No. 03-1160

In the Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA), founded in 1985, is a voluntary organization of over 2,000 attorneys who specialize in representing individuals in workplace controversies. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. TLPJ specializes in precedent-setting and socially significant individual and class action litigation. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, workers' rights, consumer and victims' rights, environmental protection and safety, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless. TLPJ is dedicated to fighting discrimination in the workplace, schools, and places of public accommodation. It has litigated numerous discrimination cases under federal civil rights statutes.

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* National Employment Lawyers Association (NELA) and Trial Lawyers for Public Justice, P.C. (TLPJ) state that no counsel for either party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Based on NELA's and TLPJ's experience and expertise in litigating discrimination cases, NELA and TLPJ believe that to combat discrimination in the workplace effectively, employers must be subject to liability for facially neutral practices that have an unjustified disparate impact based on protected characteristics. This holds true for discrimination in violation of the Age Discrimination in Employment Act (ADEA), just as it does for discrimination in violation of Title VII of the Civil Rights Act. Disparate impact theory provides an important mechanism for policing arbitrary practices and stereotypes, which is critical to achieving the goals of the ADEA.

SUMMARY OF ARGUMENT

The ADEA's "reasonable factors other than age" (RFOA) provision, 29 U.S.C. § 623(f)(1), has long been recognized by the Department of Labor (DOL) and Equal Employment Opportunity Commission (EEOC) as a defense to a claim that a facially neutral practice discriminates based on age. The DOL's interpretations applying the RFOA provision to discriminatory tests and physical fitness standards are entitled to considerable deference not only because they were issued contemporaneously with the ADEA's effective date, but because they were written by the same administration that drafted the ADEA and the Wirtz Report documenting the problems of age discrimination in both facially discriminatory and neutral practices. *See Zubar v. Allen*, 396 U.S. 168, 192 (1969). EEOC's subsequent regulations are also entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because they continued the substance of the DOL's interpretations, and are a reasonable and longstanding construction of the ADEA. *See Barnhart v. Walton,* 535 U.S. 212, 220 (2002).

Construing the RFOA provision to limit the ADEA's

prohibitions to intentional discrimination, as the court below did, runs afoul of the clear directive by Congress that the ADEA's defenses do not define the discrimination deemed to be "arbitrary" under the statute. In overruling *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and enacting the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, §§ 101-03 (1990), Congress made clear that the ADEA's prohibitions reach all forms of discrimination and that its defenses establish the standards for determining when discrimination may be excused.

Adherence to Congress' directives as to the proper statutory construction of the ADEA leads to the conclusion that the ADEA prohibits discrimination in facially neutral practices, with the RFOA defense determining whether such discrimination may be excused. The specific language of the RFOA provision "to take any action otherwise prohibited" together with "factors other than age" presumes that a violation of ADEA Section 4(a) has been established due to the adverse effects on older employees of a non-age related practice. The placement of the RFOA provision with the affirmative defenses in ADEA Section 4(f)(1), 29 U.S.C. § 623(f)(1), strongly supports the conclusion that the RFOA is an appropriate defense to a claim that a facially neutral practices violates ADEA Section 4(a), 29 U.S.C. § 623(a).

The reasonableness qualifier of the RFOA defense requires employers to prove that the neutral employment standard is job-related and consistent with business necessity. Establishing that a practice is an RFOA would demonstrate that the criteria are fair and reasonable measures of one's ability to perform the job. Allowing older employees to prove age discrimination using the disparate impact method insures that practices that adversely affect older workers are subjected to an objective scrutiny to eliminate arbitrary discrimination in the workplace.

ARGUMENT

I. THE LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN APPROPRIATE DEFENSE TO DISCRIMINATION CAUSED BY FACIALLY NEUTRAL PRACTICES.

According to the circuit court decisions rejecting disparate impact theory in ADEA cases, one of the primary obstacles is the reasonable factors other than age provision in ADEA § 4(f)(1).[2] Based on a cursory analysis, the circuit courts reason that the RFOA provision precludes challenges to facially neutral practices by limiting the scope of the ADEA's prohibitions in § 4(a) to intentional discrimination.

All of the courts that reject disparate impact theory in ADEA cases, however, fail completely to mention the Department of Labor interpretations issued contemporaneously with the ADEA that applied the RFOA as an affirmative defense to a showing that a facially neutral practice violated the statute.[3] The court below curtly dismissed the longstanding regulations of the Equal Employment Opportunity Commission that expressly recognized that the ADEA applies to disparate impact claims with the RFOA as the appropriate defense. *Smith v. City of Jackson*, 351 F.3d 183, 189 n. 5 (5th Cir. 2003).

The regulations of both the Department of Labor and the

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[2] *See Smith v. City of Jackson*, 351 F.3d 183, 190 (5th Cir. 2003); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir. 2001), *writ dismissed as improvidently granted*, 535 U.S. 228 (2002) ; *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994).

