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IN THE SUPREME COURT OF THE UNITED STATES

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AZEL P. SMITH, ET AL., :

Petitioners :

v. : No. 03-1160

CITY OF JACKSON, MISSISSIPPI, :

ET AL. :

- - - - -X

Washington, D.C.

Wednesday, November 3, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Petitioners.

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Respondents.

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3 JUSTICE STEVENS: Argument in Smith
4 against the City of Jackson.

5 Mr. Goldstein.

6 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

7 ON BEHALF OF THE PETITIONERS

8 MR. GOLDSTEIN: Justice Stevens, and may it
9 please the Court:

10 Petitioners submit that the Age Discrimination
11 in Employment Act prohibits an employment practice that
12 has a significant disparate impact on older workers if
13 that practice lacks any reasonable business justification.

14 The ADEA embodies Congress' determination that
15 age discrimination seriously impedes older Americans'
16 ability to participate fairly in the American work force.

17 JUSTICE STEVENS: Mr. Goldstein, let me just
18 interrupt a minute. You say if it lacks the -- the
19 business justification. But is it not a part of -- that
20 is not a part of the plaintiffs' primary submission, is
21 it, that it does not show? That's an affirmative defense.

22 MR. GOLDSTEIN: Justice Stevens, there is not a
23 clear answer to that question in all candor. It is not
24 before the Court. I will tell you that the lower courts
25 uniformly in the ADEA disparate impact context apply

1 Justice O'Connor's plurality opinion in Watson and the
2 Wards Cove rule rather than the post-1991 Civil Rights Act
3 rule. That is a debatable proposition because, as your
4 question suggests, in subsection (f)(1) of the statute
5 where this provision comes from -- and let me just take us
6 to the language. It would probably be most useful. In
7 the blue book, the -- the blue petitioners' brief at page
8 1 are the relevant provisions.

9 (a)(2) we'll come back to. That's the parallel
10 language to Griggs.

11 The reasonable factor other than age provision
12 is (f)(1), and it says: it shall not be unlawful for an
13 -- this is at the bottom of the page. It shall not be
14 unlawful for an employer to take any action otherwise
15 prohibited -- and I'm going to come back and focus on that
16 -- under subsection (a) where the differentiation is based
17 on reasonable factors other than age.

18 The fact that it says otherwise prohibited seems
19 to suggest that this is setting up an employer defense, as
20 your question indicates. And the Court in the -- the
21 Western Air Lines case in 1986 said that the BFOQ
22 provision, which is in (f)(1) as well, is an affirmative
23 defense. So I --

24 JUSTICE BREYER: You put your finger on exactly
25 what's the part of this case that's bothering me. Read

1 through the language. As you read through the language,
2 disparate impact does seem to be called for, and this
3 particular provision, reasonable factors other than age,
4 seems a defense to that, just as BFOQ is the defense to
5 disparate treatment. And that all seems to work.

6 But you read the definition of reasonable factor
7 other than age to mean business necessity or even Justice
8 O'Connor's opinion, which is pretty tough. It's hard for
9 an employer to make that defense. And while making it
10 hard to make that defense in the case of gender or race
11 discrimination, in fact works in my opinion perfectly
12 well. You start making it hard to make that defense here
13 and you're going to have a nightmare because every effort
14 by any employer to equalize to any degree pay or treatment
15 of his or her employees is going to have a disparate
16 impact in respect to age because the correlation with age
17 runs into all kinds of things that it doesn't in the other
18 cases.

19 So I can't believe that Congress really would
20 have wanted that, but the reason I can't believe it is
21 because I can't believe the business necessity part of it.
22 And so here I'm faced with a reg which, at one and the
23 same time, pulls in disparate impact and business
24 necessity, and now I don't know what to do.

25 MR. GOLDSTEIN: I can tell you.

1 (Laughter.)

2 MR. GOLDSTEIN: The answer is that you should
3 recognize, as does the commission, which has delegated
4 rulemaking authority under the act, that business
5 necessity, which is the term of art that they used in the
6 regulation -- and we'll come back to it. It's at page 2
7 of the blue brief -- means different things in different
8 contexts. And so I want to take you to the specific
9 citations where the EEOC has recognized the common sense
10 principle. We know that more things that are legitimate
11 employer practices correlate with age than they do with
12 race and gender. It is --

13 JUSTICE GINSBURG: Mr. Goldstein, before you do
14 that, before you deal with the EEOC regulation, this
15 statute doesn't -- at least on -- on the page 1 part you
16 called our attention to, doesn't refer to business
17 necessity. That's in the EEOC regulation. If I were just
18 reading this statute cold, I'd say, yes, that looks like
19 an affirmative defense to me, but reasonable factor seems
20 like something quite different than necessity. It isn't
21 necessary for the business to do this, but it's
22 reasonable. And if that's -- then the business necessity
23 -- it seems to me, at least arguably, an improper
24 construction of this act, that the EEOC got it wrong when
25 it referred to business necessity. They were thinking of

1 Griggs and -- and title VII, but this statute says
2 reasonable factors.

3 MR. GOLDSTEIN: Yes. Our position relies only
4 on the statute. We embrace the text of the statute.
5 (f)(1) says that the employer's conduct merely has to be
6 reasonable. We agree with that.

7 The point I would then take you to is that in --
8 if the Court were interested in the regulation -- we don't
9 think it's necessary to get to the regulation, but if it
10 were, the EEOC has said that it too recognizes that the
11 phrase, business necessity, in the context of the Age Act
12 does not mean essential to the business.

13 Let me tell you why it used the language it did,
14 business necessity, in the regulation just to clear it up.
15 And that is when this Court first used the words, business
16 necessity, in Griggs and then subsequently in Wards Cove,
17 it didn't have all the connotations that it does now as
18 being quite a high employer burden. If I could just read
19 to you two things from Griggs.

20 Griggs said, the touchstone is business
21 necessity. If the employment practice cannot be shown to
22 be related to job performance, the practice is prohibited.
23 It simply required related to job performance. That's the
24 backdrop on which the EEOC used the word.

25 JUSTICE GINSBURG: Well, I'm not sure you're

1 right about that, Mr. Goldstein, because if you think of
2 what it was, it was a pen and paper test and it was a high
3 school diploma. Now, an employer might well think I want
4 to upgrade my work force. I want this to be a real classy
5 work force. So I'm going to require a high school
6 diploma. It isn't necessary, but why is it unreasonable
7 for me to do that? So I -- I don't -- I think Griggs
8 spoke about rules that were built in headwinds because a
9 large part of the population didn't have the opportunity
10 to get high school diplomas. That doesn't exist in the
11 age discrimination area. So I -- I don't think that
12 Griggs is an example of something that was a loose
13 business necessity rule.

14 MR. GOLDSTEIN: My point is only terminological,
15 and that is, when the EEOC used those words, it did not do
16 so against a backdrop in which they carried a connotation
17 that was necessarily very strict, and it has said several
18 times -- and they are quoted in our brief -- that the
19 standard -- and this is just the bottom line. I think
20 it's a very important bottom line.

21 JUSTICE SCALIA: You don't care about those regs
22 anyway. Right?

23 MR. GOLDSTEIN: We do care about the
24 regulations.

25 JUSTICE SCALIA: Oh, you do. I thought you were

1 saying you could make your case just on the --

2 MR. GOLDSTEIN: Well, we have --

3 JUSTICE SCALIA: -- text of the statute.

4 MR. GOLDSTEIN: We can and will.

5 JUSTICE O'CONNOR: Well, maybe you should
6 because I'm not so sure that the EEOC interpretation is
7 entitled to Chevron deference.

