Fed. Reg. 47,725 (1981). The EEOC cited only two bases of authority for the revision: *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975) and *Griggs*. In *Laugesen*, a single plaintiff disparate treatment case, the court opined that then-DOL regulation 29 C.F.R. § 860.103 was aimed at policies affecting a group of older employees. It cited *Griggs*. The court merely interpreted the DOL's regulation, however, without offering an opinion on whether it was consistent with the ADEA. The court also expressly noted the unsoundness of simply transplanting Title VII concepts into the ADEA. *Laugesen*, 510 F.2d at 312. Further, as discussed above, *Griggs* did not rely on the text of Title VII, let alone the ADEA. Consequently, neither case forms a sound basis for the EEOC's regulation.

Most importantly, for the reasons discussed at length above, the ADEA can be reasonably read to proscribe only disparate treatment. Neither its language nor history permit an inference of a disparate impact claim. Consequently, the EEOC's decision to discard age-motivation in 29 C.F.R. § 1625.7(d) is inconsistent with the ADEA's language, and warrants no deference. *Betts*, 492 U.S. at 171 ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.")[21/] The fact that the guideline has survived for decades, Pet. 37, endows it with no greater authority. *Id.* ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

Finally, even if congressional inaction to reverse an agency guideline deserves the weight Petitioner ascribes it, Pet. 27, the viability of disparate impact theory under the ADEA was called into question as early as 1981, *see Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of *certiorari*) and was patently challenged in 1993 in *Hazen Paper*. Still, despite numerous amendments to the ADEA, Congress did not create a disparate impact cause of action as under Title VII. Thus, neither as originally enacted nor as amended does the ADEA create a disparate impact claim. Therefore, no such claim exists.

21/ *See Alexander*, 121 S. Ct. at 1517 (Civil Rights Act of 1964, Title VI) (regulation proscribing disparate impact is in "considerable tension" with a statute forbidding only intentional discrimination); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring) (agency regulations that proscribe conduct having only a discriminatory effect do not further the purpose of a statute proscribing only purposeful conduct; they go well beyond it).

CONCLUSION

The Court's reasoning in *Hazen Paper* compels the conclusion that age-motivation is an essential element of a cause of action for age discrimination. The ADEA's language, structure, and legislative history demonstrate that requiring employers to show the business necessity of decisions based on reasonable factors other than age that may statistically impact older workers is contrary to congressional intent.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully Submitted,

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