No. 06-1505

In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL., PETITIONERS

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.,* bears the burden of persuasion on the "reasonable factors other than age" defense.

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INTEREST OF THE UNITED STATES

The question in this case is whether plaintiffs raising a disparate-impact claim under the Age Discrimination in Employment Act (ADEA or Act), 29 U.S.C. 621 *et seq.*, bear the burden of persuading the factfinder that the challenged employment practice is not based on "reasonable factors other than age" (RFOA), 29 U.S.C. 623(f)(1). The Equal Employment Opportunity Commission (EEOC) has responsibility for interpreting and enforcing the ADEA, and it has promulgated regulations concerning the allocation of the burden of proof with respect to the ADEA's RFOA provision. See 29 C.F.R. 1657(e) (discussed pp. 15-18, *infra*). The United States filed an amicus brief at the petition stage of this case at the invitation of the Court.

STATEMENT

1. Respondent Knolls Atomic Power Laboratory (KAPL) manages and operates a federally-owned research and development laboratory under contract with the Department of Energy. In 1996, in response to a government-imposed staffing limit, KAPL instituted an involuntary reduction in force (IRIF). Pet. App. 5a, 39a. To implement the IRIF, respondent instructed managers in units that were over-budget to rate their employees from 0 to 10 on three factors—performance, flexibility, and the criticality of their skills—and then add up to 10 points for years of service. After ranking employees based on their scores, managers were instructed to identify for layoff the lowest-ranked employees. *Id.* at 5a-6a, 40a. Pursuant to this procedure, 30 out of the 31 exempt employees selected for layoff were over 40 years old. *Id.* at 75a. At the time of the layoff, approximately 40% of the workforce was under age 40. *Id.* at 41a, 74a-75a.

To evaluate the results of the managers' selections, KAPL charged a review board with ensuring that the choices "adher[ed] to downsizing principles as well as minimal impact on the business and employees." Pet. App. 40a. The board did not, however, consider issues of age discrimination. *Id.* at 17a, 41a. KAPL's only analysis of the adverse impact of the layoff on older workers was a comparison of the average age of the workforce, before and after the IRIF. *Id.* at 17a, 40a-41a. Because the workforce comprised more than 2000 exempt employees, the average age was unlikely to be affected by loss of 31 employees of any age. *Id.* at 17a, 43a. KAPL's general manager and general counsel also reviewed the layoff lists by checking the math in the scoring and consulting with some managers to confirm that their decisions were "properly made" and "legiti-

mate." *Id.* at 17a-18a, 40a-41a (citation omitted). At the end of the process, all 31 employees selected for layoff received notices of termination. *Id.* at 40a-41a, 74a.

2. Petitioners are former KAPL employees who were laid off as a result of the IRIF. At the time of the layoff, all of the petitioners were over the age of 40. In 1997, they filed suit challenging their terminations under the ADEA and state law, alleging claims of both disparate treatment and disparate impact. Pet. App. 71a-72a. At trial, petitioners' expert testified both that the subjective criteria, "criticality" and "flexibility," were chiefly responsible for determining which employees would be laid off, and that the review procedures did not offer adequate protection to prevent managers' prejudices from influencing the outcome. *Id.* at 42a.

The jury was instructed that petitioners bore the ultimate burden of persuasion on their disparate-impact claims in accordance with the method of proof set forth in *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989), for disparate-impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.,* before its amendment in 1991. See Pet. Supp. C.A. Br. 7-8 & Exh. A. At the close of trial, the jury found for petitioners on the disparate-impact claims but for respondents on the disparate-treatment claims. Pet. App. 45a, 75a-76a; App. 62-75. The district court denied respondents' motion for judgment as a matter of law. Pet. App. 77a-102a, 153a.

3. The court of appeals affirmed. Pet. App. 33a-69a. The court analyzed the jury's disparate-impact verdict under the burden-shifting framework set out in *Wards Cove. Id.* at 54a-63a; see *id.* at 7a-8a. Under that framework, a plaintiff makes a prima facie case of disparate-impact discrimination by showing that a specific employ-

ment practice or policy had a significant disparate impact on a protected group. *Wards Cove*, 490 U.S. at 656-658. The burden then shifts to the employer to produce evidence of a business justification for the challenged practice. *Id.* at 659. Once such evidence is produced, the burden shifts back to the plaintiff to persuade the factfinder that the asserted business justification is merely a pretext for discrimination. The plaintiff may sustain that burden by showing that "other tests or selection devices, without a similarly undesirable [discriminatory] * * * effect, would also serve the employer's legitimate [business] interest." *Id.* at 660 (citation omitted). Under *Wards Cove*, the "ultimate burden of proving * * * discrimination * * * remains with the plaintiff *at all times*." *Ibid.*

