MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

No. FED-16-031

LORRAINE SCAMMAN, THERESA CHARETTE, DOROTHY RILEY, PETER HARRIMAN, and DEBORAH LINCOLN, on behalf of themselves and all others similarly situated
Plaintiffs-Appellants
v.
SHAW'S SUPERMARKETS INC.
Defendant-Appellee

On Certification from the United States District Court
for the District of Maine

BRIEF FOR AARP AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

May 19, 2016

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STATEMENT OF INTEREST OF AMICUS CURIAE

AARP is a nonpartisan, nonprofit organization, with a membership, dedicated to addressing the needs and interests of people age 50 and older. AARP strives through legal and legislative advocacy to preserve and protect the means to enforce older workers' rights, including state age discrimination statutes like the one at issue in this case.

AARP has 230,000 members in Maine, and over 40 percent of them are in the workforce. Approximately one third of AARP members nationwide work, or are seeking work, and, thus, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2012), and by state age discrimination laws such as the Maine Human Rights Act (2015) (MHRA), 5 M.R.S.A. §§ 4551-4632. State laws serve as invaluable partners with the ADEA in eliminating age bias in the workplace.

Vigorous enforcement of the MHRA and other state laws prohibiting age discrimination is of paramount importance to AARP, its working members, and the millions of older workers who rely on these laws to deter and remedy ageism in the workplace. Accordingly, AARP has participated as amicus curiae in numerous state court cases to support interpretations of state age discrimination laws that give full effect to legislative intent and to oppose efforts to weaken them. Examples include: *Knotts v. Grafton City Hosp.*, No. 14-07522016 W. Va. LEXIS

277 (W. Va. Apr. 14, 2016) (adopting the rule applied in federal ADEA cases that a replacement employee need only be "substantially younger," as opposed to the "over 40/under 40" rule, since it best accomplished the West Virginia statute's goal of preventing age discrimination); *Reid v. Google, Inc.*, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (Cal. 2010) (properly declining to follow federal courts by refusing to categorically apply the "stray remarks" doctrine); and *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St. 3d 175, 803 N.E.2d 781 (Ohio 2004) (holding that to establish a prima facie case of age discrimination under the Ohio statute, it is not necessary to establish that one's replacement was outside the protected class).

AARP commends Maine's legislative efforts to combat age discrimination in the workplace even more vigorously than does the federal ADEA. Our interest in this case is to ensure that Maine's efforts are not thwarted by rewriting Maine's statute to include the ADEA's "reasonable factors other than age" ("RFOA") defense. Because of this defense, age discrimination victims find it significantly more difficult to establish disparate impact than other protected groups under federal laws. Adding this extra-statutory defense to Maine's statute would contravene the intent of both the Maine legislature and of Congress.

SUMMARY OF ARGUMENT

The question before this Court is whether courts should evaluate claims for disparate impact age discrimination under the Maine Human Rights Act (MHRA),

5 M.R.S.A. § 4572(1)(A), under a "reasonable factors other than age" (RFOA) standard, a "business necessity" standard, or some other standard.

Significantly, neither standard can be found in the text of the MHRA. Instead, the RFOA standard originates from the text of the ADEA, section 4(f)(1), 29 U.S.C. § 623(f)(1), and the "business necessity" standard is codified in 42 U.S.C. § 2000e-2(k) of Title VII of the Civil Rights Act of 1964. This Court adopted the business necessity test for addressing disparate impact claims under the MHRA. *Maine Human Rights Comm 'n v. City of Auburn*, 408 A.2d 1253, 1265-66 (Me. 1979). However, the Court has never expressly held that disparate impact age claims should be analyzed under this standard. With the question now squarely presented, this Court should look to the Maine legislature's unequivocal decision to place protection from age discrimination on equal footing with other civil rights and hold that disparate impact age claims are entitled to the same standard as other disparate impact claims – business necessity. Holding employers to a higher standard than federal law with respect to disparate impact age claims respects Maine's legislative choice and comports with U.S. Congressional intent. Congress enacted the ADEA as a floor of protection and encouraged states to surpass it.

