No. 06-1505

In The
Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, INC., ET AL.,
Respondents

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in proving discrimination "because of age" in a disparate impact case under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, the plaintiff bears the burden of proving that the employer's conduct was not based on a reasonable factor other than age.

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation, with an underlying membership that includes more than three million businesses and organizations of every size, operating within every industry sector and geographical region of the United States. A principal function of the Chamber is to represent its members' interests in cases raising issues of widespread concern and application to the business community. In that capacity, the Chamber has participated in hundreds of cases before this Court, including cases involving the Age Discrimination in Employment Act, such as *Smith v. City of Jackson*, 544 U.S. 228 (2005), and filed a brief as amicus curiae with the court of appeals prior to its first decision in this case.

The Chamber fully endorses the Age Discrimination in Employment Act and that law's recognition of the important contributions that older, more experienced workers make to the vitality and productivity of the American workforce. At the same time, the Chamber believes it is critical to preserve the careful balance that the Act strikes between prohibiting irrational barriers to the employment of older workers and preserving the flexibility and discretion to make sound business judgments that employers need to

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[1] Pursuant to this Court's Rule 37.3, this brief is filed with the written consent of the parties to the case, both of which have filed letters with this Court granting blanket consent for amicus briefs. Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution intended to fund the preparation or submission of this brief.

compete in the modern economy. Properly allocating the burden of proof in disparate impact cases is critical to maintaining that balance.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, generally protects employees who are at least 40 years old, 29 U.S.C. 631(a), against discrimination in employment on the basis of their age. The Act's coverage is sweeping: more than half of all American employees – 53% – are over the age of 40, and that percentage may grow in the coming years.[3]

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that disparate impact claims are available under Section 623(a)(2) of the ADEA. See *id.* at 233-240 & n.6. In so holding, the Court stressed that such claims are much more restricted under the ADEA than under Title VII's prohibition on race, sex, national origin, and religious discrimination in employment, see 42 U.S.C. 2000e *et seq*. See *Smith*, 544 U.S. at 233, 240 (plurality opinion). That is because Congress recognized that employers commonly make reasonable and legitimate business decisions based on factors and considerations that correlate with age and, in fact, that age itself is sometimes a relevant consideration in employment decisionmaking. The ADEA thus expressly preserves

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[2] This brief uses the terms "burden of proof" and "burden of persuasion" interchangeably.

[3] See http://www.bls.gov/web/cps/cpsaat3.pdf; Kenneth R. Davis, *Age Discrimination and Disparate Impact*, 70 BROOK. L. REV. 361, 400 (2004).

employers' discretion to differentiate between employees if the decision "is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). For three reasons, the plaintiff bears the burden of proof that a disparate impact on older workers is, in fact, because of age, and thus is not attributable to a reasonable factor other than age.

First, the starting principle is that plaintiffs bear the burden of proving all of the elements necessary to establish liability for a claim. In this context, that means that the plaintiff bears the burden of proving that discrimination on the basis of age occurred. Because the plaintiff bears the burden of proving that discrimination occurred "because of age," it would be illogical for the employer to bear the burden of proving that the alleged discrimination was because of some reasonable factor other than age, and thus was not "because of age." That would require the employer to disprove what should be an element of the plaintiff's claim. This Court's decisions in *Smith* and *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989), confirm that plaintiffs in disparate impact cases under the ADEA bear the burden of proving not just that a specific employment practice has caused a significant statistical disparity, but also that the employment practice is not reasonable. That allocation of the burden of proof, moreover, conforms to the rule in ADEA disparate-treatment cases that the plaintiff has the burden of disproving an employer's assertion that the adverse employment practice was based on a "legitimate non-discriminatory reason." See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

Second, leaving the burden of proof on the plaintiff is fair and workable, and it is necessary to preserve for employers the discretion and flexibility that they need to compete in the modern economy. Simply demonstrating a statistical disparity on workers over 40 says very little about whether the employment practice is, in fact, statutorily proscribed or even inspires sufficient concern or suspicion to warrant visiting the burden of proof on the defendant. Indeed, petitioners' argument admits as much by asserting that the burden of proof for the reasonable factor other than age would not shift until the plaintiffs first prove not only statistical disparity, but also the lack of business justification. The problem with that proposed paradigm, however, is not only the ping-ponging burdens of proof that juries would be required to track, but also this Court's recognition in *Smith* that the "reasonable factor other than age" inquiry under the ADEA displaces the more exacting business justification test. There thus is no apparent reason for parties or the court to devote time and resources to litigating the often-complex business justification issue when a reasonable non-age basis for the practice would immediately negate any basis for liability propounded by the plaintiff. And if, as petitioners propose, plaintiffs can and should bear the burden of disproving business justification, they equally can and should bear the burden of proving that the defendant acted unreasonably – a litigation task commonly assigned to plaintiffs in tort law and in a broad variety of other areas of the law.

Third, there is no basis for deference to the EEOC's litigation position asserting that the burden

of proof should be shifted to the employer. To begin with, the regulations that the EEOC has promulgated suggest the opposite. The first of those regulations provides that the "reasonable factor other than age" should be proven in disparate impact cases in the same manner as the business necessity defense. But, under *Wards Cove* and *Smith*, that approach would leave the burden squarely on the plaintiff, not the employer. Congress has made no such amendment and, even though *Smith* and *Wards Cove* have been on the books for a number of years, the EEOC has never amended its regulation to realign the burden of proof in the wake of those decisions.

