SUPREME COURT OF THE UNITED STATES

No. 03–1160

AZEL P. SMITH, ET AL., PETITIONERS *v.* CITY OF JACKSON, MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 30, 2005]

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

"Disparate treatment . . . captures the essence of what Congress sought to prohibit in the [Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*] It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993). In the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent. See *ibid.; Markham* v. *Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari). I decline to join the Court in doing so today.

I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA. The ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims. Moreover, the significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 counsel against transposing to the former our construction of the latter in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Finally, the agencies charged with administering the ADEA have never au-

thoritatively construed the statute's prohibitory language to impose disparate impact liability. Thus, on the precise question of statutory interpretation now before us, there is no reasoned agency reading of the text to which we might defer.

I

A

Our starting point is the statute's text. Section 4(a) of the ADEA makes it unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ." 29 U. S. C. §623(a).

Neither petitioners nor the plurality contend that the first paragraph, §4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961); see also *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others *because of* their [protected characteristic]. Proof of discriminatory motive is critical" (emphasis added)).

Petitioners look instead to the second paragraph, §4(a)(2), as the basis for their disparate impact claim. But

petitioners' argument founders on the plain language of the statute, the natural reading of which requires proof of discriminatory intent. Section 4(a)(2) uses the phrase "because of . . . age" in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's age.

Paragraphs (a)(1) and (a)(2) do differ in one informative respect. The employer actions targeted by paragraph (a)(1)—*i.e.*, refusing to hire, discharging, or discriminating against—are *inherently harmful* to the targeted individual. The actions referred to in paragraph (a)(2), on the other hand—*i.e.*, limiting, segregating, or classifying—are *facially neutral*. Accordingly, paragraph (a)(2) includes additional language which clarifies that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must "deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee." That distinction aside, the structures of paragraphs (a)(1) and (a)(2) are otherwise identical. Each paragraph prohibits an employer from taking specified adverse actions against an individual "because of such individual's age."

The plurality instead reads paragraph (a)(2) to prohibit employer actions that "adversely affect [an individual's] status as an employe[e] because of such individual's age." Under this reading, "because of . . . age" refers to the *cause of the adverse effect* rather than the *motive for the employer's action*. See *ante*, at 6. This reading is unpersuasive for two reasons. First, it ignores the obvious parallel between paragraphs (a)(1) and (a)(2) by giving the phrase "because of such individual's age" a different meaning in each of the two paragraphs. And second, it ignores the drafters' use of a comma separating the "because of . . . age" clause from the preceding language. That comma

makes plain that the "because of . . . age" clause should not be read, as the plurality would have it, to modify only the "adversely affect" phrase. See, *e.g.*, *United States* v. *Ron Pair Enterprises*, *Inc.,* 489 U. S. 235, 241 (1989) (interpreting statute in light of the drafters' use of a comma to set aside a particular phrase from the following language); see also B. Garner, A Dictionary of Modern Legal Usage 101 (2d ed. 1995) ("Generally, the word *because* should not follow a comma"). Rather, the "because of . . . age" clause is set aside to make clear that it modifies the *entirety* of the preceding paragraph: An employer may not, because of an individual's age, limit, segregate, or classify his employees in a way that harms that individual.

The plurality also argues that its reading is supported by the supposed "incongruity" between paragraph (a)(2)'s use of the plural in referring to the employer's actions ("limit, segregate, or classify his *employees*") and its use of the singular in the "because of such *individual's* age" clause. (Emphases added.) *Ante*, at 7, n. 6. Not so. For the reasons just stated, the "because of . . . age" clause modifies *all* of the preceding language of paragraph (a)(2). That preceding language is phrased in *both* the plural (insofar as it refers to the employer's actions relating to *employees*) *and* the singular (insofar as it requires that such action actually harm *an individual*). The use of the singular in the "because of . . . age" clause simply makes clear that paragraph (a)(2) forbids an employer to limit, segregate, or classify his employees if that decision is taken because of *even one* employee's age and *that individual* (alone or together with others) is harmed.