8 MR. GOLDSTEIN: We do believe that it is
9 entitled to Chevron deference because they have delegated
10 rulemaking authority and there is some suggestion that the
11 because of language in subsection --

12 JUSTICE O'CONNOR: But was this an actual rule
13 after notice and comment, or is it a -- an interpretation?

14 MR. GOLDSTEIN: It is a post-notice and comment
15 rule.

16 JUSTICE KENNEDY: But -- but it interprets --
17 doesn't interpret the prohibitory section. I mean, it --
18 it might be understood as simply making an assumption
19 that, say, the Griggs rule would be applied in -- in this
20 Court.

21 MR. GOLDSTEIN: It's conceivable you could read
22 it that way, although the EEOC has specified many times,
23 in the quarter century since it enacted the regulation,
24 that no, when we -- and let me take us to the text to
25 explain why, and that again is at page 2 of the blue

1 brief. They said -- and this is the block quote. When an
2 employment practice, including a test, is claimed as a
3 basis for different treatment of employees or applicants
4 for employment on the grounds that it is a factor other
5 than age, and such practice has an adverse impact on
6 individuals. That's the reference to disparate impact.
7 The regulatory materials cite to Griggs.

8 But in all events, I do want to come back to the
9 bottom line, and that is the EEOC recognizes, we recognize
10 that it's easier to prove either a defense or to put the
11 burden on the plaintiff's case. It's a -- you have a
12 higher hurdle --

13 JUSTICE BREYER: Easier -- easier is a matter of
14 degree.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: And reasonable factor could be
17 interpreted to say what the employer -- but the employer
18 just doesn't like paying these executives so much money
19 when these new younger janitors make so little. And so he
20 says, I want to pay the new younger janitors more. Okay?
21 There we've got it. Disparate impact.

22 MR. GOLDSTEIN: No.

23 JUSTICE BREYER: And now you say, what's the
24 business necessity? And frankly, there wasn't one. It's
25 just that I found it sort of bad. All right? So there we

1 are. I've lost my case.

2 Now, that's what is worrying me, and I thought
3 perhaps this reg that seems to say -- and lower courts
4 have accepted that I would lose my case -- that this reg
5 is outside Congress' -- the agency's authority for that
6 reason because Congress couldn't have intended that
7 result.

8 MR. GOLDSTEIN: Well, let me take you to the
9 lines of cases that I think might concern you. There were
10 a set of cases before this Court's decision in Hazen Paper
11 that involved two rules, Justice Breyer, and I will tell
12 you that you referred to in the Adams oral argument when
13 this case -- this issue came to you before. And so I want
14 to refer to a very specific set of cases.

15 There were a set of cases before 1993 in which
16 there was some correlation. High salary correlated with
17 age. And the courts of appeals, the Third -- the Second
18 Circuit in the Geller case and the Eighth Circuit in the
19 Leftwich case treated that as effectively a disparate
20 treatment -- disparate treatment case because of the high
21 level of correlation.

22 The more recent cases reject that result and we
23 embrace the more recent cases. And I want to cite them to
24 you so you could look them up if you wanted. The Evers
25 case, which is 241 F.3d 948; the Williams case, which is

1 112 F.Supp.2d 267; and the last one is Newport Mesa, 893
2 F.Supp 927. These cases recognized that cost is a
3 perfectly legitimate business justification, and they put a
4 single burden on the employer.

5 Now, let me just -- just to say, most impact
6 cases aren't cost cases, but I know it's a concern. They
7 say, look, if you want to cut your costs and get rid of
8 your more expensive work force, we're only going to ask
9 you to do one thing, and that is allow your more senior
10 workers to take a pay cut. They do not say, as did the
11 older cases, that it causes disparate impact and you lose
12 your case. And so we don't --

13 JUSTICE O'CONNOR: Mr. Goldstein, you -- this is
14 -- this case arises out of a compensation program of the
15 employer, and why is it brought under 4(a)(2) instead of
16 4(a)(1) which addresses discrimination in compensation?

17 MR. GOLDSTEIN: Justice O'Connor, the lower
18 courts unanimously conclude, as does the commission, that
19 (a)(2), although it does not have the word compensation in
20 it, does apply to compensation and --

21 JUSTICE O'CONNOR: But why in light of 4(a)(1)?

22 MR. GOLDSTEIN: Because they understand 4(a) --
23 and let me take you -- everyone to the text just so we can
24 all be literally on the same page, and that is going to be
25 in the red brief at page 17a. It is 623(a), and it's the

1 first block quote at the top of page 17a of the red brief.

2 They understand that 623(a)(1) refers to actions
3 against individuals, whereas 623(a)(2) refers to actions
4 against groups, group policy versus individual action, and
5 they do that because of the introductory language to
6 (a)(1) and (a)(2), to fail or refuse to hire or to
7 discharge any individual; whereas, (a)(2) refers to limit,
8 segregate, or classify his employees.

9 JUSTICE STEVENS: May I ask a question at this
10 point going really back to the question I asked you at the
11 outset of the argument? If I thought seniority or years
12 of service was a reasonable factor other than age and if I
13 thought this particular compensation program was based on
14 years of service rather than age, can I look at the
15 reasonable factor other than age in deciding whether your
16 complaint states a cause of action?

17 MR. GOLDSTEIN: Yes. Hazen Paper established
18 that that is not --

19 JUSTICE STEVENS: And if I do look at it and if
20 I do come to the conclusion I've suggested, would I not
21 have to dismiss your complaint?

22 MR. GOLDSTEIN: I may misunderstand the
23 hypothetical, Justice Stevens.

24 JUSTICE STEVENS: The hypothetical -- and I
25 think it may be the case -- that you have a compensation

1 program which uses years of service as a basis for
2 classifying employees which has a disparate impact on
3 older workers, but it does -- also it relies squarely on a
4 reasonable factor other than age if you will call years of
5 service such a factor.

6 MR. GOLDSTEIN: Yes. That's perfectly
7 legitimate. That -- as I understand the hypothetical --

8 JUSTICE BREYER: -- suppose I want --

9 JUSTICE STEVENS: I understand that to be this
10 case.

11 MR. GOLDSTEIN: No, it would not because the
12 rationale given by the employer here for -- let -- let me
13 take us to the facts and then the explanation that's given
14 by the employer. What happened here is they gave all of
15 the line police officers much bigger raises than they gave
16 to the more senior officers. That -- and the difference
17 in pay between protected persons under the ADEA and non-
18 protected persons was 4 standard deviations, a 1 in 10,000
19 chance, statisticians will tell you. And they said --

20 JUSTICE STEVENS: No, but the basis for
21 differentiation was years of service, was it not?

22 MR. GOLDSTEIN: The basis for differentiation
23 was years of service, but the question is in -- is it a
24 reasonable choice by the employer in this context. And
25 the reason is it's a --

1 JUSTICE STEVENS: Well, I'm just asking in the
2 abstract. Why wouldn't that always be a -- a reasonable
3 factor other than age?

4 MR. GOLDSTEIN: I apologize. That -- and so I
5 think I answered your hypothetical too broadly. And that
6 is, it depends. In the great majority of cases, employers
7 certainly can say I want to give a class of employees more
8 money. Perfectly sensible. Congress didn't intend to
9 block that. But the question is, is this outside the
10 usual set of cases? And the city's explanation what --
11 for this policy, which was to give the line cops more
12 money but not the rest of the cops who happen to all be
13 over 40, was that they wanted to bring the salary up to a
14 -- a regional average. And so we asked the question, does
15 this accomplish that in a reasonable way, and it does not
16 because they left out huge categories of employees.

17 JUSTICE STEVENS: But the factor -- if I
18 understand it, it wasn't because they were line officers,
19 it was rather because they had lesser years of service
20 than the more senior officers.

