No. 18-1346

In the Supreme Court of the United States

DALE E. KLEBER,

Petitioner,

v.

CAREFUSION CORPORATION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

LAURIE A. MCCANN *
DARA SMITH
DANIEL B. KOHRMAN
WILLIAM ALVARADO RIVERA
**Counsel of Record*
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2082
lmccann@aarp.org

PAUL STRAUSS
5525 S. Woodlawn Avenue
Chicago, IL 60637
Tel. (773)-551-5350
pstr1968@gmail.com

Counsel for Petitioner

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Respondent seeks to evade this Court's review by rewriting history. Unable to deny the clear holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that language in Title VII of the Civil Rights Act of 1964 that was identical to the text of section 4(a)(2) of the Age Discrimination in Employment Act (ADEA), covers disparate impact claims for job applicants, and *Smith v. City of Jackson*'s, 544 U.S. 228 (2005), express approval of two hiring claims as "appropriate" disparate impact claims under the ADEA, Respondents ask the Court to presume that it did not understand its own rulings and did not mean what it said.

The facts show otherwise. In the parties' briefing, at oral argument, and in the Court's decisions themselves, the evidence is legion that hiring claims—not just promotion and transfer claims—were top of mind for the Court, and that in *Smith*, the Court's biggest concern was the bounds of a "reasonable" hiring restriction. The Seventh Circuit's decision, like Respondent's Opposition, cannot be squared with that reality. The Court's review is necessary to correct that course, and this case is the ideal vehicle with which to do so.

ARGUMENT

I. IN BOTH *GRIGGS* AND *SMITH*, THE SUPREME COURT SPECIFICALLY CONSIDERED ARGUMENTS REGARDING THE IMPLICATION OF ITS DECISIONS FOR DISPARATE IMPACT HIRING CLAIMS, BUT NEITHER DECISION LIMITED ITS REACH TO INCUMBENT EMPLOYEES.

Respondent claims that because the plaintiffs in *Griggs* and *Smith* were "incumbent 'employees," the Seventh Circuit's conclusion that section 4(a)(2) does not cover "applicants for employment" could not possibly conflict with those decisions. *See* Brief in Opposition ("Opp.") at 6-7, 8-9. That argument is untenable on both factual and legal bases.

First, whether any outside applicants were part of the class of plaintiffs in *Griggs*[1] and *Smith* is entirely irrelevant. What the Court *actually wrote* is relevant. A decision's reach is not limited to individuals factually identical to the plaintiffs. *See, e.g., Kansas v. Cheever*, 571 U.S. 87, 93 (2013) (reaffirming the rule in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and noting the rule was not limited to the factual circumstances of *Buchanan*); *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976) (concluding that the rules in *Miliken v. Bradley*, 418 U.S. 717 (1974) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) were not limited to the context of school desegregation); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (noting that subsequent decisions after *Griswold v. Connecticut*, 381 U.S. 479 (1965) have not limited its holding to married couples). *Griggs* held that language taken *in haec verba* from Title VII and inserted into the ADEA[2] permitted disparate impact hiring claims. *See* Brief of Petitioner ("Pet.") at 14-16; App. A at 18a.

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[1] "The class action certified in *Griggs* included job seekers; the Court's decision in *Griggs* specifically referred to job seekers; and other Supreme Court decisions that issued prior to 1972 amendments to Title VII referred to outside job applicants as being within the group of individuals affected by the particular employment practice challenged in the case." Samuel Estreicher, *Untethered Textualism in the Seventh Circuit's Kleber Ruling on Age Bias in Hiring*, Verdict (March 21, 2019), https://verdict.justia.com/2019/03/21/untethered-textualism-in-the-seventh-circuits-kleber-ruling-on-age-bias-in-hiring.

[2] *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

(Easterbrook, J., dissenting) (explaining that *Griggs* "treats the word 'individual' in 42 U.S.C. § 2000e-2(a)(2), as it stood before an amendment in 1972, as including applicants for employment."). That is all that matters.

Factually, Respondents' contention that the *Griggs* and *Smith* Courts somehow never contemplated their decisions being applied to hiring discrimination claims is easily refuted. In *Griggs*, the decision's repeated references to hiring and applicants for employment make the Court's consideration irrefutable. *See* Pet. at 18.[3]

Likewise, the *Smith* decision, on its face, makes its reach clear. The Court interpreted the ADEA to allow disparate impact claims without distinguishing between applicants and current employees in a way "that parallels [its] holding in *Griggs*." *Smith* at 238.

