No. 03-1160

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents acknowledge that the petition for certiorari satisfies all of the criteria for plenary review in this Court. Respondents suggest in passing, however, that the complaint may not state a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq.* We write briefly to answer that suggestion.

1. The petition established that the complaint in this case presents a prototypical disparate impact claim. Pet. 11-13. Plaintiffs make out a prima facie disparate impact claim by "identifying the specific employment practice that is challenged" and providing "statistical evidence * * * sufficient to show that the practice in question has caused" the discriminatory effect. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Petitioners have met this burden by alleging that the respondents' Pay Plan, a written policy enacting a one-time recalibration of the salary scale, "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.

2. Respondents dispute none of the foregoing. Nor do they contend that the complaint presents anything less than an ideal vehicle in which to decide the question presented. Although the significance of respondents' point is unclear, they do assert that this Court "has held that the disparate impact doctrine is not applicable" to discriminatory compensation claims under Title VII. BIO 1. Not so. In fact, this Court suggested the opposite. See, *e.g.*, *Los Angeles* v. *Manhart*, 435 U.S. 702, 710 n.20 (1978) ("assuming [that] disparate-impact analysis applies to fringe benefits" under Title VII); see also *Wambheim* v. *J.C. Penney Co., Inc.*, 705 F.2d 1492, 1494 (CA9 1983) (holding, based on this Court's opinion in *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982), that "disparate impact analysis is appropriate" to challenge discrimination in "compensation, terms, conditions, or privileges of employment").

Congress's 1991 amendments to Title VII in turn confirmed what this Court's precedents had already suggested – that disparate impact claims are available under Title VII when an employer "discriminate[s] against any individual with respect to his compensation." 42 USC 2000e-2(a)(1); *id.* § 2000e-2(k)(1)(A)(i). See, *e.g.*, *Hemmings* v. *Tidyman's, Inc.*, 285 F.3d 1174, 1190 (CA9 2001) (sustaining a verdict in favor of female plaintiffs in a Title VII disparate impact challenge to the defendant's use of a subjective process for awarding salary and benefits); *Anderson* v. *Zubieta*, 180 F.3d 329, 339-40 (CADC 1999) (reversing the district court's grant of summary judgment and remanding plaintiffs' race- and national-origin-based disparate impact claim against defendants' pay policies for trial).

The cases cited by respondents involve the distinct context of sex discrimination, and their narrow holdings cannot be read to create a broad prohibition against all disparate impact claims attacking discriminatory compensation schemes. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), in holding that a plaintiff's disparate impact claim against a policy that denied sick pay to pregnant employees was precluded by this Court's opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), explicitly refused to decide whether disparate impact theory applies to all Title VII compensation claims. *Nashville Gas*, 434 U.S. at 144.[1]

Respondents' citations to *County of Washington* v. *Gunther*, 452 U.S. 161, 170-71 (1981), and *Manhart*, 435 U.S. at 710 n.20, simply beg the question presented by this case. They turn on a specific provision of the *Equal Pay Act* that applies only to *sex-based* discriminatory compensation

[1] Moreover, these portions of the holdings of *Gilbert* and *Nashville Gas* were superseded by the 1978 amendments to Title VII, which brought pregnancy within the ambit of the statute. *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 676 (1983); *Grant* v. *General Motors Corp.*, 908 F.2d 1303, 1307 (CA6 1990).

claims. As the dissent below explained, Pet. App. 32a, the circuits which agree that disparate impact claims are available under the ADEA hold that precedents under the Equal Pay Act, which provides an affirmative defense for wage differentials based upon "*any* other factor other than sex," 29 U.S.C. 206(d) (emphasis added), are inapposite to the ADEA, which contains an affirmative defense only for "*reasonable* factors other than age," *id.* 623(f) (emphasis added).

2. Respondents also contend that suits challenging an isolated component of a pay scheme do not state a disparate impact claim. BIO 2. Even if true, that is irrelevant, for it does not describe this case. Petitioners challenge the entire Pay Plan, the purpose and effect of which was to recalibrate respondents' pay scale. Petitioners make out a strong prima facie disparate impact claim by offering statistical evidence of the Plan's discriminatory effect upon employees age forty and older. Pet. 11-13.

This case is therefore distinguishable from the decisions cited by respondents, in which the plaintiffs challenged only a narrow component of a complex compensation scheme and failed to offer sufficient evidence to make out a prima facie disparate impact claim. In *Finnegan* v. *Trans World Airlines*, 967 F.2d 1161, 1163-64 (CA7 1992), the plaintiffs failed to make out a prima facie disparate impact claim because they challenged only the reduction of a single benefit (vacation time) in the context of a major cost-cutting plan designed to avoid bankruptcy. And in *EEOC* v. *Governor Mifflin School District*, 623 F. Supp. 734, 743 (E.D. Pa. 1985), the plaintiffs failed to make out a prima facie disparate impact claim because they challenged only the mechanism by which *annual* raises at the top of the teacher pay scale were calculated.

But in any event, this Court's precedents do not preclude a disparate impact claim directed at one portion of a larger compensation scheme. Respondents' citation to *Gilbert* is inapt. *Gilbert* dismissed a disparate impact claim by female

employees on the ground that a disability insurance plan that excluded disabilities arising from pregnancy had no gender-based disparate impact. *Gilbert*, 429 U.S. at 137-40. It stands for no broader proposition. Even *Governor Mifflin*, cited approvingly by the respondents, conceded that *Gilbert* did not offer very strong support for the defendant's claims that "it is improper to focus on just one aspect of the compensation system." *Governor Mifflin*, 623 F. Supp. at 734.

In all events, the petition does not call on *this Court* to decide whether petitioners have a winning claim of disparate impact discrimination. That question will be left to the lower courts after remand. The only relevant point is that the complaint certainly states a viable claim of disparate impact discrimination, such that this case presents an appropriate vehicle in which to decide the question presented.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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[2] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, William B. Adams, and Jennifer J. Thomas. Clinic members David M. Cooper, Eric J. Feigin, Daniel S. Goldman, and Nicola J. Mrazek also participated.