No. 09-1449

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM *et al.*,

Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Blank Page

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Defendants agree that a lower court's misconstruction of this Court's mandate ordinarily warrants certiorari and reversal. *See* BIO 3; *see also* Cross-Pet. at 29, *KAPL, Inc. v. Meacham* (No. 10-36) (noting that "failure to do what was directed by this Court on remand . . . cries out for the Supreme Court's supervision and intervention"). Defendants nonetheless oppose plaintiffs' petition on two grounds. First, they deny that the court of appeals misread this Court's decision. BIO 12-18. Second, they argue that any error should be permitted to stand because the district court's waiver finding was clearly erroneous. BIO 19-32.

Neither argument provides a basis to deny certiorari. This Court did not decide – implicitly or otherwise – whether defendants preserved their RFOA defense. The Second Circuit therefore properly put that question to the district court, which had no difficulty in concluding that defendants had waived the defense. *Some* appellate court should decide whether that finding was wrong before subjecting plaintiffs to a new trial, fourteen years after this case first arose, in order to allow respondents to raise a defense they could have, but did not, assert at the initial trial. Given the age of this case, this Court should decide that question itself and end this exceedingly protracted litigation.

I. The Court Of Appeals' Misconstruction Of This Court's Mandate Warrants Reversal.

Although defendants now argue that this Court "implicitly rejected" plaintiffs' waiver argument, BIO 2, they told the district court the opposite, insisting

that this Court had made "no finding" on waiver, "none at all." Pet. 12 n.1. It was not until they lost in the district court that defendants alleged for the first time on appeal that this Court's prior mandate precluded any inquiry into waiver. The petition explains why the Second Circuit's reasons for accepting that belated assertion are wrong. Pet. 17-22. Rather than address plaintiffs' arguments, defendants largely repeat the Second Circuit's rationale, which does not become any more convincing through mere repetition. *See* BIO 15-17. Particularly glaring is defendants' failure to explain *why* this Court would have rejected plaintiffs' waiver argument without so much as a footnote in explanation. The district court easily concluded that the argument had merit, *see* Pet. App. 6a-34a, and defendants require thirteen pages to explain why they believe the district court was wrong, *see* BIO 19-32. Given that defendants devoted only a single footnote to the question in their merits brief to this Court, *see* Pet. 18, it is implausible to suggest that the Court found the issue so clear-cut that it required no discussion at all.

In the end, this Court knows what it meant when it remanded this case for "further proceedings consistent with this opinion." *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2407 (2008). And if the Court determines that the decision below misapprehended the scope of the remand, it can easily, even summarily, correct that error. *See* Pet. 28 & n.9 (collecting examples). That limited investment of this Court's resources would be well spent. The Court has a compelling interest in proper compliance with its mandates. The decision below,

and the interpretive attitude it employed – searching for hints and implications that it need not decide an important question nowhere mentioned in the Court's opinion – undermine the Court's ability to limit the scope of its own review, confident that other issues in the case will later be given the careful attention they deserve by lower courts on remand. At the same time, basic fairness demands that plaintiffs not be subjected to the further cost and delay of a new trial simply because this Court and the Second Circuit each wrongly thought that the other had taken responsibility for deciding whether defendants had preserved their RFOA defense.

II. Defendants Waived And Forfeited Their RFOA Defense.

Defendants insist that they did not waive or forfeit their RFOA defense. BIO 19-32. But at best, that argument provides a reason to require the Second Circuit to decide the waiver question on the merits. More appropriately, given the intolerable delay already suffered by the parties in this case, this Court should resolve defendants' objections itself, affirm the district court's reinstatement of the jury verdict, and bring this case to an overdue conclusion.

A. The District Court Did Not Clearly Err In Finding, As A Matter Of Fact, That Defendants Knowingly Waived Their RFOA Defense.

Defendants' argument that they preserved their RFOA defense consists of two contradictory assertions of fact. First, defendants argue that they did not *waive* the defense because they did not know it was available as an affirmative defense at the time

of trial. BIO 20-24. Second, and inconsistently, they insist that they did not *forfeit* the defense because they in fact pressed it at trial. BIO 25-32. It is little wonder that the district court found defendants' explanation of their conduct not credible. *See, e.g.*, Pet. App. 25a-29a. Instead, that court – which oversaw the trial and has lived with this case and its lawyers for more than a decade now – made a factual finding that "defendants had actual knowledge of their right to assert the RFOA defense" and that their "choice to abandon the defense at trial was fully intentional." Pet. App. 28a-29a. Defendants point to nothing in the record that renders this finding clearly erroneous. *See generally* Pet. 23-24; Pet. App. 12a-29a.[1]

Defendants' principal contention is that at the time of trial, under circuit precedent "an employer could defend disparate impact claims *only*" through the business necessity defense, which is not actually an affirmative defense because the defendant bears only the burden of producing evidence of a business justification. BIO 21 (emphasis added). As the district court found, Pet. App. 29a-33a, none of the

