No. 03-___

IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi.

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

PETITION FOR A WRIT OF CERTIORARI

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February 10, 2004

QUESTION PRESENTED

Should this Court grant certiorari to resolve the five-to-three circuit conflict over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Willie Allen; Joe L. Austin; Jerry Brister; Gloria Burns; Jacqueline Butler; Harvey L. Davis; William H. Gladney, Sr.; Tommie L. Grant; Ned Garner; William R. Gardner; Samuel Haymer; James J. Howard; Warren E. Hull; Thomas Hunter; Arlander Luallen, Jr.; Willie Mack; Eugene McDonald; Carey N. Parkinson; Ruthie Porter; Cleotha Ratliff; John M. Russell; David L. Shaw; Wayne Simpson, Jr.; Richard J. Smith; Kenneth W. Stemmons; James B. Strawbridge; Alphonso Taylor; Miller Weston; and Shirley Williams.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Azel P. Smith, *et al*., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-38a) is published at 351 F.3d 183. The district court's order granting summary judgment in favor of respondents (Pet. App. 39a-49a), dated September 6, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, provides in relevant part:

(a) It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *
>
> * * * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age * * *.

29 U.S.C. 623

STATEMENT

Petitioners allege that respondents violated the Age Discrimination in Employment Act by adopting a pay policy that has a disparate impact on employees who are forty years of age and older. Acknowledging the deep split among the courts of appeals, the Fifth Circuit held that disparate impact claims are not cognizable under the ADEA.

1. The ADEA makes it unlawful for an employer "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," 29 U.S.C. 623(a)(1), or "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 employee, because of such individual's age," *id.* § 623(a)(2). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court interpreted nearly identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), to encompass both disparate treatment and disparate impact theories of liability.

Disparate treatment claims allege intentional discrimination on the basis of a protected characteristic. To succeed on a disparate treatment theory, plaintiffs must show that a protected characteristic "actually played a role [in the employer's decision] and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In contrast, disparate impact claims—such as the claim at issue in this petition—do not depend on the motivation for the challenged practice. Under a disparate impact theory, an employee must instead demonstrate that an employer's plan or policy adversely affected a protected group in comparison to members of a non-protected group. *See Hazen Paper Co.*, 507 U.S. at 609 (citing *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)); *Griggs*, 401 U.S. at 431 (characterizing disparate impact claims as looking beyond "overt discrimination * * * [to] practices that are fair in form, but discriminatory in operation").

2. Petitioners are police officers and public safety officers employed by respondents, the City of Jackson, Mississippi and its police department. Petitioners are all at least forty years of age and therefore fall within the class protected by the ADEA. *See* 29 U.S.C. 631(a).

Respondents recalibrated their employee pay scale by adopting a Performance Pay Plan on October 1, 1998, and revising it effective March 1, 1999 ("Pay Plan"). The new scale progresses from Step 1 to Step 5 in half-step increments, with each half step corresponding to a defined pay range. The Pay Plan initially assigned employees with fewer than five years of service to Step 1 and employees with five or more years of service to Step 1.5. Each employee was entitled to at least a 2% raise from his or her pre-Pay Plan salary. If the initial assignment failed to increase the employee's salary by at least 2%, the employee was then placed in the lowest half step that resulted in at least a 2% increase from his or her previous salary. Employees whose pay was already higher than the minimum salary in the Step 5 range received only a 2% raise.

Petitioners allege that the Pay Plan had a disparate impact on employees who are age forty or older by providing them

with proportionately smaller wage increases than were granted to employees under the age of forty.[1]

3. The district court granted respondents' motion for summary judgment on the grounds that the ADEA "does not allow for claims of disparate impact." Pet. App. 47a-48a. Although acknowledging that "[t]he Circuit Courts that have considered the issue are split," *id.* at 46a, the district court followed the circuits that have refused to allow disparate impact claims. Emphasizing the Eleventh Circuit's view that "the use of factors correlated with age * * * did not rely on 'inaccurate and stigmatizing stereotypes' and was acceptable," *id.* at 47a (quoting *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001) (internal citation omitted), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002)), the district court concluded that *Hazen Paper* strongly suggested that "no disparate impact claim should lie in cases such as this one." Pet. App. 47a.