[3] *Id.*

EEOC are clearly relevant and should be given considerable deference, rather than wholly ignored as the lower courts have done. The longstanding regulations of both agencies construe the ADEA to prohibit discrimination in facially neutral practices subject to a sufficient business justification under the RFOA defense. In other words, the regulations state the elements of a defense in a disparate impact method of proof for ADEA cases. Unless the regulations are shown to be unreasonable, they are entitled to great deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The DOL Regulations Interpreted the ADEA to Prohibit Age-Neutral Practices That Adversely Affected Older Workers, Unless Justified as Job-Related Under the § 4(f)(1) Defense.

Just days after the ADEA took effect, the Department of Labor issued interpretive regulations of the new statute. 33 Fed. Reg. 9172 (1968), 29 C.F.R. §§ 860.103-04 (1970). The contemporaneous DOL interpretations provide significant insight into the meaning and application of the RFOA provision in ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), particularly since they were written by DOL Secretary Wirtz, whose administration also drafted the bill that became the ADEA to implement the recommendations contained in his 1965 report to Congress. *See* 113 Cong. Rec. 1377 (1967) *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 62-63, 68-69 (hereinafter "LEG. HIST.").[4]

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[4] REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (JUNE 1965), *reprinted in* LEG. HIST., at 16-41 (1965) (Hereinafter cited

(continued...)

The DOL interpreted the RFOA provision as an affirmative defense to discrimination caused by non-age related factors. As examples of "differentiations based on reasonable factors other than age," DOL identified physical fitness standards, 29 C.F.R. § 860.103(f), employee tests, 29 C.F.R. § 860.104(b), quantity or quality of production and educational requirements. 29 C.F.R. § 860.103(f)(2). These practices are the very types of facially neutral practices that have since been commonly challenged under the disparate impact method of proof in Title VII cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (physical fitness standards).

Years before this Court recognized that Title VII prohibited discrimination caused by facially neutral practices such as employee tests, the DOL interpreted the ADEA to prohibit employee testing unless the test "specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated." 34 Fed. Reg. 322 (January 9, 1969); 29 C.F.R. § 860.104(b) (1970). Citing the advantage that younger test takers would have

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[4] (...continued)
as the "WIRTZ REPORT"). Following the Wirtz Report, Congress directed the Secretary of Labor to submit legislative recommendations to include:

> Provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. No. 89-602, § 606, 78 Stat. 265 (1966). In response to Congress' request, Senator Yarborough introduced the "President's recommendation" as S. 830 on February 3, 1967. 113 Cong. Rec. 2467-2476 (1967), *reprinted in* LEG. HIST., at 66, 68-70.

over older test takers, the regulations imposed the burden on the employer to justify such tests as job-related "to ensure that the test is for a permissible purpose." *Id.*

The Wirtz Report specifically found that educational and testing requirements disadvantaged older workers. ("Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly. . . ." WIRTZ REPORT at 3). Senator Yarborough, the floor manager of the ADEA, also believed that the RFOA provision would apply to arbitrary discrimination in employment testing:

> For example, if a test shows that a man cannot do certain things. . . . If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.

113 Cong. Rec. 31,253 *reprinted in* LEG. HIST. at 144.

A similar parallelism exists between the regulations' application to physical fitness standards and the Wirtz Report's documentation of the arbitrariness of many physical requirements. Section 860.103(f)(1) of the DOL's regulations recognized that physical fitness standards may be a "reasonable factor other than age." The regulation tracked the findings of the Wirtz Report, which documented how employers had commonly used fitness requirements to restrict the hiring of older workers, yet had no basis for such requirements. WIRTZ REPORT at 4. The regulation interpreted the RFOA defense to permit fitness requirements if "such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age." 29 C.F.R. § 860.103(f)(1)(i) (1970). The defense would not justify "an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform. . . ." 29 C.F.R. § 860.103(f)(1)(iii) (1970).

If the regulations had only required uniform and equal application of fitness standards to all ages to satisfy the RFOA defense, the defense could be viewed as limited to intentional discrimination. But by requiring employers to demonstrate that fitness standards were also "reasonably necessary" and job-related, the regulations applied the RFOA defense to unintentional discrimination caused by neutral practices.

Most importantly, the DOL regulations clearly set forth a job-related standard in determining the reasonableness of the factors other than age upon which the employer acted. The interpretation of the RFOA provision in the DOL regulations is remarkably similar and prescient to the elements of an employer's defense to a disparate impact claim set forth by this Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971). As the Court emphasized in *Griggs*, "any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436. That is precisely how the DOL interpreted the requirements of the RFOA provision of the ADEA.

B. The DOL Regulations Are Consistent with the Statute and its Legislative History.

A thorough study of the 1968 DOL regulations, the Wirtz Report, and the ADEA's prohibitions and defenses reveals a remarkable parallelism that can be traced to Secretary Wirtz's extensive involvement in the development of each document.[5] The Wirtz Report found that explicit age limits precluding the hiring of workers above a certain age were

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[5] *See See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AMER. UNIV. L. REV. 1071, 1099-1107 (1998) (in depth examination of Wirtz Report, development of ADEA's prohibitions and defenses, and DOL Regulations).

the most common and obvious form of age discrimination. WIRTZ REPORT at 6. The Report also identified the existence of several "institutional arrangements that indirectly restrict[ed] the employment of older workers." WIRTZ REPORT at 15. The Report in effect recognized the different forms in which age discrimination appeared: facially discriminatory practices and facially neutral practices.

