No. 03-1160

IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Legislative Materials

Administrative Materials

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

COUNTERSTATEMENT OF THE CASE

1. Petitioners are police and public safety officers employed by respondents, the City of Jackson and its Police Department. J.A. 3-4. Petitioners claim that respondents violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (App. 15a-45a), by adopting and implementing new pay plans that, among other things, allegedly had an unlawful disparate impact on officers age 40 and over. J.A. 4-7, 15-31. Petitioners' expert reported that employees age 40 and over had received statistically smaller initial pay raises than officers under age 40. Pet. App. 4a-5a. Respondents' experts reported in reply—without contradiction by petitioners—that, even after initial pay increases, older officers statistically were still paid more overall than younger officers and that younger officers were employed in greater proportions in the lowest ranks where the new pay minimums established the greatest increases over prior pay. App. 3a-6a, 8a-14a (R. 464-66, 478-79, 496-99).

2. The district court granted summary judgment. Pet. App. 39a-48a. It found legally insufficient evidence that the pay plans were adopted or applied with a discriminatory motive. Pet. App. 45a. It also concluded "that the ADEA does not allow for claims of disparate impact." Pet. App. 48a.

3. On appeal, the Fifth Circuit vacated as premature the district court's ruling on the disparate treatment claim. Pet. App. 2a. On the disparate impact issue, however, the Fifth Circuit agreed that the ADEA's prohibitions are "read most naturally as outlawing only conduct motivated by age." Pet. App. 9a. The court also found that the ADEA's "reasonable factors other than age" provision, 29 U.S.C. § 623(f)(1), "counsels against recognizing a disparate impact theory under the ADEA," Pet. App. 13a, and is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim

under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." Pet. App. 17a-18a (footnote omitted). The court further stated that "absent from the scope of the ADEA" are the concerns that, "in the Title VII context, led to the recognition of disparate impact claims." Pet. App. 21a. Judge Stewart dissented on this issue. Pet. App. 28a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that unlawful discrimination requires actual discriminatory intent, this Court has indicated that it will recognize "disparate impact" claims—*i.e.*, claims based on unjustified adverse effects rather than on discriminatory intent—only where there is "convincing evidence" that Congress intended them. The ADEA contains no such evidence.

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

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny under Title VII do not support recognition of

ADEA disparate impact claims. In addition to being enacted before *Griggs,* the ADEA addresses much more limited concerns than does Title VII; in particular, the concerns that led to recognition of disparate impact claims under Title VII are absent in the ADEA. Because older workers as a class 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 normally motivated by deep-seated animus, but rather by generalizations about individual workers' abilities to do a job. In any event, even under Title VII, disparate impact claims are not recognized where statutory provisions foreclose them; by making discriminatory intent essential, Sections 4(a) and 4(f)(1) of the ADEA foreclose disparate impact claims.

III. The "independent" textual and legislative purpose arguments that petitioners offer for recognizing ADEA disparate impact claims fare no better. The "reasonable factors other than age" provision does not imply that such claims are cognizable; rather, it confirms that, in both "pretext" and "mixed-motive" cases, no liability may be imposed for actions based on reasonable intentions. Moreover, the "because of" language refers to more than mere causation, as is confirmed by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (requiring a showing of intent as well), and even *Griggs* (also requiring a showing that a practice with adverse impact is demonstrably unjustified). Finally, disparate treatment doctrine fully meets the more limited purposes of the ADEA.

IV. No deference is owed to the view of the Equal Employment Opportunity Commission ("EEOC") that ADEA disparate impact claims are cognizable. The regulation to which petitioners refer neither construes Section 4(a) nor affirmatively recognizes disparate impact claims. Moreover, the Department of Labor ("DOL") did not recognize ADEA disparate impact claims, and the EEOC's later-adopted view

conflicts with briefs of the Department of Justice ("DOJ"), is not supported by valid reasoning, and is contrary to law. Finally, there has been no congressional acquiescence in or ratification of the EEOC's view.

ARGUMENT

This case presents the question whether Section 4(a) of the ADEA, 29 U.S.C. § 623(a), makes actionable "disparate impact" claims—*viz.*, claims that employer decisions that are neutral on their face are unlawful, without regard to whether the employer's motive in making such decisions was the ages of the pertinent individuals, because the decisions have disproportionate adverse effects on older workers and do not have a demonstrated justification. As proved below, the text, structure, and history of the ADEA show that the statute does not provide for "disparate impact" claims.

The essential tradition of federal anti-discrimination law, in its multiple constitutional and statutory manifestations, is to make actionable "disparate treatment" claims—*viz.*, claims that decisions adverse to members of a protected class are unlawful because the decisionmaker's motivating consideration in making the decisions was the protected class trait (*e.g.*, race, gender, age). *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process Clauses); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). The Court has recognized that statistics may be probative evidence for such "disparate treatment" claims. *See, e.g.*, *Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605, 620 (1974). At the same time, out of respect for the essential tradition of federal anti-discrimination law and out of concern for the far-reaching implications of disparate impact theories of liability, the Court has declined to recognize disparate impact claims unless there is "convincing evidence" that the particular anti-discrimination law goes beyond the norm and provides for such claims. *Gen.*

Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982) (42 U.S.C. § 1981). *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); *Alexander v. Sandoval*, 532 U.S. 275, 288-93 (2001) (Title VI).

The ADEA contains no such convincing evidence. As this Court held in *Hazen Paper*, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610. While not directly resolving the status of disparate impact claims, *id.*, the reasoning of *Hazen Paper*—to wit, 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)—goes far toward showing that the ADEA does not make such claims actionable.

As then-Justice Rehnquist observed 23 years ago, neutral employer decisions—including those with adverse effects on older workers—are not decisions made "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employer decisionmaking that a disparate impact prohibition would have. *Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of *certiorari*). Rather, the ADEA embodies the Secretary of Labor's conclusion, reported to Congress, that enacting a prohibition on neutral decisions with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such employer practices and their adverse effects are better countered 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. 77-89).

Contrary to petitioners (Pet. Br. at 2-4, 8, 11-17), *Griggs v. Duke Power Co.*, *supra*, and its progeny under Title VII do not call for an opposite reading of the ADEA. Those Title VII decisions do not hold that prohibitory provisions phrased like Section 703(a) of Title VII (or Section 4(a) of the ADEA) are generally to be read as providing for disparate impact claims. Rather, *Griggs* and its progeny rest on the proposition that it was proper to interpret Title VII as providing for certain disparate impact claims in order to accomplish Congress's objective of addressing the problems of race and gender discrimination in employment, as Congress understood those particular problems. That limited proposition about Title VII does not so much as throw a cross-light on the proper interpretation of the ADEA, which is a separate statute enacted —before *Griggs* was decided—for the separate purpose of meeting what Congress understood to be the distinctly different problem of age discrimination in employment.

Petitioners also err in suggesting (Pet. Br. at 2-3, 7-9, 30-36) that the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of Section 4(a)—the statutory provision at issue here—and does not affirmatively state that Section 4(a) provides for disparate impact claims. Rather, the guideline addresses Section 4(f)(1) and interprets that statutory provision (unreasonably) to require a showing of "business necessity" to establish that a neutral employer decision with an "adverse impact" on older workers is a decision based on "reasonable factors other than age." While the interpretive guideline apparently rests on the assumption that the ADEA provides for disparate impact claims, courts do not defer to agency assumptions but only to reasoned and lawful agency actions. Such a reasoned and lawful agency action is lacking here.