4. A divided panel of the court of appeals affirmed. The majority opinion acknowledged the current "debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim," Pet. App. 6a, and, "[a]fter surveying the well-traversed arguments" of this debate, *id.* at 7a, concluded that "a disparate impact theory of liability is not cognizable under the ADEA," *id.* at 21a. The majority rejected the approach taken by the Second, Eighth, and Ninth Circuits, aligning itself instead with the First, Seventh, Tenth, and Eleventh Circuits.

The court of appeals based its decision on the statute's text and legislative history. The court acknowledged the similarities between Title VII and the ADEA, but stressed that the ADEA allows employers to differentiate between

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[1] Petitioners also alleged that the Pay Plan constituted illegal disparate treatment. The Fifth Circuit remanded that claim to the district court, and it is not at issue here.

employees based upon "reasonable factors other than age," 29 U.S.C. 623(f)(1), while Title VII does not. The court of appeals then noted that in *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981), this Court interpreted the Equal Pay Act's exception for different treatment based on "any other factor other than sex," 29 U.S.C. 206(d)(1), to preclude disparate impact claims. Pet. App. 16a. It concluded that the "reasonable factors other than age" exception makes the ADEA more like the Equal Pay Act than Title VII. *Id.* at 17a. The majority also considered the ADEA's legislative history and concluded that Congress only intended the statute to prohibit intentional discrimination based on age. *Id.* at 18a-22a.

Judge Stewart dissented vigorously, arguing that the ADEA's "reasonable factors other than age" language merely codified a business necessity exception to disparate impact claims analogous to the one available under Title VII, as opposed to prohibiting such claims outright. He further rejected the majority's reliance on the Equal Pay Act. He argued that the majority ignored the fact that the "terms 'any' [as found in the EPA] and 'reasonable' [as found in the ADEA] are not synonymous." Pet. App. 32a. Turning to the legislative history, Judge Stewart noted that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of *concealed* discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." *Id.* at 34a. Ultimately, Judge Stewart concluded that the majority erred when it refused to find disparate impact claims cognizable under the ADEA.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act. Given the importance of the ADEA to the American workplace, such a conflict is

untenable. This case presents the ideal vehicle to decide this important and frequently litigated issue. Finally, the Fifth Circuit erred in concluding that the ADEA forbids disparate impact claims despite this Court's holding that the indistinguishable language of Title VII permits such actions. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Certiorari accordingly should be granted.

I. The Courts of Appeals Are Intractably Divided over the Question Presented.

In its opinion, the Fifth Circuit acknowledged that there is a longstanding and deep conflict among the circuits over whether disparate impact claims are cognizable under the ADEA. Pet. App. 6a-7a. This Court granted certiorari to resolve that question in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), but ultimately dismissed the writ as improvidently granted. 535 U.S 228 (2002). Indeed, the question has been noted as appropriate for resolution for more than two decades. *See Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari).

Three circuits—the Second, Eighth, and Ninth—squarely hold that disparate impact claims are cognizable under the ADEA. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller v. Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis v. Aerospace Community. Credit Union*, 114 F.3d 745, 750 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom, Kelleher v. Aerospace Cmty. Credit Union*, 523 U.S. 1062 (1998); *Frank v. United Airlines Inc.*, 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001).

In contrast, five circuits—the First, Fifth, Seventh, Tenth, and Eleventh—apply the contrary rule. These courts, while acknowledging that the circuits are split on this issue, have held that disparate impact claims may not be brought under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (CA1 1999); *EEOC v. Francis W. Parker School*, 41 F.3d

1073, 1076-78, 1079 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002).