Applying the *Wards Cove* framework to this case, the court of appeals held that petitioners adequately identified a specific employment practice—the "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility'" (Pet. App. 60a)—and proved that it caused a substantial adverse impact because of age. *Id.* at 59a. The court also determined that respondents offered a facially legitimate business justification for the IRIF: "to reduce [KAPL's] workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Ibid.* (citation omitted). The court concluded that petitioners nevertheless prevailed at the final step of the *Wards Cove* analysis because "[a]t least one suitable alternative" practice was clear from the record: KAPL could have designed an IRIF with "tests for criticality and flexibility that were less vulnerable to managerial bias." *Id.* at 60a-61a & n.8.

Respondents petitioned for a writ of certiorari. In their petition, they sought review of the court of appeals'

conclusion that a disparate-impact claim is available under the ADEA as well as of the evidentiary basis for the verdict. While the petition was pending, this Court issued its decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), holding that disparate-impact claims are cognizable under the ADEA. Following that decision, the Court granted the writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further proceedings. 544 U.S. 957 (2005).

4. On remand, a divided panel of the Second Circuit vacated the judgment of the district court and remanded the case with instructions to enter judgment for respondents. Pet. App. 1a-32a.

The court of appeals concluded that the analysis it had employed in its earlier decision was now "untenable" because the *Smith* Court concluded that the "'business necessity' test" applicable in Title VII disparate-impact cases after 1991 "is not applicable in the ADEA context." Pet. App. 9a (citing *Smith,* 544 U.S. at 239, 243). Instead, the court explained, the "appropriate test [under *Smith*] is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." *Ibid.* The court noted that the "reasonableness" test described in *Smith* "is derived primarily from" the provision of the ADEA stating that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where the differentiation is based on reasonable factors other than age," *i.e.*, the Act's RFOA provision. *Id.* at 9a-10a & n.4 (quoting 29 U.S.C. 623(f)(1)).

Turning to the issue of the burden of proof for "reasonableness," the court held that the "best reading of

the ADEA—in light of [*Smith*] and *Wards Cove*—is that the plaintiff bears the burden of persuading the fact-finder that any justification the employer proffers for its challenged practice is unreasonable." Pet. App. 11a. The court acknowledged that "[t]here is some force" to the view that the text of the ADEA places the burden of establishing an RFOA on the defendant. *Id.* at 13a. The court rejected that conclusion, however, based on three considerations apart from the statute's text: (1) that *Smith* "nowhere suggested" that defendants must prove the RFOA (*id.* at 11a-12a); (2) that "[a]ny other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification" (*id.* at 12a); and (3) that, because there may be a correlation between age and certain reasonable employment criteria, it "would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable" (*id.* at 12a-13a).

The court of appeals concluded that respondents met their burden of producing evidence of a legitimate business justification for the IRIF as well as the specific employment practice challenged by the plaintiffs. Pet. App. 15a. The court noted that respondents presented testimony that criteria such as flexibility and criticality were "ubiquitous components of 'systems for making personnel decisions,'" and that "the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.* at 16a.

By contrast, the court of appeals concluded, petitioners did not sustain their burden. The court noted that the reasonableness inquiry described in *Smith*, unlike

the business-necessity inquiry applicable in the Title VII context, does not ask "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." Pet. App. 16a (quoting *Smith*, 544 U.S. at 243). While "[t]here may have been other reasonable ways for [respondent] to achieve its goals," the court concluded that petitioners had not demonstrated that "the one selected" was "unreasonable." *Id.* at 19a (citations omitted).

Judge Pooler dissented. Pet. App. 21a-32a. In her view, the majority "improperly conflate[d] the analysis of proof of a [RFOA] with the legitimate business justification analysis [under *Wards Cove*]" and "err[ed] by assigning to plaintiffs the burden of proving that a RFOA does not exist." *Id.* at 21a. She explained that "existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA." *Id.* at 25a. In particular, she reasoned that Congress's inclusion of the RFOA provision among the ADEA's other exceptions to liability for actions "otherwise prohibited," including the exception for circumstances in which "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (BFOQ), 29 U.S.C. 623(f)(1), indicates that RFOA, like BFOQ, is an affirmative defense as to which the defendant bears the burden of proof. Pet. App. 26a-30a.