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT CLAIMS

A. The Text of the ADEA Does Not Recognize Disparate Impact Claims

Section 4(a) generally makes it 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). On its face and in context, this is a disparate treatment text.

1. Section 4(a) Is Naturally Read as a Disparate Treatment Prohibition

When the ADEA was passed, the "prevailing view" was that, to be unlawful, "discrimination required a purpose or motive to harm an individual because of [the individual's protected trait]"; no court or administrative agency had even suggested, much less ruled, that any anti-discrimination law provided for disparate impact claims. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69-71 (1972) [hereinafter "Blumrosen, *Strangers in Paradise*"]; *see also* Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 95 (Monte B. Lake ed., 1983) [hereinafter "Blumrosen, *Interpreting the ADEA: Intent or*

Impact"]; Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 Nw. U. L. Rev. 907, 955-58, 970 (1967); Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 518-20 (1985). Far from departing from this traditional conception, Section 4(a) is naturally read as a statutory statement of this "prevailing view" that provided only for disparate treatment claims.

a. Section 4(a)(1) applies to employer decisions to fail/refuse to hire an older worker, to discharge an older worker, or to discriminate against an older worker in setting terms of employment. Section 4(a)(2) applies to employer decisions to limit, segregate, or classify employees in a way that deprives an older worker of employment opportunities or that otherwise adversely affects an older worker's employment. But Sections 4(a)(1) and 4(a)(2) make such employer decisions unlawful only if taken "because of" age. This is discriminatory motive language.

A decision made "because of" a particular consideration is a decision made "by reason of" or "on account of" that consideration. *Webster's Third New Int'l Dictionary* 194 (1976). It is a decision that is "based on" or "motivated by" that particular consideration. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-89 & n.15. Thus, as *Hazen Paper* held, Section 4(a)'s point in prohibiting decisions made "because of" age is both to put the focus on the employer's motivating purpose and to make it clear that the same decision is not unlawful—even if it has the same effect—if it is made for a non-age-based reason. *See Hazen Paper*, 507 U.S. at 609, 610-12; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989) (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

To put the point in familiar judicial terms, Section 4(a) makes it unlawful for an employer to make a decision "at least in part 'because of,' not merely 'in spite of,' its adverse effect upon" older workers. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It is not enough for a plaintiff to prove that an employer decision had an adverse effect on older workers (or that a different decision would have proven more advantageous for older workers). Rather, "'liability depends on whether the protected trait [*i.e.*, age] . . . actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (citations omitted).

b. It has been suggested that, since Section 4(a)(1)'s purpose is to state a broad disparate treatment prohibition, Section 4(a)(2)'s purpose must be to supplement Section 4(a)(1) by stating a disparate impact prohibition. But, as its history makes clear and its language demonstrates, Section 4(a)(2)'s purpose is to provide an employer analog to the similarly worded provision in Section 4(c)(2) that prohibits intentional age discrimination by 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"); Michael E. Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 Berkeley J. Emp. & Lab. L. 1, 46-54, 72-73 (2004) (discussing origins of Section 4(a)(2)).

It has also been suggested that the first clause of Section 4(a)(2)—addressing decisions "to limit, segregate, or classify . . . in any way which would . . . adversely affect [an individual's] status as an employee"—makes unjustified adverse effects unlawful without regard to the employer's intent. But the first clause of Section 4(a)(2) standing alone—like the first clause of Section 4(a)(1) standing alone—does not state a liability standard at all. Rather, in each

instance, the first clause merely states one of the two necessary predicates for employer liability by delineating the kinds of adverse decisions to which Section 4(a) applies: In Section 4(a)(1), the listed practices are particular employer decisions which are by their nature adverse to an older worker (*e.g.*, failing or refusing to hire an older worker). And, in Section 4(a)(2), since employer decisions "to limit, segregate, or classify" are not decisions that by their nature are adverse to older workers, the listed practices are such decisions that "adversely affect [an individual's] status as an employee . . . ." In both instances, however, the statute sets a second predicate for liability—*i.e.*, that the employer has made the applicable decision, with its applicable "adverse[] [e]ffect," "because of such individual's age." In short, the first clause of Section 4(a)(2) does nothing to change the discriminatory motive requirement imposed by the "because of" language.

It has been further suggested that Section 4(a)(2)'s "because of" language should be read as a continuation of the "adversely affect" phrase in the preceding clause and that, so read, the section provides for disparate impact claims. But, as this Court has consistently recognized, the normal rule is that a comma between statutory clauses generally requires separating the language on either side. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 189 (1995); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Accordingly, Section 4(a)(2)'s "because of" clause, which is set off by a comma from the first clause, is not properly read to continue the "adversely affect" phrase. Rather, the section's grammatical structure makes it plain that the "because of" clause refers to and modifies the first clause as a whole and thereby sets a discriminatory motive predicate for Section 4(a)(2) liability. *Accord DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 843 & n.27 (1982).

Finally, it has been suggested that, since Section 4(a)(2)'s "because of" clause is phrased in the singular, it is improper to read the clause as referring to and modifying the first clause as a whole. But the section's first clause is phrased in both the plural (insofar as it refers to an employer decision "to limit, segregate, or classify his employees") and the singular (insofar as it refers only to a decision that "would deprive or tend to deprive any individual of employment opportunities . . . ."). It was therefore grammatically correct to phrase the "because of" clause in the singular, as it makes a claim actionable under Section 4(a)(2) only where the age of an individual (alone or with others) motivated the employer's decision, and the individual (alone or with others) was injured by the decision.

c. This reading of Section 4(a)(2) provides a natural congruence with Section 4(a)(1). Both provisions require that covered employer decisions be decisions made "because of" age in order to be unlawful. Both provisions, in other words, make intentional age discrimination—and only intentional age discrimination—unlawful.

2. The ADEA as a Whole Cuts Against Reading Section 4(a) as Providing for Disparate Impact Claims

Nothing else in the ADEA provides "convincing evidence" that Section 4(a) is to be read to provide for disparate impact claims. To the contrary, the remainder of the statute cuts against reading Section 4(a) as providing for disparate impact claims.

a. The ADEA simply cannot be said to enact a general prohibition on all employer decisions that adversely affect older workers. To the contrary, it only goes so far as to enact a carefully limited disparate treatment prohibition.

As originally enacted, the ADEA did not even apply to all individuals age 40 and over, but protected only those individuals age 40 to age 65. *See* 81 Stat. 602, 607.

Mandatory retirement programs were permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was age discrimination under a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 176-82 (1989). Moreover, while the statute has since been amended to apply to employees age 40 or over, Section 4(a) does not apply to discrimination that favors an older worker over a younger one. *See General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1239 (2004). Furthermore, the ADEA continues to permit mandatory retirement programs for firefighters, executives, and policymakers, *see* 29 U.S.C. §§ 623(j), 631(c), and permits age-based provisions in early retirement plans and benefit plans, *see id.* § 623(f)(2). Also, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of a business. *Id.* § 623(f)(1). In short, the ADEA always has allowed much age-based decisionmaking.

Correlatively, "[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 v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). Section 4(f)(3) makes it lawful "to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) makes it lawful "to observe the terms of a bona fide seniority system . . . ." *Id.* § 623(f)(2). And Section 4(f)(1) states that it shall be lawful "to take any action . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1).