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[1] Defendants suggest in passing that the district court's consideration of the question was barred by law of the case because the Second Circuit, in a prior appeal, had concluded that "'defendants have not waived the argument that their business justification was 'reasonable.'" BIO 16 (quoting *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 146 n.9 (2d Cir. 2006)). Neither the court of appeals nor the district court accepted this argument, and for good reason. The statement defendants quote was premised on the erroneous assumption that RFOA was not an affirmative defense that defendants were required to press at trial in order to preserve for appeal. *See* 461 F.3d at 141.

cases defendants cite support that conclusion. Defendants claim that in *Maresco v. Evans Chemetics*, 964 F.2d 106 (2d Cir. 1992), the Second Circuit "held that an employer's RFOA burden was merely a burden of producing evidence of legitimate nondiscriminatory reasons for its actions." BIO 21 (citing *Maresco*, 964 F.2d at 115). But in discussing the plaintiff's disparate impact claim in *Maresco*, the Second Circuit did not even mention RFOA. *See* 964 F.2d at 115. Nor could defendants reasonably interpret that silence to mean that the RFOA defense (or any of the Act's other four unmentioned affirmative defenses) was unavailable in a disparate impact case. Likewise, *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), never discussed the RFOA defense. *Contra* BIO 21.

The final case upon which defendants rely, *Smith v. Xerox Corporation*, 196 F.3d 358 (2d Cir. 1999), directly undermines their position. In *Xerox*, the Second Circuit explained that "[t]his Court generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact claims." *Id.* at 367. As defendants have pointed out, this included applying the business necessity test. BIO 21 (citing *Xerox*, 196 F.3d at 365). In the next breath, however, the Second Circuit explained that "a different analysis may apply to claims brought under the ADEA under some circumstances, because age tends to be highly correlated to certain factors an employer is permitted to consider." *Xerox*, 196 F.3d at 367 n.5. Far from holding that business necessity was the "only" method of defeating ADEA disparate impact claims, BIO 21, this passage clearly held out the possibility

that an employer might prevail even if it could not establish a business necessity defense, so long as it relied on reasonable factors correlated with age – that is, so long as it acted on the basis of reasonable factors other than age. Moreover, the court made clear that it was the defendant's obligation to assert its reliance on such factors at trial, refusing to consider the defense in *Xerox* because the employer did not "purport to have relied on any such factors." *Id.*

Defendants also briefly suggest (BIO 21, 25) that they were misled by the EEOC's interpretive regulations. Although those regulations did (wrongly) provide that RFOA could only be proven through evidence of business necessity, they said nothing to relieve employers of the burden of pressing and proving the defense. To the contrary, if anything, the regulations suggested precisely the opposite. *See Meacham*, 128 S. Ct. at 2407 (Scalia, J., concurring in the judgment) (concluding that the "obvious and unavoidable" implication of the regulations is that RFOA is an affirmative defense).

Finally, even if the law had been unsettled, and there was some basis for confusion, the district court found as a matter of fact that these particular defendants were *not* confused. *See* Pet. App. 27a ("Prior to and at the time of trial, then, defendants evidenced no confusion or uncertainty over who bore the burden of proof on their RFOA defense....").

B. Defendants Forfeited Their RFOA Defense By Failing To Assert It At Trial Or In Their Rule 50 Motions.

Even if defendants had not meant to abandon their ROFA defense, they nonetheless irretrievably forfeited it by failing to raise the defense at trial or in their Rule 50 motions. *See* Pet. 24-25. Defendants insist this is not so because, although they did not actually know the defense was available, they nonetheless somehow managed to press it anyway, albeit using the language of "legitimate non-discriminatory reasons other than age" and "business necessity" rather than "reasonable factors other than age." BIO 19-32. The district court rightly rejected that peculiar assertion, concluding that defendants never "subjectively intended" to raise an RFOA defense and that neither plaintiffs nor the court ever understood RFOA to be at issue at trial. Pet. App. 24a-25a.

As the district court explained, "legitimate non-discriminatory reasons other than age" and "business necessity" are terms of art that describe other defenses that are quite distinct from the reasonableness defense of the RFOA provision. *See* Pet. App. 22a-25a. Indeed, if business necessity meant the same thing as RFOA, this case would be over – the Second Circuit sustained the jury's rejection of defendants' business necessity defense in the first appeal in this case, six years ago. *See Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 74-75 (2d Cir. 2004). Moreover, defendants never raised "legitimate nondiscriminatory reasons other than age" as a basis for judgment as a matter of law

in the Rule 50(b) motion. *See* C.A. J.A. 660-61 (listing four bases for motion).

The truth is, defendants had no difficulty clearly identifying their RFOA defense in their Answer or in their numerous briefs filed after this Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2008). Their failure to mention the defense in recognizable terms at trial was a litigation – not a vocabulary – choice.