Judge Pooler suggested that, to establish an ADEA disparate-impact discrimination claim, plaintiffs must first establish that the employer's asserted business justification is merely a pretext for discrimination, pursuant to the "judicially crafted" *Wards Cove* framework. Once plaintiffs have discharged that burden, the burden shifts to the employer to prove under the RFOA's "stat-

utory exception to liability" that its practice is nevertheless based on "reasonable factors other than age." Pet. App. 24a-25a. In her view, nothing in *Smith* altered the burden of proof tied to the ADEA's RFOA provision, which is mandated by the "appropriate statutory analysis." *Id.* at 31a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that plaintiffs raising a claim of disparate-impact age discrimination under the ADEA bear the burden of persuading the factfinder that the adverse impact of the challenged employment practice was not based on a reasonable factor other than age.

The text and structure of the ADEA clearly indicate that the exception to liability for adverse effects "based on reasonable factors other than age," 29 U.S.C. 623(f)(1), is an affirmative defense to be established by the employer that asserts it. This Court has so interpreted the RFOA's neighboring exception to liability in cases in which age is a "bona fide occupational qualification," *id.*, as well as the similar exception for pay differentials "based on any other factor other than sex" under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1). And well-established rules of statutory construction support the conclusion that Congress intended the RFOA provision to operate as an affirmative defense as well.

That plain meaning interpretation is supported by agency practice. The federal agencies responsible for enforcement of the ADEA have long interpreted the ADEA's RFOA provision as creating an affirmative defense to be established by the employer, and Congress has acknowledged and embraced that interpretation in later amendments to the statute. The agencies' long-

standing position that the employer bears the burden of persuasion with respect to the RFOA defense is reasonable and entitled to deference.

This Court's decision in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), does not compel a different result. *Smith* did not address the burden of proof under the ADEA's RFOA provision. Although *Smith* makes clear that the scope of disparate-impact liability under the ADEA is "narrower" than under Title VII, *id.* at 240, it does not follow from that holding that plaintiffs must bear the burden of proving that the adverse impact of a challenged employment practice is *not* based on reasonable factors other than age. In identifying the RFOA provision as the way in which the ADEA is narrower than Title VII, the Court in *Smith* in no way suggested that the provision should not be given its natural reading and effect as an affirmative defense. Thus, nothing in *Smith* requires that plaintiffs bear the burden of persuasion with respect to the RFOA provision.

ARGUMENT

THE ADEA ASSIGNS TO THE EMPLOYER THE BURDEN OF PERSUADING THE FACTFINDER THAT A PRACTICE WITH A DISPARATE IMPACT ON OLDER WORKERS IS BASED ON REASONABLE FACTORS OTHER THAN AGE

The question in this case concerns the proper allocation of the burden of persuasion in a disparate-impact age discrimination case in which the employer seeks to avoid liability by invoking the ADEA's exception for differential treatment of older workers that is "based on reasonable factors other than age," 29 U.S.C. 623(f)(1). It is undisputed that, once plaintiffs have demonstrated that a particular employment practice has a disparate impact on older workers, the employer who seeks to de-

fend that practice on the ground that the adverse impact was based on a reasonable nonage factor must assert that defense and bears the burden of *production* with respect to the defense. See Br. in Opp. 1-2. The question is whether the employer also bears the burden of *persuasion* with respect to that defense. See, *e.g.*, *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (describing historical distinction between burdens of production and burdens of persuasion).

The text and structure of the ADEA answer that question in the affirmative: The RFOA provision creates an affirmative defense to liability for actions "otherwise prohibited" by the statute, and therefore assigns to the employer the burden of persuasion. Moreover, the federal agencies responsible for interpreting and enforcing the ADEA have long interpreted the RFOA provision to allocate that burden to the employer. Thus, even if the statutory language were susceptible to different interpretations, the responsible agencies' interpretation is, at a minimum, reasonable and entitled to deference.

A. The Text And Structure Of The ADEA Make Clear That The RFOA Provision Is An Affirmative Defense As To Which The Defendant Bears The Burden Of Persuasion

1. Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would 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)(2). As the plurality explained in *Smith*, the language of Section 4(a)(2) "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," such that "an

employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age." *Smith* v. *City of Jackson*, 544 U.S. 228, 236 & n.6 (2005) (plurality opinion). Section 4(a)(2) thus authorizes recovery for age discrimination on the "disparate impact" theory announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), for cases brought under Title VII, 42 U.S.C. 2000e *et seq.* See *Smith*, 544 U.S. at 232. As the plurality explained in *Smith*, a classification that adversely affects an employee because of that employee's age in violation of Section 4(a)(2) of the ADEA falls within "the very definition of disparate impact." *Id.* at 236 n.6 (plurality opinion).

