No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, MARGARET REYNHEER, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Petitioners,

v.

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Respondents object to the questions presented to this Court for consideration by petitioners. With respect to the first question, and contrary to certain misstatements in the petition, there is no growing split or present conflict among the circuit courts on the proper burdens of proof, persuasion and production in a disparate impact age discrimination case under the Age Discrimination in Employment Act ("ADEA").

The second question presented also misstates the record facts in this case. The alleged "practice of conferring broad discretionary authority upon individual managers to decide which employees to layoff during a reduction in force" is not the specific employment practice identified by petitioners at trial. This question also misstates the facts by ignoring the overwhelming and unrefuted evidence at trial showing that the factors used by respondents in the layoff (*i.e.*, company service, job performance, criticality and flexibility) were reasonable.

Respondents thus submit that only the following questions are presented by the petition:

1. Whether a petition for certiorari should be granted where: (i) there is no current conflict among the circuits on the proper burdens of proof and production in a disparate impact case under the ADEA, and (ii) the issue presented has recently been resolved by the Court.

2. Whether any compelling reasons exist to review the Second Circuit's determination that respondents met their burden of production and petitioners failed to meet their burden of proof at trial.

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STATEMENT PURSUANT TO RULE 29.6

KAPL, Inc.'s parent corporation is Lockheed Martin Corporation, which owns 100% of KAPL, Inc.'s stock. The publicly traded company who owns approximately 10% or more of Lockheed Martin Corporation's stock, as reported on Schedule 13G pursuant to Section 16(a) of the Securities Exchange Act of 1934, is:

State Street Bank and Trust Company, acting in various fiduciary capacities	18.7%

PRELIMINARY STATEMENT

Respondents KAPL, Inc. ("KAPL"), Lockheed Martin Corporation ("Lockheed"), and John J. Freeh ("Freeh"), former General Manager of the Knolls Atomic Power Laboratory (the "Laboratory"), oppose the petition for a writ of certiorari filed by the petitioners on May 9, 2007. For the reasons set forth in this brief, the petition, which seeks to overturn the August 14, 2006 decision of the Second Circuit Court of Appeals in favor of the respondents ("*Meacham II*"), reported at 461 F.3d 134,[1] should not be granted and should be denied in its entirety.

The petition is rife with misstatements of both law and fact related to the questions presented by petitioners. Nowhere are these misstatements more evident than in petitioners' repeated and inaccurate assertions to the effect that there is a split, conflict and a "growing division among the courts of appeals over who bears the burden of persuasion on the 'reasonable factors other than age' ["RFOA"] defense" provided in Section 623(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). Petition, 10.[2] Since this Court decided *Smith v. City of Jackson*, *Miss.*, 544 U.S. 228 (2005) ("*City of Jackson*"), there has been no conflict whatsoever, and there is no such "growing division" among the circuits, on the first question presented in the petition. That question, reduced to its essence, is whether the RFOA defense in the ADEA is an affirmative defense as to which employers like respondents bear the

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[1] A copy of the Second Circuit's reported decision on remand is in the Appendix to the petition. References to the Decision are designated "*Meacham II*, [page number in the petition's Appendix]."

[2] References to the petition filed in this case are designated "Petition, [page number]."

burden of proof, or whether it is instead a burden of production.

Notwithstanding petitioners' arguments to the contrary, *City of Jackson* resolved the issue raised in the first question presented when it held that "*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. Since *City of Jackson* was decided by this Court only two years ago, a number of court decisions in other circuits have addressed this question, and have ***unanimously*** decided that the defendant has the burden of production in raising any factors considered other than age. The plaintiff, however, still has the burden of persuading the fact finder that those factors were unreasonable. *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 987 (E.D. Mo. 2006) (emphasis added) (citing *Meacham II*, 461 F.3d at 142); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) ("*Pippin*"); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005); *Mattensen v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006).

In stark and unmistakable contrast to the position taken now by the petitioners in their first question presented, petitioners conceded below that respondents' burden at trial was merely one of production and that they (the petitioners) bore the burden of proof at trial on any alleged "unreasonableness" in respondents' facially neutral involuntary reduction in force ("RIF") policies. Petitioners should be precluded from claiming otherwise here, having previously agreed with and advocated for the very same burden-shifting approach adopted and applied by the Second Circuit in *Meacham II*.

There is likewise no conflict between the Second Circuit's decision in *Meacham II* and any valid or existing RFOA regulations issued by the Equal Employment

Opportunity Commission ("EEOC"). Indeed, the EEOC's RFOA regulations, which expressly deal only with disparate treatment cases, were effectively rejected by a majority of the Court in *City of Jackson*. The EEOC's regulations are also in the process of being reviewed and revised to conform to *City of Jackson*. The EEOC's regulations are thus entitled to no deference under *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), or otherwise.