Maine did not segregate age from other protected classes in its own anti-discrimination statute. Instead, the State placed age alongside other protected

classes in § 4572(1)(A) of the MHRA. And, while the Maine legislature incorporated one of the ADEA's affirmative defenses, it did not adopt a RFOA provision, despite ample opportunity to do so. Accordingly, because the business necessity standard applies to disparate impact claims for other protected classes under § 4572(1)(A), this Court should hold that it applies equally to disparate impact age claims. This Court should not nullify Maine's deliberate decision to provide more expansive protection against age discrimination for its older workers by shoehorning the ADEA's less protective RFOA standard into the MHRA.

ARGUMENT

I. THE ADEA, THE MHRA, AND OTHER STATE AGE DISCRIMINATION LAWS WORK TOGETHER TO COMBAT AGE DISCRIMINATION IN THE WORKPLACE.

"The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). State laws prohibiting age discrimination, many of which pre-date the enactment of the ADEA in 1967,[1] are critical partners with the ADEA in eliminating age discrimination in the workplace. The ADEA's architects

[1] Age discrimination policy began with the enactment of state legislation. Colorado enacted the first state law prohibiting age discrimination in 1903. U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964* 9 (1965) ("The Older American Worker"). It would be almost 64 years before the ADEA was enacted in 1967.

acknowledged both the importance and success of the state laws that preceded the ADEA[2] and the need for continuing state regulation. This cooperative federalism arrangement encourages states to enact more expansive age laws. The Maine legislature did just that, and its decision must be given effect.

A. Congress Intended the ADEA to Provide a Floor of Protection, Not a Ceiling.

When the ADEA was enacted in 1967, 24 states and Puerto Rico had already adopted statutes that prohibited discrimination based on age. S. Rep. No. 90-723, at 2 (1967). These states' experiences showed that although legislation in this area was effective, *id*. at 2-3; The Older American Worker at 10, more needed to be done. Rather than abandoning state efforts and replacing them with the ADEA, Congress made clear that it only intended the ADEA to provide a minimum floor of protection, 113 Cong. Rec. 2467 (1967) (statement of Sen. Yarborough), and that states remained free to enact legislation that provided even stronger protection for older workers. In response to the written question, "Does the preservation of the jurisdiction of State agencies in Sec. 14 [of the ADEA] allow State agencies to impose prohibitions against age discrimination in employment stricter than those

[2] The Older American Worker, at 10. ("There is clear evidence that in those States where a firm position has been taken, at least the obvious forms of discrimination have diminished, and job opportunities for middle-aged and older workers have increased . . . Age limitations have virtually disappeared from Help Wanted ads in the States which have prohibited them.").

provided under Federal law?," Secretary of Labor Willard Wirtz, whose report The Older American Worker is considered to be the preeminent source for construing the legislative intent behind the ADEA,[3] unequivocally responded, "Yes." *Age Discrimination in Employment, Hearings Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 90th Cong. 48 (1967) (statement of Hon Willard H. Wirtz, Sec'y of Labor).

Congress's recognition of the crucial importance of state laws in the fight against age discrimination remained steadfast. Ten years later, in 1977, during a debate surrounding the defeat of an amendment that would have allowed the ADEA to preempt state laws, the amendment's opponents emphasized that it would have "set aside this broader protection in the States which have the spirit and the drive to banish this form of discrimination on a universal basis more swiftly than the Federal government." 123 Cong. Rec. 30,560 (1977) (statement of Rep. Findley). The importance placed on preserving the states' authority to protect civil rights more stringently than the federal government was obvious:

> I think it would be unacceptable to most of the Members of the House for us to say the States cannot pass Civil Rights legislation which is stronger than the Federal statutes. It seems inappropriate today for us to say to the States they cannot decide this as they see fit.

Id. (remarks of Rep. Waxman).

[3] *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-91 (2004) (discussing the strong influence of The Older American Worker on the ADEA's text).

Maine acted on Congress's encouragement to provide more stringent protection against age discrimination by: (1) enacting an omnibus civil rights act that places age on equal footing with other protected traits; and (2) omitting the ADEA's RFOA provision when drafting the MHRA. In light of Congress's clearly expressed hope that states would surpass the ADEA's protections, this Court should not nullify Maine's decision to do so by blindly applying federal law.

