No. 10-36

IN THE

Supreme Court of the United States

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Cross-Petitioners,

v.

CLIFFORD B. MEACHAM *et al.*,

Cross-Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit violated this Court's mandate in holding that judgment as a matter of law would be inappropriate to remedy plaintiffs' alleged failure to rebut a defense that defendants never pressed at trial.
2. Whether the Second Circuit's non-precedential summary order requiring a retrial in light of the unusual developments in this particular case creates a circuit conflict worthy of certiorari.
3. Whether employees can defeat an employer's "reasonable factors other than age" defense under the Age Discrimination in Employment Act by showing that although the employer's goals were reasonable, it pursued them in an unreasonable manner, in that it unnecessarily allowed age bias to affect the selection of workers for termination.

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INTRODUCTION

The district court found that defendants knowingly and deliberately abandoned their "reasonable factors other than age" (RFOA) defense prior to trial, a finding the Second Circuit did not question on appeal. The court of appeals nonetheless refused to enforce that waiver and instead ordered a new trial to allow defendants a second chance to assert their waived defense. For the reasons set forth in plaintiffs' petition, the Second Circuit's reversal of the district court's waiver ruling was based on a misconstruction of this Court's mandate and should be reversed.

Defendants seek to compound that error through their conditional cross-petition. Having persuaded the court of appeals to overlook their waiver, defendants are not satisfied with an opportunity to assert their defense for the first time at a new trial. Instead, they insist that they have a right to immediate judgment as a matter of law on the basis of a defense that they never raised at trial and that plaintiffs never had an opportunity to counter. They cite no precedent for such a plainly unfair course of action, much less a conflict of authority. Nor do they provide any other plausible basis for certiorari in their cross-petition.

STATEMENT

The facts and the long history of this case are discussed in detail in this Court's prior decision, the decisions of the lower courts, and in plaintiffs' pending petition. *See* Pet. 4-15.[1] We will not repeat them here. However, plaintiffs are compelled to correct several aspects of defendants' description of the record.

First, defendants repeatedly assert that the evidence regarding the reasonableness of their conduct was undisputed. *See, e.g.*, Cross-Pet. 7, 13, 42. While it is true that many of the historical facts of the case are uncontested, it is not true that plaintiffs ever conceded that defendants' practices were reasonable. To the contrary, because defendants failed to present an RFOA defense at trial, the reasonableness of their practices simply was not at issue. Absent assertion of the RFOA defense, it was sufficient, under the jury instructions defendants themselves proposed, for plaintiffs to demonstrate that defendants' specific employment practices had a disparate impact on older workers and that defendants could have avoided that impact through equally effective, less discriminatory methods. That is what plaintiffs did. *See Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 75 (2d Cir. 2004) (affirming jury's findings in plaintiffs' favor). Defendants attempted to raise an RFOA defense for the first time on appeal, five years after the trial. When they presented this newfound defense,

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[1] "Pet." and "Pet. App." refer to plaintiffs' petition and petition appendix in No. 09-1449. "Cross-Pet." refers to defendants' conditional cross-petition in No. 10-36.

plaintiffs directly contested any assertion that defendants had reasonably conducted their involuntary reduction in force. *See, e.g.*, C.A. Reply Br. for Plaintiffs-Appellees-Cross-Appellants at 5-9, *Meacham v. KAPL, Inc.*, 381 F.3d 56 (2d Cir. 2004) (No. 02-7378) (2004 C.A. Reply Br.).

Similarly, plaintiffs' agreement that retaining flexible workers with critical skills was a reasonable goal is not a concession that plaintiffs were terminated on the basis of "reasonable factors other than age." *Cf., e.g.*, Cross-Pet. 11, 13, 15 (implying otherwise).[2] The specific employment practice plaintiffs challenged – and, therefore, the aspect of their conduct defendants were required to prove reasonable in order to avoid liability, *see Smith v. City of Jackson*, 544 U.S. 228, 242 (2005) – was defendants' "unaudited and heavy reliance on subjective assessments" to determine which workers were truly flexible and possessed critical skills. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 139 (2d Cir. 2006), *rev'd on other grounds*, 128 S. Ct. 2395 (2008). Plaintiffs plainly did not concede that it was reasonable for defendants to rely on unaudited subjective assessments to decide which workers were flexible and had critical skills.