21 MR. GOLDSTEIN: No.

22 JUSTICE STEVENS: No.

23 MR. GOLDSTEIN: That is not the facts here.
24 That's right. They -- they did not say we are going to
25 give pay raises to the people who have lesser years of

1 service because we're concerned about their pay. To the
2 contrary.

3 Let me take you to one piece of the record that
4 I think will be helpful. Although again the cases
5 presents the legal question, the lower court on remand can
6 resolve the case. But at page 15 of the joint appendix,
7 there is the pay plan itself, and the first sentence is
8 that -- they -- explains the purpose. The -- the city
9 wanted to provide a compensation plan that will attract
10 and retain qualified people, and then it says, to all
11 employees regardless of age. They purported to be giving
12 the same treatment to everyone regardless --

13 JUSTICE STEVENS: I don't think the statement of
14 purpose tells me what the -- what the criterion for the
15 different treatment was. I still think it was years of
16 service.

17 MR. GOLDSTEIN: Justice Stevens, I -- I just
18 think that -- it misunderstands the facts as I know them
19 in this particular case.

20 JUSTICE STEVENS: What was the criterion?

21 MR. GOLDSTEIN: The criterion was that they took
22 the -- they had different kinds of officers. They had
23 police -- line police officers, master sergeants, all the
24 way on up through the system.

25 JUSTICE STEVENS: So in other words, the

1 criterion was the kind of rank they had before.

2 MR. GOLDSTEIN: Yes, and then --

3 JUSTICE STEVENS: Why isn't that a reasonable
4 factor other than age?

5 MR. GOLDSTEIN: The question is not whether that
6 because that's not -- having those criterion is perfectly
7 reasonable. The question is, is it reasonable -- and this
8 would be resolved on remand -- to give raises to only one
9 of those categories when your explanation is that you were
10 trying to give raises to bring everyone up to a regional
11 average? And so, Justice Stevens, I think --

12 JUSTICE STEVENS: In other words, you say the --
13 the question isn't whether they used a reasonable factor
14 other than age. Your question is whether the use of those
15 factors was overall reasonable.

16 MR. GOLDSTEIN: Yes. There are two things.

17 JUSTICE STEVENS: That's a rewriting of the
18 statute.

19 MR. GOLDSTEIN: Oh, I -- I don't think so,
20 Justice Stevens. It's the same question that we ask in
21 title VII, and that is, was it a -- a -- there's a higher
22 bar there, but were you pursuing a -- a legitimate goal
23 and did you -- did you pursue it in a reasonable way?
24 That's why a title VII plaintiff -- and this has -- and I
25 do want to come back --

1 JUSTICE STEVENS: Title VII doesn't have
2 this language in it.

3 MR. GOLDSTEIN: That's absolutely right, but
4 it's not language here that would detract from that
5 structure of the -- of the title VII inquiry. All the
6 lower courts, for example, agree that it -- as I said,
7 follows the pre --

8 JUSTICE BREYER: Here you're saying
9 you're not attacking reasonable factor other than age. It
10 has to be based on reasonable factor other than age. And
11 I take it here you're saying it's not based on what they
12 advance as reasonable factors.

13 MR. GOLDSTEIN: Yes. They give --

14 JUSTICE BREYER: Is that right?

15 MR. GOLDSTEIN: Yes. They give an explanation.

16 JUSTICE BREYER: But if I -- I say my
17 explanation for why I pay the newer people more is really
18 I like to have that atmosphere. You make less money in my
19 business, but it's more democratic and people are happier
20 even though no one will invest in my company.

21 (Laughter.)

22 JUSTICE BREYER: But still, I'd like a commune.
23 All right? That's how I want to do it. Now, that's not
24 totally idiotic. It's plausible. So I just win. Right?

25 MR. GOLDSTEIN: No. You would lose a treatment

1 case.

2 JUSTICE BREYER: Ah, I lose a treatment case.
3 No, no. I'm not -- I'm just -- it's I'm not paying the
4 younger workers more. I'm paying the newer workers more.
5 All right? They happen to be much the same category, but
6 I -- I don't want it. It's not age. Or, you know, I pay
7 the lower paid workers more. How's that? Do I win?

8 MR. GOLDSTEIN: You paid the lower paid workers
9 more?

10 JUSTICE BREYER: Yes. I paid the lower paid
11 workers more? I want to bring them up to the executives.
12 I -- I like it. It's more democratic and it makes a
13 happier group. And -- and so, now, do I win or lose?

14 MR. GOLDSTEIN: You, in all likelihood, win in
15 that hypothetical. You --

16 JUSTICE BREYER: I win. And I don't have to say
17 any more than that.

18 MR. GOLDSTEIN: No.

19 But let me tell you, it's still a very important
20 statute because -- for the reason that I framed before,
21 and that is, most cases that are ADEA disparate impact
22 cases are not cost cases. There are other tests:
23 applications procedures, strength tests, and the like.
24 That's what the EEOC believes is still very essential. So
25 while we don't impose a big burden on employers in the

1 cost context for the reasons that you and Justice Stevens
2 have been exploring, that doesn't mean our position is
3 somehow worthless. The EEOC has said that the disparate
4 impact plays a, quote/unquote, vital role under the ADEA
5 and that the respondents' position would greatly weaken
6 the statute because --

7 JUSTICE GINSBURG: There haven't been a whole
8 lot of cases under the impact theory as applied to age,
9 and you just said you're not talking about the cost
10 category but that -- you mentioned physical fitness. And
11 there was a case. Smith against Des Moines involved that,
12 but it was found the -- the physical fitness test was job-
13 related.

14 Have there been mutual rules with a disparate
15 impact that you can give us as examples? When you're
16 talking about race and sex, the examples come to mind much
17 more readily than in the age category.

18 MR. GOLDSTEIN: Yes, I can. I'll give you two
19 sets of examples. The first is the examples identified by
20 the Solicitor General in his cert petition defending the
21 EEOC's position in the Francis W. Parker case in 1994.
22 The EEOC pursued cases -- and they're cited in the cert
23 petition -- involving rules that prohibit -- that require
24 recent college graduates to get a job that forbid hiring
25 someone who worked previously for a higher salary than

1 they would be getting in the new -- in the new job and
2 that laid off people who would be eligible to retire soon.
3 So those are the examples the Solicitor General gave.

4 I'll give you two other examples. One is a -- a
5 case called --

6 JUSTICE SCALIA: These are examples of--
7 violations or things that are okay?

8 MR. GOLDSTEIN: Violations. I apologize. The
9 EEOC filed suit because of these violations of the act.

10 JUSTICE SCALIA: Why isn't it a reasonable
11 factor other than age that I don't want to hire somebody
12 who's going to retire a year after I hire him?

13 MR. GOLDSTEIN: Because it's not --

14 JUSTICE SCALIA: Gee, that seems to me terribly
15 reasonable.

16 MR. GOLDSTEIN: The --

17 JUSTICE SCALIA: I don't care how old he is. I
18 don't want anybody who's going to retire the year after I
19 hire him. I don't want to have to go through this -- this
20 whole process again.

21 MR. GOLDSTEIN: The view of the commission --
22 it's one I share, but a particular court might not -- is
23 that that is not a good -- a reasonable work place
24 judgment. One could disagree with it. But the -- those
25 employees will be very valuable. And it's not that they

1 will retire, I should make clear. It's that they're
2 eligible to retire. It -- it may well be a different case
3 if you could say, I asked the person. They said they're
4 leaving in a year. The rule challenged there was mere
5 eligibility to retire, and they did give the other
6 examples.

7 I didn't finish with the court cases. They are
8 Klein, which is 807 F.Supp. 1517, which is a hiring test I
9 think by the FAA in that case that -- that happened to
10 exclude all of the people, I think, over the age of 55.
11 And there are other cases that are, in the line of cases
12 that I was discussing with Justice Breyer, in which the
13 employer doesn't say -- doesn't give the person who gets
14 the higher pay the option of taking a pay cut before being
15 fired. So the statute, both in the non-cost context and
16 the cost context, has very important applications.