Another clear signal that *Smith* considered ADEA disparate impact hiring cases to be appropriate was the Court's pronouncement that the ADEA's legislative history, "with particular reference to the

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[3] The Chamber of Commerce filed an amicus brief in *Griggs* and participated in oral argument to express its concern that endorsement of the disparate impact theory would have "substantial and far-reaching consequences on American industry" since "tests and educational requirements constitute the only objective means available to employers *to perform the necessary task of selecting among applicants or employees* . . . ." Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America, 2-3, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (emphasis supplied).

Wirtz Report," *id*.,[4] supports the "pre-*Hazen Paper* consensus concerning disparate impact liability." *Id*. The consensus the *Smith* Court referenced was that "for over two decades after [the Court's] decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases." 544 U.S. at 236-37. Significantly, during the period between *Griggs* and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), courts uniformly considered disparate impact challenges to hiring practices under the ADEA to be valid. *See*, *e.g., Geller v. Markham*, 635 F.2d 1027, 1030 (2d Cir. 1980) (school policy that prohibited hiring teachers with more than five years of experience had unlawful disparate impact on older applicants). Several of those hiring cases, including *Geller*, were cited in the Petition for Writ of Certiorari in *Smith*, Pet. for Writ of Cert., 2004 WL 304286 (U.S.), at **7-8 (citing *Wooden v. Bd. of Educ. Of Jefferson Cty., Ky*, 931 F.2d 376 (6th Cir. 1991); *Faulkner v. Super Valu Stores*, 3 F.3d 1419 (10th Cir. 1993); and *EEOC v. Francis W. Parker Sch*., 41 F.3d 1073 (7th Cir. 1994)), negating any suggestion that the *Smith* Court did not consider whether its decision to authorize disparate impact claims under the ADEA would encompass hiring policies and practices.

Finally, the transcript of oral argument in *Smith* closes the book on any possibility that the Court did not understand that its decision might be extended

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[4] This express nod to the Wirtz Report's support of disparate impact liability under the ADEA, renders Respondent's suggestion that the Wirtz Report solely addressed intentional discrimination baffling. *See* Opp. at 12.

to hiring claims. A spirited, lengthy, and rigorous colloquy between Petitioner's counsel and Justice Scalia addressed whether certain explanations for hiring policies that adversely impacted older applicants would constitute a reasonable factor other than age—an analysis that would, of course, require the predicate conclusion that disparate impact hiring claims were available in the first place. The exchange began after Justice Ginsberg asked whether Petitioner's counsel could provide examples of disparate impact age cases not involving cost issues:

> Mr. Goldstein: Yes, I can. I'll give you two sets of examples. The first is the examples identified by the Solicitor General in his cert petition defending the EEOC's position in the Francis W. Parker case in 1994. The EEOC pursued cases – and they're cited in the cert petition – involving rules that prohibit – that require recent college graduates to get a job that forbid hiring someone who worked previously for a higher salary than they would be getting in the new – in the new job and that laid off of people who would be eligible to retire soon. So those are the examples the Solicitor General gave . . .
>
> Justice Scalia: These are examples of? Violations or things that are okay?

Mr. Goldstein: Violations. I apologize. The EEOC filed suit because of these violations of the act.

Justice Scalia: Why isn't it a reasonable factor other than age that I don't want to hire somebody who's going to retire a year after I hire him?

Mr. Goldstein: Because it's not –

Justice Scalia: Gee, that seems terribly reasonable. . . .

Justice Scalia: I don't care how old he is. I don't want anybody who's going to retire the year after I hire him. I don't want to have to go through this -- this whole process again.

Mr. Goldstein: The view of the commission – it's one I share, but a particular court might not – is that that is not a good – a reasonable work place judgment. One could disagree with it. But the – those employees will be very valuable. And it's not that they will retire, I should make clear. It's that they're eligible to retire. It – it may well be a different case if you could say, I asked the person. They said they're leaving in a year. The rule challenged there was mere eligibility to retire . . . I didn't finish with the court cases. They are Klein, which is

> 807 F. Supp. 1517,[5] which is a hiring test I think by the FAA in that case that – that happened to exclude all of the people, I think, over the age of 55 . . . .