The structure of the Act is telling. Section 4(a)(2) appears among a number of provisions that generally prohibit employment age discrimination with respect to workers at least 40 years old. 29 U.S.C. 623(a)-(c) and (e); see 29 U.S.C. 631. By contrast, Section 4(f), 29 U.S.C. 623(f), creates "exceptions" to those general prohibitions. S. Rep. No. 723, 90th Cong., 1st Sess. 9 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967). As relevant here, Section 4(f)(1)—the RFOA provision—provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) * * * 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(f)(1).

The most natural reading of Section 4(f) as a whole is that those exceptions for actions "otherwise prohibited" by the substantive discrimination provisions of the

ADEA, including the RFOA exception, constitute affirmative defenses that come into play after the plaintiff has established that the employer has taken action that would otherwise violate the Act. Indeed, in dictum, this Court has already generally characterized those provisions of the ADEA as "affirmative defenses." *TWA* v. *Thurston*, 469 U.S. 111, 122 (1985). And that squares with the background rule that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); accord *Schaffer*, 546 U.S. at 57 ("[T]he burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.").

Section 4(f)(1) therefore exempts the defendant from liability that it would "otherwise" incur only if it can persuade the factfinder that its actions were justified or excusable. As Judge Pooler observed, "[i]f plaintiffs were required to show that no RFOA existed, Congress logically would have included this provision within the liability sections, rather than within the exemption sections." Pet. App. 26a-27a. Congress's decision to place the RFOA provision with the statutory exemptions therefore has great significance when it comes to allocating the burden of persuasion with respect to that provision.

2. Consistent with that understanding, this Court has held that the RFOA provision's neighboring exception for actions "otherwise prohibited * * * where age is a bona fide occupational qualification" is an affirmative defense, see *Smith*, 544 U.S. at 233 n.3, to be established by the employer, see *Western Air Lines, Inc.* v.

Criswell, 472 U.S. 400, 416-417 & n.24 (1985)); cf. *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (construing Title VII provision to require defendant to prove BFOQ). The courts of appeals have similarly characterized other exceptions in Section 4(f) as affirmative defenses. See, *e.g.*, *Jankowitz* v. *Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 651 (8th Cir. 2005) (voluntary early retirement incentive plan under 29 U.S.C. 623(f)(2)(B)(ii)); *Erie County Retirees Ass'n* v. *County of Erie*, 220 F.3d 193, 199 n.3 (3d Cir. 2000) (employee benefit plan under 29 U.S.C. 623(f)(2)(B)(i)). Congress's placement of the RFOA provision among those exemptions from liability for actions "otherwise prohibited" by the substantive liability provisions of the statute strongly indicates that the RFOA, too, is an affirmative defense as to which the employer bears the burden of persuasion. Cf., *e.g.*, *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").

3. This Court has likewise interpreted the similarly worded exception in another employment discrimination statute, the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d)(1), which "added to § 6 of the Fair Labor Standards Act of 1938 the principle of equal pay for equal work regardless of sex." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190 (1974). The EPA creates an exception to liability similar to the ADEA's RFOA provision for differential pay "based on any other factor other than sex." 29 U.S.C. 206(d)(1); see also *Smith*, 544 U.S. at 239 n.11 (plurality opinion) (noting that the EPA's "any other factor" exception and the ADEA's RFOA exception are worded similarly, but that the RFOA exception is limited to "*reasonable* factors"). In *Corning Glass Works*, this Court interpreted that language to

establish an "affirmative defense on which the employer has the burden of proof." 417 U.S. at 196-197. The Court explained that, "while the Act is silent on this question, its structure and history * * * suggest that once the [plaintiff] has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *Id.* at 196. Thus, in the EPA context, the Court treated al the statutory exceptions the same, *viz.*, as affirmative defenses. In addition, the Court observed that this construction was "consistent with the general rule that the application of an exception under the Fair Labor Standards Act is a matter of an affirmative defense in which the employer has the burden of proof." *Id.* at 196-197.

The EPA was enacted as an amendment to the Fair Labor Standards Act (FLSA) shortly before the ADEA was enacted, and Congress looked to the FLSA as a model in drafting a number of provisions of the ADEA. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). "[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality opinion) (citing *Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)). Like the EPA, the ADEA assigns to employers the burden of establishing that otherwise unlawful actions are justified by factors other than discrimination against protected groups.

B. The Responsible Federal Agencies Have Long Interpreted The RFOA Provision As An Affirmative Defense As To Which The Employer Bears The Burden Of Persuasion

Consistent with ADEA's language and structure, and this Court's construction of the EPA's similarly worded exception to liability in *Corning Glass Works*, the agencies responsible for enforcing the ADEA have long interpreted the RFOA provision as creating an affirmative defense under which employers bear the burden of persuasion.