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[2] Defendants suggest that the jury was not instructed on the RFOA defense because plaintiffs had conceded the reasonableness of their conduct. Cross-Pet. 13-14. That is untrue. Indeed, if plaintiffs had conceded that defendants had a valid RFOA defense, there would have been no need for any jury instructions at all because the case would have ended with that concession. In fact, the jury was not instructed on RFOA because defendants had abandoned the defense prior to trial. *See* Pet. App. 15a-20a.

Finally, although plaintiffs had no reason to address reasonableness at trial, the evidence they presented on other issues was sufficient to allow a jury to conclude that defendants' implementation of their reduction in force was unreasonable. *See, e.g.*, C.A. Brief for Appellees at 54-57; 2004 C.A. Reply Br. at 5-9; *Meacham*, 461 F.3d at 145 (describing plaintiffs' expert's testimony that "the procedures established for review of the decisions made by individual managers 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome'") (citation omitted); *id.* at 144-45 (describing how defendants failed to implement the safeguards they themselves had determined to be reasonable to guard against the risk that managers' subjective assessments would give effect to age bias). Thus, Judge Pooler rejected the idea that a jury which "had been properly charged that defendants bear the burden of proving a RFOA would necessarily find for defendants. Such a jury could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented." *Id.* at 153 (Pooler, J., dissenting).

Of course, had they been given the opportunity to directly address defendants' RFOA defense at trial, plaintiffs would have done much more, asking their expert to address the question more directly and vigorously cross-examining defendants' experts and witnesses on a question that has only now become important. The court of appeals rightly concluded that plaintiffs were due at least that opportunity. Pet. App. 4a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Defendants' conditional cross-petition asks this Court to review three questions, none of which merits the Court's attention.

I. Defendants' Objections To The Court Of Appeals' Implementation Of This Court's Mandate Are Meritless.

Defendants first argue that this Court ordered the court of appeals to decide solely whether defendants were entitled to judgment as a matter of law on the basis of their RFOA defense, and that the decision below conflicted with that limited remand. Although plaintiffs agree that any misconstruction of the mandate would warrant correction, *see* Pet. 16-17, defendants' objection to the court of appeals' construction of the mandate is meritless.

First, as discussed in plaintiffs' petition, this Court issued its ordinary, open-ended mandate, which allowed the court of appeals to consider any question not decided by this Court. *See* Pet. 17-22.

Second, even if this Court had limited the court of appeals to deciding whether judgment as a matter of law should be issued on the basis of defendants' RFOA defense, the court of appeals *did* decide that question, concluding that defendants were not entitled to judgment as a matter of law because of "uncertainty and multiple changes in the governing law," Pet. App. 4a. To be sure, the court of appeals did not decide whether defendants had established an RFOA defense on the pre-existing trial record. But it was not required to do so: Even if defendants had shown that the evidence was insufficient to rebut

their defense, the court of appeals was nonetheless entitled to conclude that the only proper remedy was a retrial. *See* Fed. R. Civ. P. 50(b)(2)-(3) (allowing court to remedy insufficiency of the evidence by either "direct[ing] entry of judgment as a matter of law" or "order[ing] a new trial"). As this Court has explained, "there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice." *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215 (1947). In this case, the court of appeals recognized that if changes in the legal landscape excused defendants' failure to present an RFOA defense at trial,[3] justice would best be served by a new trial at which defendants could present, plaintiffs could contest, and a jury could decide the validity of defendants' RFOA defense in the first instance.[4]

While defendants may disagree with the court of appeals' decision to order a new trial rather than to rule itself on the RFOA defense, they cannot reasonably claim that this Court's mandate foreclosed it.

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[3] The district court properly found that there were no such changes and that defendants' failure to present their RFOA defense at trial could not be excused. *See* Pet. App. 32a-33a.