The Wirtz Report examined "institutional arrangements" that operated to restrict the employment of older persons, such as: (1) "arbitrary rules which ignore individual differences," (2) "[p]romotion-from-within-policies," (3) seniority systems, (4) workers' compensation laws, and (5) private pension, health, and insurance plans. WIRTZ REPORT at 15-17.

By providing specific defenses[6] that corresponded to discrimination in the institutional arrangements set forth in the Wirtz Report,[7] Congress must have intended the ADEA's prohibitions to reach such discrimination. The inclusion of these defenses in the statute negates the argument that Congress chose to deal with facially neutral practices that disadvantaged older workers through "programmatic measures." *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996).

The first defense in ADEA § 4(f)(1) corresponds to explicit age limits, which would be unlawful except in narrow

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[6] The ADEA does not explicitly deal with the issue of workers' compensation laws, which the Wirtz Report mentions as one problematic area. *See* Fentonmiller, *supra*, note 5 at 1102. The two defenses in ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), aligned with the last two institutional arrangements discussed in the Wirtz Report, to deal with seniority systems and employee benefit plans.

[7] *See also* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 295-96 (1990).

circumstances defined by the bona fide occupational defense (BFOQ). 29 U.S.C. § 623(f)(1). *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The DOL interpretive regulations provided examples of possible BFOQs consistent with the statute and the Wirtz Report.

The second defense, the RFOA provision, responds to "[a]rbitrary rules which ignore[d] individual differences" and "[p]romotion-from-within-policies." WIRTZ REPORT at 15. The DOL regulations continued this parallelism with the statute and the Wirtz Report, providing detailed examples of "arbitrary rules" that would be subject to the RFOA provision, specifically identifying employee tests and physical fitness requirements. 29 C.F.R. §§ 860.103(f), 860.104(b) (1970).

The DOL interpretations further stated that both the BFOQ and RFOA defenses in ADEA § 4(f)(1) "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. §§ 860.102(b), 860.103(e) (1970).

The DOL interpreted the ADEA to prohibit discrimination in age-neutral, as well as explicitly age-based, policies and practices. The regulations recognized the parallelisms of the Wirtz Report between the problems of facially discriminatory and facially neutral arrangements, and the statutory defenses designed to address these problems.

C. EEOC's Longstanding Regulations of the RFOA Defense Track the DOL's Interpretations.

Since EEOC assumed jurisdiction over the ADEA in 1979, it too has interpreted the ADEA to prohibit discrimination in facially neutral practices subject to sufficient business justification by the RFOA defense. 29 C.F.R. § 1625.7 (1981). A close reading of EEOC's regulations reveals that they essentially track DOL's interpretations and condense

them by eliminating the examples DOL had provided.[8]

EEOC addressed the general application of the RFOA defense to neutral standards, such as tests, in section (d) of its regulations:

> 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. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth in Part 1607 of this Title.

29 C.F.R. § 1625.7(d) (1981).

For the first time, EEOC used the term "adverse impact" to describe the discrimination caused by a facially neutral practice, and "business necessity" to describe the job-related

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[8] Section (a) of both agencies' regulations recites the statutory provision. *See* 29 C.F.R. § 1625.7(a) (1981); 29 C.F.R. § 860.103(a) (1970). Section (b) of EEOC's regulations condenses sections (b) and (d) of DOL's interpretations. *Compare* 29 C.F.R. § 1625.7(b) (1981) *with* 29 C.F.R. §§ 860.103(b), (d) (1970). Section (c) of EEOC's regulation tracks DOL's section (c) to emphasize that the RFOA provision does not apply when age is a limiting criterion. *Compare* 29 C.F.R. § 1625.7(c) (1981) *with* 29 C.F.R. § 860.103(c) (1970). Section (e) of both agencies' interpretations imposes the burden of proof on the employer to establish the RFOA defense. *Compare* 29 C.F.R. § 1625.7(e) (1981) *with* 29 C.F.R. § 860.103(e) (1970). Finally, section (f) of the EEOC's regulations corresponds to section (h) of DOL's regulations. *Compare* 29 C.F.R. § 1625.7(f) (1981) *with* 29 C.F.R. § 860.103(h) (1970). EEOC eliminated the additional examples of RFOAs that DOL had included in 29 C.F.R. § 860.104, but referenced the example of discriminatory tests in 29 C.F.R. § 1625.7(d).

requirement of the RFOA defense. Of course such terms were unknown at the time the DOL issued its regulations in 1968. By the time EEOC assumed jurisdiction over the ADEA, these terms had come into the legal lexicon as the elements of proving discrimination under the disparate impact theory. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971).