C. Defendants' Waiver And Forfeiture Cannot Be Excused.

Defendants' knowing and intentional decision to abandon their RFOA defense cannot be excused. While defendants may be forgiven for failing to raise a defense not known to exist at the time of trial, the RFOA defense long predated this litigation and nothing in Second Circuit precedent precluded defendants from asserting it at trial. *See* Pet. 26-27; *supra* at 4-6; *Meacham*, 461 F.3d at 152-53 (Pooler, J., dissenting). Moreover, any confusion about who bore the burden of proof under the RFOA provision would not excuse defendants' failure to raise the defense in their Rule 50 motions in any event – they were obliged to identify the source of the alleged insufficiency of the evidence whether that insufficiency went to an element of plaintiffs' case-in-chief or resulted in a failure to rebut an affirmative defense. *See* Fed. R. Civ. P. 50(a)(2).

Furthermore, under this Court's decision in *Unitherm Food Systems, Inc. v. Swift-Ekhrich, Inc.*, 546 U.S. 394 (2006), defendants' failure to seek judgment as a matter of law on the basis of the RFOA defense categorically precludes setting the jury

verdict aside on that basis, even to avoid a manifest injustice. *See* Pet. 27-28. It makes no difference that defendants filed a timely Rule 50(b) motion on other grounds. *Contra* BIO 31. The same was true in *Unitherm*, *see* 546 U.S. at 398 n.2, yet this Court held that the failure to make a Rule 50(b) motion asserting the claims raised on appeal left the court of appeals without "power to direct the District Court to enter judgment contrary to the one it permitted to stand." *Id.* at 395 (citation omitted); *see also*, *e.g.*, *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1107 (Fed. Cir. 2003) (noting the constitutional underpinnings of the rule).

Strict compliance with Rule 50 and this Court's other "waiver and forfeiture rules . . . ensures that parties can determine when an issue is out of the case, and that the litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2618 n.6 (2008). It is not uncommon, especially in litigation lasting many years, that a party may come to realize that it could have, or should have, made a claim or raised a defense that it failed to assert at trial. Sometimes a post-trial judicial decision may highlight a claim or defense the party had not focused upon earlier. Or an intervening decision may make clear that the claim or defense would have been more promising than the party initially believed. But the need for an end to litigation almost always precludes the party from asking for a do-over, even if it appears, in hindsight, that the case might have come out differently if the parties had raised different claims or defenses at trial. The rules requiring presentation of claims and defense at trial would serve little

purpose if parties were easily excused from complying with them.

Defendants can avoid the potential harshness of waiver and forfeiture rules by resolving any doubts about the availability or nature of a defense in favor of asserting it at trial, or at least seeking a ruling from the district court on whether the defense is available, rather than waiting until the appeal. In this case, for example, defendants were on notice that other circuits that had directly confronted the question considered RFOA an affirmative defense to disparate impact claims,[2] and that this Court had granted certiorari on the question, but failed to answer it. *See W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985). Given the state of the law, and the clarity of the text, they cannot be heard to complain that they had no opportunity to preserve their right to assert an RFOA defense.

At the same time, failure to enforce the Court's established waiver and forfeiture rules in this case would be particularly unfair. In light of the claims and defenses actually presented at trial, and under the jury instructions defendants themselves proposed, plaintiffs were entitled to prevail so long as they demonstrated that a specific employment practice caused a substantial disparate impact and that an equally effective, less discriminatory alternative was available, regardless of how reasonable defendants' chosen methods may have

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[2] *See Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 522 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975).

been. *See* C.A. J.A. 4579-84.[3] Defendants strenuously argued that plaintiffs' claims failed under those standards, and that the ADEA did not provide a disparate impact cause of action in any event. When that litigation strategy failed, defendants argued for the first time on appeal – five years after the trial concluded – that the jury verdict should be overturned because the evidence was insufficient to rebut a defense they never made, plaintiffs never had an opportunity to contest, and the jury never considered. That assertion led to five more years of litigation in the appellate courts, and now threatens to require a new trial more than fourteen years after plaintiffs' claims first arose. That trial predictably will lead to many more years of litigation in this already protracted case.

It is not too much to ask that age discrimination claims be resolved during the lifetimes of the victims. *But see* Pet. 30 (noting that two plaintiffs have died during the pendency of this litigation). In fact, defendants agree that given the extended delays in resolving this case, "the Court should decide this dispute once and for all." Cross-Pet. 28. We agree. The district court thoroughly addressed the waiver issue and the parties have now fully briefed the

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[3] This Court has since made clear that plaintiffs were put to a higher burden than is actually required. 128 S. Ct. at 2404-06 (holding that plaintiffs establish a disparate impact violation by identifying a specific employment practice with a substantial disparate impact). That change in law had no effect in this case – under the law before and after this Court's decision, plaintiffs sustained their burden of proof, thereby requiring defendants to establish an affirmative defense (such as RFOA) in order to avoid liability.

question in response to this petition. The Court can, and should, bring this case to a final conclusion by holding that the district court did not clearly err in finding defendants' RFOA defense waived, or that defendants' failure to assert RFOA in their Rule 50(b) motion precludes any relief from the jury verdict on that ground.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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