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

RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The petition for a writ of *certiorari* essentially seeks review of the question whether so-called "disparate impact" claims are cognizable under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634. Although the decision below correctly resolves that question, if the Court is inclined to review the issue, respondents do not oppose the Court's granting of this petition in order so that it may do so.

As the petition suggests (Pet. 5-11), the question presented is one that satisfies the Court's published criteria for granting *certiorari*. *See* U.S. Supreme Court Rule 10(a). The courts of appeals are indeed deeply divided about whether disparate impact claims are cognizable under the ADEA, with decisions of the First, Fifth, Seventh, Tenth, and Eleventh Circuits conflicting with decisions of the Second, Eighth, and Ninth Circuits. *See* Pet. 6-8; Pet. App. 6a-7a. Furthermore, the question is one of national significance: Thousands of public and private employers engage, without discriminatory motive, in employment practices that disproportionately affect employees of different ages. *See* Richard A. Posner, *Aging and Old Age* 51-58, 72-78, 115-17, 358-60 (1995). Indeed, the question presented here is the same as the question upon which the Court initially granted *certiorari* in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), *cert. dismissed*, 535 U.S. 228 (2002).

The petition for a writ of *certiorari* also correctly notes (Pet. 6-11) that the decision below squarely presents the question upon which the courts of appeals have divided. To be sure, the complaint in this case raises a discriminatory *compensation* claim; and, although the petition does not acknowledge it (Pet. 11-13), even under Title VII of the Civil Rights Act of 1964, this Court has held that the disparate impact doctrine is not applicable to such claims. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981); *Los Angeles v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978); *cf.*

Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977) (declining to decide whether disparate impact doctrine applies to cases arising under subsection 703(a)(1), the provision applicable to discriminatory compensation claims). In addition, petitioners' challenge to respondents' pay plan focuses on salary *increases* rather than on the salaries themselves; and, although the petition does not recognize it (Pet. 11-13), this Court and other courts have held that, even where the disparate impact doctrine may be applicable, such claims cannot properly isolate and challenge a single component of a pay plan, benefit plan, or other integrated employment system that treats the protected class of employees more favorably overall. *See, e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 138-39 (1976); *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163-64 (7th Cir. 1992); *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 744 (E.D. Pa. 1985). But the court below did not rest its decision in this case on these narrower, more limited, grounds. Rather, the court below held, more broadly, that the disparate impact doctrine is not available under the ADEA for any kind of claim. *See* Pet. App. 2a, 7a-8a, 10a, 17a-18a, 21a-22a. As the petition argues, that is the precise rule of decision upon which the courts of appeals are so deeply divided.

Contrary to the assertions in the petition, however, the court below quite correctly held that disparate impact claims are not cognizable under the ADEA. The ADEA's prohibitory provisions, which apply to discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1) & (a)(2), are "read most naturally as outlawing only conduct motivated by age." Pet. App. 9a; *see also* Brief for Respondents in *Adams v. Florida Power Corp.*, No. 01-584 ("*Florida Power* Br.") at 7-9. This more natural construction of the statutory language is indeed compelled by other provisions of the ADEA that are not found in Title VII, including the provision in subsection 623(f)(1) which states in pertinent part that "[i]t shall not be unlawful . . . to take any action otherwise prohibited" by

subsection 623(a) "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1); *see* Pet. App. 11a-18a; *Florida Power* Br. at 10-14. The ADEA's legislative history and purposes confirm this view. *See* Pet. App. 18a-22a; *see also Florida Power* Br. at 16-19, 28-33.

Nonetheless, if the Court is inclined to consider this question and resolve the widespread conflict among the federal courts of appeals about it, respondents do not oppose the granting of this petition. Because the Fifth Circuit vacated the summary judgment dismissal of petitioners' disparate treatment claim as premature (Pet. App. 27a), this case is going back to the district court for further proceedings in all events. All parties to the litigation, including respondents, are better served by obtaining final clarification from this Court about whether disparate impact claims are cognizable under the ADEA prior to the conduct of any additional discovery or litigation in this case. Indeed, no party to the litigation would be well-served were this issue decided by this Court, in this case or in any other case, after the conduct of further proceedings below. Accordingly, if the Court is inclined to resolve the circuit split on the availability of disparate impact claims under the ADEA, respondents do not oppose the Court taking up the issue in this case at this time.

CONCLUSION

For these reasons, respondents do not oppose the granting of *certiorari* on the question whether disparate impact claims are cognizable under the ADEA.

Respectfully submitted,

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