17 I did want to return to your correct premise,
18 however, Justice Ginsburg. You said there aren't many
19 cases. I think it's important to recognize that the --
20 the important, legitimate cases, by and large, are
21 conciliated by the EEOC. Remember, it goes through an
22 administrative process first. The EEOC found a violation
23 here, gave us a right to sue letter. The -- the city just
24 declined to settle with us. There have been -- and I have
25 checked. There have been 74 disparate impact cases in the

1 history of the statute that are reported in the Federal
2 courts, and I think that is a good answer to the idea of
3 the respondents that this will impose a huge burden on
4 employers, the idea that there will be a massive amount of
5 litigation. Remember --

6 JUSTICE O'CONNOR: Well, once we -- if we were
7 to say it's covered, don't you think that number would
8 expand?

9 MR. GOLDSTEIN: It's possible it would expand
10 some, but I do think we're right to say not much
11 because --

12 JUSTICE BREYER: Well, it's not the number of
13 cases either. I mean, you could have -- it wouldn't take
14 much to have a single case that has a rule in it, say,
15 that makes it very difficult for an employer to do things
16 of type X or type Y, and that would have enormous impact
17 even though you'd say, well, it was just one case.

18 MR. GOLDSTEIN: Well, there are two fears I
19 think the respondents have articulated, neither of which
20 are borne out by actual experience because, Justice
21 O'Connor, the EEOC has recognized these claims for a
22 quarter century. Until 1993, every single circuit agreed
23 with us, and right now three circuits agree with us. So I
24 -- there is a large body of experience that suggests --
25 and that's where those 74 cases come from.

1 So, Justice Breyer, they have two concerns. One
2 is the mere notion of the possibility of liability will --
3 and the prospect of how expensive litigation would be --
4 would be deterring valuable employment practices. That's
5 not borne out by experience. Your point is, well, what if
6 the liability threshold is too high? And experience
7 suggests and the rules endorsed by the commission and the
8 lower courts are that the liability threshold is not too
9 high.

10 I did also want to say that it is the liability
11 threshold that is the key for deciding how to accommodate
12 the respondents' concerns. Justice O'Connor's Watson
13 plurality opinion explains that the evidentiary standards
14 that apply in these disparate impact cases should serve as
15 adequate safeguards. The precise, same argument was made
16 by the business community in Watson, saying, look, we're
17 going to have to adopt quotas. This will be entirely
18 unmanageable.

19 Before I sit down and reserve the remainder of
20 my time, I did want to say we have a really good case, to
21 refer back to my last argument, and that's Griggs, which
22 is about the exact same statutory text. And then we have
23 a line, a wall that is uninterrupted of this Court's
24 authority. Six straight decisions say when the statute --
25 title VII says something and the ADEA says the same thing,

1 they have the parallel construction. And in our view the
2 respondents' arguments aren't good enough to overcome the
3 double hurdle of stare decisis and Chevron deference.

4 If I could reserve the remainder of my time.

5 JUSTICE STEVENS: Mr. Nager.

6 ORAL ARGUMENT OF GLEN D. NAGER

7 ON BEHALF OF THE RESPONDENTS

8 MR. NAGER: Thank you, Justice Stevens, and may
9 it please the Court:

10 If I may, I'd like to go straight to the
11 question as to why mere statistical correlations with age
12 don't create a prima facie case of discrimination because
13 of age.

14 This Court in its title VII cases has said that
15 a mere statistical correlation with race or sex can create
16 a prima facie case of discrimination because of race or
17 sex because it's advanced a proposition that there's no
18 inherent correlation between race and sex and ability to
19 perform a job or do a job. And as a consequence, the
20 Court has said that a statistical disparity is a departure
21 from the expected norm. Thus, the statistical disparity
22 creates a suspect situation which could be treated as a
23 prima facie case of discrimination because of age, to use
24 the Court's term in *Watson*, the functional equivalent of
25 intentional discrimination.

1 In the age context, the premise doesn't apply.
2 In the age context, as Justice Breyer pointed out in the
3 Florida Power argument, as he's pointed out again today,
4 age is inherently correlated with myriad selection
5 practices. It's painful to say, particularly to a Court
6 that's a little bit older than I am, but our mental and
7 physical capacities are not constant over our lifetimes.
8 They're different for each one of us, but statistically
9 they change over time and they deteriorate over time, and
10 progress doesn't treat the skills and abilities that we
11 have with -- the same way to people who are at different
12 stages in life. Our education and our technological --

13 JUSTICE GINSBURG: Verdi wrote Falstaff when he
14 was 70 -- late -- in his late 70's. It was his greatest
15 creation. Something.

16 MR. NAGER: There is no doubt, particularly in
17 occupations like judging --

18 (Laughter.)

19 MR. NAGER: -- that experience and wisdom may be
20 something that grow over a lifetime. But as we know --

21 JUSTICE SCALIA: Wunsler died at about 28,
22 didn't he?

23 JUSTICE GINSBURG: No. 34.

24 JUSTICE SCALIA: 34, well --

25 JUSTICE SOUTER: Let me -- let me ask you this.

1 If-- if your argument has force, why haven't we been having
2 horrible example piled upon horrible example since 1981
3 when the EEOC took the position that it takes?

4 MR. NAGER: The answer to that is as follows, is
5 that Justice -- Chief -- then Justice Rehnquist, now Chief
6 Justice Rehnquist, wrote a dissent from denial at the time
7 of Geller v. Markham. And in my practical experience --
8 and I do defend these cases for a living -- that put a
9 tremendous chill on the plaintiffs bar, and there were
10 very few of these cases brought.

11 But contrary to Mr. Goldstein, who doesn't
12 represent employers and help them plan their selection
13 practices, employers made huge changes in the '80's and
14 the early '90's until this Court's decision in Hazen Paper
15 because employers were scared of these cases, and so
16 employers started managing the numbers. There were a lot
17 of reductions in force in the late '80's, as I'm sure this
18 Court remembers, as our Nation went through a -- a
19 industrial restructuring. And every one of those
20 reductions in force, I had to sit down with my clients and
21 break up the age of the work force into bands and see how
22 people were going to be affected and move numbers. And
23 the irony, of course, is -- is in doing that, employers
24 adversely impact the very people who are benefited by the
25 disparate impact doctrine under title VII because the Age

1 Discrimination Act principally favors more senior, older
2 white males, and when you try to manage your numbers so
3 that you don't adversely impact older white males, what
4 happens is -- is you adversely impact the new entrants to
5 the work force who in the last 25 years have been much
6 greater numbers of racial minorities and females.

7 JUSTICE SCALIA: What do you do about the EEOC's
8 regulation? Why isn't that -- why isn't that entitled to
9 Chevron deference?

10 MR. NAGER: Let me answer that. First of all,
11 the -- the answer is, is you only get to Chevron deference
12 if this statute is not subject to construction by this
13 Court in phase one of Chevron. The first question is can
14 this Court, looking at the language of the statute and the
15 other legal materials, interpret the statute to have a
16 single, reasonably clear meaning.

17 JUSTICE SCALIA: How can we possibly say that
18 it's not ambiguous when we have, in another context,
19 interpreted the identical language to permit --

20 MR. NAGER: Just the way this Court did last
21 term in the General Dynamics case, which I realize you
22 dissented on this point, Justice Scalia. But just last
23 term in the General Dynamics case, this Court held that
24 the phrase, because of age, is idiomatically and
25 contextually different than the phrase, because of race or

1 sex. And my point to Justice Breyer is -- is that the
2 phrase, because of age, cannot properly be construed to be
3 satisfied by a mere statistical correlation with age.