These "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is [the] 'arbitrary' [age discrimination]" that Congress determined should be prohibited. *Betts*, 492 U.S. at 176. Such a limited, nuanced scheme—directed only at "arbitrary" age discrimination—cuts

deeply against reading Section 4(a) as providing for disparate impact claims.

b. The "reasonable factors other than age" ("RFOA") provision in Section 4(f)(1) is particularly instructive in this regard. On the one hand, 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*, 528 U.S. 62, 88 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). On the other hand, 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).

While the RFOA provision applies of its own force only where a differentiation is based on "reasonable factors" other than age, determining whether a decision "is based on" such factors is an inquiry that focuses on the employer's motive in making the decision. As petitioners are forced to recognize (Pet. Br. at 24), "[t]he RFOA provision uses language that *does* of necessity connote intentionality." By doing so, however, the RFOA provision confirms that Section 4(a) states only a disparate treatment prohibition.

The fundamental distinction between a disparate treatment liability theory and a disparate impact liability theory is that motive is dispositive in the former and irrelevant in the latter. While evidence of effects (statistical or otherwise) is admissible to prove either kind of claim, the employer's motives are determinative only in a disparate treatment case. In a disparate impact case, in contrast, the dispositive inquiry is whether an employment decision has a significant adverse effect on the protected class and, if so, whether the decision is demonstrably justified. Those are not inquiries into employer motive. Thus, the RFOA provision—by underlining the ADEA's insistence that employer motive is not merely relevant but outcome-determinative—belies the notion that the

ADEA provides for disparate impact claims. Such a motive-based inquiry is wholly inconsistent with a disparate impact regime. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) ("intent plays no role in the disparate-impact inquiry").

c. Sections 2 and 3 of the ADEA provide added context for Section 4 and do so in a manner that shows that Section 4(a) is only a disparate treatment prohibition.

Section 2(a) finds both that the "setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons," 29 U.S.C. § 621(a)(2); and it declares that the first of these—"arbitrary discrimination in employment because of age"—"burdens commerce and the free flow of goods," *id.* § 621(a)(4). Section 2(b) follows by stating two purposes of the ADEA: (i) "prohibit[ing] arbitrary age discrimination in employment," and (ii) "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b).

Section 3 of the ADEA then addresses both the problem of "otherwise desirable practices [that] may work to the disadvantage of older persons"—including neutral practices with disproportionate adverse effects—and the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." Section 3 charges the Secretary with undertaking 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); 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); and requires the Secretary to increase educational

opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id.* § 622(a)(4). Thus, Section 3 provides for a broad range of non-coercive measures aimed at alleviating, among other things, the adverse effects on older workers of neutral employer practices.

Section 4, in its turn, addresses the separate problem of employer practices that "set[] arbitrary age limits regardless of potential for job performance" and does so by prohibiting "arbitrary age discrimination in employment." Thus, in contrast to Section 3 and the problems of older workers that it addresses, Section 4's sole purpose is to make intentional age discrimination—*i.e.*, disparate adverse treatment of older workers "because of" age—unlawful.

B. The Legislative History Confirms that the ADEA Does Not Recognize Disparate Impact Claims

The legislative history of the ADEA "is a model of lucidity," and it also "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*, at 73.

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. Congress 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. 241, 265 (1964).

In a June 1965 report responding to that directive, the Secretary of Labor discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 42. The Secretary found that, unlike race

discrimination, age discrimination is not based upon animus or other "feelings about people entirely unrelated to their ability to do the job." J.A. 37; *see also id.* ("There is *no* significant discrimination of this kind so far as older workers are concerned."). He instead 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. 44. This form of discrimination, he noted, is what the 1964 Congress had referred to as "arbitrary discrimination" in employment because of age. J.A. 37.

The Secretary added that the "force of certain circumstances," such as health problems, lower levels of education, and technological changes, "affect older workers more strongly, as a group, than they do younger workers." J.A. 57-66. In this regard, the Secretary noted 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. 38, 66-73. But the "firmest conclusion" from the Secretary's 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. 77-78. The Secretary recommended that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 80-81, counseling, job placement, and job training programs, J.A. 82-85, and a system of continuing education, J.A. 85-89.

On January 23, 1967, the Secretary sent proposed legislation to Congress. 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* 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary stated 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 proscription" of the legislation. *Id.* Rather, "[r]esearch would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.*

The Secretary explained that his bill addressed only "the 'unjust' or 'arbitrary' . . . discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong. 37 (1967) (internal quotation marks omitted). The Secretary indicated that, where there was "legitimate relevance," even "differentiations or distinctions" involving consideration of age were permitted. *Id.* This limitation was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which provided that there was no violation "*where age is a bona fide occupational qualification*" or "*where the differentiation is based on reasonable factors other than age.*" *Id.* at 39 (emphasis in original).

The ADEA is in essence the Secretary's proposed bill. *See EEOC Legislative History* at 173. The findings and purposes in Section 2 were enacted as the Secretary proposed, as were the education and research programs in Section 3, the prohibitions in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 68 *with* 81 Stat. 602-03. Both committee reports acknowledge the Secretary's proposals and rely upon them. *See id.* at 74-76, 106-07.

This legislative history confirms that the ADEA does not provide for disparate impact claims. In making his sweeping inquiry, the Secretary gave detailed consideration to neutral employer practices that have adverse effects on older workers. The Secretary concluded that such practices could *not* properly

be described as "age discrimination" and that only "arbitrary age discrimination" warranted prohibition. The Secretary recommended that other problems facing older workers be dealt with through education, job placement, and training measures. As Congress enacted the very language that the Secretary proposed, there is no basis for inferring that Congress had a different intent. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. Important Pragmatic Considerations Cut Against Reading the ADEA to Provide for Disparate Impact Claims

Although the text and legislative history of the ADEA are dispositive, important pragmatic reasons also cut against reading the ADEA to provide for disparate impact claims. On an operational level, the ADEA is ill-suited for such claims.

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries. Thus, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims from that authorization. *See* 42 U.S.C. § 1981a(a)(1) & (c).

In contrast, Section 7(c) of the ADEA specifically provides without any limitation that "a person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Where disparate impact claims have been allowed, those cases have been tried to juries. *See, e.g., Allen v. Entergy Corp.*, 193 F.3d 1010, 1013-15 (8th Cir. 1999); *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 547 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

But, as Title VII's scheme suggests, disparate impact claims do not fit well with a jury trial approach. 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. *See* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Tol. 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, "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" that could "impair the functioning of [a] legislative scheme" providing for disparate impact claims counsel against recognizing such claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (internal quotation marks omitted).

2. Furthermore, in Title VII cases, disparate impact claims are usually pursued as Rule 23(b)(2) class actions. Because such claims challenge practices generally applicable to a group and can be remedied by common equitable relief, Title VII disparate impact cases are the "prime examples" of cases where individualized notice and an opportunity to opt out are neither necessary nor appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

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

While the ADEA "opt-in" procedures allow older worker plaintiffs to group their resources, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-La Roche Inc. v.*

Sperling, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in ADEA disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing inconsistent obligations is entirely possible. Player, *Title VII Transplant*, at 1272-73. These procedural differences add to the showing that the ADEA is ill-suited for disparate impact claims.