B

While §4(a)(2) of the ADEA makes it unlawful to intentionally discriminate because of age, §4(f)(1) clarifies that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c),

or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U. S. C. §623(f)(1). This "reasonable factors other than age" (RFOA) provision "insure[s] that employers [are] permitted to use neutral criteria" other than age, *EEOC* v. *Wyoming*, 460 U. S. 226, 232–233 (1983), even if this results in a disparate adverse impact on older workers. The provision therefore expresses Congress' clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination. That policy, in my view, cannot easily be reconciled with the plurality's expansive reading of §4(a)(2).

The plurality however, reasons that the RFOA provision's language instead confirms that §4(a) authorizes disparate impact claims. If §4(a) prohibited only intentional discrimination, the argument goes, then the RFOA provision would have no effect because any action based on a factor other than age would not be "'otherwise prohibited'" under §4(a). See *ante*, at 9–10. Moreover, the plurality says, the RFOA provision applies only to employer actions based on *reasonable* factors other than age—so employers may still be held liable for actions based on *un*reasonable nonage factors. See *ante*, at 10.

This argument misconstrues the purpose and effect of the RFOA provision. Discriminatory intent *is* required under §4(a), for the reasons discussed above. The role of the RFOA provision is to afford employers an independent *safe harbor* from liability. It provides that, where a plaintiff has made out a prima facie case of intentional age discrimination under §4(a)—thus "creat[ing] a presumption that the employer unlawfully discriminated against the employee," *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248, 254 (1981)—the employer can rebut this case by producing evidence that its action was based on a reasonable nonage factor. Thus, the RFOA provision codifies a safe harbor analogous to the "legitimate, nondis-

criminatory reason" (LNR) justification later recognized in Title VII suits. *Ibid.; McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

Assuming the *McDonnell Douglas* framework applies to ADEA suits, see *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 311 (1996), this "rebuttal" function of the RFOA provision is arguably redundant with the judicially established LNR justification. See *ante*, at 9–10. But, at most, that merely demonstrates Congress' abundance of caution in codifying an *express statutory exemption* from liability in the absence of discriminatory intent. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 646 (1990) (provisions that, although "technically unnecessary," are sometimes "inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin *(ex abundanti cautela)*"). It is noteworthy that even after *McDonnell Douglas* was decided, lower courts continued to rely on the RFOA exemption, in lieu of the LNR justification, as the basis for rebutting a prima facie case of age discrimination. See, *e.g.*, *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F. 2d 998, 999 (CA11 1983) *(per curiam); Schwager* v. *Sun Oil Co. of Pa.*, 591 F. 2d 58, 61 (CA10 1979); *Bittar* v. *Air Canada*, 512 F. 2d 582, 582–583 (CA5 1975) *(per curiam).*

In any event, the RFOA provision also plays a distinct (and clearly nonredundant) role in "mixed-motive" cases. In such cases, an adverse action taken in substantial part because of an employee's age may be "otherwise prohibited" by §4(a). See *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 93 (2003); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 262–266 (1989) (O'CONNOR, J., concurring in judgment). The RFOA exemption makes clear that such conduct is nevertheless lawful so long as it is "based on" a reasonable factor other than age.

Finally, the RFOA provision's reference to "reasonable" factors serves only to prevent the employer from gaining

the benefit of the statutory safe harbor by offering an irrational justification. Reliance on an unreasonable nonage factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 147 (2000); see also *Hazen Paper*, 507 U. S., at 613–614.

II

The legislative history of the ADEA confirms what its text plainly indicates—that Congress never intended the statute to authorize disparate impact claims. The drafters of the ADEA and the Congress that enacted it understood that age discrimination was qualitatively different from the kinds of discrimination addressed by Title VII, and that many legitimate employment practices would have a disparate impact on older workers. Accordingly, Congress determined that the disparate impact problem would best be addressed through noncoercive measures, and that the ADEA's prohibitory provisions should be reserved for combating intentional age-based discrimination.