This circuit split has not been resolved by this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Prior to *Hazen Paper*, most courts that considered the issue had held that disparate impact claims were available under the ADEA. *See Holt v. Gamewell Corp.*, 797 F.2d 36 (CA1 1986); *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106 (CA2 1992); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (CA3 1988), *cert. denied*, 493 U.S. 944 (1989); *Wooden v. Bd. of Educ. of Jefferson Cty., Ky.*, 931 F.2d 376 (CA6 1991); *Monroe v. United Airlines, Inc.*, 736 F.2d 394 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983); *MacPherson v. Univ. of Montevallo*, 922 F.2d 766 (CA11 1991). *See also Faulkner v. Super Valu Stores*, 3 F.3d 1419 (CA10 1993). Even though *Hazen Paper* expressly left open the question whether the ADEA allows disparate impact claims, 507 U.S. at 610, it caused some lower courts "to rethink the viability of disparate impact doctrine in the ADEA context." *Mullin*, 164 F.3d at 700.

But since *Hazen Paper*, several circuits have firmly adhered to their precedents holding that disparate impact claims are cognizable. These circuits have announced that they will not change their interpretation "absent a 'clear indication' that it has been overruled." *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (CA8 1996) (internal citation omitted). *See also Smith v. Xerox Corp.*, 196 F.3d at 367 n.6 (reaffirming the Second Circuit's recognition of disparate

impact claims even though "[s]everal circuits have rejected or called into questions the availability of a disparate impact cause of action under the ADEA in light of *Hazen*"); *Frank*, 216 F.3d 845 (holding that the district court erred by concluding that disparate impact claims were no longer available after *Hazen Paper*).

This Court's intervention is therefore required because the circuit conflict is intractable. While some courts reconsidered their positions in the immediate aftermath of *Hazen Paper*, it has now been over a decade since that decision. In that time, the courts of appeals have solidified their positions, consistently denying petitions for rehearing and rehearing en banc. *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (CA9 1992), *as amended on denial of reh'g and reh'g en banc* (July 6, 1993); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996). Indeed, the circuits' positions have become so entrenched that the courts no longer discuss the reasoning behind their conclusions, but merely reiterate that a disparate impact claim is, or is not, cognizable within that circuit. *See, e.g.*, *Adams v. Ameritech Services*, 231 F.3d 414, 422 (CA7 2000), *reh'g and reh'g en banc denied* (Jan. 9, 2001) (stating simply that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit"); *Lewis*, 114 F.3d at 750 (noting merely that "[a]lthough the Supreme Court has yet to rule on this legal question, [the Eighth Circuit] continues to recognize the validity of such claims under the ADEA") (internal citation omitted).

The circuits' firm commitments to their conflicting views demonstrate that this Court's intervention is necessary.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

Almost seventy million employees age forty and over—nearly half of the civilian labor force—are protected by the ADEA. U.S. Department of Labor, Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=ln (last visited Feb. 2, 2004). Because the Act covers so many employees, the question presented is of great importance to the national economy.

It is therefore unsurprising that eight circuits have taken a position on this question and that most have faced the issue repeatedly. For example, since *Hazen Paper*, the Eighth Circuit has published nine decisions in which disparate impact claims were squarely presented.[2] Furthermore, federal district courts have reported at least ninety-five opinions since *Hazen Paper* in which disparate impact was alleged.[3]

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[2] *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (CA8 2001); *Allen v. Energy Corp., Inc.*, 193 F.3d 1010 (CA8 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (CA8 1999); *Lewis*, 114 F.3d 745; *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (CA8 1997); *Smith v. City of Des Moines*, 99 F.3d 1466; *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (CA8 1996); *Houghton v. SIPCO, Inc.*, 38 F.3d 953 (CA8 1994); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (CA8 1994).

