No. 06-1505

IN THE

Supreme Court of the United States

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*

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

REPLY BRIEF FOR THE PETITIONERS

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Respondents do not contest that the Second Circuit's decision in this case conflicts with the Ninth Circuit's decision in *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), on a question this Court granted certiorari to decide in that case but did not reach. Nor do respondents dispute that the decision below conflicts with the EEOC's interpretation of its own regulations regarding the burden of proof under the "reasonable factor other than age" (RFOA) defense – an interpretation the agency reiterated through its amicus brief in this case. In addition, respondents do not even address the petition's showing that the conflict between the EEOC's view of the statute and the interpretation of a number of courts of appeals will predictably lead to an untenable disparity of treatment between the ADEA claims of similarly situated federal and private employees. *See* Pet. 15-17. And respondents make no attempt to deny that the questions presented by the petition are of recurring importance, particularly in the context of reduction in force cases – a point further emphasized by the amicus brief of the AARP and the National Employment Lawyers Association.

Respondents nonetheless oppose certiorari, asserting among other things that this Court resolved the RFOA burden of proof question in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and that the decision below is consistent with *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *See* BIO 12-14, 22-24. Both claims are ill founded, as are respondents' other objections to granting the writ.

I. Certiorari Is Warranted To Resolve Which Party Bears The Burden Of Proof On The RFOA Defense.

1. Respondents do not dispute that the decision below conflicts with the Ninth Circuit's holding in *Criswell* that the employer bears the burden of proof on the RFOA defense. *See* Pet. 11-12. They nonetheless contend that *Criswell* was

superseded by *Smith* and overruled by subsequent circuit precedent. BIO 12, 17. Neither contention is true.

Respondents argue that *Smith* "resolved the issues 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.'" BIO 2. This assertion conflates two separate questions: (1) who bears the burden of proving that an employment practice has a disparate impact that would be otherwise prohibited by the "identical language" of Title VII and the ADEA; and (2) who bears the burden of proving the RFOA defense once an otherwise prohibited disparate impact has been established. *See* Pet. 22-23. As petitioners acknowledged below, *Smith* held that *Wards Cove* governs the first question because it construed the language common to both the ADEA and Title VII prohibiting employment practices with an unjustified disparate impact. *See* BIO 18-19 (quoting petitioners' appellate briefs). But once the employee sustains the *Wards Cove* burden, the employer may yet avoid liability if its practice is found to be "reasonable" under the RFOA provision. *See Smith*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment) (noting that "the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA") (emphasis in original). The question in this case is who bears the burden of proof at this later stage, after the practice has been shown to be "otherwise prohibited" under *Wards Cove*. On that question, *Smith* had nothing to say, as the Court was able to conclude that the employer's practice in that case was "unquestionably reasonable," 544 U.S. at 242, thereby avoiding the need to examine the burden of proof.[1]

[1] Respondents are thus confused when they charge that "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 the challenged employment practice. BIO 2. While petitioners

Respondents next assert that *Criswell* "was effectively overruled" by *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607 (9th Cir. 2005), "a post-*City of Jackson* decision . . . nearly on all fours with the decision in *Meacham II*." BIO 17. But as respondents are presumably aware, that unpublished decision has no precedential value in the Ninth Circuit, much less the authority to overrule established circuit precedent. *See, e.g.*, *Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam). In any event, *Durante* is entirely inapposite. The decision does not discuss the burden of proof under the RFOA defense, and does not even cite *Criswell*, much less purport to overrule it. Indeed, the burden of proof issue never came up in *Durante*, as the court concluded that the evidence overwhelmingly supported the employer's assertion that its practices were reasonable, 144 Fed. Appx. at 607, making the burden of proof immaterial.