A

Although Congress rejected proposals to address age discrimination in the Civil Rights Act of 1964, §715 of that Act directed the Secretary of Labor to undertake a study of age discrimination in employment and to submit to Congress a report containing "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable," 78 Stat. 265. See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 586–587 (2004); *EEOC* v. *Wyoming*, *supra*, at 229. In response, Secretary Willard Wirtz submitted the report that provided the blueprint for the ADEA. See Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (June 1965),

reprinted in U. S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act 83 (1981) (hereinafter Wirtz Report or Report). Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning. See generally Blumrosen, Interpreting the ADEA: Intent or Impact 14–20, in Age Discrimination in Employment Act: A Compliance Manual for Lawyers and Personnel Practitioners 83–89 (M. Lake ed. 1982); see also *General Dynamics*, *supra*, at 587–590 (relying on the Wirtz Report to interpret the ADEA); *EEOC* v. *Wyoming*, 460 U. S., at 230–231 (discussing the Report's role in the drafting of the ADEA).

The Wirtz Report reached two conclusions of central relevance to the question presented by this case. First, the Report emphasized that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII of the Civil Rights Act of 1964 (*i.e.*, race, color, religion, sex, and national origin discrimination). Most importantly—in stark contrast to the types of discrimination addressed by Title VII—the Report found no evidence that age discrimination resulted from intolerance or animus towards older workers. Rather, age discrimination was based primarily upon unfounded assumptions about the relationship between an individual's age and her ability to perform a job. Wirtz Report 2. In addition, whereas ability is nearly always completely unrelated to the characteristics protected by Title VII, the Report found that, in some cases, "there is in fact a relationship between [an individual's] age and his ability to perform the job." *Ibid.* (emphasis deleted).

Second, the Wirtz Report drew a sharp distinction between "'arbitrary discrimination'" (which the Report clearly equates with disparate treatment) and circumstances or practices having a disparate impact on older

workers. See *id.*, at 2, 21–22. The Report defined "arbitrary" discrimination as adverse treatment of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." *Id.*, at 2 (emphasis in original). While the "most obvious kind" of arbitrary discrimination is the setting of unjustified maximum age limits for employment, *id.*, at 6, naturally the Report's definition encompasses a broad range of disparate treatment.

The Report distinguished such "arbitrary" (*i.e.*, intentional and unfounded) discrimination from two other phenomena. One involves differentiation of employees based on a genuine relationship between age and ability to perform a job. See *id.*, at 2. In this connection, the Report examined "circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers," including questions of health, educational attainment, and technological change. *Id.*, at 11–14.[1] In addition, the Report assessed "institutional ar-

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[1] It is in this connection that the Report refers to formal employment standards requiring a high school diploma. See Wirtz Report 3. The Wirtz Report did say that such a requirement would be "unfair" if an older worker's years of experience had given him an equivalent education. *Ibid.* But the plurality is mistaken to find in this statement a congressional "goal" of eliminating job requirements with a disparate impact on older workers. See *ante*, at 6, n. 5. Rather, the Wirtz Report discussed the diploma requirement in the context of a broader discussion of the effects of "wholly impersonal forces—most of them part of what is properly, if sometimes too casually, called 'progress.'" Wirtz Report 3. These forces included "the pace of changing technology, changing jobs, *changing educational* requirements, and changing personnel practices," which "increase[d] the need for special efforts if older workers' employment prospects are to improve significantly." *Ibid.* (emphasis added); see also *id.*, at 11–15 (discussing the educational attainments of older workers, together with health and technological change, in a section entitled "The Necessary Recognition of Forces of Circumstance"). The Report recommended that such forces be addressed through noncoercive instead of prohibitory measures, and it

rangements"—such as seniority rules, workers' compensation laws, and pension plans—which, though intended to benefit older workers, might actually make employers less likely to hire or retain them. *Id.*, at 2, 15–17.

The Report specifically recommended legislative action to prohibit "arbitrary discrimination," *i.e.*, disparate treatment. *Id.*, at 21–22. In sharp contrast, it recommended that the other two types of "discrimination"—both involving factors or practices having a disparate impact on older workers—be addressed through noncoercive measures: programs to increase the availability of employment; continuing education; and adjustment of pension systems, workers' compensation, and other institutional arrangements. *Id.*, at 22–25. These recommendations found direct expression in the ADEA, which was drafted at Congress' command that the Secretary of Labor make "specific legislative recommendations for implementing the [Wirtz Report's] conclusions," Fair Labor Standards Amendments of 1966, §606, 80 Stat. 845. See also *General Dynamics*, 540 U. S., at 589 ("[T]he ADEA . . . begins with statements of purpose and findings that mirror the Wirtz Report").