3. In the ADEA context, there also is no satisfactory calculus for measuring disparate impact. In the Title VII context, race, sex, national origin, and religion are basically dichotomous variables and the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc.*, is relatively straightforward to measure. In contrast, "age is a continuum," *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985), and "impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not 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 50 and over versus under age 50). But such an approach is subject to manipulation and provides no standards for self-examination and voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); Player, *Impact Analysis Under the ADEA*, at 829-30. For example, on this approach, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A second, less manipulable approach is to specify the groupings as individuals age 40 and over versus those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is in tension with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Thus, a number of the lower courts have rejected it. *See* Tom Lee *et al.*, *Lindemann & Grossman's Employment Discrimination Law* 447 & n.197 (3d ed. Supp. 2002).

In any event, neither approach 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. Evidence that an employer decision that is neutral on its face has adverse effects on older workers also lacks the probative significance that such evidence has in race and sex discrimination cases. Although it may be idealistic in some ways, *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (op. of O'Connor, J.), the 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 employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). On this assumption, a statistical showing that a neutral employer decision produces

a deviation from the norm is taken as a significant signal that the employer practice is problematic (without evidence of justification). But this assumption has no conceivable application to younger and older workers and, accordingly, "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.

As this Court has noted, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 315 (1976). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991). In addition, older persons have less incentive than younger persons to invest in human capital and tend statistically to have more dated and less valuable technological skills and/or education. *See* Richard A. Posner, *Aging and Old Age* 51-58 (1995). And, while age frequently brings with it more experience and wisdom, *see id.* at 105-06, in many occupations and professions, age is negatively correlated with performance and interest. *See, e.g., id.* at 72-78, 115-17, 358-60. Consequently, in contrast to race and gender, "'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, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27, 65 (1979)).

As the Secretary of Labor noted (J.A. 68-73), some neutral decisions adversely affect older workers as long-term workers who have gained a more advantageous status than younger, shorter-term 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) adversely affect 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 have adverse effects on older workers. *Finnegan*, 967 F.2d at 1164. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1214 (7th Cir. 1987) (Easterbrook, J., dissenting).

The facts here illustrate the point. Petitioners complain that officers age 40 and over generally received lower initial percentage pay increases. However, officers age 40 and over were generally in *higher* ranked positions and generally received *higher* salaries both before and after the initial increases. The alleged disparate impact derives from the older workers' prior advantageous status.

In short, it is to be expected that many sound and efficacious work, selection, and compensation practices will have a disproportionate adverse impact on older workers—*e.g.*, in physically demanding jobs and in jobs requiring cutting-edge computer skills. Since such adverse effects are so predictable and yet so unavoidable, it is not appropriate to equate a showing that a facially neutral practice has a disparate impact on older workers with a *prima facie* case of unlawful age discrimination and in effect "force employers to carry the burden of justifying virtually all of their work and selection standards." Player, *Impact Analysis Under the ADEA*, at 830. As Justice Breyer has commented, "there [are] so many rules correlated with age . . . that how could the employer run his business where you are going to have a court second-guessing every single rule that's correlated with age. That's the problem." Tr. of Oral Argument at 17, *Adams v. Florida Power Corp.*, No. 01-584 (U.S. March 20, 2002), *available at* www.supremecourtus.gov/oral_arguments/argument_transcripts/01-584.pdf.

Contrary to petitioners' argument (Pet. Br. at 10 & n.4), that problem is not solved by speculative predictions that, in ADEA cases, employers will more frequently succeed in carrying the burden of justifying their neutral practices. Litigation (involving expensive psychometric studies and testimony) that is not likely to be successful has little or no social utility and should not be encouraged. Further, as petitioners have noted (Pet. 9-10 n.3), "the potential exposure to liability under the ADEA affects employers' decisions in designing their employment policies, meaning that the law's impact cannot be measured in terms of . . . litigated cases alone." Indeed, as a respected industrial psychologist has noted: "In the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device. Rather, they are a result of a total situation in which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process." Barbara Lerner, Washington v. Davis*: Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304-05. Yet, by allowing myriad employment practices that correlate with age to be challenged without more, an ADEA disparate impact regime could only retard this search for excellence and, in the process, force employers to abandon sound selection practices and/or to move toward quotas. *See Wards Cove*, 490 U.S. at 652-53; *Watson*, 487 U.S. at 991-92 (op. of O'Connor, J.).

The sum of the matter is that, while statistical disparities concerning minorities and women may tend to identify potentially problematic employment practices, such statistics are not likely to do so where older workers are concerned, since so many sound employment practices are and always will be adversely correlated with age. It just is neither practical nor constructive to allow a *prima facie* case of age discrimination to be based on correlations that prove so little and that are so

frequent and unavoidable. There certainly is no "convincing evidence" that the ADEA is intended to do so.

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

As petitioners concede (Pet. 6-7), the majority of circuits to address the issue have held that the ADEA does not recognize disparate impact claims. Echoing the minority view, however, petitioners argue (Pet. Br. at 4-5, 11-17, 22) that Section 4(a)(2) of the ADEA was derived from and is similarly worded to Section 703(a)(2) of Title VII; that *Griggs* and its progeny have construed Title VII to provide for certain race/sex disparate impact claims; and that the ADEA should therefore be construed to provide for older worker disparate impact claims. This argument does not withstand scrutiny.

First, it is plain that the 1967 Congress did not follow Section 703(a)'s language in drafting Section 4(a) in order to provide for ADEA disparate impact claims. As noted above (*supra*, at 7-8), in 1967, the prevailing conception was that anti-discrimination provisions required proof of discriminatory motive; and, as of 1967, the "disparate impact" doctrine had not been formulated by any court, enforcement agency, or even academic literature. The pathbreaking construction of Title VII in *Griggs* to recognize certain disparate impact claims did not issue until 1971. Since this later construction of Section 703(a) was not one that reflected "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), there is no proper basis for concluding that the 1967 Congress specifically intended to incorporate the disparate impact construction of Title VII into the ADEA.

Second, it is equally plain that the textual similarity of Section 703(a) of Title VII and Section 4(a) of the ADEA does not call for recognition of ADEA disparate impact claims.

While the "presumption of uniform usage" is a venerable principle of construction, that presumption clearly gives way here.

a. As this Court has stated, the "presumption of uniform usage" "is not rigid and readily yields" to other indicia of statutory meaning. *General Dynamics*, 124 S. Ct. at 1245. For example, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). For these reasons, the United States Reports are replete with cases giving similar language in two statutes (and even within the same statute) different meanings.

For example, in *General Dynamics*, in addition to finding that the word "age" has different meanings within different sections of the ADEA, 124 S. Ct. at 1246-47, the Court held that the phrase "because of . . . age" has a different scope than the phrase "because of . . . race . . . [or] sex" in Title VII. *Id.* The Court found that "age" "can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good." *Id.* at 1246. In contrast, the Court found that "'[r]ace' and 'sex' are general terms that in every day usage require modifiers to indicate any relatively narrow application." *Id.* at 1247. The Court thus found that cases construing Title VII's prohibitions as applying broadly to distinctions that hurt persons of all races and genders were inappropriate as a guide to construing the ADEA's prohibitions; the Court held that "the prohibition of age

discrimination is readily read more narrowly" to apply only to "distinctions that hurt older people." *Id.*

Similarly, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-25 (1994), the Court construed the attorney's fee provision of the Copyright Act, 17 U.S.C. § 505, to provide a single standard covering both prevailing plaintiffs and defendants, even though the Court had adopted a dual standard in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), when construing virtually identical language in Title VII. The Court noted that "Congress, in enacting § 505 of the 1976 Copyright Act, could not have been aware of the *Christiansburg* dual standard as *Christiansburg* was not decided until 1978." 510 U.S. at 523 n.9. The Court also noted that *Christiansburg* was based on "policy considerations" and "legislative history" that the Court found "not completely similar" in the Copyright Act. *Id.* at 523, 524. Thus, the Court held that the "argument based on our fee-shifting decisions under the Civil Rights Act must fail." *Id.* at 525 (footnote omitted).