Respondents also attempt to diminish the conflict between the decision below and the Sixth Circuit's opinion in *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). In *Laugesen*, the court explained that the then-applicable regulation implementing the RFOA defense provided that the "burden of proof in establishing the applicability of the exception will rest upon the employer." *Id.* at 314-15 (quoting 29 C.F.R. § 860.103(e) (1975)). The court further

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acknowledged that they bore the burden of proof in establishing an "otherwise prohibited" practice under *Wards Cove*, they embraced the position of the EEOC that the employer bears the burden of proof on the separate question of whether the RFOA defense applies to excuse that otherwise prohibited practice. *See* C.A. Supp. Reply Br. 9-10. Petitioners also argued that the burden question was not critical in this case because respondents never asked for a jury instruction on the RFOA defense or objected to the instructions that were actually given. *Id.* The Second Circuit plainly disagreed on that point but never suggested that petitioners had conceded that the employee bears the burden of proof on the RFOA defense.

explained that the regulation "is aimed at policies of companies pertaining, for example, to physical fitness, educational requirements or the like, which are differentiations based on factors other than age, but which can in fact have a disparate impact upon older employees." *Id.* at 315 (citing *Griggs v. Duke Power*, 401 U.S. 424 (1971)). Respondents note that the interpretation was expressed in the context of a disparate treatment case, BIO 17, but that does not detract from the clarity or persuasiveness of the Sixth Circuit's position on this issue, which has been uncontested in that circuit ever since.[2]

2. The uncertainty regarding the burdens of proof under the RFOA provision led this Court to grant certiorari on that question in *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985). Respondents' brief does nothing to show that the uncertainty has been resolved since that time or that this Court's intervention is no longer required. Nor do respondents contest that the question left open in *Western Airlines* is one of recurring importance in the administration of this landmark civil rights statute. *See* Pet. 13-15. Indeed, the importance of the question has been demonstrated throughout this litigation by the decisions of the EEOC and the AARP to participate as amici at various stages. *See* AARP/NELA Amicus Br. M-2 to M-3 (noting that this "issue will continue to grow in importance" as "the number of workers age 55 and older is expected to increase by 46 percent from 18.2 million to 26.6 million" by the close of this decade); EEOC C.A. Br. 2 (noting that proper interpretation

[2] Respondents contend otherwise, citing (without explanation or even a pin cite) the decision in *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990). *See* BIO 17. But *Abbott* does not even mention the RFOA defense. The case simply held that the plaintiffs failed to establish a disparate impact violation under *Wards Cove*, *see* 912 F.2d at 872-77, thereby negating any need for the employer to rely on the RFOA provision.

of the RFOA provision "raise[s] important and complex policy issues"). Prolonging the uncertainty in the operation of the RFOA defense would be contrary to the interests of employers, the federal government, and American workers.

3. This case presents an ideal opportunity for the Court to bring clarity to this important area of the law. The RFOA burden question was thoroughly briefed by the parties, along with the EEOC and other amici. *See* Pet. App. 5a. And the Second Circuit squarely resolved the question in a detailed opinion to which Judge Pooler issued a lengthy and thoughtful dissent. *See id.* 11a-15a, 25a-31a.

Respondents nonetheless insinuate that the Second Circuit had no reason to decide who bore the burden of proof on the RFOA defense because, "[a]t trial, the petitioners failed to challenge [respondents'] substantial probative evidence of reasonableness" and "failed to rebut the respondents' proof in this regard with any probative evidence of their own on this issue." BIO 5. This claim is false and was plainly rejected by court of appeals. Petitioners' principal contention below was that respondents' "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" Pet. App. 15a, was unreasonable because it unnecessarily created an avenue for the expression of unspoken age bias in the reduction in force process.[3] Far from finding that petitioners provided "no . . . probative evidence on the question of 'unreasonableness' . . . at trial," BIO 28, the Second Circuit acknowledged that "plaintiffs presented probative evidence tending to show that: (i) KAPL's criteria were subjective (and imprecise at best); (ii)