B. Importing the ADEA's Less Stringent "Reasonable Factors Other than Age" Provision into the MHRA Would Contravene Congressional Intent by Preempting the MHRA's More Vigorous Prohibition of Age Discrimination.

As this Court has emphasized, the ADEA does not preempt the MHRA or any other state law that helps it to achieve its purposes.[4] *Maine Human Rights Comm'n. v. Kennebec Water Power Co.*, 468 A.2d 307, 310 (Me. 1983) ("It is clear that Congress, in enacting the ADEA, intended to leave room for states to supply consistent legislation."). Congress's desire for states to complement and expand upon the ADEA's prohibition of age discrimination is obvious from the ADEA's text, which declares that state laws have priority over the commencement of federal actions under the ADEA. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979). Section 633(a) of the ADEA states that, "nothing in this

[4] The ADEA's purposes are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age." Further, section 633(b) grants state proceedings some priority over federal actions by specifying that "in the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age . . . no suit may be brought under [the ADEA] before the expiration of sixty days after proceedings have been commenced under the state law."

By giving state agencies an opportunity to investigate and address age discrimination claims before their federal counterpart may even begin that process, Congress ensured that states would continue to have a principal role in stamping out age discrimination. Ignoring Maine's legislative choice to enact robust protection against age discrimination by imposing an ADEA standard recognized to be less protective of employees' rights than the business necessity standard, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2008), would defeat this collaborative legislative scheme and the purpose behind it.

II. MAINE'S DECISION TO SURPASS THE ADEA'S PROTECTIONS MUST BE GIVEN EFFECT.

In 1971, in enacting the MHRA, Maine demonstrated the earnest ambition to broadly and vigorously banish age discrimination that Congress had envisioned. The state legislature drafted a statute that treats age the same as other protected classes, with very few exceptions. Most notably for this case, the MHRA did not

incorporate the ADEA's affirmative defense for policies or practices that are based on "reasonable factors other than age." 29 U.S.C § 623(f)(1).

A. Maine Placed Age Discrimination on Equal Footing with Other Forms of Discrimination.

"In enacting the Human Rights Act, Maine was legislating against the background of prior federal anti-discrimination statutes and a developing body of case law construing and applying those statutes." *City of Auburn*, 408 A.2d at 1261 (footnote citing to Title VII and ADEA omitted). Maine enacted the MHRA four years after the federal Congress rejected the option of adding age as an additional protected class under Title VII and instead enacted a separate statute focused solely on age discrimination. *Smith*, 544 U.S. at 232 ("During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination."). Maine made the opposite legislative choice and included age as one of several protected categories in its omnibus civil rights statute. The Maine statute reads:

> It is unlawful employment discrimination in violation of this Act, except when based on a bona fide occupational qualification . . .[f]or any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, . . .or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . .

5 M.R.S.§ 4572(1)(A).

The U.S. Supreme Court has pointed to Congress's decision to enact a separate age discrimination statute as support for the fallacy that age discrimination is somehow different from other types of discrimination. *Smith*, 544 U.S. at 253 (O'Connor, J., concurring).[5] The Court identified the ADEA's RFOA provision as a key textual difference between the ADEA and Title VII, causing the Court to rule that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 240.[6]

The RFOA provision narrows the scope of disparate impact liability under the ADEA by requiring employers to show only that a policy or practice is reasonable, as opposed to being justified by business necessity. 42 U.S.C. § 2000e-2(k)(1). And, "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Smith*, 544 U.S. at 243. Harkening back to the decision to create

[5] The separate statutes with distinctions in statutory language for age and other protected groups harms the federal rights of age discrimination victims in areas other than disparate impact. *See, e.g., Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 174 (2009) (holding that textual differences between the ADEA and Title VII foreclosed mixed-motive claims under the ADEA).

[6] *See also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 100 (2008) (Title VII "has no like-worded defense.").

separate statutes in the first place, the *Smith* Court stated that "Congress' decision to limit the coverage of the ADEA by including the RFOA provision," *id.* at 240, was consistent with the belief that age was different from race and other protected categories under Title VII.