More recently, in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), the Court construed a provision of the Social Security Act to provide that, in computing Social Security taxes on "wages paid," backpay awards should be attributed to the period during which they were actually paid, even though the Court had previously interpreted a similarly worded provision as attributing backpay, in determining eligibility for Social Security benefits, to the period during which the corresponding wages should have been paid. The Court explained that its holding in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), to the latter effect had been grounded on a "concern that the benefits scheme . . . would be disserved by allowing an employer's wrongdoing" to undermine an employee's eligibility for benefits. *Cleveland Indians*, 532 U.S. at 212. Because "[n]o similar concern underlies the tax provisions," the Court held

that *Nierotko* "does not compel symmetrical construction of the 'wages paid' language." *Id.* at 212, 213.

b. Here, it bears emphasis that Congress chose not to add an age discrimination prohibition to Title VII, but rather enacted a separate and distinct statute from the one construed in *Griggs* and its progeny. Although the ADEA and Title VII have some similar language, they are also distinct in many respects; and all of the factors that caused *General Dynamics*, *Fogerty*, and *Cleveland Indians* to conclude that the presumption of uniform usage must yield are present here as well: Specifically, as even petitioners concede (Pet. Br. at 15-17), the Court has not applied Title VII precedent in ADEA cases where the pertinent language of the two statutes differs; and *General Dynamics* establishes that the pertinent prohibitory language in the ADEA is different and narrower than the analogous but broader prohibitory language in Title VII. Moreover, as in *Fogerty*, the ADEA was enacted before *Griggs* and its progeny were decided and at a time when unjustified disparate impact was not a recognized concept of unlawful discrimination. And, most importantly, as in *Fogerty* and *Cleveland Indians*, the Court here faces prior precedent that, as shown below, rests not so much on the allegedly comparable language but on the different and broader "objectives underlying Congress' enactment of Title VII." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 n.13 (10th Cir. 1996); *DiBiase*, 48 F.3d at 734 (op. of Greenberg, J.); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act*: *Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 517. Indeed, the differences in legislative objectives in Title VII and the ADEA and in the concerns that each statute addresses are so deep as to preclude a symmetrical construction of the ADEA to accord with the construction of Title VII in *Griggs*.

Contrary to the impression that petitioners seek to convey (Pet. Br. at 4, 8, 11-12, 22), *Griggs* and its progeny did not

derive authorization for disparate impact claims strictly from Title VII's text, much less suggest that Section 703(a) is naturally read to state a disparate impact prohibition. Although *Griggs* quotes the statutory text in a footnote, it does not thereafter discuss or analyze that text. Rather, *Griggs* derives its holding that Title VII provides for certain racial disparate impact claims from "[t]he objective of Congress in the enactment of Title VII . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. While the Court found this objective "plain from the language of the statute," *id.* at 429, it did not state that the authorization for disparate impact claims was derived solely or even primarily from the language. Nor did the progeny of *Griggs*, which confirm that Title VII's objectives played a crucial role in the Court's interpretive analysis. *See*, *e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Watson*, 487 U.S. at 990-91.

Specifically, *Griggs* held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices." 401 U.S. at 430. *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 Corp. v. Green*, 411 U.S. 792, 806 (1973). Similarly, in determining to extend disparate impact analysis to gender cases, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), the Court was confronted with another class (women) that has been historically subject to invidious discrimination and that could cumulatively suffer from actions based on largely immutable characteristics.

The prohibitions of the ADEA, in contrast, were not enacted to address any such broad concern with cumulative disabilities resulting from historic discrimination. The prohibitions of the ADEA are intended to address the distinct problem of arbitrary age discrimination in employment—a problem that, as the Secretary of Labor reported, is different and more limited than the problem of race and sex discrimination in employment.

Specifically, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or gender, 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*, 528 U.S. at 83. 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, 34 Stan. L. Rev. at 850. Older workers as a class have not been educated in segregated schools, been subject to Jim Crow laws, been relegated to menial support jobs, or been barred from workplaces entirely. Rather, as the Secretary of Labor reported to Congress, for older workers, the issue is usually not the denial of skills or opportunity in the first instance or the cumulation of burdens over a lifetime, but the general (albeit uneven) deterioration of skills and performance with advancing age and the consequential tendency of employers to use age as a proxy for measuring an individual's abilities at a particular point in time. J.A. 37, 42-57.

The Court has indicated that disparate impact claims are also intended to address 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*, at 320-21. The Secretary thus reported to Congress 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; J.A. 37, 43-44, where prejudices having no relation to employment may cause erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary reported that age discrimination results from generalizations about work abilities that, although statistically true, may not be applicable to particular individuals. J.A. 37, 42-57. Accordingly, as *Hazen Paper* held in the context of the ADEA, "[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, contrary to petitioners' suggestion (Pet. Br. at 13-14 & n.8), the concerns that led to the enactment of Title VII and that framed the construction of Title VII in *Griggs* are not the concerns that led to the enactment of the ADEA's prohibitions on age discrimination or that the ADEA's prohibitions are aimed at addressing. As this Court recognized in *EEOC v. Wyoming*, 460 U.S. at 230-31, the ADEA addresses a different and more limited form of discrimination than does Title VII; and, accordingly, in cases like *General Dynamics* and *Betts*, the Court has held that the ADEA has a narrower prohibition that serves a more limited purpose. Indeed, as discussed above (*supra*, at 15-18), the Secretary expressly recommended that neutral practices with adverse effects on older workers not be prohibited but rather be addressed by non-coercive governmental measures. The presumption in favor of uniform usage has no proper application in such circumstances and, accordingly, the Court should decline to read Title VII's disparate impact doctrine

into the ADEA. Justice Stevens' comment that "there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant [Title VII's] standards . . . into a different statutory scheme having a different history," *Washington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring), is very much to the point here. *Accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) ("there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

In all events, as in *General Dynamics*, there is here a further textual difference between the ADEA and Title VII that requires the presumption of uniform usage to yield. As the court below recognized (Pet. App. 17a-18a), the RFOA provision in Section 4(f)(1) is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." The Court's Title VII cases themselves show that *Griggs* and its progeny give way to statutory provisions like the ADEA's RFOA provision.

In its Title VII cases, the Court has said that disparate impact claims will lie only "in some circumstances" (*Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976)), and only "in certain cases" (*Watson,* 487 U.S. at 986-87, 988). The Court, for example, has declined to decide whether such claims lie under Section 703(a)(1), the Title VII provision applicable to employers' *compensation* decisions—which is the type of decision challenged here. *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 added that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from

such consequences." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Indeed, the Court has found that *Griggs* does not apply where Title VII as a whole provides only for disparate treatment claims. For example, Section 703(h) of Title VII makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate . . . ." 42 U.S.C. § 2000e-2(h). "Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982).

The Court has likewise 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 a disparate impact claim by male employees against a gender-neutral pension plan would be barred by 29 U.S.C. § 206(d), which makes lawful compensation disparities based on "any other factor other than sex." *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C. § 206(d) in their particular areas of application, Section 4(f)(1) of the ADEA makes intent outcome-determinative and, in its instance, does so on a statute-wide basis. Thus, Section 4(f)(1) provides yet another ground against transferring the *Griggs* disparate impact construction of Title VII into the ADEA.