[3] This statistic was derived from a Westlaw search for reported U.S. district court cases in which the words "disparate impact" appeared within 20 words of "ADEA" or "Age Discrimination in Employment Act" (excluding any cases in which the court was merely describing the theory, as opposed to considering its relevance to that case). This statistic underestimates the number of disparate impact claims that were actually brought, as many district court rulings were unreported. Moreover, this number of course excludes the many disparate impact claims that have been settled, as well as the otherwise valid claims that plaintiffs have forgone pursuing in the five circuits that currently forbid such claims. And, naturally, the potential exposure to liability under the ADEA affects employers' decisions in designing

The importance of this question is heightened because it is outcome determinative. Where disparate impact claims are available, employees have been able to vindicate their rights in the federal courts. For example, in *EEOC v. Hickman Mills Consolidated School District No. 1*, 99 F. Supp. 2d 1070 (W.D. Mo. 2000), the court granted summary judgment in favor of plaintiffs on their disparate impact claim. Their employer had a policy that decreased early retirement benefits by 10% for every year a teacher worked beyond the date when he or she was first eligible for full retirement. Because plaintiffs showed through statistical analysis that "as age at retirement went up, the average percent and dollar amount of benefit went down," *id.* at 1077, and the school district "failed to submit any substantial proof of savings" to justify its policy, *id.* at 1078, plaintiffs prevailed on their disparate impact claim. In contrast, where the cognizability of such claims has been rejected, employees are left without a remedy when they have been subjected to policies that unfairly disadvantage them.

The frequent recurrence of this issue and its importance to tens of millions of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies with the location of his or her employment. As long as the circuits disagree, police officers in Jackson, Missouri (within the Eighth Circuit) are protected against policies that disproportionately affect older employees, whereas officers in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of corporations with multiple offices nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within

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their employment policies, meaning that the law's impact cannot be measured in terms of the number of litigated cases alone.

circuits that allow disparate impact claims of the rights enjoyed by their neighbors.

The central role that the ADEA plays in millions of Americans' employment relationships underscores the need for clear guidance from this Court.

III. This Case Is an Ideal Vehicle to Resolve the Question Presented.

Petitioners' complaint sets out a prototypical disparate impact claim by challenging the effect of a specific employment practice upon a class of protected workers. Petitioners challenge the respondents' 1998 adoption of a new Pay Plan, which set new salary ranges based on employees' years of service and previous earnings. Using statistical analysis of the Pay Plan's effects on all employees, petitioners allege that the adoption of the Plan had a disparate impact upon the class of employees protected by the ADEA. The Complaint expressly alleges that the Plan "increased the pay for younger workers at the expense of the officers and employees who were over 40 years of age." Complaint ¶ 9. Petitioners' expert subsequently determined that the Plan "resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty." Pet. App. 5a.

Thus, petitioners' claim mirrors the kind of disparate impact claims this Court has recognized under the nearly identical language of Title VII. For example, in *Griggs*, this Court invalidated a power company's promotion policy that required either a high school diploma or an intelligence test, since that policy disproportionately limited employment opportunities for racial minorities and bore no demonstrable relationship to job performance. 401 U.S. at 431. Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), this Court invalidated an Alabama policy requiring a minimum height and weight for prison guards, since the policy had a disparate impact on female applicants and the state did not prove that it was correlated with job performance. Congress

eventually amended Title VII to codify this proscription of employment practices that have a disparate impact upon a protected class but are unjustified by a business necessity. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). This case, like *Griggs*, *Dothard*, and actions arising under § 2000e-2(k), challenges a clear, nondiscretionary employment practice with a calculable disproportionate impact on a protected class.

Courts in other circuits have found liability on disparate impact claims analogous to the allegations presented in petitioners' complaint. In *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981), for example, the Second Circuit held that a school district's policy of refusing to hire teachers with more than five years of experience had a disparate impact upon older workers, given the plaintiffs' statistical evidence showing a "high correlation between experience and membership in the protected age group." *Id.* at 1033. Similarly, in *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983), the Eighth Circuit found that a policy reserving spots for less expensive, non-tenured professors on a new state college faculty had a disparate impact on employees protected by the ADEA, given the plaintiffs' statistical evidence of a "positive, significant correlation between age and salary for faculty members." *Id.* at 690. The Pay Plan at issue here is similar to the challenged employment practices in *Geller* and *Leftwich*, and petitioners intend to introduce similar evidence to show that the Pay Plan has a disparate impact on protected workers.