[3] Respondents assert in passing that this "do[es] not state a disparate impact claim under the ADEA," BIO 6, but *Watson* clearly held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." 487 U.S. at 991. To the extent there is uncertainty on this point, the Court should resolve it by granting certiorari on the second question presented by this petition.

the subjectivity disproportionately impacted older employees; (iii) KAPL observed that the disproportion was gross and obvious; and (iv) KAPL did nothing to audit or validate the results." Pet. App. 17a (internal quotation marks and citation omitted). Respondents, of course, contested these assertions, putting forward an expert who claimed that respondents had designed and implemented reasonable procedures to protect against bias in the reduction in force process. *See* BIO 10. But petitioners presented substantial evidence to rebut this assertion, including their own expert witness who testified that the procedures established for review of the decisions made by individual managers "did not offer adequate protections to keep the prejudices of managers from influencing the outcome." Pet. App. 18a (citation omitted); *see also id.* at 41a-43a.[4]

It is important to keep in mind that the Second Circuit was not conducting its own de novo review of summary judgment evidence during which it could exercise its independent judgment on the question of reasonableness. Instead, the court was reviewing a jury verdict in petitioners'

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[4] For example, the review board established to "assess[] the design and execution of the IRIF," Pet. App. 17a, received no age discrimination training and was not provided with the ages of employees recommended for layoff. *See* Trial Tr. 1292-93, 3726; *see also id.* 1510 (district court observing that there was "no evidence . . . that the review board considered age in any of its examinations or any of its reviews in this matter"). Respondents also relied on the fact that that their in-house counsel reviewed the entire process. Pet. App. 17a. However, during his review, counsel spoke to only three of the approximately thirty managers who completed matrices, Trial Tr. 1290-91, 1503; did not review the ages of the employees at issue, *id.* 1287, 1290; and, in violation of respondents' policy, failed to perform his own Adverse Age Impact Analysis, *id.* 1294-95, relying instead on the analysis prepared by the human resources department, which asked only whether the average age of the workforce had gone down as a result of laying off thirty-one workers, *see* Pet. App. 17a-18a, 40a-41a.

favor. Moreover, the jury reached its decision on the basis of jury instructions to which respondents offered no relevant objection. *See* Trial Tr. 4731-36. In fact, respondents never requested that the jury be instructed on the RFOA burden of proof question. *See id*. at 4412-95 (charge conference). Accordingly, the question before the court of appeals was simply whether, "after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, [the court] finds that there was insufficient evidence to support the verdict." Pet. App. 50a (citations omitted). In light of this deferential standard of review, it is unsurprising that the Second Circuit felt compelled to decide which party bore the burden of proof on the RFOA defense.

4. Beyond claiming that *Smith* allocated the burden of proof on the RFOA defense to the plaintiff, respondents make little attempt to defend the decision below on the merits. They do not contest that the phrasing of the defense – providing a safe haven for conduct "otherwise prohibited" by the Act, 29 U.S.C. § 623(f)(1) – is a formulation traditionally used to establish an affirmative defense upon which the defendant bears the burden of proof. *See* Pet. 17-18; *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (stating the "general rule" that the party who "claims the benefits of an exception to the prohibition of a statute" bears the burden of proof).

Nor do respondents dispute that the other defenses in 29 U.S.C. § 623 are traditional affirmative defenses. *See* Pet. 17-18. As explained in the petition, when this Court construed one such exception (for action taken in accordance with a "bona fide employee benefit plan") to place the burden of proof on the employee, *see Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 181 (1989), Congress promptly reversed that result through new legislation. Pet. 18-19. And the legislative history accompanying the bill makes clear Congress's intent to retain the pre-*Betts* case law placing the burden of proving *all* of the Section 623 defenses, including

the RFO defense, on the employer. *See id.* 19. Respondents assert that this legislative history is inapt because it describes the version of the bill reported out of committee, which was subsequently amended before passage. BIO 21. But the authors of that amendment stated expressly that the change in the language of the bill did not reflect any change in Congress's intent with respect to the burden of proof on the RFOA defense. *See* 136 Cong Rec. S13596 (statement of bill managers describing amendment) ("In particular, the managers declare that they are not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law.").