III. PETITIONERS' ARGUMENT THAT THE ADEA'S TEXT AND LEGISLATIVE PURPOSES INDEPENDENTLY SUPPORT RECOGNITION OF DISPARATE IMPACT CLAIMS IS IN ERROR

Petitioners' fallback from their argument for a symmetrical construction of Title VII and the ADEA is (Pet. Br. at 8-9, 17-29) that an "independent examination" of the ADEA's text and legislative purposes supports recognition of disparate impact claims. Not even the courts that have approved ADEA disparate impact claims have accepted the erroneous arguments that petitioners offer in this regard.

A. The Text of the ADEA Does Not Support Recognition of Disparate Impact Claims

Petitioners advance two principal textual arguments: First, they suggest (Pet. Br. at 19) that the RFOA "provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age—that is, without having a discriminatory purpose." Second, they suggest (Pet. Br. at 22) that "the phrase 'because of'—unlike such terms as 'willfully,' or 'purposefully,' or 'knowingly'—does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation." Neither suggestion is sound.

1. Petitioners' RFOA argument proceeds from the premise (Pet. Br. at 17-21) that, unless the RFOA provision is read as a basis for implying that Section 4(a) provides for disparate impact claims, the RFOA provision has no operative meaning and effect. That premise is wrong.

As the courts of appeals have long held, in a disparate treatment case, the RFOA provision confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination. *See, e.g.*, *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979); *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 v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975). In this same vein, the courts of appeals have also construed the RFOA provision to provide the ADEA's answer to the question raised by mixed-motive cases; 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). In short, the RFOA provision has the meaning and effect of "insur[ing] that employers [are] permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33.

That the RFOA provision applies only to actions "otherwise prohibited" by Section 4(a) does not provide a proper basis for construing Section 4(a) as providing for disparate impact claims. The statutory phrase is "otherwise prohibited," not "prohibited," and the word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" at most refers to employer decisions that, on their face and without further explanation, could be deemed ADEA violations. The reference, in other words, would be to a traditional "pretext"

case, once the *prima facie* case is made, if the defendant did not show a legitimate non-discriminatory reason for its action. *See Reeves*, 530 U.S. at 142-43. The reference would also be to a mixed-motive case, once the plaintiff showed that an illegitimate factor had actually played a role in the decision, if the defendant did not show that the same decision would have resulted from legitimate considerations. *See Desert Palace, Inc., v. Costa*, 539 U.S. 90, 93 (2003). So, as the courts of appeals have held, in both "pretext" and mixed-motive cases, the RFOA provision confirms that an action "otherwise prohibited" is lawful if the action was nonetheless based on "reasonable factors other than age." No disparate impact claims need be implied. Indeed, the RFOA provision also applies to "any action otherwise prohibited under subsection[] . . . (e)," and subsection (e) covers only actions "based on age," 29 U.S.C. § 623(e), and accordingly, the "otherwise prohibited" language necessarily refers to circumstances where the employer acted with allegedly discriminatory intent.

Nor does the RFOA provision's use of the term "reasonable" fairly suggest that Section 4(a) provides for disparate impact claims. 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* 1293 (8th ed. 2004), or "using or showing reason," *Webster's New World Dictionary* 1183 (2d college ed. 1979). That was the usage in equal protection law at the time of the ADEA's enactment. *See, e.g.*, *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 624 (1961) (a "classification having some *reasonable basis* does not offend against the equal protection clause") (emphasis added); *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). Not surprisingly, in its disparate treatment and mixed-motive cases, the Court uses the term "reasonable" and analogous modifiers in this same way. *See*, *e.g.*, *McDonnell Douglas*, 411 U.S. at 802-03 (employer

must offer a "*reasonable* basis" for rejection of applicant) (emphasis added); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (defendant must offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal") (emphasis added); *Desert Palace*, 539 U.S. at 93 ("legitimate" reasons required); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-400 (1983) ("wholly permissible" or "valid" reasons required). This Court has previously said that such modifiers ordinarily should not be understood to add substantive restrictions beyond the basic requirement of a rational, non-discriminatory intent. *See Hazen Paper*, 507 U.S. at 612. And, in the context of the ADEA, it is clear that the term "reasonable" in the RFOA provision, rather than requiring more than a reasonable grounding for an allegedly rational, non-discriminatory decision, is simply the contrasting antonym to the term "arbitrary" that modifies the concept of "age discrimination" referenced in Section 2 (and the legislative history) and prohibited by Section 4(a). In short, petitioners' protest (Pet. Br. at 9, 19-20) that, unless ADEA disparate impact claims are cognizable, the term "reasonable" in the RFOA provision becomes meaningless surplusage, is wholly without substance.

In any event, the Court has expressed a healthy skepticism about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 259-62 (1994), and the court below was thus quite right to "decline to infer from the inclusion of the word 'reasonable' that Congress meant to create an implicit background rule that actions resulting in an age-disparate impact are as a general matter proscribed." Pet. App. at 17a. Legislation frequently includes clarifying provisions in order to remove argued ambiguities and reassure skeptics; and the insertion of "technically unnecessary" provisions "out of abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti canutela*)." *Fort Stewart Schools v.*

FLRA, 495 U.S. 641, 646 (1990). So, even if the term "reasonable" or, for that matter, the entire RFOA provision were nothing more than confirmation that employer decisions based on reasonable factors other than age are lawful—like Section 4(f)(3)'s confirmation of the lawful employer authority to "discharge or otherwise discipline an individual for good cause"—that would not be a proper basis for reading Section 4(a) to make disparate impact unlawful. *See Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."). Indeed, even on this surplusage hypothesis, the RFOA provision would still "underscore the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination law," *McKennon*, 513 U.S. at 360; and, as explained above (*supra*, at 13-14), such a focus on employer motives is wholly incompatible with a disparate impact regime.

2. Petitioners' contention (Pet. Br. at 22-24) that the phrase "because of" in Section 4(a)(2) is a mere "causation" requirement is equally off the mark. This contention contradicts petitioners' argument that language must be given the same meaning in each place that it is used in a statute, as the Court in *Hazen Paper* held that the phrase "because of" in Section 4(a)(1) states a discriminatory intent requirement (and not a mere causation or correlation requirement). *See* 507 U.S. at 609, 610, 612. This contention also contradicts petitioners' argument that Section 4(a)(2) should be read to mirror this Court's construction of Section 703(a)(2) of Title VII, as the Court has held that liability is established under that provision only if a neutral practice *both* caused an adverse impact *and* is not demonstrably justified. *See Wards Cove*, 490 U.S. at 658; *Griggs*, 401 U.S. at 430-31. In all events, to use the late-Justice Brennan's words, "[t]o construe the words 'because of' as colloquial shorthand for "but for causation," as [do

petitioners], is to misunderstand them." *Price Waterhouse*, 490 U.S. at 241 (plurality op.) (footnote omitted).

To begin with, in the context of a statute regulating employer conduct with respect to its employees, it makes no sense to construe the phrase "because of" as a mere causation requirement. *All* adverse employer decisions are by definition caused by the employer. If the "because of" phrase is to place any meaningful limits on the statute's application, it must require something more than just causation.