The foregoing illustrates why this case, unlike *Adams v. Florida Power Corp.*, 255 F.3d 1322 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), and *Thweatt v. Electronic Data Systems Corp.*, *cert. denied*, 124 S. Ct. 922 (2003), is the ideal vehicle to resolve the question presented. This case is fundamentally different from *Adams*, in which members of this Court pressed the petitioners to identify "the precise rule * * * that's comparable to a high school diploma," as in *Griggs*, or "a height and weight" standard, as

in *Dothard*. Oral Arg. Trans., No. 01-584, *Adams v. Florida Power Corp.*, at 15. Adams' counsel was unable to identify any practice that caused the disparate impact, save the employer's general "decision to downsize itself." *Id.* at 7. *See also id.* at 15-16. In contrast to *Adams*, but like *Griggs* and *Dothard*, petitioners here challenge a specific employment practice—the Pay Plan, an explicit, written policy.

This case is also very different from *Thweatt*, in which the petitioners asked this Court to review a "Performance Management *Process*" that used manager evaluations to rank employees, to determine compensation, and to select candidates for termination. Pet. for Cert., No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 9 (emphasis added). The respondents in *Thweatt* correctly noted that the petitioner's claim was inappropriate under a disparate impact theory since it challenged a discretionary review policy where "members of the protected class were evaluated and ranked at different times, by different decision-makers, based on different considerations or criteria, as part of a multi-layered selection process." Brief in Opposition, No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 11. Unlike the "process" at issue in *Thweatt*, the Pay Plan at issue here was non-discretionary and assigned petitioners to steps within the new pay scale based solely on their tenure and their current salary.

As the effects of this employment practice can be precisely measured in monetary terms, petitioners had little difficulty performing the kind of statistical analysis required for a disparate impact claim. Indeed, the ability to consider the statistical effect of the Pay Plan on the protected class, without reference to respondents' possible motivations for changing its policy, makes this case an ideal vehicle to consider the disparate impact claim as distinct from the disparate treatment claim.

IV. The Fifth Circuit's Decision Is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *." 42 U.S.C. 2000e-2(a)(1). In 1971, this Court held that Title VII's language authorizes both disparate impact and disparate treatment claims for employment discrimination. *See Griggs*, 401 U.S. at 431. In 1967, Congress used precisely the same language in drafting the Age Discrimination in Employment Act, merely substituting the word "age" for the words "race, color, religion, sex, or national origin." 29 U.S.C. 623(a)(1). Three circuit courts have correctly held that the text of the ADEA, like the identical text of Title VII on which it was based, authorizes both disparate impact and disparate treatment claims.

Congress' intent in enacting the ADEA can only be effected by recognizing disparate impact claims. The Act was passed to combat subtle age discrimination "based in large part on stereotypes unsupported by objective fact." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). Disparate impact claims are particularly appropriate to target these sorts of subtle employment biases. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (noting that Title VII disparate impact claims need not be limited to "cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination"). Limiting the ADEA only to disparate treatment claims would fall far short of Congress' goal of eradicating subtle discrimination against employees age forty and older, since disparate treatment claims fail "[u]nless it is proven that an employer intended to disfavor the plaintiff *because of* his membership in a protected class." *Watson*, 487 U.S. at 1002 (emphasis added).

The provision of the ADEA principally relied on by the Fifth Circuit majority, 29 U.S.C. 623(f), does not call for a different result. That provision exempts from the Act otherwise invidious differentiation that is "based on reasonable factors other than age." To be sure, that language,

as the majority noted, bears some similarity to the Equal Pay Act's exception for "any other factor other than sex," 29 U.S.C. 206(d)(1)(iv), which has been interpreted by this Court to prohibit disparate impact claims under the EPA. *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981). However, as Judge Stewart correctly noted in his dissent, "the flaw in the majority's logic is that the terms 'any' and 'reasonable' are not synonymous." Pet. App. 32a. A more appropriate interpretation of the "reasonable factors other than age" provision would render it a defense to liability, much like a showing of "business necessity" can negate a prima facie claim of disparate impact in a Title VII case. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). *See also Griggs*, 401 U.S. at 431.