1. When the ADEA was first passed in 1967, the responsibility to enforce and administer the statute was vested in the Department of Labor (DOL). In 1968, less than a year after the passage of the Act, DOL promulgated a regulation providing that, "in accord with a long chain of decisions of the Supreme Court * * * with respect to other remedial labor legislation, all exceptions such as [RFOA] must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer." 29 C.F.R. 860.103(e) (1969).

2. In 1979, enforcement authority was transferred to the Equal Employment Opportunity Commission. See 29 U.S.C. 621 note. Since that time, both by regulation and in litigation, the EEOC has continued to construe the RFOA exception as an affirmative defense on which the employer bears the burden of proof. See 29 C.F.R. 1625.7(e) ("[T]he employer bears the burden of showing that the [RFOA] exists factually."); *Age Discrimination Employment Act*, 44 Fed. Reg. 68,861 (1979) (proposed interpretations) ("The burden of proof in establishing

that the differentiation was based on factors other than age is upon the employer.").[1]

[1] By its terms, 29 C.F.R. 1625.7(e) applies "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment." A separate subsection of the RFOA regulation provides: "When 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). The court of appeals concluded (Pet. App. 13a n.6), based on this regulatory language, that the EEOC construes the RFOA provision as an affirmative defense to be established by the employer only in disparate-treatment cases, and not disparate-impact cases. The court of appeals' conclusion is incorrect.

There is no indication in either the statutory or the regulatory text that Congress or the EEOC intended there to be one burden of proof for the RFOA provision in the disparate-*treatment* context and another in the disparate-*impact* context. To the contrary, from the outset the EEOC's position has been that the employer bears the burden of establishing RFOA in any age-discrimination case. 44 Fed. Reg. at 68,861. The current version of Section 1625.7(d) focuses on the distinct issue of business necessity (and takes a position that does not survive *Smith*—see 544 U.S. at 243; *id.* at 266 (O'Connor, J., concurring in judgment)), and does not address the burden of persuasion (though in context, it is clearly the defendant, not the plaintiff, who would be making the "claim" that the "factor other than age" was the basis for the challenged decision). Although this Court later held that the plaintiff bears the burden of persuading the factfinder on the business necessity, or business justification, in a Title VII disparate-impact case, see *Wards Cove,* 490 U.S. at 659-660, business necessity is not the test under the RFOA defense and the EEOC has continued to interpret the statute and regulations to make the ADEA's RFOA provision an affirmative defense on which the employer bears the burden of persuasion. See, *e.g.*, 29 C.F.R. 1625.7(e). Moreover, that the regulation is written in an awkward fashion or even mistaken in some other particular is not a reason to ignore the EEOC's clear and consistent position that the burden of persuasion quite naturally lies with the defendant. See *Smith*, 544 U.S. at 247 (Scalia, J., concurring).

To the extent there is any ambiguity in the statutory language of the ADEA, DOL's and EEOC's longstanding interpretation of the RFOA provision as an affirmative defense is entitled to deference. See, *e.g.*, *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) (holding that the EEOC's reasonable interpretation of ambiguous language in Title VII warrants deference); accord *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in judgment); see *id.* at 239-240 (plurality opinion). Deference is particularly appropriate where, as here, the interpretation is set forth in a regulation that was adopted soon after passage of the statute and has remained consistent thereafter. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The EEOC has, moreover, interpreted its regulations as assigning to the employer the duty to establish the applicability of the RFOA provision in both disparate-treatment and disparate-impact cases. See Gov't Br. as Amici Curiae Supporting Resp. at 23-27, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985) (No. 83-1545) (disparate treatment); EEOC Br. as Amicus Curiae at 5, 11, *Smith* v. *City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996) (No. 95-3802) (disparate impact) ("Consistent with the language of the provision, both the [EEOC] and the Department of Labor have long interpreted § 4(f)(1) as an affirmative defense to disparate impact claims under the ADEA."). In this case, after remand from this Court, the EEOC filed an amicus brief in the court of appeals in which it asserted that, under EEOC regulations, the RFOA provision is "an affirmative defense that the employer must establish." EEOC C.A. Br. on Remand 15. The EEOC's interpretation of its regulations, as explained in its amicus brief in this

and other cases, is consistent with the language of the statute and its other regulatory pronouncements and is therefore entitled to deference. See *FedEx* v. *Holowecki*, No. 06-1322 (Feb. 27, 2008), slip op. 6; *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Smith*, 544 U.S. at 244 n.1 (Scalia, J., concurring in part and concurring in judgment) (deferring to the EEOC's position as reflected in amicus briefs, including the EEOC's pre-remand amicus brief in the Second Circuit *in this case*).

