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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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MEACHAM ET AL. *v.* KNOLLS ATOMIC POWER LABORATORY, AKA KAPL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06–1505. Argued April 23, 2008—Decided June 19, 2008

When the National Government ordered its contractor, respondent Knolls, to reduce its work force, Knolls had its managers score their subordinates on "performance," "flexibility," and "critical skills"; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. Petitioners (Meacham, for short) were among those laid off, and they filed this suit asserting, *inter alia,* a disparate-impact claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.* To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance; and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. The jury found for Meacham on the disparate-impact claim, and the Second Circuit initially affirmed. This Court vacated the judgment and remanded in light of its intervening decision in *Smith* v. *City of Jackson*, 544 U. S. 228. The Second Circuit then held for Knolls, finding its prior ruling untenable because it had applied a "business necessity" standard rather than a "reasonableness" test in assessing the employer's reliance on factors other than age in the layoff decisions, and because Meacham had not carried the burden of persuasion as to the reasonableness of Knolls's non-age factors.

Held: An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under §623(f)(1). Pp. 5–17.

(a) The ADEA's text and structure indicate that the RFOA exemp-

tion creates an affirmative defense, for which the burden of persuasion falls on the employer. The RFOA exemption is listed alongside one for bona fide occupational qualifications (BFOQ), which the Court has recognized to be an affirmative defense: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on [RFOA] . . . ." §623(f)(1). Given that the statute lays out its exemptions in a provision separate from the general prohibitions in §§623(a)–(c), (e), and expressly refers to the prohibited conduct as such, it is no surprise that this Court has spoken of both the BFOQ and RFOA as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122. This reading follows the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it," *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508. As this longstanding convention is part of the backdrop against which the Congress writes laws, the Court respects it unless there is compelling reason to think that Congress put the burden of persuasion on the other side. See *Schaffer* v. *Weast*, 546 U. S. 49, 57–58. The Court has given this principle particular weight in enforcing the Fair Labor Standards Act of 1968, *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196–197; and it has also recognized that "the ADEA [is] enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," *Lorillard* v. *Pons*, 434 U. S. 575, 580. Nothing in §623(f)(1) suggests that Congress meant it to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it. Any further doubt would be dispelled by the natural implication of the "otherwise prohibited" language prefacing the BFOQ and RFOA defenses. Pp. 5–9.

(b) Knolls argues that because the RFOA clause bars liability where action is taken for reasons "other than age," it should be read as mere elaboration on an element of liability. But *City of Jackson* confirmed that §623(a)(2)'s prohibition extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision. 544 U. S., at 239, 243. And *City of Jackson* made it clear that action based on a "factor other than age" is the very premise for disparate-impact liability, not a negation of it or a defense to it. Thus, it is assumed that a non-age factor was at work in such a case, and the focus of the RFOA defense is on whether the factor relied on was "reasonable." Pp. 10–11.

(c) The business necessity test has no place in ADEA disparate-impact cases; applying both that test and the RFOA defense would

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entail a wasteful and confusing structure of proof. The absence of a business necessity enquiry does not diminish, however, the reasons already given for reading the RFOA as an affirmative defense. *City of Jackson* cannot be read as implying that the burden of proving any business-related defense falls on the plaintiff, for it confirmed that the BFOQ is an affirmative defense, see 544 U. S., at 233, n. 3. Moreover, in referring to "*Wards Cove*'s interpretation of identical language [in Title VII]," *City of Jackson* could not have had the RFOA clause in mind, for Title VII has no like-worded defense. And as *Wards Cove* did not purport to construe any Title VII defenses, only an over-reading of *City of Jackson* would find in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA. Pp. 12–15.

(d) *City of Jackson* confirmed that an ADEA disparate-impact plaintiff must "'"isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities."'" 544 U. S., at 241. This is not a trivial burden, and it ought to allay some of the concern that recognizing an employer's burden of persuasion on an RFOA defense will encourage strike suits or nudge plaintiffs with marginal cases into court; but in the end, such concerns have to be directed at Congress, which set the balance by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. Pp. 15–17.

461 F. 3d 134, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Parts I and II–A. SCALIA, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part. BREYER, J., took no part in the consideration or decision of the case.