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. :

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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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P R O C E E D I N G S

(11:02 a.m.)

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

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: I can tell you.

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: We do care about the regulations.

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

saying you could make your case just on the --

MR. GOLDSTEIN: Well, we have --

JUSTICE SCALIA: -- text of the statute.

MR. GOLDSTEIN: We can and will.

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: Yes.

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

MR. GOLDSTEIN: No.

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

are. I've lost my case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: -- suppose I want --

JUSTICE STEVENS: I understand that to be this case.

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

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

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

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

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

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

MR. GOLDSTEIN: No.

JUSTICE STEVENS: No.

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

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

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

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

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

JUSTICE STEVENS: What was the criterion?

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

JUSTICE STEVENS: So in other words, the

criterion was the kind of rank they had before.

MR. GOLDSTEIN: Yes, and then --

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

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

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

MR. GOLDSTEIN: Yes. There are two things.

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

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

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

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

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

MR. GOLDSTEIN: Yes. They give --

JUSTICE BREYER: Is that right?

MR. GOLDSTEIN: Yes. They give an explanation.

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

(Laughter.)

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

MR. GOLDSTEIN: No. You would lose a treatment

case.

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

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

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

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

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

MR. GOLDSTEIN: No.

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: Because it's not --

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

MR. GOLDSTEIN: The --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If I could reserve the remainder of my time.

JUSTICE STEVENS: Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

(Laughter.)

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

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

JUSTICE GINSBURG: No. 34.

JUSTICE SCALIA: 34, well --

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NAGER: No.

JUSTICE GINSBURG: -- disparate impact.

MR. NAGER: That is not quite right, Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: (e)?

MR. NAGER: (d) as in David.

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

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

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

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

JUSTICE STEVENS: Does it say what you just said?

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

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

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

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

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

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

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

MR. NAGER: Well --

JUSTICE BREYER: -- what in fact it thinks.

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

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

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

MR. NAGER: Which one --

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

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

JUSTICE BREYER: Where the Government hasn't

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

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

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

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

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

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

JUSTICE SCALIA: Yes, well.

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

so? Why not?

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

JUSTICE SOUTER: Give me some examples.

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

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

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

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

MR. NAGER: Well, as --

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

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

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

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

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

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

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

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

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

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

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

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

What the Secretary of Labor's report goes on at

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

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

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

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

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

And so what this statute does -- and this Court

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

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

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

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

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

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

MR. NAGER: Right.

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

Let me go also --

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

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

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

MR. NAGER: Two points?

JUSTICE BREYER: Yes.

MR. NAGER: One is -- is --

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

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

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

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

And the confirmation that it's a reference --

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

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

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

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

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

classify.

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

JUSTICE BREYER: It would be the natural way.

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

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

JUSTICE SCALIA: Right.

JUSTICE BREYER: -- or otherwise adversely affect.

JUSTICE SCALIA: Exactly.

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

JUSTICE SCALIA: It is.

JUSTICE BREYER: Now --

MR. NAGER: One still --

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

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

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

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

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

MR. NAGER: No, no, no.

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

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

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

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

strengthened our case.

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

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

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

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

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

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

JUSTICE O'CONNOR: But is it an affirmative

defense?

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

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

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

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

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

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

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

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

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

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONERS

MR. GOLDSTEIN: Thank you, Justice Stevens.

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: What of dual motive?

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

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

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

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

JUSTICE STEVENS: Thank you, Mr. Goldstein.

The case is submitted.

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