To suggest that EEOC's use of these terms constitutes a significant departure from DOL's regulations is to place form over substance at the highest degree. Despite the labels EEOC used in its regulations, the essence of its interpretation of the RFOA provision tracked the DOL's interpretation that the RFOA defense applied to facially neutral practices unless justified "as reasonably necessary for the specific work to be performed." *See* 29 C.F.R. § 860.103(f)(1)(i) (1970).

D. The Regulations of Both the DOL and EEOC are Entitled to *Chevron* Deference.

Since Congress gave the DOL and EEOC the authority to issue rules and regulations to implement the ADEA, *see* 29 U.S.C. § 628, their interpretations are entitled to great deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, because nothing in the text of the ADEA clearly precludes its application to facially neutral policies, the agencies' interpretations must receive deference unless they are unreasonable. *See Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 46 (2002). Yet, the court below did not even consider the DOL's regulations and disregarded EEOC's interpretations as not entitled to *Chevron* deference, finding a lack of "significant analysis." *Smith v. City of Jackson*, 351 F.3d 183, 189 n. 5 (5th Cir. 2003).

Although both agencies designated their ADEA regula-

tions as "interpretive rules," *Chevron* deference is still appropriate. This Court previously found the consistent interpretive rules of ADEA § 4(f)(1) by DOL and EEOC as persuasive authority. *See Western Airlines Inc. v. Criswell*, 472 U.S. 400, 412 (1985). NELA and TLPJ submit that both the DOL and EEOC regulations should be recognized as reasonable and authoritative constructions of the ADEA for several reasons.

First, the DOL interpretations were issued contemporaneously with the effective date of the statute, entitling them to substantial deference. *See Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969). Second, the DOL regulations were drafted and issued by Secretary Wirtz, who also authored the administration's bill that became the ADEA and the report to Congress prompting enactment of the ADEA. *See, e.g., Zubar v. Allen*, 396 U.S. 168, 192 (1969) (departmental interpretation of a statute carries the most weight when specifically interpreted by administrators who participated in its drafting). Third, the interpretations are consistent with the statute and its legislative history as demonstrated by the parallel treatment of discrimination caused by facially neutral practices such as employment and fitness tests. Fourth, the DOL regulations remained consistent and unchanged throughout the DOL's jurisdiction of the ADEA. *See EEOC v. Associated Dry Goods, Corp.*, 449 U.S. 590, 600 (1981) (contemporaneous construction deserves special deference when it has remained consistent over a long period of time). Finally, Congress was clearly aware of the DOL's interpretations of the RFOA and did not act to alter the agency's construction of the statute when considering other amendments to the ADEA. *See, e.g., Improving the Age Discrimination Law*, SENATE SPECIAL COMM. ON AGING, 93rd Cong. 1st Sess. at 12, 33-44 (1973) *reprinted in* LEG. HIST., at 229, 238-244 (stated that RFOA applied to tests and included DOL's regulations in report).

For similar reasons, EEOC's regulations are also entitled

to *Chevron* deference. Contrary to the Fifth Circuit's view, EEOC engaged in a thorough study of the ADEA's interpretations and undertook a formal rulemaking process. Two days before EEOC assumed jurisdiction of the ADEA, the agency issued notice in the Federal Register that it had undertaken a complete review of all of the DOL's interpretations of the ADEA. 44 Fed Reg. 37,974 (1979). Five months later, EEOC issued proposed interpretations of the ADEA for notice and comment. 44 Fed Reg. 68,858 (1979). After careful review of the comments, EEOC made changes to the proposed regulations. 46 Fed. Reg. 47,724 (1981).

EEOC's regulations reflect careful deliberation and a "relatively formal administrative procedure," which support full *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Furthermore, Congress endorsed EEOC's regulations and court decisions concluding that the RFOA is an affirmative defense. *See* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, at 253-54, 348-49 (1990) (hereinafter cited as "OWBPA LEG. HIST."). Finally, *Chevron* deference is warranted because EEOC's interpretations have been consistent and long-standing. *See Barnhart v. Walton,* 535 U.S. 212, 220 (2002).

II. THE CONTEXT AND LANGUAGE OF THE RFOA PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF § 4(a) CAUSED BY A NON-AGE FACTOR.

Section 4(f)(1) of the ADEA states:

> It shall not be unlawful for an employer, employment agency, or labor organization ——
>
> (1) *to take any action otherwise prohibited* under subsection (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(f)(1) (2000) (emphasis added).

A. The OWBPA Exemplifies Congress' Intent that the Provisions in ADEA § 4(f) Do Not Define the Act's Prohibitions.

The proper analysis to apply in construing the ADEA's defenses related to the Act's prohibitions and purposes is obviously central to the Court's resolution of this case. Courts unwilling to accept a disparate impact theory in ADEA cases make a fundamental error in construing the RFOA provision to narrow the Act's prohibitions.