B

The ADEA's structure confirms Congress' determination to prohibit only "arbitrary" discrimination (*i.e.*, disparate treatment based on unfounded assumptions), while addressing practices with a disparate adverse impact on older workers through noncoercive measures. Section 2—which sets forth the findings and purposes of the statute—draws a clear distinction between "the setting of arbitrary age limits regardless of potential for job performance" and "certain otherwise desirable practices [that] may work to

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specifically focused on the need for educational opportunities for older workers. See *id.*, at 23–25.

the disadvantage of older persons." 29 U. S. C. §621(a)(2). In response to these problems, §2 identifies three purposes of the ADEA: "[1] to promote employment of older persons based on their ability rather than age; [2] to prohibit arbitrary age discrimination in employment; [and 3] to help employers and workers find ways of meeting problems arising from the impact of age on employment." §621(b).

Each of these three purposes corresponds to one of the three substantive statutory sections that follow. Section 3 seeks to "promote employment of older persons" by directing the Secretary of Labor to undertake a program of research and education related to "the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy." §622(a). Section 4, which contains the ADEA's core prohibitions, corresponds to the second purpose: to "prohibit arbitrary age discrimination in employment." Finally, §5 addresses the third statutory purpose by requiring the Secretary of Labor to undertake a study of "institutional and other arrangements giving rise to involuntary retirement" and to submit any resulting findings and legislative recommendations to Congress. §624(a)(1).

Section 4—including §4(a)(2)—must be read in light of the express statutory purpose the provision was intended to effect: the prohibition of "arbitrary age discrimination in employment." §621(b). As the legislative history makes plain, "arbitrary" age discrimination had a very specific meaning for the ADEA's drafters. It meant disparate *treatment* of older workers, predominantly because of unfounded assumptions about the relationship between age and ability. See *supra*, at 8–10. Again, such intentional discrimination was clearly distinguished from circumstances and practices merely having a disparate impact on older workers, which—as ADEA §§2, 3, and 5 make clear—Congress intended to address through re-

search, education, and possible future legislative action.

C

In addition to this affirmative evidence of congressional intent, I find it telling that the legislative history is devoid of any discussion of disparate impact claims or of the complicated issues such claims raise in the ADEA context. See Gold, Disparate Impact Under the Age Discrimination in Employment Act of 1967, 25 Berkeley J. Emp. & Lab. L. 1, 40 (2004). At the time the ADEA was enacted, the predominant focus of antidiscrimination law was on intentional discrimination; the concept of disparate impact liability, by contrast, was quite novel. See, *e.g.*, Gold, *Griggs*' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Indus. Rel. L. J. 429, 518–520 (1985); Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 69–71 (1972). Had Congress intended to inaugurate disparate impact liability in the ADEA, one would expect to find some indication of that intent in the text and the legislative history. There is none.

D

Congress' decision not to authorize disparate impact claims is understandable in light of the questionable utility of such claims in the age-discrimination context. No one would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination, like racial minorities have. See *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 313–314 (1976) *(per curiam);* see also Wirtz Report 5–6. Accordingly, disparate impact liability under the ADEA cannot be justified, and is not necessary, as a means of redressing the cumulative results of past discrimination.

Cf. *Griggs,* 401 U. S., at 430 (reasoning that disparate impact liability is necessary under Title VII to prevent perpetuation of the results of past racial discrimination).

Moreover, the Wirtz Report correctly concluded that—unlike the classifications protected by Title VII—there often *is* a correlation between an individual's age and her ability to perform a job. Wirtz Report 2, 11–15. That is to be expected, for "physical ability generally declines with age," *Murgia*, *supra*, at 315, and in some cases, so does mental capacity, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 472 (1991). Perhaps more importantly, advances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-à-vis younger workers. Wirtz Report 11–15. Beyond these performance-affecting factors, there is also the fact that many employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority. See, *e.g.*, *Finnegan* v. *Trans World Airlines, Inc.*, 967 F. 2d 1161, 1164 (CA7 1992) ("[V]irtually all elements of a standard compensation package are positively correlated with age"). Accordingly, many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers. Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.