The conclusion that disparate impact claims are cognizable under the ADEA is reinforced by the Equal Employment Opportunity Commission's settled interpretation of the Act. The EEOC's interpretation is owed deference, as it is the executive agency charged with enforcing the Act. *See* 29 U.S.C. 625 (noting transfer of the enforcement authority from the Secretary of Labor to the EEOC by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978)). The EEOC has stated that "[w]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). This interpretation, which has remained constant for more than two decades, was specifically drafted "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity." 46 Fed. Reg. 47,724 (Sept. 29, 1981).

Because this interpretation is set forth in a published regulation that was the product of formal notice-and-comment rulemaking—a fact the court below ignored, treating it as

though it were simply an informal, internal agency guideline, Pet. App. 10a n.5—it is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[4] *See* 46 Fed. Reg. 47,724 (describing the notice-and-comment proceedings for 29 C.F.R. 1625.7(d)). Even if *Chevron* were inapplicable, however, considerable deference would still be due. This Court has squarely held that EEOC interpretive guidelines are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002). The court of appeals wrongly suggested that no deference at all is due—indeed, that the guidelines need not even be treated as having "persuasive force"—because EEOC did not "thoughtfully consider[]" its interpretation but instead simply "assumed" the disparate impact theory was available.

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[4] The ADEA, unlike Title VII, provides the EEOC with authority to promulgate substantive rules and regulations to carry out the statute. *Compare* 29 U.S.C. 628 (permitting the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]") *with* 42 U.S.C. 2000e-12(a) (permitting the EEOC "to issue * * * suitable *procedural* regulations to carry out [Title VII]") (emphasis added). The Commission's interpretative regulations under the ADEA are therefore distinct from the more limited interpretative guidelines that the EEOC may issue under Title VII. Thus, this Court's previous refusal to provide *Chevron* deference to the EEOC guidelines interpreting Title VII, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002), is inapposite both because the agency's powers under the two statutes differ and because the Title VII guidelines were not a product of notice-and-comment rulemaking like the ADEA regulations at issue here. Thus, the courts of appeals have applied *Chevron* deference to EEOC's interpretations of the ADEA in numerous cases, *see, e.g.*, *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099-1100 (CA9 1994) (giving Chevron to EEOC interpretation of the ADEA); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (CA7 1994) (same).

Pet. App. 10a n.5. This suggestion flatly ignores the notice-and-comment procedures EEOC employed, as well as the fact that the agency has maintained its interpretation consistently for twenty years notwithstanding the unspecified "subsequent developments" to which the court of appeals obliquely referred. *Id.*

Even had it not sought public comment, EEOC's own substantial expertise would render its interpretations "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. *See Griggs*, 401 U.S. at 434 (giving "great deference" to the EEOC's interpretation of federal employment law); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (relying on the EEOC's guidelines to interpret the scope of the bona fide occupational qualification exception to the ADEA). This Court has held that consistent, long-held agency interpretations merit particularly deferential treatment under *Skidmore*. *See, e.g.*, *Alaska Dep't of Env'tl Conservation v. EPA*, __ U.S. __, 72 U.S.L.W. 4133 (holding that because petitioner's arguments "do not persuade us to *reject as impermissible* EPA's longstanding, consistently maintained interpretation," that interpretation, as embodied in an interpretive guideline, must be upheld (emphasis added)). Moreover, EEOC's interpretations of its own regulations, such as those contained in 46 Fed. Reg. 47,724, are of course entitled to a very high degree of deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation—even one presented only in a legal brief—is "controlling unless plainly erroneous or inconsistent with the regulation" (quotation marks omitted)).

* * * *

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which ADEA cases are litigated. As a prototypical disparate impact claim that challenges a

particular employment practice through the use of statistical analysis, this case would serve as an ideal vehicle to examine whether such claims are actionable under the ADEA. Finally, the decision reached by the court below incorrectly barred petitioners' disparate impact claims, and should be reversed.

CONCLUSION

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

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