NELA and TLPJ submit that Congress clearly precluded the statutory construction of the ADEA used by the court below, when it resoundingly rejected the same approach in overruling *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989), and enacting the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, §§ 101-03 (1990) ("OWBPA"). In Congress' view, the proper analysis to apply is to broadly define discrimination in the ADEA's prohibitions and to use the Act's defenses to set the standards for determining when that discrimination may be excused. Applying Congress' view of the proper construction of the ADEA, the ADEA's prohibitions reach facially neutral practices and the RFOA provision sets forth an affirmative defense which can exempt certain justifiable practices.

This Court acknowledged in *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1245 n. 7 (2004), that Congress revised the judicial construction of the ADEA used in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989) (. . . "with the 1990 amendments it meant to overrule *Betts*."). Congress could not have been clearer that the *Betts* approach to construing the ADEA was wrong. The OWBPA "explicitly and completely rejects both

the reasoning and the holding in *Betts*." 1 OWBPA LEG. HIST., at 20 (Statement of Managers Explaining the Bill).

In enacting the OWBPA, Congress expressly disagreed with and overruled both the reasoning and conclusion in *Betts* that ADEA § 4(f)(2) merely redefined the conduct prohibited by ADEA § 4(a). In *Betts*, the Court interpreted the employee benefit plan provision in ADEA § 4(f)(2) to "redefine[ ] the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." 492 U.S. at 181. Relying as well on the ADEA's purpose to prohibit arbitrary discrimination, the Court reasoned that discrimination in employee benefits was not the type of arbitrary discrimination that was intended to be covered in the general prohibitions of ADEA § 4(a).

In overruling *Betts,* the OWBPA rejected a narrow reading of the ADEA's purpose to prohibit "arbitrary discrimination" as a basis for restricting the reach of the ADEA's prohibitions. Congress confirmed that the "ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." 1 OWBPA LEG. HIST., at 20 .

The OWBPA also provides clear congressional confirmation that the ADEA's prohibitions are to be interpreted "like the comparable provisions of Title VII" because the ADEA's prohibitions were taken *in haec verba* from Title VII. H.R. Rep. No. 101-664, at 33 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240 (1990). To reinforce the continued parallelism between the ADEA's prohibitions and Title VII's prohibitions, Congress deliberately did not amend ADEA § 4(a) in 1990. *Id*. Instead, to correct the Court's holding that § 4(a) did not cover discrimination in employee benefits, Congress added a provision to the definitions section of the statute to include employee benefits within

the meaning of the § 4(a) phrase "compensation, terms, conditions, or privileges of employment." Pub. L. No. 101-433, §§ 102 (1990), codified at 29 U.S.C. § 630(l).

To correct the Court's reasoning and holding that discrimination in employee benefits was not arbitrary, Congress amended the ADEA's defense for employee benefit plans, 29 U.S.C. § 623(f)(2)(B) (2000), not the ADEA's prohibitions. The defense defines the circumstances under which an employer could justify age discrimination. *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240-41 (1990). In amending ADEA § 4(f)(2), Congress emphasized that the defense "provides a sound mechanism for harmonizing two purposes of the ADEA . . .: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." *Id*.

Finally, the OWBPA overturns the Court's conclusion that ADEA § 4(f)(2) was a definitional provision and not a defense, by explicitly imposing the burden of proof on the employer to establish the elements of § 4(f)(2). Pub. L. No. 101-433, § 103 (1990), codified as 29 U.S.C. § 623(f)(2). In *Betts*, the Court reasoned that the seniority system provision in ADEA § 4(f)(2), like the seniority system provision in Title VII § 703(h), 42 U.S.C. § 2000e-2(h), was a definitional provision and not an affirmative defense. *Betts*, 492 U.S. at 181-82. The OWBPA specifically overturns this reasoning by reiterating that all of the defenses in ADEA § 4(f)(2) are true affirmative defenses on which the employer bears the burden of persuasion to establish the elements of the defense. *See S.1511 Final Substitute: Statement of Managers*, 1 OWBPA LEG. HIST., at 25 (1990).[9]

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[9] The versions of the OWBPA prior to final passage included ADEA §§ 4(f)(1) and (3), and specifically imposed the burden of

(continued...)

The OWBPA exemplifies the proper analysis to use in determining whether the RFOA provides a defense in the disparate impact methodology of proof. In contrast, construing the RFOA to redefine the ADEA's prohibitions against arbitrary discrimination repeats the erroneous judicial construction in *Betts* that was rejected by the OWBPA. The statutory analysis directed by Congress in the OWBPA leads to the conclusion that the RFOA provision operates as an affirmative defense to a claim of discrimination caused by a facially neutral practice.