Additionally, contrary to the arguments made by petitioners, there is also no conflict or inconsistency between the decision in *Meacham II* and the prior, controlling decisions of this Court, including *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) ("*Watson*"), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) ("*Wards Cove*"), and *City of Jackson*. Indeed, after this Court vacated the Second Circuit's prior decision in this case, reported at 381 F.3d 56 (2d Cir. 2004) ("*Meacham I*"),[3] and remanded for reconsideration in light of *City of Jackson* (*see KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005)), the Second Circuit did precisely what it was directed to do by the Court and reconsidered *Meacham I*, following both *City of Jackson*'s and *Wards Cove's* teachings to the letter. In so doing, the Second Circuit properly adopted and applied *Wards Cove's* familiar burden-shifting analysis to the petitioners' disparate impact age discrimination claims under the ADEA, as modified by a majority of the Court in *City of Jackson*, to preclude any requirement that the respondents prove or establish "business necessity" and

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[3] The initial decision rendered by the Second Circuit in this case prior to the remand by this Court is contained in the Appendix to the petition. References to this decision are designated "*Meacham I*, [page number in the petition's Appendix]."

to foreclose petitioners' reliance on alleged "equally effective alternatives." *See City of Jackson*, 544 U.S. at 243.

Furthermore, as discussed in greater detail below, petitioners' new claim, expressed for the first time in this manner in the second question presented in the petition, to the effect that respondents had a "practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during" the RIF (Petition, i), misstates the facts and the record evidence introduced at trial and relied upon by the Second Circuit in *Meacham II*. This alleged practice was not the specific employment practice identified by the petitioners at trial as causing a disparate impact due to age. *See Meacham* Decision and Order, 84a.[4] Instead, petitioners contended at trial that the facially neutral policy was the overall selection process called for by respondents' RIF guidelines. *Id.* Over respondents' objections, the Second Circuit on remand gave petitioners the benefit of the doubt on this issue by finding that the specific employment practice identified by petitioners was respondents' alleged "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility.'" *Meacham II*, 15a.

Even if petitioners had identified and proved at trial that respondents' alleged "practice of conferring broad discretionary authority upon individual managers" caused the statistical disparities complained of, which

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[4] The District Court's decision, rendered February 13, 2002, is reported at 185 F. Supp. 2d 193 (N.D.N.Y. 2002) and is contained in the Appendix to the petition at pages 70a-154a. References to this Decision are designated "*Meacham* Decision and Order, [page number in the petition's Appendix]."

they failed to do, the Second Circuit properly held in *Meacham II* that respondents' burden at trial "was to advance a justification for these features of the IRIF, and it was [petitioners'] burden to demonstrate that that justification [was] unreasonable." *Id.* The Second Circuit also correctly held, both in *Meacham I* and *Meacham II*, that the District Court was correct in holding that KAPL satisfied its burden of producing evidence that a legitimate business justification motivated the challenged components of the RIF. *Meacham I*, 59a; *Meacham II*, 15a; *Meacham* Decision and Order, 93a-94a.

Whether characterized as a burden of production or one of proof and persuasion, the record evidence in this case demonstrates that respondents met their burden at trial of showing that the criteria used to select employees for layoff in the RIF, including flexibility and criticality of skills, were reasonable. In fact, as the Second Circuit acknowledged in *Meacham I* and *Meacham II*, respondents introduced substantial evidence that their legitimate business justification – reducing the "workforce while still retaining employees with skills critical to the performance of KAPL's functions" – motivated the challenged components of the RIF and that, unchallenged, KAPL's justification would preclude a finding of disparate impact. *Meacham I*, 59a; *Meacham II*, 8a.

At trial, the petitioners failed to challenge this substantial probative evidence of reasonableness, including the testimony of respondents' expert, Dr. Frank Landy, and other KAPL witnesses, discussed below. Indeed, petitioners failed to rebut the respondents' proof in this regard with any probative evidence of their own on this issue. This failure was appropriately noted by the Second Circuit, which observed that petitioners, "who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of

KAPL principals regarding the planning and execution of the IRIF." *Meacham II*, 18a.

Even now, petitioners candidly admit that they are not complaining "that [respondents] attempted to lay off inflexible workers with less critical skills; [rather,] their complaint is that the means chosen [by respondents] to fulfill that goal were so haphazard and unconstrained that age could be used by supervisors as an illegitimate proxy for flexibility and criticality, thereby exposing older workers to the central harm the ADEA was enacted to prevent." Petition, 27. This claim, never proven and completely at odds with the undisputed proof of "reasonableness" relied upon by the Second Circuit in *Meacham II*, is tantamount to and indistinguishable from petitioners' intentional age discrimination claims. All of those claims were rejected by the jury at trial in this case, which found that all twenty-eight (28) original plaintiffs, petitioners included, failed to prove that the respondents were motivated by the plaintiffs' ages when they were selected for layoff in the RIF based on their managers' assessments of their individual performance, company service, flexibility, and criticality to the work of the Laboratory.

Having failed to prevail at trial on their intentional discrimination claims, petitioners may not now seek to negate the jury's verdict on this issue by alleging, as part of their disparate impact claims, that their layoffs were the result of "subconscious age bias," or "stereotypes of older workers as inflexible and outdated." While these allegations might state a claim for disparate treatment – a claim squarely rejected by the jury and subsequently dismissed by the district court in this case – they do not state a disparate impact claim under the ADEA. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Wado v. Xerox Corp.*, 991 F. Supp. 174, 186 (W.D.N.Y. 1998), *aff'd*, 196 F.3d 358 (2d Cir. 1999);

Kourofsky v. Genencor Int'l, Inc., 459 F. Supp. 2d 206, 215 (W.D.N.Y. 2006). *See also Khalil v. Farash Corp.*, 452 F. Supp. 2d 203 (W.D.N.Y. 2006).