Given that the MHRA contains no language equivalent to the RFOA provision, this Court must not import one into the state's statutory scheme. Indeed, Maine's decision to enact a unified employment discrimination scheme – with all protected categories, including age, under the umbrella of a single statute – shows that Maine properly rejects the premise that age discrimination is significantly different from discrimination based on other protected traits and does not deserve the same level of protection.

This Court has previously declined invitations to apply different standards to different protected groups under the MHRA. In *Maine Human Rights Comm'n v. Canadian Pacific, Ltd.*, this Court applied the same standard used to evaluate a bona fide occupational qualification ("BFOQ") defense to an intentional gender discrimination claim under the MHRA to intentional disability discrimination claims. 458 A.2d 1225, 1232 (Me. 1983) ("We determine . . . that Maine law will not support any such distinction between gender and physical handicap-based discrimination."). Unmoved by arguments that the state law should mirror federal law in treating disability discrimination differently, this Court explained that,

unlike federal law, "[t]he MHRA prohibits employment discrimination based on any one of several characteristics," and does not "distinguish between the application of the BFOQ defense to occupational qualifications based on either physical handicaps or other prohibited classifications." *Id.* at 1232-33. That logic applies with equal force here. "In light of the MHRA's expressed policy of providing all persons with a fair employment opportunity," *id.* at 1233, if the business necessity standard applies to disparate impact claims for other protected classes under the MHRA, the business necessity standard must apply to disparate impact claims by victims of age discrimination.

Other states with omnibus civil rights statutes have also stood firm in their decisions to treat all protected classes equally. For example, in interpreting West Virginia's comprehensive civil rights statute, the Supreme Court of Appeals of West Virginia held:

> [I]n West Virginia, the legislature has not chosen to distinguish claims based on age from other protected classes under the [West Virginia] Human Rights Act. As a result we are not free to fashion such a distinction. Therefore, if disparate impact has been applied by this court to other cases arising under the Human Rights Act, it would similarly be applied to claims of age-based discrimination.

W. Va. Univ. v. Decker, 447 S.E.2d 259, 265 (1994). Moreover, the *Decker* court applied the same standard used for analyzing disparate impact claims by other protected classes – business necessity – to the age discrimination claim before it

since the theory "applie[d] equally to all claims arising under W. Va. Code, 5-11-1 [1967] *et seq.*, including age-based discrimination." *Id.*

In deciding the identical issue of whether Michigan's comprehensive employment discrimination statute allowed age discrimination victims to bring disparate impact claims, Judge Edward Thomas of the Wayne County Circuit Court in Michigan, in an oral opinion issued in the case of *Siegel v. Ford Motor Co.* (No. 01-102583-CL, Mich. Cir. Ct.), echoed the sentiments of the West Virginia court: "Because Michigan's Elliot-Larson Civil Rights Act does not distinguish between age and other categories, such as race, sex, or religion, the disparate impact theory is available to all protected groups . . . ." Helen Irvin, *Judge in Ford Case Rules Disparate Impact Available for Age Bias Under Michigan Law*, 152 Daily Lab. Rep. A-2 (Aug. 8, 2001).

Like West Virginia and Michigan, Maine does not distinguish between age and other protected groups. Accordingly, the standard for analyzing disparate impact claims under the MHRA should be the same for all groups – business necessity.

B. The ADEA's RFOA Provision Should Not Be Read Into the MHRA.

In support of its position that the "reasonable factor other than age" standard applies to analyze disparate impact age claims under the MHRA, Defendant relies on the notion that Maine generally follows the ADEA when interpreting Maine's

prohibition of age discrimination. However, while the ADEA may aid in the interpretation of the MHRA, *Wells v. Franklin Broad. Corp.*, 403 A.2d 771, 773 n.4 (Me. 1979), it only should be used to do so where the provisions in both statutes are "substantially identical." *Percy v. Allen*, 449 A.2d 337, 342 (Me. 1982). Here, they are not. Despite ample opportunity, the Maine legislature chose not to incorporate the ADEA's "reasonable factors other than age" provision, which is the basis for the ADEA's narrower standard for disparate impact claims as compared to Title VII. *See Smith*, 544 U.S. at 240.