A second regulatory provision expressly places the burden of proving the "reasonable factor other than age" on the defendant. But that regulation is specifically limited to disparate treatment cases. The EEOC, in fact, specifically deleted draft language in that regulation that spoke more broadly. The EEOC should not be able to reinstate a rejected regulatory text through brief writing. Finally, deference to litigation positions is particularly inappropriate when the statutory question at issue involves not how statutory terms should be interpreted or how a specialized administrative adjudicatory process should operate, but how legal claims should be proven in a courtroom, and the agency itself is a courtroom litigant with a vested interest in relieving its own burden of proof.

ARGUMENT

IN A DISPARATE IMPACT CASE, THE PLAINTIFF BEARS THE BURDEN OF PROVING THAT THE ALLEGED DISCRIMINATION IS BECAUSE OF AGE, AND NOT BECAUSE OF A REASONABLE FACTOR OTHER THAN AGE

A. Statutory Text And Precedent Require The Plaintiff To Prove The Cause Of The Alleged Discrimination

1. The Plaintiff In A Disparate Impact Case Must Prove Adverse Action "Because Of Age"

While nothing in the ADEA's text expressly allocates the burden of proof for the "reasonable factor other than age" (RFOA) inquiry, the structure of the statute, combined with established rules of burden allocation, demonstrate that the burden rests on the plaintiff. As relevant to disparate impact cases, the ADEA prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees" in a manner that adversely affects the individual's employment opportunities or status "because of such individual's age." 29 U.S.C. 623(a)(2). Accordingly, liability under the ADEA hinges on whether the alleged adverse employment action befell the employee "because of [the employee's] age."[4] Under traditional principles of burden allocation, the plaintiff – the party seeking affirmative action and relief through the intervention of the court – "bear[s] the burden of persuasion re-

[4] Although not applicable in a disparate impact case, see *Smith*, 544 U.S. at 236 & n.6, Section 623(a)(1) likewise prohibits only actions taken "because of such individual's age."

garding the essential aspects of [its] claim." *Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Plaintiffs in an ADEA case thus bear at all times the burden of proving that the alleged discrimination was "because of [their] age."

The Court held in *Smith* that a discriminatory impact claim is one proper means of proving discrimination "because of * * * age" under Section 623(a)(2). In recognizing the availability of disparate impact claims under the ADEA, however, *Smith* did not – could not – alter the statutory text or eliminate the plaintiff's ultimate obligation to establish that the alleged discrimination was "because of * * * age." See *Smith*, 544 U.S. at 235 (plurality opinion) (recognizing disparate impact claims rests on "the better reading of the statutory text"); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (plurality opinion of O'Connor, J.) (the different "factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used").

To the contrary, this Court has long recognized that disparate impact claims are a means of proving that an adverse employment action is because of or attributable to an employee's protected status (whether race, sex, or age), and thus that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Fort Worth*, 487 U.S. at 987 (plurality opinion of O'Connor, J.). Disparate impact claims do not turn upon the employer's intent or purpose. But they still

require proof that, whatever the subjective motivation, the employer's action "in fact fall[s] more harshly on one group" of employees because of that status and not because of another reason, *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), and thus the employer's action is "discriminatory in operation," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).[5]

2. The RFOA Provision Directly Counters The Plaintiff's Case

Read against the backdrop of the plaintiff's statutory burden to establish that the alleged discrimination was "because of * * * age," Section 623(f)'s provision that employer conduct is lawful if based on "reasonable factors other than age" functions not as an affirmative defense, but as a straightforward denial of the plaintiff's statistical disparate-impact case. When a plaintiff claims that he was fired or laid off because of his age, an employer, invoking the RFOA provision "replies, in effect, not so, plaintiff was fired for * * * some other non-discriminatory reason." *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588,

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[5] See also *Smith*, 544 U.S. at 234 (plurality opinion) (disparate impact claims eliminate practices that "operate as built-in headwinds for minority groups"); *Griggs*, 401 U.S. at 430 (employment practices that are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); J.A. 73 (jury finding that disparate impact was "because of their age"); 7/25/00 Tr. 4732 (Jury Instructions) (under disparate impact theory, "[i]t is sufficient if the plaintiffs establish by a preponderance of the evidence that they experienced an adverse impact different from similarly situated co-workers because of the ages of the plaintiffs, whether or not the defendant you are considering intended that such a result occur").

591 (5th Cir. 1978). The RFOA provision operates in the same manner in disparate impact cases. The essence of petitioners' disparate impact claim is that, while the reduction-in-force process was facially neutral, the "startlingly skewed results" of the plan, Pet. Br. 7, combined with the substantial opportunity the plan's terms allegedly left for individual supervisors to "give effect to overt or subconscious bias," *id.* at 8, permitted the jury to conclude that the firings were because of the employees' age. Likewise, even in disparate impact cases that involve non-discretionary criteria, the plaintiff's prima facie statistical case is still designed to demonstrate that, whatever the employer's subjective motivation, the employment action fell significantly more harshly on older workers because of their age. *Teamsters*, 431 U.S. at 335 n.15. Under both scenarios, employers invoking the "reasonable factor other than age" provision reply "not so," *Marshall*, 576 F.2d at 591, asserting a reasonable non-age based explanation for the results.