Transcript of Oral Argument, *Smith v. City of Jackson*, 544 U.S. 228 (2005), 2004 U.S. Trans. LEXIS 61 (2004), at **19-20.

The focus on hiring continued into the questioning of Respondent's counsel, with Justice Stevens asking for counsel's response to Secretary Wirtz's statement that for the ADEA to achieve its purpose of "eliminat[ing] discrimination in the employment of older workers, it would be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." *Id*. at *41. And Justice Scalia again raised the possibility of "a rule that you won't hire any employee.

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[5] The facts in *Klein v. U.S. Dep't of Transp.*, 807 F. Supp. 1517 (E.D. Wash. 1992), are remarkably similar to those in the Petitioner's case. Mr. Klein unsuccessfully sought employment as an electronics technician with the Federal Aviation Administration (FAA). 807 F. Supp. at 1520. Klein claimed that the agency's reliance on "recent hands-on experience and education," *id*., at 1523, and its disfavoring of "past supervisory experience, which they said would make it difficult for him to work in a lower level position," *id*., at 1521, had a disparate impact on applicants over the age of fifty. The district court agreed. *Id*. at 1524 ("Subjective job criteria present potential for serious abuse and should be viewed with much skepticism.").

. . .", because they might retire soon anyway. *Id.* at *46.

Self-evidently, the discussion at oral argument concerned the lawfulness of possible justifications for not wanting to hire older applicants—not whether those applicants' had cognizable disparate impact claims in the first place.[6] And, while Justice Scalia expressed personal frustration with the idea that a court might find it unreasonable not to hire individuals out of concern that they might retire soon, in the end he did not join Justice O'Connor's concurrence arguing that section 4(a)(2) does not apply to "applicants for employment." And, Justice Scalia joined Part IV of the opinion—making it the opinion of the Court—describing two *and only* two textual differences between the ADEA's and Title VII's disparate impact provisions, neither of which related in any way to hiring. 544 U.S. at 240.

Given the conspicuousness of hiring cases and preoccupation with the reasonableness of hiring

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[6] This exchange is understandable since at the time *Smith* was being decided, the EEOC's regulations on burdens of proof in ADEA cases seemed to require a showing of business necessity as part of the "reasonable factor other than age" (RFOA) defense. *See* 29 C.F.R. 1625.7(d) ("When an employment practice, including a test, is claimed as a basis for different treatment . . . on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity"). The EEOC subsequently disavowed that regulation, stating that it "d[id] not survive" *Smith. Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 n.9 (2008).

policies and practices during the deliberation of *Smith*, Respondent's claim that the Court either never considered hiring claims or tacitly excluded them does not hold water. Instead, the historical record and the Court's decision itself unequivocally show that despite the fact that the *Smith* plaintiffs were current employees complaining about discriminatory compensation, the Court anticipated that its holding would be applied to hiring policies and practices and deliberated how the ADEA's RFOA defense, which the Court identified as the response to a disparate impact claim, *Smith*, 544 U.S. at 239; *Meacham,* 554 U.S. at 96, would play out in the hiring context. In light of this robust discussion of hiring practices at oral argument, it is incredible to conclude that the Court failed to consider hiring implications—and then cited hiring decisions with approval—by accident.

II. RESPONDENT'S RELIANCE ON PRE-*SMITH* DECISIONS EXAGGERATES THE SUPPOSED UNIFORMITY OF APPELLATE DECISIONS HOLDING THAT SECTION 4(a)(2) DOES NOT PROTECT APPLICANTS, AND, EVEN IF LEGITIMATE, REVEALS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

Respondents' attempt to manufacture a consensus would require the Court to ignore its own precedent. In an attempt to create uniformity and unanimity in the chaos of two divided en banc decisions that overturned two divided panel decisions, Respondent draws on pre-*Smith* cases to exaggerate the number of appellate courts that held that section

4(a)(2) does not allow disparate impact hiring cases. The other circuit decisions Respondent invokes, *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996), and *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996), were expressly overruled by *Smith*, 544 U.S. at 237 n.9.[7]

On the other hand, if the Court considers pre-*Smith* cases valid authority, what emerges is not a consensus but a circuit split. The U.S. Court of Appeals for the Second Circuit's decision in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), recognizing a disparate impact hiring claim under the ADEA remains good law, and conflicts irreconcilably with the decisions of other Courts of Appeals, including the decision below.