Finally, as discussed in greater detail below in Point II, petitioners' claim before this Court that respondents' use of "subjective criteria like 'flexibility' and 'criticality of skills'" was "without implementation of meaningful checks [which] led to 'startlingly skewed' results" (Petition, 26), ignores and misstates the record evidence at trial. Contrary to petitioners' claim, the preponderance of the evidence demonstrated, as the Court of Appeals noted after remand, that "KAPL set standards for managers constructing [the layoff] matrices and selecting employees for layoff, and it did monitor the implementation of the RIF." *Meacham II*, 19a. Although ignored by petitioners, the evidence further established, as the Second Circuit also observed, that respondents' RIF policies "restricted arbitrary decision-making by individual mangers, and the measures that KAPL put in place to prevent such arbitrary decision-making and ensure the layoffs satisfied KAPL's business needs – while not fool proof – were substantial." *Id.*

After *City of Jackson*, it is not enough for petitioners to allege, as they have in their petition and as they did before the Second Circuit and at trial, that there were other alternatives and that respondents could have done even more. This line of argument is foreclosed by *City of Jackson*. To hold otherwise, as discussed below, would not only be inconsistent with *City of Jackson* and the RFOA exception to liability under the ADEA, but would also put undue pressure upon employers to use impermissible and unlawful quotas to avoid a disparate impact ADEA claim.

COUNTER STATEMENT OF THE CASE

At the trial in this case (although nowhere is this mentioned in the petition), petitioners asserted two separate theories of age discrimination. *Meacham I*, 43a-45a. Petitioners first alleged that respondents intentionally discriminated against them because of their ages in selecting them for termination from employment during a RIF implemented in 1996. Second, they alleged that the same actions that formed the basis of their intentional age discrimination claims also resulted in a disparate impact on employees age forty and over. *Id.*

As noted earlier, petitioners have similarly failed to mention anywhere in their petition that the jury *completely exonerated* respondents from all liability on petitioners' claims of intentional age discrimination under both federal and state law. More specifically, the jury found, on both a "direct evidence" theory and a "pretext" theory, as to each of the original twenty-eight (28) plaintiffs, that they failed to prove that the respondents were motivated by age in selecting them for termination in the RIF. Nevertheless, the jury found in favor of a sub-group of twenty-six of the original twenty-eight plaintiffs on their disparate impact claims. *Id.* at 45a.

Factual Background

As correctly explained in both *Meacham I* and *Meacham II*, KAPL, a wholly owned subsidiary of Lockheed Martin, manages and operates the Laboratory, which is a government-owned nuclear research and development facility, pursuant to a contract with the United States Department of Energy ("DOE"). *Meacham I*, 37a-38a; *Meacham II*, 4a. As also noted correctly by the Second Circuit, employees at KAPL work on "designing advanced nuclear powered propulsion systems;

training sailors to operate them; and overseeing their maintenance, repair, refueling and decommissioning." *Meacham I*, 37a.

In 1996, the United States Naval Nuclear Propulsion Program (referred to in *Meacham II* as "NR"), which funds KAPL's operations (together with the DOE) and sets annual staffing limits for the Laboratory, imposed a more stringent limit on annual staffing levels. At the same time, NR assigned certain additional work to the Laboratory that required new hires. *Meacham I*, 38a. This case arises out of a RIF of Laboratory personnel implemented in 1996 in response to NR's revised annual staffing limits, which was in turn a response to the end of the Cold War. *Meacham II*, 5a.

KAPL attempted to meet this staffing ceiling without laying off employees involuntarily, but could not avoid a RIF. *Meacham I*, 38a. To determine which salaried employees should be laid off, KAPL designed an age-neutral matrix for ranking employees based upon comparative performance, criticality of skills, flexibility (ability to perform more than one job), and years of company service. *Id.* at 39a-40a.

Contrary to petitioners' statement that KAPL conferred unfettered or broad discretion on its managers during the RIF selection process, respondents produced substantial and unrefuted evidence at trial demonstrating that KAPL provided specific definitions explaining each of these selection criteria as well as training on how to apply them. Moreover, respondents produced uncontroverted evidence at trial showing that these RIF selection criteria (*i.e.*, performance, company service, criticality and flexibility) are job-related and reasonable. In fact, respondents produced evidence showing that these layoff selection criteria, and the safeguards adopted to ensure that the RIF was

implemented fairly, were among the best practices used by employers in similar layoff situations. *Meacham II*, 5a-6a; 16a.

The testimony at trial included that of Dr. Frank Landy, an expert in industrial psychology with substantial experience in downsizings. The petition omits the fact that Landy testified, based on his detailed review of the RIF procedures and their implementation, that KAPL's practices met the "job-related" standard recognized by experts in the field. Landy's testimony also established that the RIF decisions were based upon essential jobs or skills necessary to do the work at KAPL and that the process used by KAPL to select employees for layoff was clearly job-related and consistent with KAPL's business needs. *Id.* at 16a.