Significantly, the ADEA's RFOA provision is not the only exemption contained in section 4(f)(1), 29 U.S.C. § 623(f)(1). That section includes another exemption that excuses liability for intentional discrimination "where age is a bona fide occupational qualification."[7] MHRA's prohibition of intentional discrimination is also subject to an exemption for bona fide occupational qualifications. Section 4572(1) reads: "It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification." But, in stark contrast to the ADEA, § 4572(1) of the MHRA contains no exemption for when a "differentiation is based on reasonable factors

[7] Section 623(f)(1) reads: 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 bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ." 29 U.S.C. § 623(f)(1).

other than age." *See Musk v. Nelson*, 647 A.2d 1198, 1201-2 (Me. 1994) ("[A] well-settled rule of statutory interpretation states that express mention of one concept implies the exclusion of others not listed.") (citing *Westcott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) ("expressio unius est exclusio alterius")).

The RFOA language was statutorily created by Congress and is specific to the ADEA. Nowhere in § 4572 of the MHRA did the Maine legislature replicate that language. The most logical place for the inclusion of RFOA language in the MHRA would be § 4573, which details what is not unlawful discrimination. The exception for employee benefit plans in this section, § 4573(1-A)(B), explicitly references the ADEA and incorporates the ADEA's standards on employee benefit plans.[8] The MHRA's inclusion of an exception for employee benefit plans strikingly similar to the ADEA's exception shows that when Maine legislators intended for a specific ADEA defense to apply to age cases, they incorporated it into the text of the MHRA. They did not incorporate the ADEA's RFOA provision, and this Court should not do so either.

Furthermore, the legislative history of the MHRA shows the pattern of the legislature's addressing age discrimination without inserting the RFOA defense

[8] Section 4573 (1-A)(B) states, "It shall not be unlawful employment discrimination…[t]o discriminate on account of age to…[o]bserve the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan that does not evade or circumvent the purposes of this chapter and that complies with the Federal Age Discrimination in Employment Act."

into the statute. In 1979, for example, the legislature directly addressed age discrimination and did not add the RFOA language to the Act.[9] Instead of modifying the defenses to age discrimination, the legislature added § 4574, which reaffirmed the importance of § 4572's protections for age discrimination and expanded protections to prohibit mandatory retirement. Reacting to an argument that this section was not needed because of existing federal law, Representative Davies stated, "[t]he federal government's law is one that does not cover a number of provisions that were originally covered in this state . . . [t]he intention of the law that is before us today is to also fill those gaps that apply to the private sector." Me. Legis. Rec. 109th Leg., Vol. II, 1319 (May 22, 1979). The legislature did not amend § 4572 to include the RFOA language, nor did it insert the RFOA language into § 4574.

Unlike Maine, states that have wanted to include the ADEA's RFOA provision in their civil rights laws have left no doubt about their intent to do so. Almost without exception, those states have explicitly incorporated a "reasonable factors other than age" provision into their employment discrimination statutes. Ariz. Rev. Stat. Ann. § 41-1463(G)(4)(a) (Arizona) (it is not unlawful "with respect to age, for an employer . . . to take any action otherwise prohibited . . . if

[9] The 1979 amendment was the culmination of several efforts by the Maine legislature to strengthen existing age discrimination protections. *See Kennebec Water Power Co.*, 468 A.2d at 309. At no point, however, was RFOA language added to the MHRA.

the differentiation is based on reasonable factors other than age"); Ark. Code Ann. § 21-3-203(b)(1) (Arkansas) ("where the differentiation is based on reasonable factors other than age"); Colo. Rev. Stat. § 24-34-402(4)(a) (Colorado); Mont. Code Ann. § 49-3-103(1)(a) (Montana); Neb. Rev. Stat. § 48-1003(2) (Nebraska) ("when the differentiation is based on reasonable factors other than age, such as physical conditions"); N.Y. Exec. Law § 296(3-a)(d) (New York); S.C. Code Ann. § 1-13-80(I)(7)(i) (South Carolina) (it is not unlawful discrimination "where the differentiation is based on reasonable factors other than age"); Tenn. Code Ann. § 4-21-407(a)(1) (Tennessee). No state court has found the RFOA defense to be applicable without such explicit language.