3. Congress's subsequent actions also support the conclusion that employers bear the burden of proof under the RFOA provision. Although Congress has amended the ADEA, including Section 4(f), several times since 1968, it has never overriden DOL's or EEOC's regulations allocating the burden to the employer to establish that "otherwise prohibited" actions fall within the RFOA provision or the ADEA's other exceptions. On the contrary, Congress has drafted legislation on the premise that the agencies have correctly interpreted the language of Section 4(f).

In 1990, Congress amended the ADEA in response to this Court's decision in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158, 180 (1989). See Older Workers Benefits Protection Act (OWBPA), Pub. L. No. 101-433, § 101, 104 Stat. 978. *Betts* concerned Section 4(f)(2) of the ADEA, which then provided: "It shall not be unlawful for an employer * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. 623(f)(2) (1982); see *Betts*, 492 U.S. at 165. The Court interpreted that provision to be "not so much a defense to a charge of age discrimination as * * * a

description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id.* at 181. The Court accordingly held that, "when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving" that claim. *Ibid.*

In response to *Betts*, Congress amended Section 4(f)(2) to provide: "It shall not be unlawful for an employer * * * *to take any action otherwise prohibited* * * * to observe the terms of a bona fide employee benefit plan" under certain circumstances. 29 U.S.C. 623(f)(2) (emphasis added). The Senate Report described the Act as "overturn[ing] both the reasoning and holding of the Supreme Court in [*Betts*]," by, among other things, "reestablish[ing] that employers bear the burden of proving" "the affirmative defense for employee benefit plans." S. Rep. No. 263, 101st Cong., 2d Sess. 5 (1990). The Senate Report explained that the Act incorporated into the amended Section 4(f)(2) the "otherwise prohibited" language of Section 4(f)(1) specifically for the purpose of clarifying that Section 4(f)(2) establishes an affirmative defense to be proved by the defendant, noting that Section 4(f)(1)'s language "is commonly understood to signify an affirmative defense." *Id.* at 29-30. The Senate Report "note[d] with approval the uniform body of federal court decisions holding that the 'bona fide occupational qualification' exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof," and "likewise endorse[d] the position of the EEOC that the 'reasonable factors other than age' exception included in section

4(f)(1) is an affirmative defense for which the employer bears the burden of proof." *Ibid.* (citations omitted).[2]

In enacting the OWBPA, Congress acknowledged the EEOC's and DOL's interpretation of Section 4(f)(1), and it effectively ratified that interpretation by borrowing language from Section 4(f)(1) to make clear that Section 4(f)(2) also sets out an affirmative defense to be established by the employer. That Congress has embraced, rather than overridden, the interpretation of the agencies responsible for ADEA enforcement provides further support for the agencies' longstanding position that the burden of persuasion rests on the employer to establish

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[2] At the time the Senate Report was written, the draft of the OWBPA contained a provision that would have clarified that an employer "acting under paragraphs [(f)(1) or (f)(2)] shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act." See S. 1511, 101st Cong., 2d Sess. (1990). As enacted, however, the amended version of Section 4(f)(2) does not mention Section 4(f)(1), instead providing that "[a]n employer * * * acting under subparagraph (A), or clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter." 29 U.S.C. 623(f)(2). The history of that provision makes plain that Congress omitted the cross-reference to Section 4(f)(1) because it thought the reference superfluous, and not to signal that Section 4(f)(2) should be interpreted to allocate burdens of proof differently from Section 4(f)(1). Explaining the omission, the Senate managers stated:

> [T]he managers declare that they are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law. * * * * This bill overturns the Supreme Court's allocation of the burden of proof under paragraph 4(f)(2). Because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in *Betts*, the managers find no need to address it in this bill.

136 Cong. Rec. 25,353 (1990).

the RFOA defense. See *Associated Dry Goods*, 449 U.S. at 600 n.17.

C. Neither *Smith* Nor *Wards Cove* Supports Assigning The Burden Of Persuasion To Plaintiffs To Disprove The Employer's Entitlement To The RFOA Defense

Although the court of appeals acknowledged that "[t]here is some force" to the argument based on the text and structure of the ADEA that the RFOA provision should be interpreted as an affirmative defense to be established by the employer, Pet. App. 13a, it held that this interpretation "does not withstand" this Court's decision in *Smith*, *id.* at 13a-14a. That conclusion is incorrect. The Court in *Smith* did not directly address the burden of proof question presented by this case, and the Court's decision in *Smith* cannot be read to resolve that question.