Thus, unlike an affirmative defense, the employer's identification of a reasonable, non-age basis for the employment decision does not admit the plaintiff's prima facie case, and then assert a distinct legal basis in defense. Instead, it "contradict[s] or tend[s] to disprove an[] element of the statutory" claim. *Dixon v. United States*, 126 S. Ct. 2437, 2444 (2006); see *Marshall*, 576 F.2d at 591 (the bona fide occupational qualification provision is an affirmative defense – "one in the nature of confession and avoidance," but the RFOA provision is simply a "denial[] of the plaintiff's prima facie case"); *Black's Law Dictionary* 55 (5th ed. 1979) (defining "affirmative de-

fense" as a "new matter which, *assuming the complaint to be true*, constitutes a defense to it") (emphasis added).

To be sure, the ADEA restricts employers to using "reasonable" factors other than age, but that does not change the fundamental function that the provision serves in the proof of an ADEA case. Assertion of the RFOA remains a straightforward denial of the plaintiff's claim that the adverse employment action occurred or befell the employees "because of age," arguing instead that the action is "attributable to a nonage factor," *Smith*, 544 U.S. at 239 (plurality opinion).

In that respect, in both its terms and purpose, the RFOA provision parallels the judicially recognized "legitimate, nondiscriminatory reason" defense used in disparate treatment cases under both the ADEA and Title VII. In those cases, the Court has long recognized that a defendant can rebut a plaintiff's prima facie disparate treatment claim by identifying a legitimate, non-discriminatory reason for the employment action. While the defendant bears the burden of producing that reason, the burden of persuasion and proof that the proffered reason is not legitimate or is not non-discriminatory remains with the plaintiff. See, *e.g.*, *Reeves*, 530 U.S. at 142; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981).

The RFOA provision serves the same function with respect to disparate impact claims under the ADEA and, in fact, "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor." *Smith*, 544 U.S. at 239 (plurality

opinion). In fact, the Court reasoned in *Smith* that the existence of the RFOA provision itself supported recognition of disparate impact claims, because Congress's requirement that the employer's decisionmaking factor be "reasonable" implied that, in the absence of disparate treatment, only the use of *unreasonable* non-age factors could support liability under the ADEA. *Id.* at 239 & n.11 (plurality opinion). That is because the unreasoned use of factors having a substantially disparate impact on protected employees could support an inference of discrimination, and tolerating a disparate impact based on such an "insubstantial justification * * * would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." *Wards Cove*, 490 U.S. at 659.

On the other hand, as long as the non-age factor is reasonable, no such inference of "discrimination against [the] protected group" is permitted under the ADEA, *Wards Cove*, 490 U.S. at 659, and the claim of discrimination "because of age" fails, regardless of the extent of the impact on older workers or the existence of alternative means to accomplish the employer's goals. *Smith*, 544 U.S. at 239 (plurality opinion). The RFOA provision thus sharply defines and delimits the scope of disparate impact claims under the ADEA, foreclosing a finding of discrimination "because of age" any time the disparate impact is attributed to a reasonable non-age factor. *Id.* at 243.

That direct and definitional correspondence between the terms of a disparate impact claim and the RFOA provision means that the RFOA "redefines the elements of a plaintiff's prima facie case instead of

establishing a defense to what otherwise would be a violation of the Act." *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989). Just as the "legitimate, nondiscriminatory" defense counters the elements of a prima facie disparate-treatment case, the RFOA and the elements of a disparate-impact claim are mutually negating: the RFOA denies the plaintiff's case on its own terms. That is not an affirmative defense, but a traditional defensive response to a plaintiff's evidence that leaves the burden of proof right where it started – on the plaintiff.

Petitioners rely heavily (Br. 25-32) on Congress's placement of the RFOA provision in Section 623(f) alongside the affirmative defense of a "bona fide occupational qualification." But it is a cardinal principle of statutory construction that a single statutory provision should not be read in isolation, and that the statute must be read as a whole. *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). When the RFOA provision is lined up against the ADEA's basic liability provision, the RFOA, by it terms, serves to negate and deny the central element of the plaintiff's claim – that is, that the adverse employment action is because of age. Cf. *Betts*, 492 U.S. at 181 (concluding that a provision of the ADEA that "appears on first reading to describe an affirmative defense," actually "delineates which employment practices are illegal and thereby prohibited and which are not" when the statute is considered as a whole).

Underscoring the point, the Court in *Smith* upheld dismissal of the police officers' disparate impact claim at the summary judgment stage because it was "clear

from the record that the City's plan was based on reasonable factors other than age." 544 U.S. at 241. That clarity meant not that the City had incontrovertibly established an affirmative defense, but that the plaintiffs had "not set forth a valid disparate-impact claim." *Id*. at 232.[6]

3. *Wards Cove* And *Smith* Confirm That The Burden Of Proof Remains With The Plaintiff

In *Wards Cove*, *supra*, this Court identified the key elements of a Title VII disparate impact case, and explained how the burdens of persuasion and production would be allocated. The Court first held that, to establish a prima facie case of discrimination on disparate impact grounds, a plaintiff must both demonstrate the existence of a "significant[]" statistical disparity and "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove*, 490 U.S. at 656. Once that prima facie case is established, the burden shifts to the employer to produce evidence that the challenged employment practice has a business justification and, more particularly, that the practice "serves, in a significant way, the le-

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[6] Contrary to petitioners' argument (Br. 25), the Equal Pay Act, 20 U.S.C. 206(d)(1), is of little relevance because, as *Smith* explains, there is no disparate impact liability under that statute. See *Smith*, 544 U.S. at 239 n.11. Beyond that, the plaintiff's prima facie case in an Equal Pay Act case requires far more exacting proof of discriminatory treatment than the statistical correlation with age at issue here, and thus raises a far more substantial basis for inferring discrimination on the basis of sex and shifting the burden of proof to the defendant. See generally *County of Washington v. Gunther*, 452 U.S. 161 (1981).

gitimate employment goals of the employer." *Id.* at 659. While the employer has the burden of production for business justification, "[t]he burden of persuasion * * * remains with the disparate-impact plaintiff." *Ibid.* The plaintiff's demonstration of a prima facie case of disparate impact does not relieve the plaintiff of "[t]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice." *Ibid.* Keeping the burden of proof on the plaintiff, the Court explained, not only accords with "the usual method for allocating persuasion and production burdens in the federal courts," but also "conforms" disparate impact cases "to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Id.* at 659-660.