B. Congress Uses the Prefatory Language "Any Action Otherwise Prohibited" to Signify an Affirmative Defense.

The RFOA defense begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). This prefatory phrase means that the RFOA provision does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

Congress views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added

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[9] (...continued)
proof for ADEA § 4(f)(1) on the employer. *See* S. Rep. No. 101-263, at 2 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 321 (1990); H.R. Rep. No. 101-664, at 3 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 210 (1990). The final Statement of Managers deleted reference to ADEA §§ 4(f)(1) and (3) from the bills because the *Betts* decision did not interpret those provisions. *See S.1511 Final Substitute: Statement of Managers*, *id.* at 25.

this very language to ADEA § 4(f)(2) in the OWBPA, to clearly make it an affirmative defense. 1 OWBPA LEG. HIST., at 253-54, 348-49.

Prior to 1990, ADEA § 4(f)(2) did not include the prefatory language from ADEA § 4(f)(1). ADEA § 4(f)(2) stated:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan. . . which is not a subterfuge to evade the purposes of this Act. . . .

29 U.S.C. § 623(f)(2) (1989).

The OWBPA's amendment to ADEA § 4(f)(2) adding the prefatory language from § 4(f)(1) is important because it reflects Congress' understanding of the meaning and effect of a key phrase in § 4(f)(1). Congress stated:

> the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added) has been incorporated as part of section 4(f)(2). . . .

1 OWBPA LEG. HIST., at 348. Congress used the prefatory language from § 4(f)(1) to make unmistakably clear that the addition of this language to § 4(f)(2) imposed two conditions: (1) the condition precedent of a violation of § 4(a), and (2) the employer bore the burden of establishing the elements of the defense. *See* S. Rep. No. 101-263, at 29-30 (1990), *reprinted in* 1 OWBPA LEG. HIST. at 348-49; H.R. Rep. No. 101-664 (1990), at 46-47, *reprinted in* 1 OWBPA LEG. HIST., at 253-54.

In so doing, Congress confirmed its understanding that the prefatory language in § 4(f)(1) had the same effect. Congress also expressed its approval of the circuit court decisions and EEOC's regulations concluding that the reasonable factors other than age exception included in

§ 4(f)(1) was an affirmative defense for which the employer bears the burden of proof. *Id*.

C. The Placement of the RFOA Provision Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the BFOQ provision and the foreign workplace provision. This Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The foreign workplace provision has also been recognized as an affirmative defense.[10] The contiguous placement of the RFOA provision with these other affirmative defenses certainly suggests that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration. *See* H.R. Rep. No. 90-13054 & S. Rep. No. 90-830 (1967), *reprinted in* LEG. HIST., at 94 & 127. Their contiguous relationship is no accident, and implies that the defenses were joined together to be

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[10] The foreign workplace defense was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792. *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Eglit, AGE DISCRIMINATION, § 5.61 at 5-276 (2d ed. 1995).

interpreted similarly. *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

The first part of ADEA § 4(f)(1) provides an affirmative defense to classifications that are facially discriminatory. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 122. The action "otherwise prohibited" by § 4(a) is the explicit use of age in the terms of the policy or practice. *Id.* The BFOQ defense in § 4(f)(1) provides the appropriate response to intentional discrimination because the employer admits it used age as a qualification, but seeks to justify its action by showing that the use of age as a criterion is bona fide and reasonably necessary to the operation of the business. *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 411.

The "reasonable factors other than age" defense provides the second part of ADEA § 4(f)(1). Again, the prefatory language requires that an action violating § 4(a) has been established. The language in the RFOA provision "factor other than age" connotes that the second defense in ADEA § 4(f)(1) responds to classifications that are not age-related, or in other words are facially neutral, since the BFOQ defense responds to facially discriminatory policies. The contiguous design of the two defenses to address facially discriminatory and facially neutral practices reflects Congress' concern with both intentional and unintentional discrimination. The placement and context of the RFOA provision clearly supports reading the provision as a defense to facially neutral actions that violate ADEA § 4(a)

D. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate.

A denial that an action was motivated by age responds to a claim that the employment action was motivated by age. A simple denial of discrimination is the appropriate response to a prima facie claim of intentional discrimina-

tion under the *McDonnell Douglas* model of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Response by denial means that the plaintiff's evidence does not establish an action "otherwise prohibited" by § 4(a), since a prima facie case based on circumstantial evidence merely raises an inference of discrimination that does not shift the burden of proof to the employer. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

In contrast, the RFOA defense does not logically or structurally operate as a denial of intentional discrimination.[11] None of the language in ADEA § 4(f)(1) suggests that the provision includes or responds to an element of intent to discriminate.

When proof of intent to discriminate is part of a claim or its corresponding defense, Congress clearly includes language imposing an intent requirement. Again, the OWBPA amendments to ADEA § 4(f)(2) are instructive. Prior to the OWBPA, the bona fide seniority system and employee benefit plan provisions in § 4(f)(2) contained the phrase "subterfuge to evade the purposes of this Act." 29 U.S.C. § 623(f)(2) (1989). In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), the Court interpreted this phrase as requiring evidence of an intent to discriminate.[12]

The OWBPA removed the phrase "subterfuge to evade the purposes" from ADEA § 4(f)(2). *See* S. Rep. No. 101-263, at 18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 337

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[11] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 832-33 (1997).