The only exception to this rule – Texas – is really no exception at all, because the statute incorporates the ADEA's standards by reference. Texas, like Maine, has a comprehensive employment discrimination statute that includes age with other protected groups.[10] In *Tex. Parks & Wildlife Dep't v. Dearing*, 240 S.W.3d 330 (Tex. App. 2007), a case presenting the identical issue as this case, the plaintiff argued that the ADEA's RFOA exception should not be applied to disparate impact age claims under the Texas employment discrimination statute because of the Texas "legislature's omission of an express RFOA provision in the

[10] Tex. Lab. Code Ann. § 21.051 prohibits employers from discrimination against employees on the basis of race, color, disability, religion, sex, national origin, or age.

labor code while including the *Griggs* 'business necessity' limitation. . . ." 240 S.W.3d at 350.

But, Texas, unlike Maine, had amended its statute to specifically address the burden of proof for disparate impact age claims. Following the 1991 amendments to Title VII, the Texas Legislature "made corresponding amendments to Texas law that tracked the new subsection (k)(1) of title VII, section 703, *but made these provisions applicable solely to claims for disparate-impact discrimination involving protected categories other than age.*" *Id*. (emphasis added). To address disparate impact age claims, the Texas legislature added a separate provision, Tex. Lab. Code Ann. § 21.122(b), which reads:

> To determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments. (29 U.S.C. Section 621 et seq.).

So, while Texas has an omnibus civil rights statute like Maine's, Texas -- unlike Maine -- but, "like [the U.S] Congress, chose to treat age-discrimination claims differently from those involving other protected classes." *Tex. Parks & Wildlife Dep't*, 240 S.W.3d at 354.

This Court has rejected previous invitations to limit the MHRA's coverage or prohibitions without statutory support. For example, when asked to limit the coverage of the MHRA to those 40 and over in the same manner as the ADEA, this

Court declared that, "in enacting the age discrimination prohibitions, the Legislature intended to supplement the federal ADEA, and we decline to superimpose a limitation which does not appear on the face of the statute." *Kennebec Water Power Co.*, 468 A.2d at 310.

Similarly, the U.S. District Court for the District of Maine rejected the argument that since compensatory damages are not available under the ADEA, age discrimination victims relying on the MHRA should not be able to recover such damages, even though they are recoverable under § 4613(2)(B) of the MHRA. *Tracy v. PMC Med. Mgmt., Inc.*, No. 00-157, 2000 U.S. Dist. LEXIS 13938, at *10 (D. Me. Sept. 19, 2000) ("The courts cannot apply a court-made rule of statutory construction to read into that statutory language a limitation not otherwise present."). The district court ruled that it was inappropriate to use federal law to determine what damages are available to age discrimination victims under the MHRA, given that the two statutes are not "substantially identical with respect to the types of damages available for age discrimination claims." *Id.* at *5. The court explained, "By invoking federal case law, and indeed the language of the ADEA itself, the defendant asks this court *to superimpose a limitation of damages that does not appear on the face of section 4613*. The difference in the availability of compensatory damages under the two statutes is a substantive difference in

statutory language, and accordingly deference to construction of the ADEA language is not warranted." *Id.* at *7 (emphasis added).

In this case, Defendant likewise asks this Court to superimpose a limitation – in the form of a lower standard of proof for employers defending against a disparate impact age claim – that does not appear in the text of the MHRA. This Court must not "read into [the MHRA's] statutory language a limitation not otherwise present." *Id.* at *10.

CONCLUSION

The Maine legislature took a strong stance against age discrimination by including age as one of several protected categories in a single, comprehensive anti-discrimination statute and by including very few exceptions from its coverage. The MHRA does not incorporate the ADEA's "reasonable factors other than age" provision. Accordingly, this Court should answer the certified question as follows: Plaintiffs' claims for disparate impact age discrimination under the MHRA should be evaluated under the "business necessity" analysis promulgated by the Law Court in *Maine Human Rights Comm 'n v. City of Auburn.*

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, I filed a Brief for AARP as Amicus Curiae in Support of Plaintiffs-Appellants with the Maine Supreme Judicial Court, sitting as the Law Court, by placing 10 printed copies in an overnight mail package to the Clerk of the Law Court. I further certify that the following parties have been served this day by placing two printed copies of the Brief in the U.S. Mail, first class:

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