While Congress subsequently amended Title VII to alter the *Wards Cove* method of proving disparate impact claims, Congress did not amend the ADEA "or speak to the subject of age discrimination." *Smith*, 544 U.S. at 240. Thus, *Wards Cove*'s "interpretation of Title VII's identical language remains applicable to the ADEA," *ibid.*, and, under that paradigm, the burden of proving that the employer's practice resulted in discrimination because of age, rather than because of some non-protected status (such as seniority), "remains with the plaintiff *at all times*." *Wards Cove*, 490 U.S. at 659.

Accordingly, just as in *Wards Cove*, the plaintiff's job is not done in an ADEA case when it proves a prima facie case of statistical disparity and identifies

the allegedly culpable employment practice. True, the statistical case shifts the burden to the employer to identify a "reasonable factor other than age" that caused the disparity – RFOA being the ADEA's less-exacting version of the business justification requirement at issue in *Wards Cove*. But the burden of persuasion and of ultimately proving that there was discrimination on the basis of age, rather than on a non-age ground, remains "*at all times*" with the plaintiff. *Wards Cove*, 490 U.S. at 659.

Petitioners argue (Br. 49) that the *Wards Cove* model is not applicable because the RFOA does not exist under Title VII, and thus the language of the two statutes is not "identical," *Smith*, 544 U.S. at 240. That is true, but of no help to petitioners for three reasons. First, the language that is most relevant and controlling for burden-of-proof purposes is the language creating the disparate-impact cause of action, which the ADEA adopted "*in haec verba*" from Title VII, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), including the identical requirement under each statute that the plaintiff prove that discrimination occurred "because of" a protected status (such as race, sex, or age). See 42 U.S.C. 2000e-2(a); 29 U.S.C. 623(a)(2). The RFOA, just like the business justification rule under Title VII (prior to the 1991 amendment), is a form of evidence that negates the inference arising from the prima facie disparate-impact case that the adverse employment action was "because of" a protected status. Both are thus responses to – denials of – the plaintiff's proof, which, in the absence of congressional direction to the contrary, leave the burden of discounting the defense

evidence and proving the requisite causation squarely on the plaintiff's shoulders.

Second, the RFOA is virtually identical in both terms and function to the rule under the ADEA (as well as Title VII) that a "legitimate, non-discriminatory" reason for employment action, once articulated by the employer in a disparate treatment case, must be disproven by the plaintiff. See *Reeves*, 530 U.S. at 142; *Burdine*, 450 U.S. at 254-255. The Court in *Wards Cove* specifically determined that the burden of proof in disparate impact cases should "conform[] to the rule in disparate-treatment cases" where "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." 490 U.S. at 660. In the ADEA, the RFOA does exactly that, and statutorily closes the gap between proof of disparate-treatment and proof of disparate-impact cases. Just as an employer's legitimate non-age-based reason is a defense to disparate-treatment claims, so also is a reasonable non-age-based reason a defense to disparate impact claims. And, as *Wards Cove* indicated, *ibid.*, the burden of proving each of those defenses should be the same. Cf. *Fort Worth*, 487 U.S. at 987 (plurality opinion of O'Connor, J.) ("Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.").

Third, the Court in *Smith* itself did not hesitate to apply the *Wards Cove* model to the RFOA provision, notwithstanding the textual difference between Title VII and the ADEA. See 544 U.S. at 241; see also *id.*

at 267 (O'Connor, J., concurring) ("agree[ing] with the Court" that, if permitted, ADEA disparate impact claims "are governed by the standards set forth in our decision in *Wards Cove* * ** [which] means that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion"). That makes sense because, as *Smith* explains, the whole point of the RFOA is to *reduce* the burdens employers face in justifying their practices and to narrow the scope of disparate-impact claims. *Ibid.* It thus would be illogical for the ADEA's statutory adoption of the more *employer-protective* RFOA provision, rather than the Title VII business justification rule, to result in the imposition of a *greater burden of proof* on employers in ADEA cases than employers faced in Title VII cases under *Wards Cove*.

B. Keeping The Burden Of Proof On The Plaintiff Comports With The ADEA's More Modest Limitations On Employment Decisionmaking And Has Proven To Be Workable

1. The RFOA Provision Reflects That Many Employment Practices Having A Disparate Impact Are Reasonable

Where the burden of proof for the RFOA provision is placed must comport with the careful balance Congress struck in the ADEA between combating irrational age barriers and stereotypes and preserving the flexibility and discretion that employers need to ensure their workforce can compete in the modern economy. See S. Rep. No. 107-158, ch. 4(A)(3)(a)

(2002) (Act seeks "to balance the right of older workers to be free from age discrimination in employment with the employer's prerogative to control managerial decisions"). In enacting the ADEA, Congress recognized that older workers, "unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment,'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000), and they face "little discrimination arising from dislike or intolerance of older people," *Smith*, 544 U.S. at 232. Quite the opposite, aging is a natural human condition, and Congress knew that "all persons," including the managers adopting employment criteria and making employment decisions, "if they live out their normal life spans, will experience it." *Kimel*, 528 U.S. at 83. Moreover, unlike the protected groups in Title VII, Congress was not confronting in the ADEA an established pattern of facially neutral tests or standards being used either to perpetuate the effects of past discrimination or to circumvent prohibitions on disparate treatment. See *Smith*, 544 U.S. at 240-241; *id.* at 258-259 (O'Connor, J., concurring).