Moreover, there is no basis for—and no authority cited for—petitioners' assertion (Pet. Br. at 22) that "the phrase 'because of' . . . does not refer to an actor's state of mind in all (or even most) contexts . . . ." As shown above (*supra*, at 7-9), the phrase "because of" is naturally and commonly understood as stating a discriminatory motive (as well as a causation) requirement. *See Hazen Paper*, 507 U.S. at 609-10 ("because of" means that a Section 4(a)(1) "disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the employer's decisional] process and had a determinative influence on the outcome").

In any event, contrary to petitioners' suggestion (Pet. Br. at 22-23), construing the "because of" language to state a "causation" test does not establish that the ADEA states a disparate impact prohibition. Under Section 4(a)(2), *age* must be the causative factor. Thus, contrary to petitioners' suggestion (Pet. Br. at 23), if an employee is denied a job based on a physical strength test, the worker's employment prospects have *not* been adversely affected because of age, but rather because of physical weakness. That "physical strength is negatively correlated with age" (Pet. Br. at 23) does not itself make the adverse effect of the test on the older worker "because of" age; as the Court analogously held in *Hazen Paper*, even though years of employment service for pension eligibility is "empirically correlated with age," the two factors are "analytically distinct" and "thus it is incorrect to say that a

decision based on years of service is necessarily 'age based'." 507 U.S. at 608, 611. The same is true for a physical strength requirement (and is even more obviously true for a negative correlation between percentage pay increases and age—a correlation plainly having nothing to do with the aging process itself). Indeed, petitioners' effort to *equate* decreased physical strength with old age is precisely the sort of generalized stereotype that the ADEA was designed to prohibit. In a statute premised on the notion that there is a manifest *difference* between aging and negative physical characteristics sometimes associated with aging, age cannot properly be treated as a synonym for characteristics associated with aging.

Petitioners' argument (Pet. Br. at 23) that, had it intended a discriminatory intent requirement, Congress "could have included words such as 'willful,' 'purposeful,' 'knowing,' 'deliberate,' or malice'" proves nothing. This Court has already held that the phrase "because of" age in Section 4(a)(1) states a discriminatory motive requirement. *See Hazen Paper*, 507 U.S. at 609-12. No alternative words were needed in Section 4(a)(1) to establish an intent requirement, and thus none are needed in Section 4(a)(2). Further, both the ADEA and Title VII use words like "willful" and "malice" to establish the higher standard of intent required for imposition of liquidated and/or punitive damages. *See* 29 U.S.C. § 626(b) ("willful[ness]" requirement for liquidated damages); 42 U.S.C. § 1981a(b)(1) ("malice or . . . reckless indifference" requirement for punitive damages). The "because of" language simply establishes the lesser intent standard for a basic disparate treatment claim. *Accord Hazen Paper*, 507 U.S. at 614-17.

Petitioners' final argument (Pet. Br. at 24)—that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to a discriminatory intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement—is weaker yet.

There is no canon of construction which suggests that synonymous phrases in different passages of a statute cannot have similar meanings. On the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on" may both properly connote an intent requirement, and in the ADEA they surely do.

B. Petitioners' Legislative Policy Arguments Are Also Without Merit

Petitioners' legislative policy arguments are no better. Petitioners point out (Pet. Br. at 25) that, like Title VII, the ADEA is directed at "the elimination of discrimination in the workplace." *McKennon*, 513 U.S. at 358. But, as Justice O'Connor has noted, "[w]hile the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting." *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). Rather, the evils that Congress sought to eradicate are the particular forms of discrimination that Congress perceived workers to face; and, as explained above (*supra*, at 15-18), Congress perceived that older workers face more limited forms of discrimination than the ones faced by minorities and women—and, for older workers, that does not include the adverse effects of unjustified neutral practices. Petitioners plainly err in suggesting otherwise.

It is true, as petitioners note (Pet. Br. at 25-26), that the ADEA expresses a concern that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). It is also true, as petitioners note (Pet. Br. at 26-27), that the Secretary's report identifies a number of these practices—including some neutral practices with adverse

effects. But these truths are of no aid to petitioners: "Issues obviously central to disparate impact were never mentioned in committee hearings, in committee reports, or in discussions on the floor of Congress. . . . In addition, no witness or legislator described an employment practice with a disparate impact and said the act would or should outlaw the practice." Gold, 25 Berkeley J. Emp. & Lab. L. at 40, 72 (footnotes omitted). Rather, as explained above (*supra*, at 15-18), the ADEA addresses these practices and the resulting disadvantages for older workers through non-coercive governmental measures such as education, training, and manpower programs; it is no part of the ADEA's purpose to prohibit neutral practices.

Petitioners suggest (Pet. Br. at 27-28) that reading Section 4(a) to provide for disparate impact claims is necessary to assure that the statute addresses the legislative concern with stereotyping of older workers. But, whereas Title VII was concerned with subconscious stereotypes and prejudices rooted in animus, the ADEA was concerned only with generalizations about older persons' work abilities that, while statistically true, may not be applicable to particular older individuals. *See Hazen Paper*, 507 U.S. at 610-11. This distinct concern is fully addressed by providing for disparate treatment claims. As *Hazen Paper* concluded, "[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 . . . ." *Id.* at 611 (emphasis in original).

Petitioners further err in suggesting (Pet. Br. at 9, 24, 28-29) that disparate impact claims are necessary to "overcom[e] problems of proof raised by purposeful but veiled discrimination" against older workers. The issue here is not whether statistics are admissible as proof in an age discrimination case—they surely are, and such statistical proof will expose any employer practices that have the effect of systematically disadvantaging older workers. *See Teamsters*

v. United States, 431 U.S. at 339-40. To be sure, such statistics will only be admissible as proof going to whether the employer adopted the practice with a discriminatory motive—*i.e.*, to the question whether the decision was "because of," or "in spite of," age. *Feeney*, 442 U.S. at 279. But the proof of impact will be allowed; and there is nothing unjust or untoward in requiring a determination about the motive for it. In *Watson*, the Court said that it is not "appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination." 487 U.S. at 987. Since *Hazen Paper* in turn holds that statistical correlations with age are not sufficient by themselves to establish intentional discrimination under the ADEA, those same insufficient statistical correlations cannot properly establish liability for unintentional discrimination.

Finally, petitioners err in suggesting (Pet. Br. at 27, 29) that disparate impact claims are necessary to protect older workers from thoroughly unjustifiable practices. Petitioners offer no evidence that human resources and labor market pressures are not adequate to deter unreasonable practices with systemic adverse effects on older workers. Nor do petitioners give proper weight to the proposition that "[t]he 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." *Loeb v. Textron*, 600 F.2d at 1012 n.6. Indeed, petitioners' argument in this regard is actually with the Secretary's conclusion that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest" (J.A. 78), and that such practices and their effects are better addressed through education, training, and manpower programs. But the 1967 Congress agreed with the Secretary, not with petitioners.

IV. THE COURT SHOULD NOT DEFER TO THE EEOC'S VIEW THAT ADEA DISPARATE IMPACT CLAIMS ARE COGNIZABLE

Throughout their brief, petitioners contend (Pet. Br. at 2-3, 7-9, 11, 13, 24-25, 27-29, 29-36) that, in all events, the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. But the Solicitor General is not appearing in this case to advocate the adoption of the EEOC's view; and no appellate court has approved ADEA disparate impact claims on the basis of the EEOC's view. Nor should this Court.