III

The plurality and JUSTICE SCALIA offer two principal arguments in favor of their reading of the statute: that the relevant provision of the ADEA should be read *in pari materia* with the parallel provision of Title VII, and that we should give interpretive weight or deference to agency statements relating to disparate impact liability. I find

neither argument persuasive.

A

The language of the ADEA's prohibitory provisions was modeled on, and is nearly identical to, parallel provisions in Title VII. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995); *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978). Because *Griggs*, *supra,* held that Title VII's §703(a)(2) permits disparate impact claims, the plurality concludes that we should read §4(a)(2) of the ADEA similarly. *Ante*, at 4–9.

Obviously, this argument would be a great deal more convincing had *Griggs* been decided *before* the ADEA was enacted. In that case, we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims. See, *e.g.*, *Department of Energy* v. *Ohio*, 503 U. S. 607, 626 (1992); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992). But *Griggs* was decided four years *after* the ADEA's enactment, and there is no reason to suppose that Congress in 1967 could have foreseen the interpretation of Title VII that was to come. See *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 523, n. 9 (1994); see also *supra*, at 10–11 (discussing novelty of disparate impact theory at the time of the ADEA's enactment).

To be sure, where two statutes use similar language we generally take this as "a strong indication that [they] should be interpreted *pari passu*." *Northcross* v. *Board of Ed. of Memphis City Schools,* 412 U. S. 427, 428 (1973) *(per curiam)*. But this is not a rigid or absolute rule, and it "'readily yields'" to other indicia of congressional intent. *General Dynamics*, 540 U. S., at 595 (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932)). Indeed, "'the meaning [of the same words] well may vary to meet the purposes of the law.'" *United States*

v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001) (alteration in original) (quoting *Atlantic Cleaners & Dyers*, *supra*, at 433). Accordingly, we have not hesitated to give a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that Congress did not intend the language to be used uniformly. See, *e.g.*, *General Dynamics*, *supra*, at 595–597 ("age" has different meaning where used in different parts of the ADEA); *Cleveland Indians*, *supra*, at 213 ("wages paid" has different meanings in different provisions of Title 26 U. S. C.); *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 343–344 (1997) ("employee" has different meanings in different parts of Title VII); *Fogerty*, *supra*, at 522–525 (Copyright Act's attorney's fees provision has different meaning than the analogous provision in Title VII, despite their "virtually identical language"). Such is the case here.

First, there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent. Most importantly, whereas the ADEA's RFOA provision protects employers from liability for any actions not motivated by age, see *supra*, at 4–7, Title VII lacks any similar provision. In addition, the ADEA's structure demonstrates Congress' intent to combat intentional discrimination through §4's prohibitions while addressing employment practices having a disparate impact on older workers through independent noncoercive mechanisms. See *supra*, at 8–11. There is no analogy in the structure of Title VII. Furthermore, as the Congresses that adopted *both* Title VII *and* the ADEA clearly recognized, the two statutes were intended to address qualitatively different kinds of discrimination. See *supra*, at 7–8. Disparate impact liability may have a legitimate role in combating the types of discrimination addressed by Title VII, but the nature of aging and of age discrimination makes such liability inappropriate for the ADEA. See

supra, at 12–13.

Finally, nothing in the Court's decision in *Griggs* itself provides any reason to extend its holding to the ADEA. As the plurality tacitly acknowledges, *ante*, at 6, the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose*, *i.e.*,

> "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U. S., at 429–430.

In other words, the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, see *Murgia*, 427 U. S., at 313–314, and it therefore should not control our decision here.

Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent. In my judgment, the significant differences between Title VII and the ADEA are more than sufficient to overcome the default presumption that similar language is to be read similarly. See *Fogerty*, *supra*, at 523–524 (concluding that the "normal indication" that similar language should be read similarly is "overborne" by differences between the legislative history and purposes of two statutes).