The problem of age discrimination thus is "different in kind from discrimination on account of race" or gender. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). Congress's central concern was with preventing "arbitrary" discrimination arising from unwarranted age limits or stereotypical assumptions about the abilities of older workers. See *Smith*, 544 U.S. at 232. At the same time, Congress was aware that age, while sometimes employed in an arbitrary manner, "not uncommonly has relevance to

an individual's capacity to engage in certain types of employment." *Id.* at 240. In addition, Congress knew that a variety of criteria that are "routinely used" by employers "may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241. For those reasons, in enacting the ADEA, Congress expressly tempered the statute's reach by providing that any employer action that is based not on age, but on reasonable factors other than age, remains permissible. 29 U.S.C. 623(f)(1). The RFOA provision thus "reflects th[e] historical difference," *Smith*, 544 U.S. at 241, between age and other protected statuses and, to that end, "significantly narrow[s]" the ADEA's coverage in general, *id.* at 233, and the scope of disparate impact claims in particular, *id.* at 240.

The ADEA's acceptance of all employment practices based on reasonable non-age factors, regardless of how significantly a practice burdens older workers, demonstrates that even substantial statistical disparities in an employment practice's effect do not inspire the same suspicion or automatic need for justification that they do when race or gender is at issue. Because the probative force of statistics alone is of such limited evidentiary value in the age context, relieving the plaintiff at this early juncture of its burden to prove that the alleged discrimination was because of age could "result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances." *Smith*, 544 U.S. at 241 (quoting *Wards Cove*, 490 U.S. at 657). Tellingly, in the absence of express congressional direction, such a statistical prima facie case was insuffi-

cient to shift the burden of proof of race discrimination to the employer in *Wards Cove*, even though history and experience cast a much more skeptical eye on such disparities. There is no sound basis for a different rule under the ADEA, where any disparate impact on older workers is far less suspect, and where Congress has dictated, through the RFOA, broader latitude for employers' decisionmaking. In short, the statutory scheme that Congress carefully designed in the ADEA would make little sense if employers bore the burden of proving that decisions that Congress recognized will generally be run-of-the-mill and non-discriminatory are, indeed, run-of-the-mill and non-discriminatory. See Pet. App. 13a ("It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable.").

2. Petitioners' Burden-Of-Proof Scheme Would Be Unworkable

Perhaps recognizing that a statistically disparate impact on workers over 40 alone casts little doubt on the legitimacy of the employer's practice – and thus would not, on its own, warrant imposing the burden of proving non-liability on the employer – petitioners argue (Br. 47-48) that the burden would not shift until after a lack of business justification had been established under the *Wards Cove* framework. Thus, in petitioners' view, after the plaintiff proves a significant statistical disparity, the burden would shift to the defendant to articulate a business justification for the challenged employment practice, and then the burden would shift back to the plaintiff to prove the absence of such justification or pretext, and then

back to the defendant to prove reliance on a reasonable non-age factor. But that multi-pronged proof scheme would be unwieldy to apply, lacks any basis in the ADEA, and makes little sense in practice.

First, *Smith* held that, under the ADEA, the RFOA provision displaces the business justification test with a less-exacting and more employer-protective reasonableness inquiry. 544 U.S. at 241-243. The RFOA thus does not, as petitioners posit, tag along as a fall back to be invoked only if business justification is disproven. Instead, by enacting the RFOA, Congress eliminated altogether in the ADEA any inquiry into either the actual necessity of the business practice or the availability of alternative means for the employer to achieve its goals. *Id*. at 243; see U.S. Br. 26 ("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.").

Second, petitioners' multi-layered approach makes little sense. Every non-age based business justification identified by an employer for an employment practice would necessarily subsume a reasonable non-age factor for the decision. The employer's articulation of the one would necessarily include the other. There would be no point to dragging employers through months or, as in this case, years of resource-consuming discovery and litigation over the harder question of whether the factor rose to the level of business necessity and what alternatives were available (if any), when the ADEA requires only that the non-age factor be reasonable. The RFOA is de-

signed to curtail disparate impact liability and to protect the reasonable business judgments of employers, not to force employers and courts to spend scarce resources running around Robin Hood's barn.

By contrast, leaving the burden of proving that the disparate impact is because of age, and not some reasonable non-age factor, on the plaintiff would be simpler and readily workable. Petitioners, in fact, admit their ability to bear the burden of proof on business justification. If plaintiffs can bear the burden of persuasion on the necessity of employment criteria to the business and the existence of alternative measures that have a less differential impact, then they surely can bear the more straightforward burden of contesting reasonableness. Indeed, across the law in a wide variety of areas, plaintiffs are routinely called upon to contest the reasonableness of a defendant's actions. More to the point, plaintiffs already bear the burden of proving in ADEA disparate treatment cases that the defendant's actions were not attributable to a legitimate, nondiscriminatory reason. There is no reason they cannot do what is functionally the same thing in disparate impact cases.