[4] Thus, the Second Circuit's refusal to examine the current trial record only hurt plaintiffs, not defendants. When Judge Pooler reviewed the existing evidence using the correct burdens of persuasion, she properly concluded that defendants had not met their burden of demonstrating that no reasonable juror could have rejected an RFOA defense on the present record. *See Meacham*, 461 F.3d at 153 (Pooler, J., dissenting); *see also* C.A. Br. for Appellees at 52-57.

II. The Court Of Appeals' Decision To Remand For A New Trial Rather Than To Enter Judgment As A Matter Of Law Does Not Warrant Review.

Defendants next assert that the Second Circuit's decision to remand the case for a new trial created a certworthy conflict, apparently over the circumstances in which a court of appeals may resolve an RFOA defense on a pre-existing trial or summary judgment record. *See* Cross-Pet. 36-40. That claim is baseless.

1. Defendants point out that other courts, in various circumstances, have awarded defendants summary judgment or judgment as a matter of law on RFOA defenses. Cross-Pet. 36-40. The opinion below does not establish any principle of law in conflict with those decisions. The Second Circuit did not hold, as a general matter, that RFOA can never be established as a matter of law. It simply concluded that in this particular case, where the record at trial was developed in the absence of any asserted RFOA defense, it would be inappropriate to order judgment as a matter of law without permitting plaintiffs an opportunity to rebut the defense their employer withheld from the jury at trial.

None of the decisions defendants cite confronted such a question, much less reached a contrary conclusion. For example, defendants claim that *Allen v. Highlands Hospital Corporation*, 545 F.3d 387 (6th Cir. 2008), conflicts with the decision in this case because it affirmed a grant of summary judgment in favor of an employer even though the district had wrongly viewed RFOA as part of the plaintiff's case-

in-chief. Cross-Pet. 30-31, 37. But in *Allen*, the Sixth Circuit did not grant summary judgment on the basis of an RFOA defense the plaintiff had no opportunity to rebut. Instead, the court affirmed the order of summary judgment on other unrelated grounds. *See* 545 F.3d at 405 (affirming summary judgment for "two independent reasons," namely that the plaintiffs "fail[ed] to satisfy the specific-practice requirement and [did] not provid[e] sufficient statistical evidence of discriminatory impact").

The only other precedential circuit decision defendants cite, *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186 (10th Cir. 2006), is likewise inapposite. *See* Cross-Pet. 37.[5] There, the defendant conceded that this Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005) – which overturned Tenth Circuit precedent refusing to recognize a disparate impact claim under the ADEA – excused any failure by the plaintiffs to have properly presented a disparate impact claim at summary judgment. 440 F.3d at 1199. But the court of appeals refused to remand the case to the district court to consider the disparate impact claim in the first instance because none of the parties wished to produce additional evidence and the court of appeals' review of the evidence would be *de novo* in any event. *Id.* This case is entirely different. Here, plaintiffs have argued consistently that if provided an

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[5] Defendants' citations to various unpublished decisions, *see* Cross-Pet. 37, fare no better. There was no allegation in either *Summers v. Winter*, 303 Fed. Appx. 716 (11th Cir. 2008), or *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005), that the plaintiffs were deprived of a fair opportunity to rebut the defendants' RFOA defense.

opportunity, they would have produced relevant expert testimony and vigorously challenged defendants' newly-minted RFOA defense. *See*, *e.g.*, C.A. Appellee Br. 39. Moreover, the jury's assessment of that evidence would have been subjected to exceedingly deferential review on appeal. *See*, *e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Thus, *Pippin* provides no reason to believe that the Tenth Circuit would have decided this case any differently than the Second.

In any event, the summary order below was unpublished and nonprecedential. Even if it were in tension with the decision of another court, it would not create a conflict in the law of the circuits worthy of this Court's intervention.

