SUPREME COURT OF THE UNITED STATES

No. 91–1600

HAZEN PAPER COMPANY, ET AL., PETITIONERS *v.*
WALTER F. BIGGINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April 20, 1993]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring.

I agree with the Court that the Court of Appeals placed improper reliance on respondent's evidence of pension interference and that the standard for determining willfulness announced in *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111 (1985), applies to individual acts of age discrimination as well as age discrimination manifested in formal, company-wide policy. I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. See App. 29–30 (amended complaint); 5 Record 71–76 (jury instructions). As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e to 2000e-17. As the Court acknowledges, *ante*, at 5, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. See *Markham* v. *Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari); *Metz* v. *Transit Mix, Inc.*, 828 F. 2d 1202, 1216–1220 (CA7 1987) (Easterbrook, J., dissenting);

Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837 (1982). It is on the understanding that the Court does not reach this issue that I join in its opinion.