3. Shifting The Burden Of Proof Would Substantially Erode The Discretion The ADEA Left To Employers

As both *Wards Cove* and Congress's reaction to that decision underscore, where the burden of proof is placed in employment discrimination cases has important implications for employer flexibility and business decisionmaking. Given the long history of invidious discrimination in employment on the basis

of race, ethnicity, gender, and religion, see, *e.g.*, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986), and the fact that reasonable business judgments do *not* naturally or commonly correlate with significant differentiation along racial or gender lines, Congress understandably casts a more skeptical eye on employment practices that result in or perpetuate race and gender disparity in the workplace. The ADEA, by contrast, operates against a very different backdrop, in which Congress recognized that employment decisions based on age themselves are "not uncommonly" relevant, and that many other reasonable and sensible employment criteria correlate significantly with age. See *Smith*, 544 U.S. at 240-241. What is more, the majority of employees are over the age of 40, http://www.bls.gov/web/cps/cpsaat3.pdf, which means that, as a matter of ordinary statistics, most employer practices will affect more workers over 40 than under 40. Congress thus enacted the RFOA provision to ensure a wide berth for reasoned and reasonable employer judgments.

Preserving such employer flexibility and discretion is vital in the modern economy. The rapid advancement of technology and globalization of the economy have forced businesses to restructure, reorganize, and reduce their workforces to compete and to survive economically. One unfortunate aspect of that process has been the widespread need for reductions in force. "As global competition increases and improvements in technology accelerate, U.S. corporations must respond in order to maintain * * * their

position in the international marketplace. As human capital becomes superseded by technological efficiencies, the result of downsizing is inevitable." Ira M. Millstein, *The Responsible Board*, 52 BUS. LAW. 407 (1997).[7] According to the Department of Labor, in 2007 alone, businesses engaged in 15,493 "mass layoff events," defined as layoffs of 50 or more employees, resulting in the separation of over 1.5 million employees.[8] In the first two months of 2008, employers engaged in 3,110 mass layoff actions, affecting 321,485 employees.[9]

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[7] See also Theodore Hershberg, *Defining the Challenge: Human Capital Development – America's Greatest Challenge*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 46 (1996) ("To stay competitive in the global economy, corporate America has been engaged in a dramatic downsizing process."); Robert Goldscheider, *Entrepreneurialism: The Engine that has Helped the United States Regain World Leadership – An Example for Japanese Industry*, 39 IDEA 507, 519 (1999) ("Corporate downsizing * * * has helped make American companies more efficient and competitive."); Carol B. Swanson, *Antitrust Excitement in the New Millenium: Microsoft, Mergers, and More*, 54 OKLA. L. REV. 285, 300 & n.110 (2001) ("Market globalization also imposes competitive pressures on domestic businesses to become bigger, better, and more efficient * * *. Because of these competitive pressures, companies engage in downsizing and consolidation to become more efficient."); Thomas H. Vickers, *Advising Financially Troubled Entities*, 5 S. CAL. INTERDISC. L.J. 469, 477 (1997) ("Plant closings, mass layoffs, and reductions in force * * * have become commonplace in the more competitive economic world confronted by employers.").

[8] See http://www.bls.gov/news.release/archives/mmls_01242008.pdf.

[9] See http://www.bls.gov/news.release/archives/mmls_02272008.pdf; http://www.bls.gov/news.release/archives/mmls_03212008.pdf.

Faced with such economic pressures, now more than ever, employers need the substantial flexibility and discretion in streamlining the workplace that the RFOA provision seeks to preserve.[10] But, as this Court has recognized, many such reductions and layoffs are likely to have a disproportionate effect on older workers because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." *Smith*, 544 U.S. at 240. In addition, numerous factors of importance to employers in the modern economy correlate with age, including technology-based skills, education levels, physical ability, and entitlement to benefits, such as salary, vacation time, pension status, retirement eligibility, and seniority.[11] Indeed, because "[v]irtually all elements of a standard compensation package are positively correlated with age," "many employer decisions that are intended to cut costs or respond to

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[10] See, *e.g.*, Guillermo Rotman, *Shared Office Providers Deliver Cost Savings and Flexibility*, 39 AREA DEVELOPMENT SITE AND FACILITY PLANNING 30 (Apr. 2004) ("Organizations . . . need the flexibility to locate, relocate, upsize, or downsize in order to meet market conditions."); Roger L. Schantz, *Current Issues in Insurance Law, Comment, Lapeer Foundry: The NLRB Closes the Door on Unilateral Economic Layoffs*, 51 OHIO ST. L.J. 1049, 1062 (1990) ("Speed and flexibility are extremely important in the decision to implement economic layoffs.").

[11] See *Smith*, 544 U.S. at 259 (O'Connor, J., concurring) ("[A]dvances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-à-vis younger workers."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976) (per curiam); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951, 952 (8th Cir. 1999); *Allen v. Diebold, Inc.*, 33 F.3d 674, 676 (6th Cir. 1994); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 876 (6th Cir. 1990).

market forces will likely have a disproportionate effect on older workers." *Id.* at 259 (O'Connor, J., concurring).

Employers, of course, cannot use age as a proxy for those considerations. The point of the ADEA was to make employers "focus on those factors directly," *Kimel*, 528 U.S. at 88, but not to preclude use of such factors altogether. See *EEOC v. Wyoming*, 460 U.S. 226, 232-233 (1983) ("[I]n order to insure that employers were permitted to use neutral criteria not directly dependant on age * * * the Act provided that certain otherwise prohibited employment practices would not be unlawful * * * 'where the differentiation is based on reasonable factors other than age.'"); *Allen*, 33 F.3d at 677 ("The ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations.").