Moreover, although respondents disagree with the EEOC's position, they cannot dispute that the Commission construes the Act and its own regulations to place the burden of the RFOA defense on the employer. *See* EEOC C.A. Br. 15 ("The Commission's regulation similarly interprets RFOA to be an affirmative defense that the employer must establish.") (citing 29 C.F.R. § 1625.7); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (noting that an agency's interpretation of its own regulations must be accepted unless "plainly erroneous or inconsistent with the regulation") (internal quotation marks and citation omitted). That interpretation is consistent with the original regulations issued by the Department of Labor at the time of the statute's enactment. *See* 33 Fed. Reg. 9172, 9173 (1968) (promulgating 29 C.F.R. § 860.103).

Respondents' assertion that this Court invalidated the relevant EEOC regulation in *Smith*, *see* BIO 20, is plainly untrue. At most, the Court disagreed with the EEOC's position on the requirement of "business necessity" in 29 C.F.R. § 1625.7(d). But as Justice Scalia explained, that conclusion did not mean that the rest of that subsection (recognizing a disparate impact claim) was unworthy of *Chevron* deference. *See Smith*, 544 U.S. at 247 (Scalia, J., concurring in part and concurring in the judgment). In this case, the RFOA burden of proof question is addressed in an

entirely separate subsection of the regulation – one the Court did not cite, much less disapprove, in *Smith*. *See* 29 C.F.R. § 1625.7(e).[5]

Giving a uniform interpretation to all the defenses in Section 623(f) achieves a sensible balance, permitting employees to state a claim by proving that an employment practice is "otherwise prohibited" by the ADEA under the traditional *Wards Cove* standard, but allowing employers to escape liability if they can meet the modest burden of demonstrating that their practices are reasonable. The Second Circuit's decision in this case upsets that intended balance. This Court should grant certiorari in this case to restore it.

II. This Court Should Grant Certiorari To Decide Whether Employees May Challenge The Disparate Impact Of Employers' Subjective Decisionmaking Processes Under The ADEA.

The Court should also grant certiorari to decide whether the RFOA provision effectively precludes disparate impact challenges to an employer's practice of conferring broad discretionary authority upon individual managers to decide which employees to layoff during a reduction in force. *See* Pet. 25-29.

Evidently unable to explain why that question is unworthy of this Court's attention, respondents address a *different* question petitioners do *not* raise, accusing petitioners

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[5] Respondents also note that the EEOC has announced plans to review its ADEA regulations in light of *Smith*. BIO 20-21. But that is no ground to deny deference to the current regulation, particularly given that it is clear from the Commission's amicus brief in this case that it continues to believe that the employer bears the burden of proof under the RFOA defense after *Smith*. While the Commission will likely revise its discussion of "business necessity" in light of *Smith*, there is no reason to believe that it will reverse the position it has taken in post-*Smith* litigation on the RFOA burden of proof.

of asking this Court "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." BIO 22 (emphasis added). To the contrary, petitioners ask only that this Court overrule the Second Circuit's holding that employers may *almost always* rely on delegated managerial discretion in termination decisions, even when the delegation predictably results in disparate treatment of older workers and is otherwise unreasonable. Pet. 25-28.

Respondents assert that under the Second Circuit's decision employees "are still free to challenge an employer's RFOA showing." BIO 27. But the decision below effectively predetermines that such challenges will always fail when an employer makes decisions on the basis of subjective recommendations by first-line supervisors. *See* Pet. App. 19a (holding that "at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable"). Respondents offer no explanation of how a system of discretionary decisionmaking by direct supervisors could ever be challenged under *Watson* in light of this holding. Review and reversal are warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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