4 JUSTICE STEVENS: In that -- in that
5 case, we were construing the word age and age definitely
6 has a different meaning from sex or -- or race.

7 MR. NAGER: I'm not saying that the -- the
8 General Dynamics case disposes of this case, Justice
9 Stevens. I'm simply pointing out that, as Justice
10 Souter's opinion for the Court last term held, that
11 similar language in similar statutes can have different
12 meaning and not be ambiguous.

13 JUSTICE GINSBURG: Yes, but not whole texts, not
14 -- I don't remember whether it was (1)-(1) and (2) or (a)
15 and (b), but this is not a word, age. It's -- it's lines and
16 lines, and to -- and to say, oh, in Griggs we held that
17 the title VII language -- this language means you can have
18 a disparate impact theory, but in age, we're going to read
19 those very same words to prohibit. In one sense -- one
20 you read to say, these words permit disparate impact, and
21 then you read the same words to say these words
22 prohibit --

23 MR. NAGER: No.

24 JUSTICE GINSBURG: -- disparate impact.

25 MR. NAGER: That is not quite right, Justice

1 Ginsburg. What we're saying is -- is that the natural meaning
2 of the phrase, because of, either in title VII or in the
3 Age Act, is a natural, more conventional reference to
4 intent. Nonetheless, the Court, because of the objectives
5 of title VII and because statistical correlations could
6 equal a functional equivalent of intentional
7 discrimination, construed title VII to go beyond intent-
8 based claims to encompass disparate impact claims. Our
9 point to the Court today is -- is that neither of those
10 two critical premises apply, that a mere correlation with
11 age does not, in the context of age, equal a prima facie
12 case of --

13 JUSTICE SCALIA: If that's so, Congress
14 shouldn't have copied the language of title VII. It isn't
15 a matter of it just accidentally comes out to -- to be
16 sounding the same, as though, you know, two monkeys did it
17 on a typewriter or something. They copied -- they copied
18 title VII.

19 MR. NAGER: Well, they copied it before Griggs
20 was decided, indeed, before any agency of Government,
21 before any court in this country, and before any academic
22 in this country had floated the concept --

23 JUSTICE SCALIA: Well, I think it's a fair
24 conclusion that they meant the two to mean the same thing,
25 whether it was before Griggs or after Griggs. They copied

1 the language. It seems to me they wanted the two to mean
2 the same.

3 MR. NAGER: I -- I think that that's wrong,
4 Justice Scalia.

5 JUSTICE SCALIA: Or -- or at least it is
6 arguably so, in which case you come back to my question.
7 Why isn't the -- the EEOC's resolution of that ambiguity
8 conclusive?

9 MR. NAGER: Well, let me answer that question
10 directly and then come back and argue with you about your
11 premise. If you turn to the appendix and on the red
12 brief, page 56a is the regulation. And it is -- as
13 Justice Kennedy pointed out, it is not an interpretation
14 of the prohibition of the statute. It is an
15 interpretation of the reasonable factor other than age
16 provision. And as an initial point, I'd submit to you,
17 Justice Scalia, that it's one thing to defer to an
18 agency's interpretation of the provision that you're being
19 asked to construe in resolving what the meaning of the
20 provision you're being asked to construe is. It's another
21 thing to defer to their interpretation of a distinct
22 provision which isn't a prohibition at all.

23 Let me move on and let's read what it says,
24 though. What it says is -- is the following. It's
25 interpreting a phrase that says is based on a reasonable

1 factor other than age, which Mr. Goldstein has conceded in
2 his brief and the petitioners in the Florida Power case
3 also conceded is necessarily a reference to
4 intentionality. But there's not a word in this regulation
5 about employer intentions. Quite the contrary.

6 And the reason why I -- I asked you to turn to
7 page 56a of our brief rather than the quotation of the
8 regulation in Mr. Goldstein's brief is because there's an
9 additional sentence in the regulation that Mr. Goldstein
10 didn't print in his brief, and that is that the EEOC said
11 where tests are involved --

12 JUSTICE SCALIA: Where -- where are you reading
13 from?

14 MR. NAGER: Page 56a of the red brief. I'm
15 sorry, Justice. It's section (d).

16 JUSTICE SCALIA: (e)?

17 MR. NAGER: (d) as in David.

18 What the EEOC said is that the reasonable
19 factors other than age provision is not an intent-based
20 provision. It's a business necessity provision. They did
21 it, saying it means the same thing as it's -- as it means
22 in title VII because their whole purpose here was to
23 conform the Age Act to title VII, and they said you have
24 to comply, where tests are involved, with the Uniform
25 Guidelines on Employee Selection that they jointly

1 promulgated with the Department of Labor, the Justice
2 Department, and the Civil Service branch, whose name has
3 escaped me right now.

4 JUSTICE STEVENS: Mr. Nager, I'm lost. What --
5 what part of 56a are you referring to? (d)?

6 MR. NAGER: (d) on page 56a. I'm sorry?

7 JUSTICE STEVENS: Does it say what you just
8 said?

9 MR. NAGER: Tests which are asserted -- the last
10 sentence. Tests which are asserted as reasonable factors
11 other than age will be scrutinized in accordance with the
12 standards set forth at part 1607 of this title. Part 1607
13 of this title is the Uniform Guidelines on Employee
14 Selection.

15 JUSTICE BREYER: All that's true, but they --
16 they did promulgate this guideline, as far as -- I looked
17 it up. At that time, they said, look, it's going to be
18 disparate impact, and they cited Griggs. And people have
19 put comments, which I haven't read yet, but I imagine the
20 comments went to disparate impact. And then when they
21 rewrote it in this form, they have a little paragraph of
22 explanation which makes pretty clear it's meant to be
23 disparate impact.

24 MR. NAGER: I have no doubt that they were
25 assuming that this Court's decision in Griggs -- because

1 this is what they said in their comments -- this Court's
2 decision in Griggs required disparate impact analysis --

3 JUSTICE BREYER: Well, all right. But I mean,
4 they -- everybody knew what they were driving at at the
5 time they promulgated this. So it seemed to me that if --
6 if we're not governed by the reg, it must be because the
7 reg is outside the statutory authority. And it might be
8 outside the statutory authority if in fact it embodies too
9 tough a test.

10 MR. NAGER: It's -- it's outside the -- the
11 statutory authority for two reasons.

12 JUSTICE BREYER: But now we've heard it doesn't
13 embody that much of a tough test, and you know, the EEOC
14 isn't here to tell us --

15 MR. NAGER: Well --

16 JUSTICE BREYER: -- what in fact it thinks.

17 MR. NAGER: Mr. Goldstein cited a bunch of EEOC
18 briefs in his brief, and you'll notice he didn't quote a
19 single part of -- of those EEOC briefs which say that the
20 standard under the Age Act is less than the standard under
21 the Age Act. What he cites to is a footnote in his
22 opening brief where he quotes one sentence from an EEOC
23 brief where an EEOC appellate lawyer said it is -- is
24 likely that an employer will be able to prevail more
25 often.

1 The EEOC never said -- and -- and I litigate
2 against them. I can tell you the only thing that they
3 would hate less but hate a lot than your ruling in our
4 favor that there's no disparate impact claims at all is
5 that Mr. Goldstein has represented what their version of
6 the defense is because that's not the Government's
7 position.