Landy further explained how each of the four criteria on the matrix was commonly used in selecting employees for downsizing. According to Landy, criticality is commonly used to assess the skill level of individuals to perform necessary work and flexibility is necessary because the greater number of skills the employee has, the more valuable they are to the employer in performing potential work. Landy also testified that assessments of past performance are valuable as a predictor of future performance, while company service is valuable to retain institutional memory. *Id.*

Landy's testimony was consistent with the testimony offered by other KAPL witnesses, including but not limited to Dennis Burek, KAPL's Staffing Manager. Burek testified that an employee's flexibility measures the scope of that employee's skills to determine whether he or she had skills which could enable them to be used in other parts of the Laboratory or to be retrained for other Laboratory work. Flexibility was important because KAPL needed to retain employees who could perform

more than one function, especially with a workforce that was declining in overall numbers. Criticality was used to assess how important a person's skills were for the Laboratory and Naval Reactors program under which KAPL works. This was essential, according to Burek, because KAPL needed to determine whether the loss of skills would render it unable to perform its work or would reduce the quality of the work performed, and whether it could afford to lose certain skills.

The testimony at trial also included that of KAPL managers who completed and/or reviewed the layoff matrices, as well as that of senior managers and KAPL's legal counsel. The undisputed testimony of these KAPL witnesses established that respondents did in fact review and audit the reasons supporting each termination decision and concluded that each of the low rankings was the result of legitimate, non-discriminatory business reasons related to the employees' company service, job performance, flexibility, and criticality to the work of the Laboratory. *Meacham II*, 17a. Accordingly, KAPL proceeded, in good faith, with the RIF. *Meacham I*, 73a-74a.

At trial, as well as on appeal to the Second Circuit, petitioners did not dispute respondents' showing that the selection criteria themselves were reasonable ones. Rather, petitioners sought to prove only that the RIF selections were infected by age bias (a disparate treatment argument completely rejected by the jury), and that there were alternatives to the RIF. *Meacham II*, 18a. In *Meacham I*, the Second Circuit rejected the alternatives petitioners had relied upon at trial, finding that they were replacements for the RIF itself, which "was (and is) a personnel decision justified by KAPL's business objectives." *Meacham I*, 80a. Petitioners' have never challenged this finding.

The Second Circuit in *Meacham I* nevertheless upheld the verdict, finding that there was at least one suitable alternative to the RIF; namely, using more safeguards against subjectivity. On remand, the Second Circuit concluded that their analysis was untenable, however, in light of *City of Jackson's* ultimate holding that the RFOA's reasonableness inquiry precludes a consideration of alternatives. *Meacham II,* 9a.

Petitioners did not dispute any of these findings below before the Second Circuit and cannot do so now before this Court. Similarly, the EEOC expressly conceded in the proceedings below after remand, in their brief as amicus curiae for the petitioners, that the respondents "explained that the purpose of the IRIF and its constituent parts was to reduce the workforce while still retaining employees with skills critical to the performance of KAPL's functions" and that **"this purpose is important and facially legitimate."** EEOC Brief on Remand, pp. 18-19 (emphasis added).

ARGUMENT

POINT I

THERE IS NO "GROWING DIVISION" OR PRESENT CONFLICT AMONG THE CIRCUITS ON THE QUESTIONS PRESENTED IN THE PETITION

Contrary to repeated misstatements of law and fact contained in the petition, there is no "growing division" or present conflict between the decision in *Meacham II* and the decisions of other circuit courts which have addressed the questions here presented. Indeed, the Court in *City of Jackson* resolved the first issue presented here regarding the appropriate burdens of proof and production when it held that: "*Wards Cove's*

pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

Title VII and the ADEA contain nearly identical language prohibiting employment decisions having a disparate impact. *Id.* at 233 (observing that "except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,'" Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a), is identical to Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)). However, as the Court explained in *City of Jackson*, the two statutes differ in one important respect: the ADEA contains a provision (*i.e.*, the RFOA exemption) which permits employers to take actions otherwise prohibited under the statute if such actions are based upon reasonable factors other than age.

As explained by Justice Stevens, writing for the Court in *City of Jackson*, "in cases involving disparate-impact claims . . . the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'" *Id.* at 239. In other words, disparate impact claims under the ADEA "are strictly circumscribed by the RFOA exception." *Id.* at 439 (O'Connor, concurring).

Importantly, *City of Jackson* did not change the respective burdens of proof and production in a disparate impact case based on age, but held that the same burdens of proof and production applicable to similar cases under Title VII (under *Wards Cove*) apply equally to disparate impact cases under the ADEA. Indeed, the Court held that, under the ADEA, just like under Title VII, the plaintiff must first identify a specific employment practice which is responsible for the disparate impact in order to state and establish a prima facie case of disparate impact age discrimination. *Id.* at 241 ("It is not enough to simply allege that there is a disparate impact

on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). Secondly, the Court held that even if the plaintiff demonstrates that there is such a specific employment practice that resulted in a disparate impact, the employer may defend its actions by showing that the challenged practice "was based on reasonable factors other than age." *Id.*

In so ruling, the Court recognized that "age unlike race or other classifications protected by Title VII, may be correlated with an individual's capacity to engage in certain types of employment." *Id.* at 240. Accordingly, and because of the RFOA provision's liability-limiting effects, the Court held that in a disparate impact age discrimination case under the ADEA an employer is not required to prove "business necessity" to defend itself, but need only show that its actions were reasonable and based on reasonable non-age factors.