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[7] The *Smith* Court expressly referred to the Tenth Circuit's decision in *Ellis* as one of the circuits that erroneously interpreted its decision in *Hazen Paper*, to deny the disparate impact theory of proof to victims of age discrimination. The *Smith* Court also commended another Tenth Circuit decision for "authorizing recovery on a 'disparate-impact' theory in [an] *appropriate* case [ ]." *Smith*, 544 U.S. at 237 (emphasis added). The "appropriate" Tenth Circuit decision was *Faulkner*, 3 F.3d 1419 (10th Cir. 1993) – a disparate impact *hiring* case. *Smith*, 544 U.S. at 237 n.8.

III. THE RESPONDENT'S TEXTUAL ARGUMENTS ATTEMPT TO PREMATURELY ARGUE THE MERITS OF THE CASE AND, IN ANY EVENT, THEY ARE WRONG.

The Respondent's textual arguments, which argue the merits of the case rather than addressing the Petition, nonetheless provide no support for reading an exception into section 4(a)(2) to exclude older job applicants. First, the specific reference to applicants for employment in ADEA section 4(c)(2), the labor organizations provision, is explained by the provision's prohibition of discriminatory refusal to *refer* applicants for employment. The definitional provision associated with section 4(c)(2)—the section Respondent uses as a contrast with section 4(a)(2)—makes clear that "employees" as used in that subsection *must* include prospective employees because the definition states that covered labor organizations are those that "operate[] a hiring hall or hiring office which *procures employees for an employer* or *procures for employees opportunities to work for an employer* . . . . " ADEA § 11(e), 29 U.S.C. § 630(e) (emphasis added).

Another supposed negative inference Respondent invokes, a comparison to the federal sector ADEA provisions, is a false comparison. The federal sector provisions were modeled on the federal government employee provision of Title VII, and were not based on section 623(a). *Gomez-Perez v. Potter*, 553

U.S. 474, 487 (2008). Finally, the ADEA's retaliation provision was taken *in haec verba* from Title VII.[8] *Compare* 29 U.S.C. § 623(d) with 42 U.S.C. § 2000e-3(a). And this Court has already determined that "the use of the term 'applicants' in § 704(a) does not serve to confine, by negative inference, the temporal scope of the term 'employees.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 (1997). Nor did Title VII's identical retaliation provision prevent the *Griggs* Court from applying Title VII's disparate impact to job applicants.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The Petitioner's complaint sets out a quintessential disparate impact hiring claim. Mr. Kleber identified a specific requirement that has an adverse impact on older workers. *Smith*, 544 U.S. at 241. Specifically, he alleges that the Respondent's "policy of establishing maximum years of experience for jobs," Docket 22 at 2, including the one he applied for, "discriminates against older workers in violation of the federal Age Discrimination in Employment Act (ADEA) . . ." *Id.* The Respondent's "seven-year experience cap is at the heart of this lawsuit." App. at 63a.

In response to Mr. Kleber's charge filed with the Equal Employment Opportunity Commission (EEOC), the Respondent responded as one would expect an employer to respond to a disparate impact claim: by "saying its maximum experience cap in the job posting was an 'objective criterion based on the *reasonable*

[8] *Lorillard*, 434 U.S. at 584.

concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention." *Id.* (emphasis supplied). No facts are in dispute. Only one exceptionally clean legal issue is disputed: whether section 4(a)(2) of the ADEA protects outside applicants as well as incumbent employees. In contrast, the case the Court declined to review two years ago, *Villarreal v. R.J. Reynolds Tobacco Co.,* 839 F.3d 958 (11th Cir. 2016) (en banc), *cert denied*, 137 S. Ct. 2292 (2017), raised the same issue, but with more complicated facts, and also included a legal issue on equitable tolling. This case presents the ideal vehicle to resolve the question presented.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari as to the sole question presented.

Respectfully submitted,

LAURIE A. MCCANN *
DARA SMITH
DANIEL B. KOHRMAN
WILLIAM ALVARADO RIVERA
*Counsel of Record
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2082
lmccann@aarp.org

PAUL STRAUSS
5525 S. Woodlawn Avenue
Chicago, IL 60637
Tel. (773)-551-5350
pstr1968@gmail.com

Counsel for Petitioner