8 JUSTICE BREYER: All right. So we don't know
9 what the Government's position is. They're not here. So
10 suppose I think, one, the language is against you, the
11 language of the statute. I do think it's against you.
12 Two, the EEOC reg does foresee a disparate impact test.
13 Three, the practicalities are absolutely with you, and
14 that has to go with the scope of the statute. And four,
15 it might be possible for the EEOC to write a reg that
16 deals with the problems you're worried about while
17 advancing a disparate impact test. Suppose I think all
18 those things --

19 MR. NAGER: Which one --

20 JUSTICE BREYER: -- which are at least
21 consistent. What would I do with this case? That's my
22 problem.

23 MR. NAGER: Okay. I -- I would submit that you
24 should --

25 JUSTICE BREYER: Where the Government hasn't

1 appeared and told us what they want to do or what they
2 think should be done, et cetera.

3 MR. NAGER: I -- I should -- I would submit,
4 Justice Breyer, that you should reexamine your premise
5 that the language of the Age Act, both in section 4(a) by
6 itself and construed in light of 4(f) and the legislative
7 history and purposes of the statute encompass disparate
8 impact claims.

9 JUSTICE SCALIA: Maybe the EEOC regulation was
10 not so much an interpretation of the statute as an
11 interpretation of Griggs.

12 MR. NAGER: Oh, I think that's --

13 JUSTICE SCALIA: I mean, maybe this provision
14 represents the judgment of the agency that Griggs applies
15 to this other statute, and -- and I'm not sure that we owe
16 Chevron deference to that determination.

17 MR. NAGER: Well, I -- I don't think you did,
18 although I don't even think, frankly, from what I've read
19 is they made the judgment. They made the assumption.

20 JUSTICE SCALIA: Yes, well.

21 JUSTICE SOUTER: Mr. Nager, will you go to
22 another one of Justice Breyer's premises? He says
23 following the practicalities are with you, which you're
24 certainly going to accept. He says I think the EEOC can
25 deal with some of these practical problems. Do you think

1 so? Why not?

2 MR. NAGER: Great question and the answer is no,
3 they can't. And the reason is --

4 JUSTICE SOUTER: Give me some examples.

5 MR. NAGER: The reason is -- is because if you
6 -- if you lower the prima facie case so that it's
7 meaningless, so that it means that all a plaintiff has to
8 do is find a selection practice -- because it's always
9 going to correlate with age -- it means you shifted the
10 burden to an employer in every case to establish that its
11 -- its practice meets whatever standard your hypothesizing
12 the EEOC might come up with later, Justice Breyer.

13 Meanwhile, the world has to go on, and what my
14 clients will do is as follows. They will say, well, you
15 know, we're not going to wait to see if -- if this new
16 practice we're going to consider is going to stand the
17 test of time in court and under the EEOC's yet-to-be-
18 articulated regulation. We're going to stick with the
19 tried and true. We are not going to innovate at all, and
20 if we're going to innovate, we're going to massage the
21 numbers while we do it. The employers --

22 JUSTICE BREYER: That would be a fairly easy
23 burden -- a fairly easy burden to meet. And -- and to give
24 you a fairly easy burden is consistent with the idea of
25 trying to get employers to think about the problem. An

1 employer who uses a different factor which is correlated
2 with age but it's -- it's an unreasonable thing to do or
3 it isn't the real basis hasn't thought about the harm that
4 he's working.

5 MR. NAGER: Well, as --

6 JUSTICE BREYER: So we could give you an easy
7 burden and still accomplish the objective.

8 MR. NAGER: I -- I don't want to resist the easy
9 burden, but I do want to tell you, as Justice Scalia
10 pointed out in the Florida Power argument, my clients do
11 think about these things because if -- you know, if they
12 adopt an unreasonable practice that has an adverse
13 statistical effect and they think they're likely to get
14 sued about it, they actually do have to worry about it
15 because these cases are tried to juries and they have to
16 have a reasonable explanation for what their practice
17 because they get tried to juries as disparate treatment
18 cases.

19 Our point is not that statistics are not
20 admissible. They are. Our point is -- is that they're
21 not sufficient by themselves to create a prima facie case
22 of -- because of age, as it would be in a title VII case
23 where we wouldn't expect to see the statistical disparity.
24 So it's fair to say that there's a reasonable adverse
25 inference to be drawn from the existence of the disparity

1 itself. That is the premise articulated by this Court as
2 to why the disparate impact doctrine can -- can at -- the
3 prima facie case aspect of it equals a prima facie case of
4 discrimination because of race or sex. That is not true
5 here.

6 Now, it is also the case that when this Court
7 adopted the disparate impact doctrine, it said it placed
8 an enormous weight on the objectives of title VII's
9 prohibitions, which it construed to be, as Justice
10 Ginsburg pointed out, eliminating these built-in
11 headwinds.

12 Well, when -- when the Secretary of Labor
13 proposed the Age Discrimination Act, he gave a report to
14 Congress and he said age discrimination is different than
15 race and sex discrimination. It is not based on animus.
16 It is -- it is not dealing with a group of individuals who
17 have suffered cumulative disabilities over their lifetime
18 because of historic discrimination. He said it's -- the
19 problem of age discrimination is the problem of over-
20 generalization by an employer.

21 JUSTICE GINSBURG: But he gave the very same
22 example that was Griggs. He gave the example of the high
23 school diploma because he thought that people of a certain
24 age, when there wasn't such general education as there is
25 today, might not have a high school diploma to a much

1 higher extent than the people who came -- the generation
2 who came after.

3 MR. NAGER: But his solution was not a disparate
4 impact doctrine. His solution was --

5 JUSTICE GINSBURG: Well, it's a little, and you
6 said his solution was we're going to have training and
7 manuals and all. But that's not altogether clear.

8 MR. NAGER: Well, take a look at the statute,
9 Justice Ginsburg. Please look at page 15a and 16a in the
10 red brief. And if you look at section 621(b) -- it's at
11 the bottom of page 15a of the red brief -- Congress said
12 what the purposes of the Age Discrimination Act were, and
13 it had three, but it's only addressed one through the
14 prohibition. The second one was to prohibit arbitrary age
15 discrimination in employment. The other two were to
16 promote employment of older persons based on ability and
17 to help employers and workers find ways of meeting
18 problems arising from the impact of age on employment.

19 And if you turn the page and look at section
20 622(a)(1), the very first thing Congress mandates that the Secretary
21 shall do to address its other two purposes, to undertake
22 research and promote research with a view to reducing
23 barriers to the employment of older persons and the
24 promotion of measures for using their skills.

25 What the Secretary of Labor's report goes on at

1 length about is it identifies all kinds of factors,
2 neutral and non-neutral --

3 JUSTICE GINSBURG: But it doesn't say there that
4 that is to implement the first -- that -- that only the
5 second one, to prohibit arbitrary age discrimination.

6 MR. NAGER: It does -- what it -- you're right
7 it doesn't say the following. It doesn't say, and we
8 don't want disparate impact, because in 1967 the -- the
9 concept of disparate impact as a legal theory was unknown
10 to Congress, to the courts, and to the administrative
11 agencies.

12 But what the Secretary of Labor did do in his
13 report is, after identifying all of the problems that
14 adversely affect older workers, he says, I recommend a
15 two-pronged approach. One prong is prohibitory. It's
16 coercive. You shall not -- we'll prohibit arbitrary age
17 discrimination in employment, which the Secretary
18 explained to Congress, and this Court last term said
19 itself, means a -- is a -- is -- is the use of age as the
20 decision-making criteria.

21 He said, separately we should have a series of
22 programs that seek to enlarge the abilities of older
23 workers, that seek to educate employers about the
24 abilities of older workers through non-coercive programs.

25 And so what this statute does -- and this Court

1 has said it in several of its cases -- this statute was
2 based upon the Secretary of Labor's report. The Secretary
3 wrote the bill, and although Congress amended it in other
4 ways, it didn't amend any of these provisions. That this
5 statute took a more nuanced approach to deal with a
6 distinctly different problem, and the problem --

7 JUSTICE STEVENS: Mr. Nager, at the end of his
8 report, Secretary Wirtz said the -- a purpose, to
9 eliminate discrimination in the employment of older
10 workers, it would necessary not only to deal with overt
11 acts of discrimination, but also to adjust those present
12 employment practices which quite unintentionally lead to
13 age limits in hiring.

