

Opinion of SCALIA, J.

## 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 SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join all except Part III of its opinion. As to that Part, I agree with all of the Court’s reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 601–602 (2004) (SCALIA, J., dissenting).

This is an absolutely classic case for deference to agency interpretation. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, confers upon the EEOC authority to issue “such rules and regulations as it may consider necessary or appropriate for carrying out the” ADEA. §628. Pursuant to this authority, the EEOC promulgated, after notice-and-comment rulemaking, see 46 Fed. Reg. 47724, 47727 (1981), a regulation that reads as follows:

“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 a practice has

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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).

The statement of the EEOC which accompanied publication of the agency’s final interpretation of the ADEA said the following regarding this regulation: “Paragraph (d) of §1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. See *Laugesen v. Anaconda Corp.*, 510 F. 2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971).” 46 Fed. Reg., at 47725. The regulation affirmed, moreover, what had been the longstanding position of the Department of Labor, the agency that previously administered the ADEA, see *ante*, at 10; 29 CFR §860.103(f)(1)(i) (1970). And finally, the Commission has appeared in numerous cases in the lower courts, both as a party and as *amicus curiae*, to defend the position that the ADEA authorizes disparate-impact claims.<sup>1</sup> Even under the unduly constrained standards of agency deference recited in *United States v. Mead Corp.*, 533 U. S. 218 (2001), the EEOC’s reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference. *Id.*, at 229–

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<sup>1</sup>See, e.g., Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellees in *Meacham v. Knolls Atomic Power Laboratory*, No. 02–4083(L) etc. (CA2), p. 12, available at <http://www.eeoc.gov/briefs/meacha.txt> (all internet materials as visited Mar. 24, 2005, and available in the Clerk of Court’s case file) (“The Commission has consistently defended [the interpretation announced in 29 CFR §1625.7(d) (2004)], arguing that a claim of discrimination under a disparate impact theory is cognizable.”); Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellants Seeking Reversal in *Sitko v. Goodyear Tire & Rubber Co.*, No. 02–4083 (CA6), p. 8, available at <http://www.eeoc.gov/sitkov.txt> (pending); *EEOC v. McDonnell Douglas Corp.*, 191 F. 3d 948, 950–951 (CA8 1999).

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231, and n. 12. *A fortiori*, it is entitled to deference under the pre-*Mead* formulation of *Chevron*, to which I continue to adhere. See 533 U. S., at 256–257 (SCALIA, J., dissenting).

JUSTICE O’CONNOR both denies that the EEOC has taken a position on the existence of disparate-impact claims and asserts that, even if it has, its position does not deserve deference. See *post*, at 18–21 (opinion concurring in judgment). The first claim cannot be squared with the text of the EEOC’s regulation, quoted above. This cannot possibly be read as agnostic on the question whether the ADEA prohibits employer practices that have a disparate impact on the aged. It provides that such practices “can *only* be justified as a business necessity,” compelling the conclusion that, absent a “business necessity,” such practices are prohibited.<sup>2</sup>

JUSTICE O’CONNOR would not defer to the EEOC regulation, even if it read as it does, because, she says, the regulation “does not purport to interpret the language of §4(a) at all,” but is rather limited to an interpretation of the “reasonable factors other than age” (RFOA) clause of §4(f)(1) of the ADEA, which she says is not at issue. *Post*, at 19. This argument assumes, however, that the RFOA clause operates independently of the remainder of the ADEA. It does not. Section 4(f)(1) provides, in relevant part:

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<sup>2</sup>Perhaps JUSTICE O’CONNOR adopts the narrower position that, while the EEOC has taken the view that the ADEA prohibits actions that have a disparate impact, it has stopped short of recognizing “disparate impact *claims*.” *Post*, at 18 (opinion concurring in judgment) (emphasis added). If so, this position is equally misguided. The EEOC need not take the extra step of recognizing that individuals harmed by prohibited actions have a right to sue; the ADEA itself makes that automatic. 29 U. S. C. §626(c) (“Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . .”).

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“It shall not be unlawful for an employer, employment agency, or labor organization . . . 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) (emphasis added).

As this text makes clear, the RFOA defense is relevant *only* as a response to employer actions “otherwise prohibited” by the ADEA. Hence, the unavoidable meaning of the regulation at issue is that the ADEA prohibits employer actions that have an “adverse impact on individuals within the protected age group.” 29 CFR §1625.7(d) (2004). And, of course, the only provision of the ADEA that could conceivably be interpreted to effect such a prohibition is §4(a)(2)—the provision that JUSTICE O’CONNOR maintains the EEOC “does not purport to interpret . . . at all.” *Post*, at 19.<sup>3</sup>

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<sup>3</sup>JUSTICE O’CONNOR argues that the regulation does not necessarily construe subsection (4)(a)(2) to prohibit disparate impact, because disparate treatment *also* can have the effect which the regulation addresses—viz., “an adverse impact on individuals within the protected age group,” 29 CFR §1625.7(d). See *post*, at 20. That is true enough. But the question here is not whether disparate treatment claims (when they have a disparate impact) are *also* covered by the regulation; it is whether disparate impact claims of *all* sorts *are* covered; and there is no way to avoid the conclusion (consistently reaffirmed by the agency’s actions over the years) that they are. That is also a complete response to JUSTICE O’CONNOR’s point that the regulation could not refer to §4(a)(2) because it includes “applicants for employment,” who are protected only under §4(a)(1). Perhaps applicants for employment are covered only when (as JUSTICE O’CONNOR posits) disparate treatment results in disparate impact; or perhaps the agency’s attempt to sweep employment applications into the disparate impact prohibition is mistaken. But whatever *in addition* it may cover, or may erroneously seek to cover, it is impossible to contend that the regulation does *not* cover actions that “limit, segregate or classify” employees in a way that produces a disparate impact on those within the protected age group; and the only basis for its interpretation that those actions are prohib-

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Lastly, JUSTICE O’CONNOR argues that the EEOC’s interpretation of what is “otherwise prohibited” by the ADEA is not entitled to deference because the Court concludes that the same regulation’s interpretation of *another term*—the term “reasonable factors other than age,” which the regulation takes to include only “business necessity”—is unreasonable. *Post*, at 21. Her logic seems to be that, because the two interpretations appear in the same paragraph, they should stand or fall together. She cites no case for this proposition, and it makes little sense. If the two simultaneously adopted interpretations were contained in *distinct* paragraphs, the invalidation of one would not, of course, render the other infirm. (JUSTICE O’CONNOR does not mean to imply, I assume, that our rejection of the EEOC’s application of the phrase “reasonable factors other than age” to disparate impact claims in paragraph (d) of §1625.7 relieves the lower courts of the obligation to defer to the EEOC’s other applications of the same phrase in paragraph (c) or (e)). I can conceive no basis for a different rule simply because the two simultaneously adopted interpretations appear in the same paragraph.

The EEOC has express authority to promulgate rules and regulations interpreting the ADEA. It has exercised that authority to recognize disparate-impact claims. And, for the reasons given by the plurality opinion, its position is eminently reasonable. In my view, that is sufficient to resolve this case.

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ited is §(4)(a)(2).