[12] *See General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1245 n. 7 (2004) (noting that Congress overturned the *McMann* decision in the 1978 amendments to the ADEA).

(1990); H.R. Rep. No. 101-664, at 34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 241 (1990). The ADEA's defense for employee benefit plans is now a clear, objective showing of increased cost, without any inquiry into the intent of the employer. 29 U.S.C. § 623(f)(2)(B)(i) (2000). *Id.*

In contrast, the ADEA's seniority system provision continues to require proof of intent by virtue of the OWBPA. By adding the phrase "not intended to evade the purposes of this Act" to the seniority system provision, Congress continued to require the element of intent in this defense. *See* § 4(f)(2)(A), 29 U.S.C. § 623(f)(2)(A) (2000).

This deliberate exclusion of language requiring evidence of intent in subpart B of § 4(f)(2), and inclusion in subpart A, demonstrates that Congress acted purposefully to impose the elements of intent or compliance with the purposes of the Act in the ADEA's defenses. *See Russello v. United States*, 464 U.S. 16, 23 (1983) *(quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

The absence of language in ADEA § 4(f)(1) of an intent requirement or an element related to the purposes of the ADEA strongly suggests that Congress drafted the provision to preclude any inquiry into these elements in establishing the underlying violation in § 4(a) or the RFOA defense. To construe the RFOA provision as a response to intentional discrimination ignores the deliberate omission of key language in § 4(f)(1).

III. THE RFOA PROVIDES A FEASIBLE DEFENSE TO PROVING AGE DISCRIMINATION UNDER A DISPARATE IMPACT THEORY.

A. The Term "Reasonable" in ADEA § 4(f)(1) Requires The Employer to Show That the Factor is Job-Related.

The language of ADEA § 4(f)(1) requires that the "factors other than age" must be "reasonable." Neither the statute nor its legislative history provides a definition of the term "reasonable." *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995). The term "reasonable" must be given effect, however. *See United States v. Menasche*, 348 U.S. 528, 539-40 (1955) (court's duty to give effect to every clause and word of a statute "rather than to emasculate an entire section.") It cannot be ignored as the courts rejecting disparate impact theory under the ADEA have done.[13]

The question whether a neutral factor is "reasonable" under a disparate impact theory applying the RFOA provision differs in type and degree from whether an employer's response to a claim of disparate treatment is legitimate. Applying the Court's reasoning in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611 (1993), legitimate in this context simply means not prohibited by the ADEA.

In contrast, Black's defines "reasonable" as "fair, proper, just, moderate, or suitable under the circumstances." BLACK'S LAW DICTIONARY 1138 (5th ed. 1979). A legitimate reason is not the same as a reasonable factor, given the Court's analysis in *Hazen Paper*. For example, an employer's response to an ADEA disparate treatment claim could be a reason such as race or pension vesting that violates another statute, but is not unlawful under the ADEA. *Hazen Paper*, 507 U.S. at 611. Such a response would not be reasonable because it would subject the

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[13] *See Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *writ dismissed as improvidently granted*, 535 U.S. 228 (2002); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); *EEOC v. Frances W. Parker School*, 41 F.3d 1073 (7th Cir. 1994).

employer to liability for other claims.

The reasonableness requirement of the RFOA provision also makes the defense inappropriate as a response to a disparate treatment claim because the disparate treatment theory does not permit inquiry into the "reasonableness," fairness, justness, or propriety of the employer's actions. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 (7th Cir. 1998). Under the disparate treatment method of proof, the employer's actions may be unreasonable or unfair or arbitrary, yet not intentionally discriminatory. *See also* L. STEVEN PLATT & CATHY VENTRELL-MONSEES, AGE DISCRIMINATION LITIGATION, § 14.180 (2000).

A "reasonable factor" clearly connotes something more and different than a legitimate factor. The context of the RFOA suggests that the term "reasonable" imposes an objective requirement that the factor be related to an individual's ability to do the job.[14]

The meaning of "reasonable factor" as job-related is reflected by its juxtaposition to the BFOQ defense. Immediately preceding the language "reasonable factors other than age," Congress used the term "*reasonably* necessary" to describe the relationship between a "bona fide occupational qualification" and the "normal operation of the particular business." 29 U.S.C. § 623(f)(1). The BFOQ defense focuses on the employee's ability to do the job. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). By following the BFOQ defense, a plausible reading of the term "reasonable factors" would be factors related to the job requirements or job performance, given the context of the term within the statute.

The degree of reasonableness would depend on the

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[14] *See* Player, *supra*, note 11, at 840-41; Kaminshine, *supra,* note 7, at 302.

circumstances of the case. In the BFOQ context, reasonably necessary means the employer is compelled to use age as a proxy for the job-related qualifications. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985). The term "reasonably necessary" must mean more than a "rational basis in fact," since this Court rejected such a rationality standard for a BFOQ as inconsistent with the ADEA in *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 420, n. 30.