1. In *Smith*, the Court considered the viability of a disparate-impact claim brought by senior police officers who were challenging a pay plan that granted proportionately higher raises to junior officers. In affirming dismissal of the claim, the Court held that disparate-impact claims are cognizable under the ADEA, but that the scope of ADEA disparate-impact liability "is narrower" than under Title VII, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. 544 U.S. at 238-242. The Court pointed in particular to two textual differences between Title VII and the ADEA. First, the Court noted that the ADEA contains the RFOA provision, which has no parallel in Title VII. *Id.* at 238-239. Second, the Court noted that, in response to *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989), Congress expanded the scope of disparate-impact liability under Title VII in the Civil Rights Act of

1991, but made no similar amendment to the ADEA. Accordingly, the Court stated, "*Wards Cove*'s pre-1991 interpretation of Title VII's *identical language* remains applicable to the ADEA." *Smith*, 544 U.S. at 240 (emphasis added). In the Court's view, these textual differences suggest that Congress intended to "give older workers employment opportunities whenever possible" but also recognized that age, unlike race or sex, "not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id*. at 240-241.

Turning to the facts in *Smith*, the Court concluded that plaintiffs could not make out a prima facie case because they failed to identify a specific employment practice that adversely affected older workers. 544 U.S. at 242. But even if they had, the Court concluded that dismissal of that action was appropriate because, in light of the employer's legitimate goals of attracting and retaining officers, the challenged practice was "unquestionably reasonable." *Id.* at 242. The Court acknowledged that "there may have been other reasonable ways for the City to achieve its goals," but explained that, "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Id.* at 243.

2. *Smith* does not suggest, much less hold, that the plaintiff must bear the burden of persuasion with respect to the reasonableness inquiry under the ADEA's RFOA provision. As the court of appeals itself recognized (Pet. App. 11a-12a), given the obvious fit between the employer's goals and the means selected to achieve

them, the Court in *Smith* had no occasion to resolve the question of which party bears the burden of proof with respect to the RFOA provision, and nothing in the Court's decision purports to resolve the issue.

Nor does *Smith*'s discussion of the textual differences between Title VII and the ADEA suggest a particular allocation of the burden of persuasion with respect to the ADEA's RFOA provision. *Smith*'s reference to *Wards Cove* sheds no light on that question, since, as the Court explicitly noted, Title VII—the statute at issue in *Wards Cove*—contains no analog to the ADEA's RFOA provision. 544 U.S. at 240. Accordingly, although *Wards Cove* may have continued significance in ADEA cases such as this on matters such as the specificity of the practice challenged as having a disparate impact, see *id.* at 241, the effect of the RFOA provision—which was not at issue in *Wards Cove*—is not dictated by that decision.[3]

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[3] The court of appeals attempted to analogize the RFOA provision to Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), which the court identified as "the source of the 'business necessity' test" first announced in *Griggs* in identifying the contours of disparate-impact liability under Title VII. Pet. App. 14a (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975)); see *Griggs*, 401 U.S. at 432. Section 703(h) provides that it shall not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test * * * is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(h). The court of appeals noted that, although this provision "lends itself to interpretation as an affirmative defense, with the burden of persuasion on the employer[,] * * * the Supreme Court has determined that it is not." Pet. App. 15a; see also *id.* at 14a (citing *Wards Cove*, 490 U.S. 642).

The analogy is inapt. As a preliminary matter, it is far from clear that the burden-shifting scheme outlined in *Wards Cove* rests in any way on an interpretation of Section 703(h)—a provision not cited in *Wards*

And although the relationship between age and capacity to participate in certain types of employment may explain why Congress included a RFOA provision in the ADEA and not Title VII, see *Smith*, 544 U.S. at 240-241, that relationship has "no bearing on where the RFOA burden should rest," Pet. App. 31a (Pooler, J., dissenting). If anything, Congress's decision to include the RFOA exception in the part of the statute carving out exemptions to liability provides a clear answer to the burden of proof question in the RFOA/ADEA context relative to Title VII at the time of *Wards Cove*, which lacked an analogous provision. After all, in contrast to the Court's efforts to allocate burdens of proof in the absence of clear textual directives in a case like *Wards Cove*, when the Court construed an analogous *textual*

Cove, and one that is, moreover, expressly limited to the administration of ability tests. It is true that the Court in *Albemarle Paper* stated that *Griggs* "was construing 42 U.S.C. § 2000e-2(h)" when it held that "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." 422 U.S. at 45 & n.21 (quoting *Griggs*, 401 U.S. at 432). But *Griggs* was also explicit in applying the business-necessity test to employment practices beyond the reach of Section 703(h). 401 U.S. at 431 (applying the business-necessity test to high school diploma requirement); see *id.* at 433 n.8 ("Section 703(h) applies only to tests. It has no applicability to the high school diploma requirement.").