B

The plurality asserts that the agencies charged with the

ADEA's administration "have consistently interpreted the [statute] to authorize relief on a disparate-impact theory." *Ante*, at 10. In support of this claim, the plurality describes a 1968 interpretive bulletin issued by the Department of Labor as "permitt[ing]" disparate impact claims. *Ibid.* (citing 29 CFR §860.103(f)(1)(i) (1970)). And the plurality cites, without comment, an Equal Employment Opportunities Commission (EEOC) policy statement construing the RFOA provision. *Ante*, at 11 (citing 29 CFR §1625.7 (2004)). It is unclear what interpretive value the plurality means to assign to these agency statements. But JUSTICE SCALIA, at least, thinks that the EEOC statement is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and that "that is sufficient to resolve this case." *Ante*, at 5 (opinion concurring in part and concurring in judgment). I disagree and, for the reasons that follow, would give no weight to the statements in question.

The 1968 Labor Department bulletin to which the plurality alludes was intended to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.'" 29 CFR §860.1 (1970) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 138 (1944)). In discussing the RFOA provision, the bulletin states that "physical fitness requirements" and "[e]valuation factors such as quantity or quality of production, or educational level" can qualify as reasonable nonage factors, so long as they have a valid relationship to job qualifications and are uniformly applied. §§860.103(f)(1), (2). But the bulletin does not construe the ADEA's *prohibitory* provisions, nor does it state or imply that §4(a) authorizes disparate impact claims. Rather, it establishes "a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the" RFOA exemption. *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S.

158, 172 (1989) (discussing 1968 bulletin's interpretation of the §4(f)(2) exemption). Moreover, the very same bulletin states unequivocally that "[t]he clear purpose [of the ADEA] is to insure that age, within the limits prescribed by the Act, is not *a determining factor in making any decision* regarding the hiring, dismissal, promotion or any other term condition or privilege of employment of an individual." §860.103(c) (emphasis added). That language is all about discriminatory intent.

The EEOC statement cited by the plurality and relied upon by JUSTICE SCALIA is equally unhelpful. This "interpretative rule or policy statement," promulgated in 1981, superseded the 1968 Labor Department bulletin after responsibility for enforcing the ADEA was transferred from Labor to the EEOC. See 46 Fed. Reg. 47724 (1981). It states, in relevant part:

> "[W]hen 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 a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 CFR §1625.7(d) (2004).

Like the 1968 bulletin it replaces, this statement merely spells out the agency's view, for purposes of its enforcement policy, of what an employer must do to be certain of gaining the safety of the RFOA haven. It says nothing about whether disparate impact claims are authorized by the ADEA.

For JUSTICE SCALIA, "[t]his is an absolutely classic case for deference to agency interpretation." *Ante*, at 1 (opinion concurring in part and concurring in judgment). I disagree. Under *Chevron*, we will defer to a reasonable agency interpretation of ambiguous statutory language, see 467 U. S., at 843–844, provided that the interpretation

has the requisite "force of law," *Christensen* v. *Harris County*, 529 U. S 576, 587 (2000). The rationale for such deference is that Congress has explicitly or implicitly delegated to the agency responsible for administering a statute the authority to choose among permissible constructions of ambiguous statutory text. See *Chevron*, *supra*, at 844. The question now before us is not what it takes to qualify for the RFOA exemption, but rather whether §4(a)(2) of the ADEA authorizes disparate impact claims. But the EEOC statement does not purport to interpret the language of §4(a) at all. Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner. As to the specific question presented, therefore, the regulation is not entitled to any deference. See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 106–109, and n. 17 (1993); see also *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287–289, and n. 5 (1978).[2]

JUSTICE SCALIA's attempt to link the EEOC's RFOA regulation to §4(a)(2) is premised on a dubious chain of inferences that, in my view, highlights the hazards of his approach. Because the RFOA provision is "relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA," he reasons, the "unavoidable meaning" of the EEOC statement is that the agency "interprets the ADEA to prohibit employer actions that have an 'adverse impact on individuals within the protected age group.'" *Ante*, at 4 (opinion concurring in part and concurring in judgment)

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[2] Because the EEOC regulation does not actually interpret the text at issue, we need not address the degree of deference to which the regulation would otherwise be entitled. Cf. *General Dynamics Land Systems, Inc.* v. *Cline,* 540 U. S. 581, 600 (2004) (declining to address whether EEOC's regulations interpreting the ADEA are entitled to *Chevron* deference).