The Court concluded that this narrower "reasonableness inquiry" is different than the "business necessity" test articulated in *Wards Cove* for Title VII cases, "which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." As explained by Justice Stevens, "the reasonableness inquiry includes no such requirement." *Id.* at 243 (observing that "[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable").

A. The Circuit Courts Are Unanimous in Applying the Correct Evidentiary Burdens Following *City of Jackson*

Since *City of Jackson* was decided only two years ago, the courts of appeals and district courts have had no difficulty following its holdings. In fact, as regards the first question presented in the petition, it was recently observed by one district court that:

> a number of court decisions in other circuits have addressed this question, and have **unanimously** decided that after the plaintiff has presented evidence of a prima facie case of disparate impact age discrimination, the defendant has the burden of production, in raising any factors considered other than age. The plaintiff then has the burden of persuading the fact finder that those factors were unreasonable.

EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980, 993 (E.D. Mo. 2006) ("*Allstate*") (emphasis added).

The district court in *Allstate* cited and relied upon *Meacham II*, particularly for the Second Circuit's holding that "[t]he best reading of the text of the ADEA – in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." *Allstate*, 458 F. Supp.2d at 993. *Allstate* also relied upon the following recent decisions from the Seventh, Ninth, and Tenth Circuits: *Pippen v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) ("Thus, after an employee establishes a prima facie case of disparate impact age discrimination under the ADEA, the burden of production shifts to the employer to assert that its neutral policy is based on a reasonable factor other than

age. . . . [A]n employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable."); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005) ("Qualcomm [defendant] produced unrebutted evidence that its termination decisions were made to satisfy the differing business needs of the varying divisions and departments . . . ."); and *Mattensen v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006) (finding that it was erroneous to instruct the jury that the RFOA requirement was an affirmative defense). *See also Seasonwein v. First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006) (affirming the grant of summary judgment to employer where plaintiff failed to establish a prima facie case of disparate impact age discrimination).

These cases (and the lack of others to the contrary), decided after this Court's decision in *City of Jackson*, conclusively show that there is no conflict whatsoever on the first question presented, as petitioners have asserted. The courts of appeals have indeed been unanimous in holding that the RFOA defense is not an affirmative defense. These decisions are fully in accord with *City of Jackson*'s holdings with respect to the appropriate burdens of proof and production to be used in disparate impact cases under the ADEA.

The Second Circuit's decision in *Meacham II* is entirely consistent with all of the other post-*City of Jackson* circuit court decisions, and with other lower court decisions decided in and outside of the Second Circuit. *See*, *e.g.*, *Adams v. Lucent Techs., Inc.*, No. 2:03CV300, 2007 U.S. Dist. LEXIS 662 (S.D. Ohio Jan. 3, 2007); *Gaskey v. Fulton Bellow, LLC*, No. 3:05-CV-540, 2007 U.S. Dist. LEXIS 19841 (E.D. Tenn. Mar. 20, 2007); *Kourofsky v. Genencor Int'l, Inc.*, 459 F. Supp. 2d 206 (W.D.N.Y. 2006) (following *Smith*, *Wards Cove*, and

Meacham II in dismissing plaintiff's disparate impact claims under the ADEA).

Tellingly, petitioners have not cited a single circuit court or district court decision decided since *City of Jackson* departing or differing in any respect from the burden-shifting approach adopted and applied in *Meacham II*, *Pippen*, *Durante*, *Mattenson*, *Seasonwein*, *Allstate*, *Kourofsky*, and other similar cases. That is because no such case exists.

In a disingenuous effort to manufacture a conflict between the circuits where none currently exists, petitioners hearken back more than twenty (20) years to the Ninth Circuit's decision in *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), and more than thirty (30) years to the Sixth Circuit's decision in *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). The rationale expressed in these older decisions cannot and does not survive *City of Jackson*.

In fact, *Criswell* was effectively overruled on this point by *City of Jackson* and by *Durante*, a post-*City of Jackson* decision from the Ninth Circuit nearly on all fours with the decision in *Meacham II*. And the dicta relied upon by petitioners from the Sixth Circuit's decision in *Laugesen*, which was a disparate treatment case, simply does not stand for the proposition cited in the petition. *See* Petition, 12. In any event, a subsequent and more recent Sixth Circuit case decided after *Laugesen*, but not cited by petitioners, supports the view that an employer's burden in a disparate impact case under the ADEA is one of production only and not one of proof. *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990).

In short, neither *Criswell* nor *Laugesen* supports the petitioners' claims that a conflict among the circuits

exists, and petitioner's reliance on these two outdated cases does not create a current conflict ripe for Supreme Court review.