In any event, Section 703(h) differs from the ADEA's RFOA provision in material respects. Perhaps most important, Section 4(f)(1), unlike Section 703(h), clearly creates an exception to liability for practices "otherwise prohibited" by the statute, thus making clear that the provision does more than simply differentiate between lawful and unlawful practices. Thus, even if *Wards Cove* were interpreted as construing Section 703(h) of Title VII—a provision not cited in the Court's decision—it would not control the proper interpretation of the different statutory provision at issue here.

defense in Title VII, it had little difficulty concluding that the defendant bore the burden. See, *e.g.*, *Johnson Controls*, 499 U.S. at 206. And, as discussed, the Court has had little difficulty in giving effect to the similarly worded and equally textually-rooted affirmative defense established by the EPA. See *Corning Glass Works*, 417 U.S. at 196-197. Nothing in *Smith* compels this Court to disregard the clear import of the RFOA provision.

D. The RFOA Defense Replaces, Rather Than Supplements, The Business Necessity Test Applicable In Title VII Cases

Petitioners—like the dissenting judge below, see Pet. App. 23a-24a—take the position that the RFOA provision comes into play only after the parties have litigated the question of business justification pursuant to the *Wards Cove* analysis. Pet. Br. 46-49. In their view, litigation of an ADEA disparate-impact claim therefore requires a four-step process: First, the plaintiff demonstrates that a specific employment practice had a disparate impact on older workers; second, the burden shifts to the defendant to produce evidence of an asserted business justification for the challenged employment practice; third, the burden shifts back to the plaintiff to rebut the employer's proffered justification by proving the existence of other equally effective practices with less discriminatory impact; and finally, the burden shifts to the employer to establish that the adverse impact of its challenged employment practice was based on reasonable factors other than age. *Ibid.* Although the Court could resolve the question presented without more fully addressing the role of the RFOA provision, the government's position is the RFOA plays a much more straightforward role in a much more straightforward statutory scheme.

The ADEA provides no textual basis for asking *both* whether a challenged employment practice is supported by business justification *and* whether it is based on reasonable factors other than age. See Pet. App. 10a n.5 (describing the dissent's proposed approach as "introduc[ing] a redundant (and counterintuitive) step in the analysis"). Nor does *Wards Cove* command that result. The purpose of the business-justification test described in *Wards Cove* is to determine whether the challenged employment practice is being used "merely as a 'pretext' for [age] discrimination." *Wards Cove*, 490 U.S. at 660-661. If disparate-impact plaintiffs have already established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*. Indeed, in *Smith*, this Court observed that the RFOA provision is unnecessary in disparate-treatment cases in which the question is whether the employer has intentionally discriminated *on the basis of age*. See 544 U.S. at 238-239; see also *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997) ("The plain language of § 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors 'other than age,' *not* if the policy is reasonably based on age.").

Rather, like the other affirmative defenses set out in Section 4(f) of the ADEA, the RFOA provision comes into play immediately after the plaintiffs have demonstrated that the employer has engaged in a practice "otherwise prohibited" by the preceding sections of the Act. In a disparate-impact discrimination case, once plaintiffs have demonstrated that a specific employment practice has a significant disparate impact on older wor-

kers—that is, that the employer has "limit[ed], segregat[ed], or classif[ied] his employees in [a] way which * * * adversely affect[s an individual's] status as an employee, because of such individual's age," 29 U.S.C. 623(a)(2)—the burden shifts to the defendant to justify the challenged employment practice by persuading the factfinder that the adverse impact of the practice resulted from the use of reasonable criteria other than age.

That does not mean that *Wards Cove* has no application in a disparate-impact case under the ADEA. As *Smith* illustrates, *Wards Cove* applies to ADEA cases such as this on matters such as the specificity of the practice challenged as having a disparate impact. See *Smith*, 544 U.S. at 240-241.

As this Court's decision in *Smith* illustrates, the burden of establishing a RFOA is neither impractical nor insurmountable. See 544 U.S. at 241-242. Indeed, as petitioners explain (at 35-36), in the wake of this Court's decision in *Smith*, most disparate-impact claims brought under the ADEA have been dismissed at the pleadings stage. But the burden of establishing a RFOA is nevertheless one that Congress placed on employers that assert that affirmative defense.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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