14 And your point, as I understand it, yes, that
15 was one of his purposes, but he meant that one to be
16 accomplished with ERISA and other things like that.

17 MR. NAGER: Well, the quote that you just gave
18 says that there are express uses of age and there are non-
19 age reasons that lead to the use of express limits of age,
20 for example, the hypothetical that Justice Scalia gave
21 with Mr. Goldstein, saying, well, I wouldn't want to hire
22 someone who's going -- who tells me they're going to
23 retire a year from now. But if he said I'm not going to
24 hire you because you're 64 because I know you're going to
25 -- people retire at 65 mostly, that would be the same kind

1 of non-age-based motive that nevertheless used age as a
2 decision-making criteria. That's what that quote is
3 referring to. If you -- if you -- the second half --

4 JUSTICE STEVENS: The quote -- the reference to
5 employment practices which quite unintentionally lead to
6 age limits in hiring. I see what you're saying.

7 MR. NAGER: Right.

8 And then -- and -- and the point here is this
9 was thought out. It wasn't thought out as disparate
10 treatment versus disparate impact because the concepts
11 didn't exist at the time, but it was thought out as
12 arbitrary age discrimination versus other factors that
13 adversely bear on older workers. The prohibitions went to
14 arbitrary age discrimination and didn't go to the adverse
15 impacts. It was the -- the non-coercive measures that
16 went to the adverse impacts.

17 Let me go also --

18 JUSTICE BREYER: No how does that work?
19 Because the -- the particular language, it shall be
20 unlawful for an employer to classify his employees in any
21 way that would adversely affect an individual's status --
22 his status, it says -- as an employee because of such
23 individual's age. Now, that sounds as if it's driving
24 right at disparate impact. It's -- it's unlawful to
25 classify an employee in any way that would adversely

1 affect him because of his age. That's what it says.

2 And then you turn to the defense and it says, but
3 there's the defense with a differentiation, i.e., the
4 classification is based on reasonable factors other than
5 age. And therefore it would sound as if it says, look at
6 the factor and ask is the factor reasonable. If so, the
7 employer wins if it's really based on that factor.

8 MR. NAGER: Two points?

9 JUSTICE BREYER: Yes.

10 MR. NAGER: One is -- is --

11 JUSTICE BREYER: How do we get out of that
12 language?

13 MR. NAGER: Well, we love the language. We
14 don't have to get out of it. It says because of age.
15 That's a reference, a traditional, conventional
16 reference --

17 JUSTICE BREYER: No, no, but it says -- it says
18 that would adversely affect him because of his age.

19 MR. NAGER: Well, the first -- before the comma
20 is the statement both of the action of the employer and
21 the injury that it has to cause in order for a claim to
22 exist, and then there's another requirement. The
23 requirement is -- is that the action and the -- the effect
24 of -- the injury that's affected by it be -- because of
25 age. That is a conventional reference to intent.

1 And the confirmation that it's a reference --

2 JUSTICE BREYER: Oh, no. It's not intent
3 because to read it as part of classifying, which
4 you'd have to do to get it because of intent, you'd have
5 to say to classify his employees because of such
6 individual's age. Now, that's a little tough because
7 you're talking about employees, and then you go to such
8 individual.

9 MR. NAGER: It -- it -- the phrase, because of
10 age, modifies all of the words that precede the comma that
11 separates the two.

12 JUSTICE SCALIA: Segregate or classify. You
13 want to read it all the way up back to segregate or
14 classify.

15 MR. NAGER: Well, I -- I think it does modify
16 the verb, but --

17 JUSTICE SCALIA: It would be good if you had a
18 comma after employees. I -- I might go along with you if
19 there was a comma after -- to limit, segregate, or
20 classify his employees, comma, in any way which would
21 deprive or tend to deprive any individual of opportunities
22 or otherwise affect his status as an employee, comma,
23 because of such individual's age -- go way back to before
24 the comma. I can see that, but without the comma, that's
25 -- that's an awful travel back to limit, segregate, or

1 classify.

2 MR. NAGER: Well, I -- I think that's the
3 grammatically correct way to read it. But even -- even if
4 it was just modifying the adversely affect --

5 JUSTICE BREYER: It would be the natural way.

6 MR. NAGER: -- it would still be because of age.

7 JUSTICE BREYER: The natural way -- wait. The
8 natural way is to read it as modifying to deprive --

9 JUSTICE SCALIA: Right.

10 JUSTICE BREYER: -- or otherwise adversely
11 affect.

12 JUSTICE SCALIA: Exactly.

13 JUSTICE BREYER: That's the natural way to read
14 it.

15 JUSTICE SCALIA: It is.

16 JUSTICE BREYER: Now --

17 MR. NAGER: One still --

18 JUSTICE BREYER: -- suppose we read it that way.
19 Then what do you say?

20 MR. NAGER: You -- even if you read it that way,
21 it still says, comma, because of age, and the because of
22 age is a reference to intent, and the confirmation of
23 that, Justice Breyer, is the defense that you keep
24 pointing to because as Mr. Goldstein conceded in his brief
25 and as you pointed out in your questioning, it says, is

1 based on. That is also a reference to intent. This
2 statute is preoccupied with intent.

3 What section 4(f) was about was identifying the
4 situations in which age would be used but it, nonetheless,
5 wouldn't even be arbitrary --

6 JUSTICE SCALIA: Indeed, and I guess what
7 supports that reading is that intent -- intent to
8 discriminate in hiring -- the intentional discrimination
9 because of age in hiring is covered by (2) rather than (1)
10 isn't it?

11 MR. NAGER: No, no, no.

12 JUSTICE SCALIA: You think -- I mean, if -- if
13 you have a rule -- if you have a rule that you won't hire
14 any employee -- I mean, we -- we were talking earlier
15 about the -- the reason -- (2) reads employees in the
16 plural, and (1) reads refuse to hire or discharge any
17 individual. So if you have any intentional discrimination
18 that is against a class, it comes under (2) rather than
19 (1).

20 MR. NAGER: I had never thought of construing
21 the --

22 JUSTICE SCALIA: Is that wrong? Well, I thought
23 -- I thought that's what -- what counsel for the
24 petitioner was telling us.

25 MR. NAGER: Well, if -- if he did, he's only

1 strengthened our case.

2 What I want to say to the Court is -- is that
3 both of those provisions are modified by the phrase,
4 because of age. This Court in Hazen Paper construed the
5 because of language in 4(a)(1) as a reference to intent
6 and said statistical correlations with age are not
7 sufficient to establish because of age within the meaning
8 of section 4(a)(1). And the presumption of uniform usage
9 -- we're entitled to point to it as well that the
10 presumption of uniform usage which would be that the
11 phrase, because of age, in section 4(a)(2) is also not
12 satisfied by a mere statistical correlation with age.

13 And the reason why title VII is different than
14 the Age Act -- I keep coming back to this because this is
15 so critical, Justice Breyer -- is that the premise of the
16 Court's statistical cases under title VII is that it's --
17 it presumes that there's no inherent difference in ability
18 between the races and the genders, whereas you know and I
19 know that there is a difference in an -- an inherent
20 correlation between abilities and skills, between people
21 of different ages statistically. And so that whereas in
22 the -- in the race and sex context, a statistical
23 disparity by itself points out that there's something
24 suspect and so would justify putting the employer to the
25 burden on those occasions which would happen. And by

1 definition, I think you and I both think, Justice Breyer,
2 that it's not all that often that you're going to have
3 these statistical disparities in the race and sex context.
4 In the age context, they happen all the time. So it's --
5 it -- there's no basis for suggesting that a statistical
6 correlation by itself creates something suspect, and it
7 would rob the notion of a prima facie case of any meaning
8 to say that -- that a statistical correlation with age,
9 which we expect to see all the time, would establish a
10 prima facie wrong.