B. Petitioners Conceded Below that the Employer's Burden Is One of Production

Also significantly undercutting petitioners' argument is the fact that petitioners themselves admitted below that the ADEA's RFOA exception is not an affirmative defense, but is instead a burden of production. In fact, after this Court remanded this case, the Second Circuit invited the parties to submit briefs regarding the impact of *City of Jackson* on the decision in *Meacham I*. In response, petitioners conceded, in their Brief, that *City of Jackson* "provides some guidance regarding the burden shifting analysis which the lower courts are to employ when litigating disparate impact claims brought under the ADEA." Brief for Plaintiffs-Appellees-Cross-Appellants On Remand from the United States Supreme Court, June 13, 2005 ("Petitioners' Brief on Remand"), 1-2.

Petitioners also admitted in their Brief on Remand that in *City of Jackson*, "the Supreme Court held that . . . the burden shifting analysis previously set forth in *Wards Cove*, continues to be applicable to disparate impact claims brought under the ADEA." *Id.* at 6. Petitioners candidly admitted below that: "the defendant-employer does **not** have the burden of proof to establish business necessity under the ADEA as it does in a Title VII disparate impact case." *Id.* (emphasis in original).

Similarly, when addressing the respondents' "Business Justification" for the RIF, petitioners took a position diametrically opposed to the one they are now taking in their petition on the first question presented, conceding that "when analyzing a disparate impact claim

of age discrimination, the 1991 amendments to Title VII do **not** apply" and "that the burden shifting analysis previously set forth in *Wards Cove*, is applicable to disparate impact claims brought under the ADEA." Petitioners' Brief on Remand, 13. According to Petitioners:

> This requires that once [petitioners] met their burden under step one, [respondents] were required to produce evidence of their business justification for their use of the practices identified by the employee. *Wards Cove*, 490 U.S. at 658. **A defendant-employer's burden remains one of production, not proof.** *Wards Cove*, 490 U.S. at 659-660, *Watson*, 487 U.S. at 997. **The "ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."** *Wards Cove*, 490 U.S. at 659, quoting, *Watson*, 487 U.S. at 997.

Id. at 13-14 (emphasis added).

In *Meacham II*, the Second Circuit subsequently agreed with, adopted and applied this same burden-shifting approach to the petitioners' disparate impact age discrimination claims under both the ADEA and the New York State Human Rights Law, N.Y. Exec. Law § 296. Having conceded and argued below that the burden of proving disparate impact age discrimination was in fact at all times theirs, and that respondents' RFOA burden at trial was nothing more than a burden of production, petitioners should not now be allowed to reverse course and make exactly the opposite argument in an effort to obtain review of the Second Circuit's well-reasoned decision in *Meacham II*.

C. The EEOC'S RFOA Regulations Are Not Entitled To Deference

As already noted, in *City of Jackson* this Court concluded that the "reasonableness inquiry" under the ADEA's RFOA provision is different than the "business necessity" test articulated in *Wards Cove* for Title VII cases. Again, "the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243. In reaching this decision, the majority of the Court effectively rejected the EEOC's regulations on this subject. *Id.* at 266-67. *City of Jackson* also necessarily rejected, in a disparate impact case, the next provision of the regulation which states, in relevant part, that "[w]hen the exception of a [RFOA] is raised against an individual claim of ***discriminatory treatment***, the employer bears the burden of showing that the [RFOA] exists factually." 29 C.F.R. 1625.7(e) (emphasis added).

Here, petitioners assert that the Second Circuit's decision in *Meacham II* is at odds with this regulation, and that this regulation is entitled to what has come to be known as "*Chevron* deference" under *Chevron U.S.A. Inc., v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioners' argument misses the mark, however, and completely ignores *City of Jackson*'s narrower reading. Indeed, as correctly pointed out by the panel majority in *Meacham II*, this regulation on its face applies only "in the context of disparate treatment" and was effectively rejected by *City of Jackson*. *Meacham II*, 13a n.6. As a result, the majority of the three-judge panel in *Meacham II* properly refused to give the EEOC's regulation, or their position in the proceedings below after remand, "any weight." *Id.*

No different conclusion should be reached by the Court in this case. This is especially so given the fact that the EEOC has reported publicly that it intends to

revise its regulations on the RFOA provision of the ADEA to conform to the decision in *City of Jackson*. *See*, *e.g.*, *EEOC Semiannual Regulatory Agenda*, 70 Fed. Reg. 65,359 (Oct. 31, 2005).

Finally, the legislative history of the ADEA, and its subsequent amendment in 1990 by the Older Workers Benefit Protection Act ("OWBPA"), codified in part at 29 U.S.C. § 623(f)(2), offers no support at all to the position taken by the petitioners before this Court (*see* Petition, 18-19), and by Judge Pooler in her dissent in *Meacham II*. *See Meacham II*, 27a-28a. Both Judge Pooler and the petitioners rely upon a Senate Committee report (*see*, S. Rep. No. 101-263, as reprinted in 1990 U.S.C.C.A.N. 1509, 1535), concerning an earlier draft of the proposed legislation. That earlier draft contained a provision at the end of ADEA Section 4(f) stating that: "[a]n **employer . . . acting under paragraphs (1) [*i.e.*, BFOQ] or (2) [*i.e.*, RFOA] shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act."** This provision was ultimately eliminated completely from the final version of the bill, which then became law.