(quoting 29 CFR §1625.7(d) (2004)). But, of course, *disparate treatment* clearly has an "adverse impact on individuals within the protected age group," *ibid.*, and JUSTICE SCALIA's reading of the EEOC's rule is hardly "unavoidable." The regulation says only that if an employer wants to rely on a practice—say, a physical fitness test—as the basis for an exemption from liability, and that test adversely affects older workers, the employer can be sure of qualifying for the exemption only if the test is sufficiently job related. Such a limitation makes sense in disparate treatment cases. A test that harms older workers and is unrelated to the job may be a pretext for—or even a means of effectuating—intentional discrimination. See *supra*, at 6–7. JUSTICE SCALIA completes his analytical chain by inferring that the EEOC regulation *must* be read to interpret *§4(a)(2)* to allow disparate impact claims because that is the only provision of the ADEA that could "conceivably" be so interpreted. *Ante*, at 4 (opinion concurring in part and concurring judgment). But the support for that inference is doubtful, to say the least. The regulation specifically refers to employment practices claimed as a basis for "different treatment of employees *or applicants for employment*," 29 CFR §1625.7(d) (2004) (emphasis added). Section 4(a)(2), of course, does not apply to "applicants for employment" at all—it is only §4(a)(1) that protects this group. See 29 U. S. C. §623(a). That suggests that the EEOC must have read the RFOA to provide a defense against claims under §4(a)(1)—which unquestionably permits only disparate treatment claims, see *supra*, at 2.

This discussion serves to illustrate why it makes little sense to attribute to the agency a construction of the relevant statutory text that the agency itself has not actually articulated so that we can then "defer" to that reading. Such an approach is particularly troubling where applied to a question as weighty as whether a statute does or does not subject employers to liability absent discrimi-

natory intent. This is not, in my view, what *Chevron* contemplated.

As an interpretation of the *RFOA provision*, moreover, the EEOC regulation is both unreasonable on its face and directly at odds with the Court's holding in today's case. It says that the RFOA exemption is available only if the employer's practice is justified by a "business necessity." But the Court has rejected that reading of the RFOA provision, and rightly so: There may be many "reasonable" means by which an employer can advance its goals, and a given nonage factor can certainly be "reasonable" without being necessary. *Ante*, at 14; see also *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 419 (1985) (distinguishing "'reasonable necessity'" standard from "'reasonableness'"). Of course, it is elementary that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Betts*, 492 U. S., at 171. The agency clearly misread the RFOA provision it was attempting to construe. That error is not necessarily dispositive of the disparate impact question. But I think it highlights the improvidence of giving weight (let alone deferring) to the regulation's *purported assumption* that an *entirely different provision* of the statute, which is not even the subject of the regulation, authorizes disparate impact claims. In my view, we should simply acknowledge that this regulation is of no help in answering the question presented.

IV

Although I would not read the ADEA to authorize disparate impact claims, I agree with the Court that, if such claims are allowed, they are strictly circumscribed by the RFOA exemption. See *ante*, at 13–14. That exemption requires only that the challenged employment practice be based on a "reasonable" nonage factor—that is, one that is rationally related to some legitimate business objective. I also agree with the Court, *ante*, at 11, that, if disparate

impact claims are to be permitted under the ADEA, they are governed by the standards set forth in our decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989). That means, as the Court holds, *ante*, at 12, that "a plaintiff must demonstrate that it is the application of a *specific or particular employment practice* that has *created* the disparate impact under attack," *Wards Cove*, *supra*, at 657 (emphasis added); see also *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 994 (1988) (opinion of O'CONNOR, J.). It also means that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion. See *Wards Cove*, *supra*, at 659–660; see also *Watson*, *supra*, at 997 (opinion of O'CONNOR, J.). Even if petitioners' disparate impact claim were cognizable under the ADEA, that claim clearly would fail in light of these requirements.