11 And, of course, the Secretary of Labor wrote a
12 report telling Congress that race and sex were different
13 than age for this very reason.

14 JUSTICE STEVENS: But in your view, is based on
15 reasonable factors other than age strictly an affirmative
16 defense?

17 MR. NAGER: I -- I think that it is -- it was
18 intended to address mixed motive cases. That's why it was
19 added. I think it is a indicia of the fact that this
20 statute is concerned with intent in its prohibitions only.
21 I'm not saying it's conclusive of that, but I'm saying
22 it's another indicia, that if you look at all of section
23 4(f), it's about the instances in which age is being
24 used --

25 JUSTICE O'CONNOR: But is it an affirmative

1 defense?

2 MR. NAGER: I -- I don't think that it is, and I

3 -- I --

4 JUSTICE STEVENS: Well, did you challenge the
5 sufficiency of this complaint on the ground that it did
6 not allege that the -- the program was not based on -- was
7 based on factors that were unreasonable?

8 MR. NAGER: I -- I didn't handle the case in the
9 trial court, but I believe that the -- our -- our client
10 denied all of the allegations in the complaint and
11 affirmatively said this was -- its salary program was a
12 reasonable factor other than age, yes. And certainly in
13 the courts below, the reasonable --

14 JUSTICE STEVENS: What I'm trying to think
15 through is whether that issue is one that can be resolved
16 on the pleadings, or does it always require a trial.

17 MR. NAGER: Well, I think the question of
18 whether or not the reasonable factor other than age
19 provision, when read in conjunction with section (a)(4) --
20 4(a) shows that this is an intent-based statute, as a pure
21 legal question, can be judged on the pleadings. The --
22 the question of whether or not a -- in a particular fact
23 situation something is a reasonable factor other than age
24 or not I think would be subject to what the proof is. It
25 might be undisputed.

1 JUSTICE GINSBURG: On your reading, I just don't
2 see that there's any function. I mean, if disparate
3 impact is out of it, then -- then what work is there for
4 the reasonable factor other than age to do?

5 MR. NAGER: It was added in as a safe harbor to
6 address mixed motive cases. There was a concern at the
7 time that since employers had been using age as the
8 decision-making factor, that they would continue to think
9 about it, and the question was raised, well, would that
10 mean that the very fact they thought of it, even though
11 they had a nondiscriminatory reason, mean that they still
12 violated the act? And the Secretary said, no, we've put
13 in this reasonable factor other than age provision to make
14 it clear. It -- it was simply a safe harbor.

15 JUSTICE STEVENS: Thank you, Mr. Nager. I think
16 you've answered the question.

17 Mr. Goldstein, you have 4 minutes, and let's
18 make it 4 and a half.

19 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

20 ON BEHALF OF THE PETITIONERS

21 MR. GOLDSTEIN: Thank you, Justice Stevens.

22 I want to start with our affirmative case which
23 is one of stare decisis and then go to what I think is the
24 thing that might concern the Court and that's the
25 practicalities of implementing our rule.

1 Our stare decisis case I think is fairly
2 decisive. The language of title VII was the model for the
3 ADEA. It runs all the way through the same in subsection
4 (a)(2). This Court construed the text of the statute to
5 give rise to disparate impact liability, and there are six
6 cases of this Court that say when the language is the
7 same, because one was derived from the other, we give them
8 the same meaning.

9 Now, I take it that the respondents have three
10 answers to that.

11 The first is they attempt to rewrite the
12 rationale of Griggs and say Griggs really isn't so much
13 about the text of the statute. It's what Congress was
14 getting after, and this Court in Griggs was principally
15 concerned with the fact that, look, in the context of age
16 and sex discrimination, there's no legitimate correlation
17 between an -- a disparate impact and a legitimate employer
18 policy. That is not, in fact, what the rationale of
19 Griggs is.

20 The rationale of Griggs is that it doesn't
21 matter to the employee if you are purposefully
22 discriminated against or accidentally discriminated
23 against. Congress was concerned with the effects of
24 discrimination. And this Court reached that conclusion
25 based on the text of the statute. If I could read from

1 Griggs, quote, the objective of Congress in the enactment
2 of title VII is plain from the language of the statute.
3 That's the same language as in our statute. The thrust of
4 section 703(a)(2) was to address, quote, the consequences
5 of employment practices, not simply the motivation.

6 This Court subsequently reiterated twice that
7 disparate impact comes from the text of the statute, not
8 from the air. Those two cases are quoted at page 9 of our
9 reply brief and they resolve all doubts about commas and
10 because of or anything like that. The Court in both
11 Connecticut v. Teal and Justice O'Connor's opinion for the
12 Court in Watson tied it directly to the statute. If I
13 could just read the Watson example. Again, they're quoted
14 in full. In disparate impact cases, quote, the employer's
15 practices may be said to, quote, adversely affect an
16 individual's status as an employee because of such
17 individual's race, color, religion, sex, or national
18 origin.

19 Now, the second argument they have -- and this
20 was the Fifth Circuit's argument -- is the RFOA provision
21 exists in the ADEA, not in title VII. I do not understand
22 how the RFOA provision -- if it means anything, it doesn't
23 help us.

24 Again, let me take you back to the text. It's
25 on page 1 of the blue brief. It's in a few other places,

1 but it's there. It shall not be unlawful for an employer
2 to take any action otherwise prohibited under subsection
3 (a) where the differentiation is based on reasonable
4 factors other than age. The necessary premise of that
5 provision is that something will be otherwise unlawful
6 when it's based on something other than age. It can't be
7 talking about disparate treatment. The only kind of
8 liability that involves factors other than age is impact.
9 And then on top of that, Congress required that the
10 employer's conduct be reasonable.

11 JUSTICE SCALIA: What of dual motive?

12 MR. GOLDSTEIN: Because the statute refers to
13 something otherwise unlawful, it can't be talking about
14 Price Waterhouse mixed motive. Price Waterhouse mixed
15 motive cases establish liability; i.e., you're not liable
16 if you had another reason for doing it. But the premise
17 of (f)(1) is that it's already otherwise unlawful, this is a
18 defense to that.

19 The third thing that they say is that in Hazen
20 Paper this Court construed the because of language in
21 (a)(1) not to refer to impact. The critical difference is
22 that the (a)(1) language does not include the -- the
23 clause that refers to the impact on the employee that
24 Justice Stevens and Justice Breyer talked about with Mr.
25 Nager. They're structured very differently.

1 As to the practicalities, let me just say this
2 has been the rule for a quarter century of the EEOC. It
3 was the rule in every circuit until 1993. It is still the
4 rule in three circuits. The notion that there is a big
5 problem with administering it and that the EEOC can't
6 recognize the -- as it has in all the examples we cite,
7 that it's easier for an employer to prevail in the ADEA
8 context is not accurate.

9 I also want to just agree with Justice Breyer,
10 that an important part of impact liability is just making
11 employers think about it. And that comes from Justice
12 Kennedy's opinion in McKennon where he said that disparate
13 impact, quote, acts as a spur or catalyst to cause
14 employers to self-examine and self-evaluate their
15 employment practices to endeavor to eliminate, so far as
16 possible, the last vestiges of discrimination.

17 JUSTICE STEVENS: Thank you, Mr. Goldstein.

18 The case is submitted.

19 (Whereupon, at 12:03 p.m., the case in the
20 above-entitled matter was submitted.)

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