2. Review is further unwarranted because the Second Circuit's refusal to order entry of judgment as a matter of law was correct. The only remotely plausible basis for permitting defendants to pursue their RFOA defense at this late date would be that their failure to do so at trial should be excused in light of changes in the law.[6] In such circumstances, the only appropriate remedy is a new trial at which the defendant is permitted to assert, and the plaintiff to rebut, the defense. Consider, for example, what would have happened if a plaintiff attempted to assert a disparate impact cause of action for the first time on appeal in the aftermath of this Court's decision in *Smith*. Had circuit precedent previously

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[6] Plaintiffs obviously contest this premise, and the district court found that nothing in the law at the time of trial precluded defendants from raising an RFOA defense. *See* Pet. 25-28; Pet. App. 32a-33a.

refused to recognize a disparate impact claim, it might be appropriate to excuse the plaintiff's failure to raise that previously barred claim at trial. But no one would think that it was permissible to award the plaintiff judgment as a matter of law on the grounds that the evidence the plaintiff had produced in support of a disparate treatment claim sufficed to show disparate impact. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That the defendant had not rebutted this accidental showing would be entirely unsurprising and no reason to permit entry of judgment as a matter of law in the plaintiff's favor.

The Second Circuit properly recognized that the same is true in this case. Defendants cannot simultaneously point to alleged changes in the law to excuse their failure to assert an RFOA defense earlier and at the same time insist that plaintiffs should have anticipated the defense and rebutted it at trial.

III. The Third Question Presented Was Not Decided Below And Does Not Merit Review.

Finally, defendants ask this Court to decide whether its decisions "preclude employees, who have conceded the reasonableness of the non-age layoff factors in question, from defeating an employer's RFOA showing with allegations of 'subconscious age bias' or 'application problems,' or by showing that there were alternative non-age factors available that may have had less of a disparate impact." Cross-Pet.

ii.[7] Defendants do not allege any circuit conflict on this question. And because neither the court of appeals nor the district court reached the merits of defendants' RFOA defense, neither passed on the question in any event.

That, in itself, is sufficient reason to deny certiorari. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (noting that the Court does not "ordinarily consider questions not specifically passed upon by the lower court"). The Court's reluctance to decide questions not addressed below is particularly appropriate when it comes to challenges to the sufficiency of the evidence. "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). Thus, "a litigant should not have his right to a new trial foreclosed without having had the

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[7] There is a notable disconnect between this question and defendants' actual arguments in their brief. Although they repeatedly assert the general reasonableness of their practices, defendants hardly mention – much less defend – their assertion that plaintiffs are barred from showing that defendants' administration of their reduction in force was unreasonable because, although it had reasonable goals, it was implemented in a way that unnecessarily allowed age bias to affect the selection of workers for termination. *See* Cross-Pet. 40-43; *but see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (recognizing availability of disparate impact claim to challenge an "employer's undisciplined system of subjective decisionmaking [that] has precisely the same effects as a system pervaded by impermissible intentional discrimination").

benefit of the trial court's judgment on the question." *Id.* at 217.

In fact, deciding the sufficiency of the evidence to support defendants' RFOA defense would not simply be imprudent, it would be unconstitutional. The Seventh Amendment limits judicial examination of jury verdicts to the rules of the common law at the time of the Amendment's adoption. *See, e.g., Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935). And, this Court has made clear that

> under the pertinent rules of the common law the Court of Appeals could set aside the verdict for error of law, such as the *trial court's* ruling respecting the sufficiency of the evidence, and direct a new trial, but could not *itself* determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

Id. at 658 (emphasis added). Accordingly, where, as here, the district court has never ruled on the sufficiency of the evidence to support an affirmative defense, the Seventh Amendment precludes that issue from being resolved for the first time on appeal. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (explaining that any suggestion that "a court of appeals would be free to examine the sufficiency of the evidence . . . regardless of whether the district court had ever ruled on that motion" was "inconsistent with this Court's explanation of the requirements of the Seventh Amendment") (emphasis omitted).

Finally, review of the scope of the RFOA defense would be premature. As defendants acknowledge, the EEOC is presently working on notice-and-comment regulations to address the very questions defendants ask this Court to resolve. Cross-Pet. 13 n.2. Because the Commission's expert views are entitled to deference (or, at the very least, respect), *see Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2408 (2008) (Scalia, J., concurring in the judgment), the Court should await a case in which it can consider the RFOA's application in light of the resulting EEOC regulations, and in the context of a decision actually applying the defense to the facts of a particular case.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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