First of all, as the court below noted (Pet. App. 10a n.5), the EEOC has not promulgated a regulation—substantive or interpretive—construing the ADEA to provide for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of the prohibitions in Section 4(a). Rather, it is an interpretation of the RFOA provision in Section 4(f)(1) that, as its enacted code heading confirms, defines one "lawful practice[]." And the interpretive guideline does *not* affirmatively construe Section 4(a) to provide for disparate impact claims; instead, it construes Section 4(f)(1) to require a showing of "business necessity" to establish that a practice with "adverse impact" is a "reasonable factor[] other than age." In short, there is no EEOC regulation determining Section 4(a)'s meaning to which the Court could possibly defer. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank,* 510 U.S. 86, 106-09 & n.17 (1993); *see generally SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (agency action may be sustained only on grounds relied upon by agency).

To be sure, the EEOC interpretation appears to rest on the assumption that the ADEA provides for disparate impact

claims. But judicial deference is owed, if at all, only to affirmative acts of interstitial lawmaking by an agency; no judicial deference is owed to apparent assumptions made by an agency in the course of addressing a distinct regulatory issue. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287-89 & n.5 (1978) (although "it is undoubtedly a fair inference that the Administrator thought" its regulation was statutorily authorized as an "emission standard," an "implication" was not sufficient and no deference was owed where the Administrator failed to give the issue "specific attention"); *see also SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Public Citizen v. HHS*, 332 F.3d 654, 661 (D.C. Cir. 2003).

The EEOC's General Counsel's appellate briefs—arguing that the ADEA does provide for disparate impact claims—do not fill the regulatory vacuum. Agency counsel cannot change what a regulation says or the authority under which a regulation was promulgated. Agency counsel's litigation positions are "hardly tantamount to an administrative interpretation" of the relevant statutory and regulatory provisions. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). On the contrary, as in *Betts* (where the EEOC attempted in this Court to transfer its invalid "cost-justification" interpretation of the term "subterfuge" in Section 4(f)(2) to the statutory phrase "such as a retirement, pension or insurance plan"), this Court should conclude that the EEOC's litigation positions are "entitled to little, if any, deference." *Betts*, 492 U.S. at 174-75.

Second, there is in all events no merit to the EEOC's view that would warrant judicial deference.

a. Contrary to petitioners' suggestion (Pet. Br. at 2, 5, 8, 33-35), the EEOC's view is "at sharp variance with the

original interpretation" of the ADEA by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 102. The DOL's 1968 interpretive bulletin did not address the scope of Section 4(a) and its prohibitions, much less state that Section 4(a) prohibits facially neutral practices with unjustified disparate impact. *See* 29 C.F.R. §§ 860.103-.104 (1970) (App. 46a-50a). On the contrary, the bulletin addressed the RFOA provision and stated, 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" (*id.* § 860.103(b)); "[t]he clear purpose [of the provision] 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)). This is disparate treatment language.

To be sure, the bulletin provided some objective guides that the DOL indicated would support a "differentiation based on reasonable factors other than age." *Id.* § 860.103. But those guides do not implicitly reflect, much less expressly embrace, that the ADEA provides for disparate impact claims. 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 in its enforcement will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)), these guides explained what an employer had to do to ensure that no enforcement action was initiated by the DOL to challenge an

employer action allegedly based on a reasonable factor other than age. In other words, as this Court held in construing other provisions of the DOL's interpretive bulletin, these guidelines stated "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, a range of commentators have so read the DOL's bulletin and have stated that the original DOL interpretations did *not* embrace the disparate impact doctrine. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 96; Player, *Title VII Transplant*, at 1273; Evan H. Pontz, Comment, *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, 447 (1985). Petitioners' contrary argument is in error.

b. The EEOC's change from the DOL's prior course was precipitous and without thorough consideration. The EEOC's guidelines were proposed only months after the EEOC assumed responsibility for enforcing the ADEA, and long before the EEOC had gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,861 (1979) (App. 51a-53a). Moreover, although the EEOC has substantive rulemaking authority under the ADEA, the EEOC chose to issue its guidelines only as "interpretive rules or statements of policy" and without complying with the 30-day notice period required for the imposition of substantive rules (through 29 U.S.C. § 628's express incorporation of the Administrative Procedure Act's rulemaking provisions). *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,724 (1981) (App. 54a). Most

importantly, the EEOC issued the pertinent guideline as an interpretation of Section 4(f)(1), not of Section 4(a); did not affirmatively conclude that Section 4(a)(1) provides for disparate impact claims; and, as justification for its construction of Section 4(f)(1), simply cited this Court's decision in *Griggs*, which dealt only with Title VII and says nothing about either Section 4(a) or Section 4(f)(1), and the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975), which did not even involve a disparate impact claim. *See* 46 Fed. Reg. at 47,725 (App. 55a). Notably, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's earlier issued opinion dissenting from the denial of *certiorari* in *Markham v. Geller*, 451 U.S. 945, which did address these issues.

c. The EEOC's apparent assumption that the ADEA provides for disparate impact claims is bound up in a regulatory interpretation that is itself legally unreasonable. Specifically, the EEOC regulation equates the RFOA provision with a "business necessity" standard and requires compliance with the Uniform Guidelines for Employee Selection. But those guidelines expressly 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). Moreover, a "business necessity" exists under those guidelines only if, among other things, a challenged practice is "job related" and no equally effective alternative practice with less adverse impact is available. *See id.* §§ 1607.3(B), 1607.6(A). Yet there is no dictionary definition or legal precedent that even arguably allows the term "reasonable" in the RFOA to be given such a restrictive meaning. Indeed, 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 declared, a standard "of reasonable necessity[] [is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). In short, the EEOC interpretive regulation on Section 4(f)(1) improperly equated these two distinct standards and is not a legally valid construction of that statutory provision, much less of the meaning of Section 4(a).

d. Most fundamentally, the EEOC interpretation is invalid as contrary to law. Twice before this Court has held that interpretations of the ADEA announced by the EEOC in the 1981 interpretive bulletin went beyond the EEOC's legal authority and thus were not worthy of the Court's deference. *See General Dynamics*, 124 S. Ct. at 1248; *Betts*, 492 U.S. at 171. For the reasons stated throughout this brief, the same is true here.

Finally, petitioners plainly err in suggesting (Pet. Br. at 35-36) that "Congress can fairly be deemed to have acquiesced in the [EEOC's] regulatory construction of the statute." As illustrated by then-Justice Rehnquist's opinion in *Markham*, 451 U.S. at 947-49, the DOJ's briefs opposing recognition of ADEA disparate impact claims, *see*, *e.g.*, App. 58a-63a, reprinting Brief for Appellant, *Arnold v. Postmaster Gen.*, Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988), and the substantial circuit split that exists on the issue, there has never been an administrative and judicial consensus in which Congress could have acquiesced. *See Fogerty*, 510 U.S. at 532. But, in all events, in order to acquiesce in or ratify any such position, Congress would have at least had to "reenact" or "amend" the pertinent substantive provisions of the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress has not done so, and amendment of other statutory provisions—even related ones—is not legally sufficient. *See*, *e.g.*, *Betts*, 492 U.S. at 168. Because Congress may legislate

only through bills passed by both Houses and presented to the President, legislative acquiescence may not be found in the mere failure of Congress to disapprove the assumption about disparate impact claims arguably made in the EEOC's 1981 guidelines and later argued in court by the EEOC's lawyers. *See Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf*, 511 U.S. at 264.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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