Adopting a litigation model and proof scheme under the ADEA that casts a cloud of suspicion over the use of such factors by transferring the burden of proving non-liability to the employer just because of a factor's statistical correlation with age would ignore the balance Congress struck and the workplace realities against which it legislated. Shifting the burden of proof will also make it harder for courts to dispose of cases before discovery and trial, forcing employers to devote already strained resources to litigation rather than business development. What is worse, the practical effect of a proof scheme that presumptively equates age correlation with age discrimination will be to chill employers' use of the broad swath of

legitimate employment criteria that happen to correlate with age and to hamstring employers' ability to respond quickly and efficiently to changing economic pressures and developments. Those consequences, in turn, will decrease business efficiency and competitiveness, which could ultimately lead to even more job losses.

Petitioners, at bottom, want enforcement of the ADEA to mirror enforcement of Title VII following the 1991 amendments. But Congress deliberately did not write the ADEA that way, and chose in 1991 not to amend the ADEA to parallel Title VII. See *Smith*, 544 U.S. at 240-241. The text of the two statutes, the respective histories of age and race or sex discrimination, and the economic and demographic realities of the workforce are significantly different, and the burden of proof in ADEA cases must respect those differences.[12]

C. No Deference Is Owed To The EEOC's Litigating Position

Petitioners (Br. 38-44) and the United States argue (Br. 15-21) that the Court should defer to the EEOC's view, as expressed in its brief in this case, that the burden of proof under the RFOA provision rests with the employer. No such deference is appropriate because the relevant regulatory texts and history suggest the opposite and, in any event, the bur-

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[12] See *Smith*, 544 U.S. at 236 n.7 (plurality opinion) (noting that "the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently," particularly when "coupled with a difference in the text of the statute such as the RFOA provision") (emphasis omitted).

den of proof in a judicial proceeding to which the EEOC itself may be a party is not the type of issue for which the agency's judgment should receive deference.

First, contrary to the government's litigation position before this Court, the better reading of the relevant regulatory texts and history supports placing the burden of proof under the RFOA provision on the plaintiff. The EEOC's regulation addressing litigation of the RFOA provision, 29 C.F.R. 1625.7, does not directly address the burden of proof in disparate impact cases. But Section 1625.7(d) does provide that, when an employment practice has a disparate impact on older workers, the "factor other than age" must "be justified as a business necessity." *Wards Cove*, in turn, held that the burden of proving business necessity is on the employee, 490 U.S. at 659-660, and *Smith* confirmed that the *Wards Cove* model continues to apply to the unamended ADEA, 544 U.S. at 240. The EEOC has amended its regulation twice in the nine years since *Wards Cove* and the three years since *Smith*, see 72 Fed. Reg. 36,875 (July 6, 2007); 72 Fed. Reg. 72,944 (Dec. 26, 2007), but has never changed its rule that RFOA should be proven in the same manner as business justification, which *Wards Cove* placed on the plaintiff and *Smith* left there for purposes of the ADEA. Cf. 73 Fed. Reg. 16,807 (Mar. 31, 2008) (proposing for the first time – and after the filing of the government's brief in this case – to amend the regulation). Thus, the EEOC regulation endorses a litigation model that, under this Court's precedent, is most fairly read as leaving the RFOA burden of proof on the plaintiff. Subse-

quent unpublished, litigation-inspired, interpretive positions cannot conflict with that plain regulatory text. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (no deference would be owed to an agency's interpretation of its own regulation if it was "inconsistent with the regulation" itself).[13]

Second, subsection (e) of the regulation provides that, in disparate *treatment* cases, "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. 1625.7(e); see 73 Fed. Reg. 16,807, 16,808 (Mar. 31, 2008). That provision reinforces – as the preceding subsection 1625.7(d) indicates – that the burden of proving RFOA in disparate impact cases is on the plaintiff. Otherwise, there was no reason for the regulation to carve out, by way of contrast and structurally separate from the preceding disparate impact subsection, a specific burden of proof rule for disparate treatment cases only. Moreover, "disparate impact" and "disparate treatment" are terms of art in civil rights law. Just as Congress is presumed to be aware of and to adopt the established meaning of le-

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[13] The government asserts (Br. 16) that the EEOC's invocation of the "business necessity" model "takes a position that does not survive *Smith*." See also 70 Fed. Reg. 65,360-61 (Oct. 31, 2005). That is certainly true with respect to the substantive standard by which the disparate impact claim is measured, but nothing in *Smith* undermines the underlying regulatory judgment about where the burden of proving the ADEA's equivalent to "business necessity" – the RFOA provision – falls. Alternatively, if the EEOC's position is that the entire regulatory provision is now invalid due to the EEOC's long-term and fundamental misunderstanding of the RFOA provision, the EEOC is ill-positioned to claim deference to their reading of a statutory provision that they have so profoundly misunderstood for so long.

gal terms of art used in legislation, *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-202 (1974), it strains the regulatory text to the breaking point for the EEOC to argue that the phrase "discriminatory treatment" includes "disparate impact."[14]

The regulatory history confirms that common-sense conclusion. As originally proposed, the draft regulation spoke more broadly and assigned the RFOA burden of proof to employers without restricting it to disparate treatment cases. 44 Fed. Reg. 68,858, 68,861 (Nov. 30, 1979) ("The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer."). The specific limitation to "disparate treatment" cases thus was specifically and deliberately added by the EEOC after further consideration and public comment on the draft regulation. See 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981). Whatever interpretive discretion the EEOC has under the ADEA, it cannot adopt through litigation interpretations of statutory text that specifically failed to survive the regulatory process *and* that are in tension with the text of the regulations as promulgated. See *Thomas Jefferson Univ.*