The Court has described the employer's response to a disparate impact claim under Title VII as a "*reasonable* measure of job performance" with the "touchstone [a]s business necessity." *Griggs v. Duke Power*, 401 U.S. 424, 431, 436 (1971). Similarly, Title VII requires that the particular employment practice causing a disparate impact must be job related and "consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i).[15]

The absence of the term "necessary" in the RFOA defense implies that the employer is not compelled to use the factors it chose. However, because the employer bears the burden of proving the RFOA defense, allowing any rationale would not justify excusing the violation of § 4(a). Rather, the language and context of the defense suggest an intermediate burden on the employer to demonstrate the reasonableness of its action. The employer's justification should be more than a mere rationality, but less than absolute necessity.

The business necessity standard of *Griggs* would be consistent with the intermediate burden posed by the RFOA defense. Neutral practices can unfairly target ageist traits in the abstract, rather than measuring the individ-

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[15] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991), amended Title VII to generally codify the job related and business necessity concepts of *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971). *See* § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i).

ual's ability to do the job. Requiring employers to justify a practice as job-related insures the criteria relate to one's ability to do the job. A showing that a practice is an RFOA would demonstrate that the criteria are not arbitrary, but fair and reasonable. Proof by the employer of a substantial business purpose for using the factor should establish that the decision was "fair, proper, just, moderate, [or] suitable under the circumstances." BLACK'S, at 1138 (5th ed. 1979).

B. The Disparate Impact Method of Proof Insures that Employment Criteria are Job-Related.

The handful of disparate impact claims that have been fully litigated demonstrate that the theory provides a viable and feasible means for challenging age discrimination in neutral practices or justifying those practices as job-related and consistent with business necessity.[16] A close of examination of one case, *Smith v. City of Des Moines*, 998 F.3d 1466 (8th Cir. 1996), exemplifies how disparate impact theory actually operates in ADEA cases with the RFOA provision as a defense.

Smith challenged a new fitness requirement that all firefighters at the rank of captain or below had to pass a test determining whether they could safely fight fires while wearing a self-contained breathing apparatus ("SCBA"). A spirometry test measured the capacity of the lungs to exhale. If a firefighter failed the spirometry test, he or she had to pass a maximum stress test to measure the body's effective use of oxygen. 998 F.3d at 1468.

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[16] *See, e.g., Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (8th Cir. 2001); *Allen v. Entergy Corp., Inc.*, 193 F.3d 1010 (8th Cir. 1999); *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *Smith v. City of Des Moines*, 998 F.3d 1466 (8th Cir. 1996).

Having served 33 years as a firefighter with the Des Moines Fire Department, Smith had risen to the level of captain when the new fitness standard was implemented. After failing the tests the first year and then passing them the next three years, Smith failed the tests and was placed on sick leave. The city ultimately discharged Smith at age 55 for failing to meet the department's physical fitness standards. *Id.*

Smith filed suit under the ADEA, pursing both disparate treatment and disparate impact theories. The district court granted summary judgment to the city on both claims, finding the city had established a "business necessity" defense in response to the disparate impact claim. Smith's treatment claim failed because he was not qualified to perform the job. *Id.*

The Eighth Circuit assumed that Smith had demonstrated that the testing requirement had a disproportionate impact on older persons. *Id.* at 1470. The court then applied a defense "derived in part" from Title VII's disparate impact doctrine, relying on *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14 (1977), and "in part from a provision of the ADEA which states that an employment practice is not unlawful 'where the differentiation is based on reasonable factors other than age.' 29 U.S.C. § 623(f)(1) (1994)." The court held that the city had the burden of persuasion to establish two elements: (1) "that the requirement has a manifest relationship to the employment in question," and (2) "is necessary to safe and efficient job performance." *Id.* at 1471.

The city demonstrated that the requirement was job-related by producing undisputed evidence that captains were frequently involved in fighting fires and wore SCBAs in such circumstances. As for the second element of the defense, the city produced evidence that it had relied on national standards on fitness testing for firefighters and had their own expert review relevant medical literature in

setting the appropriate test measures. The court emphasized that "The city has not proceeded arbitrarily, but rather has carefully developed a standard based upon the available medical literature and using the best test available for measuring fitness, the stress test." *Id.* at 1473. In response to the city's showing, the court found that Smith had failed to show that a proposed alternative would have a less discriminatory impact on older firefighters. *Id.*

Allowing Smith to challenge the physical fitness tests under a disparate impact theory insured that the city was not engaging in arbitrary age discrimination, without regard to the motive it had in mandating the requirement. Requiring Smith to proceed on a disparate treatment claim only would not subject job requirements to the scrutiny needed to insure that they test the individual for the job and not the person in the abstract. Rather, if older workers can show that a neutral practice disproportionately disadvantages them, that practice should be scrutinized under the objective standards of job-relatedness and business necessity.

CONCLUSION

For the foregoing reasons, *amici curiae* NELA and TLPJ urge the Court to reverse the judgment below and to hold that the ADEA permits disparate impact claims, with ADEA Section 4(f)(1) providing an affirmative defense to such claims.

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