In any event, with respect to the RFOA provision, as noted by Judge Pooler in *Meacham II*, "the OWBPA's legislative history is not relevant to determining the intent of [the Congress] who enacted Section 623(f)(1), which was not changed by the OWBPA." *Meacham II*, 28a.

Under all these circumstances, this Court should afford no weight at all to the EEOC's position or pre-*City of Jackson* regulations on this question. It cannot fairly be said that *Meacham II* (or the decision of any other circuit court) is in conflict with any EEOC regulation entitled to *Chevron* deference with respect to the first question presented by petitioners.

POINT II

THERE ARE NO COMPELLING REASONS WHY THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S FINDINGS THAT PETITIONERS FAILED TO CARRY THEIR BURDEN OF PROOF AT TRIAL

On their second question presented, petitioners urge this Court to grant their petition and basically to hold, as a matter of law, that employers may never use managerial discretion or subjective criteria in selecting employees for a RIF any time there is a statistical disparity in the rates of selection between older and younger workers. Petition, Point II. This is contrary to well-established law and there are no compelling reasons for granting such a request.

A. Petitioners' Claims Are Contrary to Settled Law

Long before *City of Jackson* was decided, the Court made it clear in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981), that an "employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."

Since that time, lower federal courts have uniformly held that an employer may exercise discretion or use subjective factors to make personnel decisions so long as the decisions are not based on an unlawful factor. *See, e.g., Pippin*, 440 F.3d at 1195 (affirming the dismissal of plaintiffs' disparate impact claim and holding that, as a matter of law, the employer's decision to terminate employees during a RIF based upon their performance and skill set was not unreasonable); *Chapman v. AI Transp.*, 229 F.3d 1012, 1034 (11th Cir. 2000) (finding that a subjective reason is a legally

sufficient, non-discriminatory reason if the defendant articulates a reasonably specific factual basis upon which it is based); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (holding that where an employer's explanation, offered in clear and specific terms, "is reasonably attributable to an honest even though partially subjective evaluation of … qualifications, no inference of discrimination can be drawn"); *Armstrong v. Blair*, No. CIV-03-0255-C, 2006 U.S. Dist. LEXIS 65280 (W.D. Okla. 2006) (citing *Simms v. Oklahoma*, 165 F.3d 1321 1330 (10th Cir.), *cert. denied*, 528 U.S. 815 (1999)).

Even Judge Pooler of the Second Circuit, the lone dissenter in *Meacham II*, has previously held that "there is nothing unlawful about an employer's basing its hiring on subjective criteria" and that "[a]n employer is entitled to arrive at a subjective evaluation of a candidate's suitability for a position." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 104-06 (2d Cir. 2001). Of course, the panel majority in *Meacham II* appropriately followed *Byrnie* in this regard and is consistent with the other decisions cited above.

Moreover, both state and federal courts considering claims of disparate impact age discrimination under the ADEA and the New York Human Rights Law, including the Second Circuit, have recognized that the very same subjective criteria used by KAPL in this case, including performance, criticality of skills, and flexibility, are legitimate and reasonable criteria upon which to base a RIF, as a matter of law. *See, e.g.*, *Pippin*, 440 F.3d at 1201 (performance, needed skills and recruiting concerns are all reasonable business considerations in selecting employees for a RIF); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666 (7th Cir. 1998) (evaluating an individual or group based upon their lack of flexibility is not to indulge in age stereotyping; instead it is the kind of evaluation that is appropriate under the anti-discrimination laws).

Accord Furr v. Seagate Tech., Inc., 82 F.3d 980, 987-988 (10th Cir. 1996), *cert. denied sub nom. Doan v. Seagate Tech.*, 519 U.S. 1056 (1997); *Hardy v. GE*, 270 A.D.2d 700, 702 (N.Y. App. Div.), *appeal denied*, 95 N.Y. 2d 765 (2000). The Second Circuit's decision in *Meacham II* is in accord with these decisions, as well as with this Court's decision in *Watson*, and should not be disturbed.

In *Watson*, this Court specifically held that subjective criteria could be challenged on disparate impact grounds under Title VII. The Court did not hold, however, and it stopped well short of ruling, that subjective criteria could never be used by employers in making their employment decisions if a statistical disparity resulted. In fact, *Watson* suggested just the opposite when it recognized that subjective traits necessarily and legitimately enter into personnel decisions and are essential to an individual's success. *Watson*, 487 U.S. at 999 (citing with approval the Second Circuit's decision in *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984) that "[i]t would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review").

The very same reasoning applies under the ADEA which, as already noted, is even more narrowly circumscribed than Title VII because of the RFOA limitation on employer liability.

B. The Court Should Not Constrain Reasonable and Otherwise Legal Business Decisions

Although the Court held in *Watson* that disparate impact challenges to subjective employment practices are permitted under Title VII, the *Watson* Court also

cautioned that: "[i]n evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that '[c]ourts are generally less competent to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'" 487 U.S. at 999 (quoting *Furnaco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

The Second Circuit's decision in *Meacham II* obviously had these same concerns in mind when, citing *Furnaco* and Judge Pooler's prior decision in *Byrnie*, the panel majority explained that it was important for the court to "keep in mind that 'we are not a super-personnel department.'" *Meacham II*, 16a. *See also Wittenburg v. Am. Express Fin. Advisors, Inc.*, 464 F.3d 831 (8th Cir. 2006) (recognizing that courts do not sit as super-personnel departments to review the wisdom or fairness of a company's job elimination policies during a RIF).