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[14] For purposes of this case, the Court need not decide whether the EEOC's rule concerning the burden of proof in disparate treatment cases is proper. The regulation's reference to the burden to prove the claim "factually" is most naturally read as referring only to the burden of production. If the regulation reaches further, however, then the defensibility of the EEOC's view would be in substantial doubt, given that the plaintiff already bears the burden of disproving the existence of a "legitimate, nondiscriminatory reason" for the employment action in disparate treatment cases under the ADEA, *Reeves*, 530 U.S. at 142, and there is no sensible basis for distinguishing between that burden and the RFOA burden.

v. Shalala, 512 U.S. 504, 512 (1994) (no deference is owed where an "alternative reading is compelled * * * by other indications of the Secretary's intent at the time of the regulation's promulgation").

Petitioners (Br. 41) and the government (Br. 18) contend that Congress ratified the EEOC's allocation of the burden of proof in 1990 when it enacted the Older Workers Benefits Protection Act (OWBPA), Pub. L. No. 101-433, § 101, 104 Stat. 978. If that is true, that would hurt rather than help petitioners. That is because, shortly before enactment of the OWBPA and any alleged ratification, this Court had held that the burden of proving business necessity in disparate impact cases falls on the plaintiff. See *Wards Cove*, *supra*. Thus, to the extent Congress focused on the issue at all, it is much more likely that they were aware of and ratified the EEOC's *published regulation* equating the models for RFOA and business necessity proof, as read in light of this Court's decision in *Wards Cove* (a decision well known to Congress) holding that the burden of proving business necessity remains with the employee.[15] There is certainly no sound basis for concluding that Congress acquiesced in the EEOC's unwritten position that a civil-rights term of art like "discriminatory treatment" in 29 C.F.R. 1625.7(e) means both "disparate treatment" and "disparate impact." See *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994); *Corning Glass Works*, 417 U.S. at 201-202; cf. *Cline*, 540

[15] That understanding is strengthened by this Court's observation in *Smith*, 544 U.S. at 240, that Congress left the *Wards Cove* model intact for the ADEA.

U.S. at 600 (no deference owed to EEOC position under the ADEA that "is clearly wrong").[16]

Finally, and in any event, there is a substantial question whether the EEOC is entitled to deference on the burden of proof question. The deference due an agency interpretation turns, in the first instance, "on whether the matter is more properly viewed as within the agency's expertise or, on the contrary, as a clearly legal issue that courts are better equipped to handle." *Dion v. Secretary of Health & Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987). While the ADEA assigns the EEOC an informal conciliation role in administering the statute, 29 U.S.C. 626(d), the ADEA does not require administrative adjudication of claims by the EEOC as a prerequisite to judicial review. See 29 C.F.R. 1614.201. Where the burden of proof falls for the RFOA provision thus does not implicate any adjudicatory expertise statutorily assigned to the EEOC. Contrast *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001) (deferring to agency determination of where burden of proof fell on an issue adjudicated by the agency in administrative proceedings that are mandated to precede judicial review). Nor does the RFOA burden of proof issue entail the interpretation and construction of ambiguous language in any specific statutory provision, see *Federal Express Corp. v.*

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[16] The other potential reading of the OWBPA is that it said nothing at all about the burden of proof under the RFOA provision. See 136 Cong. Rec. 25,353 (1990) ("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."). That would not help petitioners either.

Holowecki, 128 S. Ct. 1147, 1154 (2008), because the text of the ADEA does not expressly address the burden of proof.

Instead, the burden of proof issue pertains to how claims will be proven in courtroom litigation, which is a matter that falls "within the peculiar expertise of the judiciary." *Midland Coal Co. v. Office of Workers' Comp. Programs*, 149 F.3d 558, 561 (7th Cir. 1998). Indeed, "[w]here Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for '[it] is the kind of question which has traditionally been left to the judiciary to resolve.'" *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)); see also *Greenwich Collieries*, 512 U.S. at 272-281 (no deference to agency allocation of burden of proof under the Administrative Procedure Act). [17]

The claim to deference to a litigation position is particularly weak when, as here, the agency is itself charged with litigating the very type of claims at issue in court. Principles of agency deference less logically extend to an agency's interpretative determina-

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[17] Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 640, 649 (1990) (declining to defer to agency's position on "whether exclusivity provisions in state workers' compensation laws bar migrant workers from availing themselves of a private right of action under [a federal statute]"); *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) ("A statute of limitations is not a matter within the particular expertise of the INS. Rather, we consider this 'a clearly legal issue that courts are better equipped to handle.'"); *Lynch v. Lyng*, 872 F.2d 718, 724 (6th Cir. 1989) (no deference to agency's position on the effective date of a statute).

tion to relieve itself of affirmative litigation burdens. Cf. *Holowecki*, 128 S. Ct. at 1156-1157 (deferring to EEOC litigation position when there is "no reason to assume the agency's position * * * was framed for the specific purpose of aiding a party in this litigation"); *Kentucky River*, 532 U.S. at 712 (deferring to agency's burden-of-proof rule for "supervisory" status where such status "is not an element of the Board's claim"). At a minimum, given the EEOC's self-interest, deference on such burden of proof questions should be conditioned on full and formal agency deliberation through either the rulemaking process or the formal administrative adjudicatory process. Here, of course, the only regulations on the books are best read as leaving the burden of proof in disparate impact cases on the plaintiff.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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