The Supreme Court in this case must likewise keep these same concerns in mind before granting petitioners' extraordinary request to outlaw the use of subjective criteria if there is evidence of a statistical disparity, as there admittedly was in this case. To do otherwise would not only be at odds with prior precedents and established law, but would also unnecessarily constrain demonstrably reasonable and otherwise lawful business judgments, and put undue pressure on employers to use quotas or to give preferential treatment to workers age 40 and over.

As already noted, petitioners' second question presented is based on their unproven claim that managerial discretion in ranking employees for the RIF based on subjective assessments of criticality and flexibility led to "startlingly skewed" statistical results, which they contend, can only be the result of a hidden age

bias. Petition, 26. This Court has long recognized, however, that a plaintiff in a disparate impact case must meet a "high standard of proof." *Watson*, 487 U.S. at 999. In fact, this Court has cautioned against relying on statistics alone to establish disparate impact liability even in cases involving the use of subjective selection criteria. *Id.* at 994-995.

Thus, this Court held in *Watson* that a plaintiff's burden in a Title VII case goes beyond establishing that there are statistical disparities in the workforce. *Id.* at 997. This same reasoning applies in an ADEA case because, as the Court held in *City of Jackson*, the scope of liability is narrower under the ADEA than under Title VII and the statute itself permits actions based upon reasonable non-age factors. *City of Jackson*, 544 U.S. at 240.

Petitioners contend, however, that the Second Circuit's decision in this case "effectively forecloses disparate impact challenges to subjective decisionmaking under the ADEA." Petition, 26. Stated otherwise, petitioners contend that if *Meacham II* is not overruled, employees will effectively be precluded from challenging any subjective decision making process used to select employees for a RIF because a plaintiff will not be able to prove a negative. This claim is baseless.

Under *City of Jackson*, it must again be emphasized, employers must produce evidence as to the reasonableness of their decisions. Even after *City of Jackson*, however, employees like the petitioners in this case are still free to challenge an employer's RFOA showing. The decision by the Second Circuit here in question does nothing to alter or foreclose this opportunity.

But, in order to be successful on any such RFOA challenge in a disparate impact case under the ADEA, *Wards Cove*, *City of Jackson* and *Meacham II* demonstrate that an employee must do more than rely on the extent of the statistical disparities established as part of the employee's prima facie case. Rather, the employee must prove and persuade the trier of fact that the employer's actions, or the criteria the employer used in making its decision, were both unreasonable *and* based on an unlawful factor like age.

Here, the petitioners quite simply failed to meet their burden of proof and persuasion with regard to these required elements of their disparate impact claim. The respondents' proof at trial established why flexibility and criticality of skills were so important to the work and mission of the Laboratory and that these were not merely reasonable criteria upon which to rank employees for the RIF – these layoff policies and criteria are among the best practices used by employers throughout the country. As found by the Second Circuit on remand, petitioners did *not* directly challenge this proof or the testimony of KAPL witnesses in this regard. *Meacham II*, 18a.

Instead, petitioners relied at trial, as they did before the Second Circuit on remand, and as they do now in their petition, solely on the extent of the statistical disparity and "skewed" results of the RIF established by petitioners as part of their prima facie case. As the majority of the panel below correctly explained in *Meacham II*, however, it is important to distinguish between any "startlingly skewed" statistical disparities and probative evidence that the business justifications for the outcomes were unreasonable. *Id.*

No such probative evidence on the question of "unreasonableness" was introduced or established by the petitioners at trial. And, because there can be no

question here that the respondents fully satisfied their burden of showing that the layoff and the criteria they used to select petitioners for inclusion in the RIF were reasonable ones, the Court must deny petitioners' application for a writ of certiorari on petitioners' second question presented as well.

As noted in a very similar context under Title VII, this Court has reasoned that any other result would put undue pressure on employers to use quotas or provide older workers with preferential treatment to avoid disparate impact liability. *Wards Cove*, 490 U.S. at 652; *Watson*, 487 U.S. at 977. The ADEA does not require employers to give employees age forty and over preferential treatment or to make termination selections based on quotas. *See Watson*, 487 U.S. at 977.

Moreover, although petitioners fail to mention this fact, if respondents had selected different (and younger) employees for the RIF simply because they were under 40, as petitioners would have had it, it would have been a *per se* violation of New York's Human Rights Law, N.Y. Exec. Law § 296, which prohibits age discrimination against employees eighteen (18) and over.

In sum, this is a "Hobson's choice for employers…[leading] in practice to perverse results" that not even the Court in *Watson* contemplated, which Congress could never have intended when it enacted the RFOA exception as part of the ADEA, and which this Court should refuse to countenance. *Watson,* 487 U.S. at 993.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied in its entirety.

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Respectfully submitted,

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